

Little v Benedictine Hosp.

2010 NY Slip Op 30349(U)

February 17, 2010

Supreme Court, New York County

Docket Number: 100551/07

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Sandra Little

INDEX NO. 100 551/07

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -
Benedictine Hospital

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
FEB 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/17/10

Luy
J.S.C.

Check one: FINAL DISPOSITION

LOUIS B. YORK
NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK **PART 2**
Justice

-----X

SANDRA LITTLE,
Plaintiff,
-against-

Index No. 100551/07
Motion Date _____
Motion Seq. No. 005
Motion Cal. No. _____

BENEDICTINE HOSPITAL,
Defendant.

-----X

The following papers, numbered 1 to _____ were read on this motion to Change Venue

NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS

Cross-Motion: Yes No

Defendant moves to change venue to Ulster County in this action on two grounds: (1) that New York county is not the proper venue for this action; and (2) for the convenience of material witnesses, all of whom reside in Ulster County. Defendant also moves to vacate the Note of Issue on the ground that discovery is incomplete.

Plaintiff was a patient at Benedictine Hospital in Ulster County. At the time she was residing in Ulster County. She claims that the hospital's employees failed to lock the wheels of her bed and that as she was sleeping, the bed rolled out from under her causing her to fall to the floor and suffer severe injuries to her back. She then commenced this lawsuit in New York County.

Upon the filing of the Note of Issue and information obtained during discovery, and after obtaining information from the post office, defendant discovered that the address listed on the summons as plaintiff's residence - 65 East 14th Street - did not exist. If that is so argues defendant, New York County was not a proper venue for this action. During her deposition, however, plaintiff testified that her residence at the time the Summons and complaint was filed was New York County where she sub-letted for a short period of time and then moved to Brooklyn for a relatively short stint at a residence there. From the history of her various residences, it is difficult to discern exactly when and where plaintiff resided at various times in this lawsuit. Suffice it to say, that she resided in both Massachusetts, Brooklyn and Ulster County where she received the medical attention and hospitalization that is the basis for this lawsuit. Plaintiff's residency at the time of the filing of the motion papers herein was in Massachusetts. Ultimately, plaintiff produced proof of a sublease at 605 East 14th Street in Manhattan to substantiate her residency in New York when this lawsuit was filed. The underlying lease of the sublessor was also produced. The typo of 65 rather than 605 on the summons was a ministerial or clerical error and did not, therefore, oust this court of jurisdiction as defendant contends. Furthermore, the production of the lease and sublease appear to satisfy the proper venue requirements, although barely under the circumstances. That takes care of the improper venue argument. Still to be considered is whether the convenience of material witnesses justifies a change of venue.

There are at least five nurses who are going to testify according to the affidavit of Jackie Pietro, the Risk Manager and Safety Coordinator for defendant Benedictine Hospital. Ms. Pietro gave an affidavit after interviewing the nurses in which she explains that they are all located in Ulster County and details the materiality of their evidence and the varying physical, financial or familial hardships they would suffer. The doctor who treated the plaintiff at Benedictine Hospital is not an employee of Benedictine hospital, but an independent contractor now, although he may have been such an employee when he treated her.

Plaintiff suggests that plaintiff's treating doctor, Dr. William head is located in New York and would suffer hardship by having to testify in Ulster County.

CPLR 510 states:

The Court, upon motion, may change the place of trial where:

* * *

3. the convenience of material witnesses and the ends of justice will be promoted by the change.

The factors to consider in deciding whether to grant a motion for a change of venue under CPLR 510 are (a) where the accident occurred and (2) the convenience of material witnesses (*Montero v Elrac*, 300 AD2d 9, 10, 751 NYS2d 432 [1st Dept 2002]). The four-prong test to be applied in determining the convenience of material witnesses are (1) whether the movant contacted the witnesses; (2) how the witnesses will be inconvenienced; (3) the

nature of their anticipated testimony; and (4) how their testimony is material, id; (*Walton v Mercy College*, 20 Misc3d 1136 (A) 867NYS2d 379 (Table), 2008 W.L. 3865297 [Sup Bx Cty 2008], affd 63 AD3d 425, 879)

The affidavit of Jackie Pietro adequately sets forth the inconvenience that will be suffered by the nurses, as well as the hospital itself, if they have to testify in New York County. Nevertheless, the convenience of a party and its employees are not factors in deciding a change of venue provision (*Barbot v Naga Dushana*, 235 AD2d 289 [1st Dept 1997]), but the inconvenience to a treating physician is a factor in making such a determination (*Schneeweis v Pelkey*, 138 AD2d 271, 525 NYS2d 846 [1st Dept 1988]). Although there has been no detailed discussion from the defendant about the inconvenience to plaintiff's treating doctor at Benedictine Hospital and no indication that he/she has been contacted by defendant, it stands to reason that his testimony would be material to diagnosis, prognosis and treatment and that he/she would be inconvenienced by having to shut down his practice while he travels to NY County, testifies and travels back to Ulster County.

The attempt to draw Dr. Head into the discussion by claiming him as plaintiff's treating physician, strikes the Court as a suspicious allegation. First of all, how could Dr. Head be her treating physician when it is uncontroverted that she has been living in Massachusetts for some time and has been treated by medical facilities and doctors there? Moreover, there has been no indication that Dr. Head has been contacted and what material

testimony he could offer and whether he would be inconvenienced. Does he have an active private practice or is he someone who mostly testifies for litigants. In the latter case, there would be no inconvenience to him.

In summary, we have evidence that the current venue would inconvenience the defendant and its employees, although no great weight is accorded to that. Substantial weight is given to the fact that the accident occurred in Ulster County and substantial weight is accorded to the plaintiff's doctor being from Ulster County. Plaintiff currently resides in Massachusetts, which is closer to Ulster County than New York County. The records pertaining to her hospitalization are in Ulster County. There apparently is going to be testimony from physicians and other personnel from Massachusetts where plaintiff is now located and where she has received substantial treatment. Massachusetts is closer to Ulster County than it is to New York. Ulster County is, therefore, the most convenient county. Viewing all the facts in this action, the ends of justice will be best served by transferring the trial to Ulster County. The court makes no decision with regard to plaintiff's motion to strike the Note of Issue. Since this case will be tried in Ulster County, it seems more appropriate for that Court to decide this issue. In fact, the only participant with ties to New York County is plaintiff's counsel. This Court and County at this point has very little, if any, interest in this case.

The Court has examined plaintiff's remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that the venue of this action is changed from this court to the Supreme Court, County of Ulster, and the Clerk of the Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Ulster upon service of a copy of this Order with Notice of Entry and payment of appropriate fees, if any.

Dated: February 17, 2010

Enter:

FILED

FEB 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

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Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

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