

**Unitrin Advantage Ins. Co. v Delta Diagnostic  
Radiology, P.C.**

2010 NY Slip Op 30526(U)

March 11, 2010

Supreme Court, New York County

Docket Number: 111528/09

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 111528/2009  
 UNITRIN ADVANTAGE INSURANCE  
 vs.  
 DELTA DIAGNOSTIC RADIOLOGY  
 SEQUENCE NUMBER : 001  
 CHANGE VENUE

INDEX NO. \_\_\_\_\_  
 MOTION DATE 12/14/09  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-6

7  
8

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided in accordance with the enclosed memorandum decision and order.*

**FILED**  
MAR 15 2010  
NEW YORK COUNTY CLERK'S OFFICE

*N.B. -- preliminary conference is scheduled for 4/2/10 at 12 noon.*

Dated: 3/11/10

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 55

-----X  
UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

Index No. 111528/09

-against-

DELTA DIAGNOSTIC RADIOLOGY, P.C.,  
INFINITY HEALTH PRODUCTS, LTD., NATURAL  
THERAPY ACUPUNCTURE, P.C., ZENAIDA  
REYES-ARGULLES, M.D., PUSHP R. BHANSALI,  
M.D., FLATBUSH CHIROPRACTIC, P.C.,  
OMEGA MEDICAL DIAGNOSTIC, P.C.,  
PROFESSIONAL HEALTH IMAGING, P.C.,  
ELLEN DUFF, REGINALD SOLOMON, MARCELLE  
MOHAMED, and CORETTA LESSIE,

DECISION and ORDER

Defendants.

-----X  
SOLOMON, J:

Defendants Natural Therapy Acupuncture, P.C., Zenaida Reyes-Arguelles, M.D. and Flatbush Chiropractic, P.C. move pursuant to CPLR 510 and 511 to change the venue of this action to the Civil Court, Kings County, or to Supreme Court, Kings County, on the grounds that Kings County would be a more convenient venue for witnesses. The motion is denied for the reasons below.

Plaintiff Unitrin Advantage Insurance Company (Unitrin) provides automobile insurance. Its complaint alleges that five individual defendants made claims for medical benefits, under New York's no-fault automobile insurance law, arising from an automobile accident that occurred in Kings County. The other defendants, including movants, are said to be medical care

[\* 3]

providers who sought payment of medical bills under a Unitrin policy, purportedly for treatment of the injured co-defendants. Moving defendants are all located in Kings County, although one of the captioned defendants has a Queens County address.

Unitrin is a foreign corporation with an office in Dewitt, New York, which the court notes is located in Onondaga County. Unitrin asserts that defendant Dr. Reyes-Arguelles has an office in New York County as well as Brooklyn, so venue here is proper. It also argues that New York County is a reasonable venue because of its central location and availability to plaintiff and all defendants.

Movants' answer to Unitrin's complaint is dated September 18, 2009. The answer includes an affirmative defense that venue in New York County is improper, and "requests" that the court change venue to Kings County (Notice of Motion, Ex. 4, paragraphs 45-46). This motion was filed on November 2, 2009.

Venue is proper in any county where a party resides (CPLR 503[a]). A corporation is deemed a resident of the county where its principal office is located (CPLR 503[c]). When the plaintiff commences an action in a county that is not a proper venue, a defendant that wants to change venue must serve on the plaintiff a demand to change the venue to a proper county with the answer or before the answer is served (CPLR 511[a]-[b]). Thereafter, the defendant must move to change the venue to a

proper venue within fifteen days after service of the demand. A motion to change venue based on improper venue that is not made in this period must be denied (see, *Kurfis v Shore Towers Condominium*, 48 AD3d 300 [1<sup>st</sup> Dept 2008]). Even if venue is improper, a defendant is not entitled to a change of venue as of right unless it follows the procedure set forth in CPLR 511 (*id.*).

This motion was made forty-two days after the date of the answer, so if the answer is deemed a written demand upon Unitrin to change to a proper venue, the motion is untimely. Moreover, Unitrin correctly argues that movants' affirmative defense is not a demand to change venue within the meaning of CPLR 511(b), and that no such demand was served with the answer or before. Accordingly, that branch of the motion made under CPLR 511 is denied.

Movants also seek to change venue under CPLR 510(3) based on the alleged inconvenience of material witnesses, and in the interest of justice. It is incumbent on movants to demonstrate that the convenience of material witnesses and the ends of justice are promoted by the change, and must provide (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county where the action was commenced, (3) that the witness has been contacted and is available and willing to testify for defendant, (4) the nature

of the anticipated testimony, and (5) the manner in which the proposed testimony is material to issues in the case (*Leopold v Goldstein*, 283 AD2d 319 [1<sup>st</sup> Dept 2001]).

In the present matter, movants have provided no support for their claim that material witnesses would be inconvenienced by a New York County venue. There are affidavits from movants (or their principals) that it would be convenient for them to have the action in the court house in Kings County, but not that traveling to this court house would impose any inconvenience (see, *Rodriguez v Ryder Truck Rental, Inc.*, 100 AD2d 811 [1<sup>st</sup> Dept 1984] ["The bare allegation that the trip from The Bronx to Manhattan involves 'great trouble and expense' and 'great inconvenience and hardship' for the witnesses is ludicrous on its face. In such circumstances, to grant a venue change from New York County to Bronx County, a subway ride away, constitutes an improvident exercise of discretion."]).

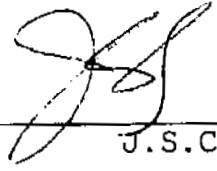
Finally, movants request transfer to the Civil Court, but that is not an appropriate forum because the complaint herein seeks declaratory judgment, and the Civil Court does not have jurisdiction to provide that relief. Accordingly, it hereby is

ORDERED that the motion to change venue is denied, and counsel for all appearing parties are directed to appear in Part 55, 60 Centre Street, Room 432, New York, NY 10007, on April 12, 2010 at 12 noon for a preliminary conference; and it further is

ORDERED that plaintiff's counsel shall notify all appearing defendants of the preliminary conference forthwith.

Dated: March 11, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C

**JANE S. SOLOMON**

**FILED**  
MAR 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE