

Lopes v Barcohana

2010 NY Slip Op 30801(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 116668/2007

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PART **IA** PART 16

PRESENT. **ALICE SCHLESINGER**

Index Number : 116668/2007

LOPES, CONSTANCE

vs

BARCOHANA, KEVIN

Sequence Number : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 and cross-motion to change venue to Nassau County are granted in accordance with the accompanying memorandum decision.

FILED

APR 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

APR 05 2010

Dated: April 5, 2010

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
CONSTANCE LOPES,

Plaintiff,

-against-

Index No. 116668/2007
Mot Seq. 001 and 002

KEVIN BARCOHANA, M.D., NORTH AMERICAN PARTNERS IN ANESTHESIA, LLP, STEPHEN LITVAK, M.D., LONG ISLAND JEWISH MEDICAL CENTER, DOUGLAS K. HELD, M.D., LAWRENCE GORDON, M.D., GORDON & HELD, M.D., P.C., RICHARD ETRA, M.D., MOLLICK, ETRA, ETRA & COHEN, LLP, STEVEN KORBEN, M.D., CHRIS LASCARIDES, M.D., GREAT NECK MEDICAL GROUP, LLP, FRANKLIN HOSPITAL and SAINT VINCENT'S CATHOLIC MEDICAL CENTERS OF NEW YORK,

Defendants.

-----X
SCHLESINGER, J:

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendants Kevin Barcohana, M.D., and North American Partners in Anesthesia, LLP, have moved in this medical malpractice action to change venue from New York County to Nassau County (Mot. Seq. 001). Defendants argue that the sole basis for venue in New York County was the residence here of defendant Saint Vincent's Catholic Medical Centers, but plaintiff discontinued the action against Saint Vincent's by Stipulation on January 19, 2010. Defendants Douglas K. Held, M.D., Lawrence Gordon, M.D., and Gordon & Held, M.D., P.C., have cross-moved for the same relief. In addition, defendants Steven Korben, M.D., Chris Lascarides, M.D., and Great Neck Medical Group, LLP, have moved to change venue on the same ground (Mot. Seq. 002), defendants Stephen Litvak, M.D., and Long Island Jewish Medical Center have cross-moved, and Richard Etra, M.D., and Mollick, Etra, Etra & Cohen, LLP have submitted papers in support. The motions are all consolidated for disposition.

This Court grants the motions and cross-motions and directs a change of venue to Nassau County where the plaintiff resides and substantial treatment was rendered. New York County was properly chosen as the venue for the instant action in the first instance because Saint Vincent's has its principal place of business here. However, as noted above, the plaintiff discontinued all claims against Saint Vincent's in January of this year. When venue is based on the residence of a party and the action is discontinued against that party, then the court should grant the motion to change venue.

As demonstrated in the cases cited by the defendants here, the law in this Department is clear that a motion to change venue must be granted under these circumstances. For example, in *Clase v. Sidoti*, 20 A.D.3d 330 (1st Dept. 2005), the Bronx County Supreme Court denied the defendant's motion to change venue and the Appellate Division reversed. The plaintiff in *Clase* was suing Dr. Eugene J. Sidoti and the Montefiore Medical Center and had selected Bronx County as the venue for trial based on the Medical Center's principal place of business there. When the plaintiff discontinued the action against the Medical Center, Dr. Sidoti moved to change venue to Westchester County where both the plaintiff and the defendant doctor resided. The Appellate Division held that "where venue is placed on the basis of the principal place of business of an improper party, a motion to change venue should be granted after the action is dismissed against the improper party." *Id.* at 331.

Similarly, in *Crew v. St. Joseph's Medical Center*, 19 A.D.3d 205 (1st Dept. 2005), defendant St. Joseph's Medical Center moved to change venue from Bronx County to Westchester County after the plaintiff had discontinued the action against defendant Dr.

Nadem Sayegh, whose residence had been the basis for the Bronx venue. After the discontinuance, no party resided in the county selected as the venue for trial. As a result, the Appellate Division affirmed the trial court's decision, granting the change of venue. *See also, Chow v Long Island R.R.*, 202 AD2d 154 (1st Dep't 1994); *Gramazio v Borda, Wallace & Wittv.* 181 AD2d 428 (1st Dep't 1992); and *Caplin v Ranhofer*, 167 AD2d 155 (1st Dep't 1990)(venue changed after court dismissed claims against the party whose residence was the sole basis for venue).

Plaintiff's opposition is unavailing. Plaintiff first claims that the motions must be denied because the defendants have failed to comply with the procedures set forth in CPLR §511 for a motion to change venue. However, that provision and the cited cases apply only when venue is improperly placed in the first instance. In this case, venue was properly placed here in the first instance, but the basis for venue was removed when the action was discontinued against Saint Vincent's.

Similarly unavailing is plaintiff's claim that the motions must be denied as untimely because defendants waited five weeks after the Stipulation of Discontinuance was filed before making their motion. The delay is not so excessive or unreasonable as to justify keeping venue here when the case law dictates otherwise. *See Toro v Gracin*, 148 AD2d 364 (1st Dep't 1989)(five-month delay did not constitute "inordinate delay" of the magnitude to deny change of venue, where jury was not about to be selected). Further, as defendants note in reply, since the motion to change venue was made within the time frame for summary judgment, the delay is not on its face unreasonable and the Court has the discretion to entertain the motion. *Montero v Elrac, Inc.*, 16 AD3d 284 (1st Dep't 2005).

In sum, this Court finds here that the plaintiff's discontinuance of the action against defendant Saint Vincent's removes the basis for venue in New York County and justifies a change of venue to Nassau County where the plaintiff and other defendants reside.

Accordingly, it is hereby

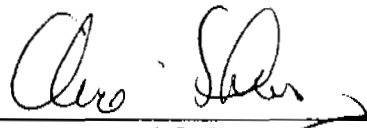
ORDERED that the motions and cross-motions by the various defendants to change venue from New York County to Nassau County are granted; and it is further

ORDERED that the venue of this action is changed from this court to the Supreme Court, County of Nassau, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Nassau, upon the service by any moving defendant of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the decision and order of the Court.

Dated: April 5, 2010

APR 05 2010



J.S.C.
ALICE SCHLESINGER

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE