

Denis v Nyack Hosp.
2010 NY Slip Op 31470(U)
June 8, 2010
Sup Ct, NY County
Docket Number: 602234/2009
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

PRESENT: ALICE SCHLESINGER

PLA PART 16

Index Number : 602234/2009

DENIS, MARIE E.

vs.

NYACK HOSPITAL

SEQUENCE NUMBER : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion by various defendants to change venue to Rockland County is granted in accordance with the accompanying memorandum decision.

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

FILED

JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUN 08 2010

Dated: June 8, 2010

ALICE SCHLESINGER 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: IA PART 16

-----X
MARIE E. DENIS and JEAN R. DENIS,

Plaintiffs,

-against-

Index No. 602234/2009

Motion Seq. Nos. 001
and 002

NYACK HOSPITAL, JEFFREY ROSENBERG, M.D.,
SATISH REDDY, M.D., FREDERICK HUIE, M.D.,
MARIANNA GOLDEN, M.D., VEERANA MERLA,
M.D., LALITHA REVICHANDRAN, M.D., and
BRIAN GOLDEN, M.D.,

Defendants.

-----X
SCHLESINGER, J.

FILED

JUN 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

There are two procedural matters before the Court. First, defendant Nyack Hospital moved to change venue from New York County to Rockland County. Defendant Marianna Golden cross-moved for identical relief, and defendant Brian Golden submitted an affirmation in support of the change of venue. They argue that plaintiffs based their choice of venue on Dr. Brian Golden's alleged residence in New York County, but contend that Dr. Golden resides in New Jersey and has not lived in New York County since 2002, well before this action was commenced.

Plaintiffs did not respond to Nyack Hospital's motion directly, but suggested, in a companion motion, that venue may be proper based on the residence of defendant Dr. Huie.

Second, defendant Dr. Frederick Huie moved to dismiss plaintiffs' complaint against him due to an alleged failure to obtain personal jurisdiction; he claims that service was improper – that the summons and complaint were not received – and that he therefore did not receive notice. Plaintiffs vigorously oppose Dr. Huie's motion and insist

that service was proper. Specifically, plaintiffs claim that the summons and complaint were both mailed and affixed to the door of Dr. Huie's residence after multiple attempts to serve him personally had failed.

Venue in New York County is Improper

In New York, the place of trial shall be in the county designated by the plaintiff unless the court orders a change in response to the defendant's motion or both parties agree to change venue. CPLR §509. Pursuant to CPLR §510, the court upon motion may change the place of trial of an action where: (1) the county designated for that purpose is not a proper county; or (2) there is reason to believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change.

If a defendant seeks to change venue as of right based on improper county under CPLR §510, subd. 1, as here, the defendant must follow the steps set forth in CPLR §511. Specifically, the defendant must serve a demand for a change of venue on the plaintiff with or prior to the answer to the complaint. CPLR §511(a). If the plaintiff does not consent to the proposed change within five (5) days of such a demand, the defendant then has fifteen (15) days to move for a change of venue. CPLR §511(b). If the defendant fails to follow this procedure, the defendant is no longer entitled to a change of venue as of right, but may still ask the court in its discretion to change venue under either subdivision 2 or 3 of Section 510 quoted above. Siegel, D., *New York Practice*, §123 (4th ed. 2005); see also, *Lynch v. Cyprus Sash & Door Co., Inc.* 272 A.D.2d 260 (1st Dep't 2000).

Here, defendant Nyack Hospital has moved for an order to change venue from New York County to Rockland County pursuant to CPLR §510, subd. 1, on the ground that New York County is not a proper county. Defendant Dr. Marianna Golden has cross-moved for the identical relief, and Dr. Brian Golden has submitted papers in support. Defendants note that plaintiffs based their choice of venue in New York County on the alleged residence here by defendant Dr. Brian Golden. However, Dr. Golden has submitted an affidavit confirming that he now resides in New Jersey and has not resided in New York County since 2002. Since Rockland is the county where the plaintiffs reside, where the treatment at issue was provided, and where most defendants maintain their offices, defendants urge this Court to transfer venue there.

Although plaintiffs did not respond to Nyack Hospital's motion directly, they suggest, in a companion motion regarding service of process, that even if venue is improper based on Dr. Golden, venue *might* be proper based on the residence of defendant Dr. Huie. This argument is wholly without merit as Dr. Huie resides in Staten Island (which is where plaintiffs attempted to serve him in this case), and no evidence whatsoever is offered to suggest that Dr. Huie resides – or has ever resided – in New York County.

Defendants have established their entitlement to the requested relief. They have proven that the basis for venue alleged by plaintiff is improper, and they have followed the procedures set forth in CPLR §511 to demand a change in venue. Therefore, this case will be transferred to Rockland County.

The Jurisdictional Motion should be Decided in a Rockland County Court

The jurisdictional matter before the Court turns on an issue of fact. Plaintiffs have submitted an affidavit claiming that, after three attempts to serve Dr. Huie personally at three different times of day, a process server affixed the summons and complaint to the door of Dr. Huie's residence and mailed a copy to that same address. This service appears to comport with the CPLR §308(d) requirement for "nail-and-mail" service.

Dr. Huie has submitted an affidavit in support of his motion to dismiss, claiming that he did not receive the summons. While he was away on vacation for the month of August, he had an individual named Joseph Gangemi check his mail and residence, a single family home, on a daily basis. Mr. Gangemi has submitted an affidavit attesting that he found no summons and complaint affixed to the door of the residence, nor saw them when he checked the mail. Dr. Huie similarly asserts that he found no papers at his residence or in the mail when he returned from vacation.

The competing affidavits create an issue of fact that would ordinarily be resolved at a traverse hearing. However, since the case is being transferred to Rockland County based on the venue issue above, the Court finds it more appropriate to transfer this jurisdictional motion there as well.

Accordingly, it is hereby

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


ORDERED that the venue of this action is changed from the Supreme Court, County of New York, to the Supreme Court in Rockland County, and the Clerk of the Supreme Court, County of New York, is directed to transfer the papers on file in this

action (Index No. 602234/2009) to the Clerk of the Supreme Court, County of Rockland, upon the service by counsel for Nyack Hospital of a copy of this order with notice of entry upon counsel for the plaintiffs and the Clerk of the Court and the payment of appropriate fees, if any; and it is further

ORDERED that the Clerk of the Supreme Court, Rockland County, upon receipt of a copy of this order with notice of entry, shall assign a Rockland County index number to the files transferred pursuant to this order and assign to an appropriate justice of that court the motion by defendant Dr. Huie to dismiss for lack of personal jurisdiction.

Dated: June 8, 2010

JUN 08 2010



J.S.C.
ALICE SCHLESINGER

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE