

Ellman v S&L Birchwood, LLC

2010 NY Slip Op 32946(U)

October 15, 2010

Supreme Court, New York County

Docket Number: 105331/10

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16
PART

PRESENT: _____
Justice

Index Number : 105331/2010
ELLMAN, NANCY
vs.
S & L BIRCHWOOD, LLC
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by defendant to change venue to Suffolk County is granted in accordance with the accompanying memorandum decision.

FILED

OCT 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

OCT 15 2010

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

NANCY ELLMAN, as Administrator of the Estate
of Roderic Austin Ellman, Deceased,

Plaintiff,

-against-

Index No. 105331/10
Motion Seq. No. 001

S&L BIRCHWOOD, LLC, d/b/a APEX
REHABILITATION & CARE CENTER and
JANE E. TURK,

Defendants,

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SCHLESINGER, J.:

Defendant, S & L Birchwood, LLC, has moved in this medical malpractice action to change venue from New York County to Suffolk County pursuant to CPLR §§ 501, 510(1) and 511(b) based on a venue selection provision in the Admission Agreement issued by the nursing home where the alleged malpractice occurred. Plaintiff opposes this motion, arguing that defendant's motion is untimely and that the venue selection provision is not controlling.

Facts and Procedural History

Plaintiff's decedent, Roderic Ellman, was admitted to a nursing home facility maintained by defendants at Birchwood Gardens in early 2007. In connection with that admission, his spouse signed an Admission Agreement dated February 1, 2007, a copy of which is attached to defendant's moving papers as Exhibit D.¹ Mr. Ellman passed away on September 24, 2008, allegedly because he choked while eating unattended.

¹ The facts are drawn from the papers and exhibits submitted by the parties on this motion and are undisputed.

On April 23, 2010, plaintiff Nancy Ellman, as the administrator of Mr. Ellman's estate, commenced this malpractice action alleging that Mr. Ellman's death was caused by the nursing home's negligent care and treatment of Mr. Ellman. On June 1, 2010, defendant served a Verified Answer along with a Demand to Change Venue from New York County to Suffolk County. Ten days later, on June 11, defendant served a motion to change venue to Suffolk County; however, this motion was rejected by the Motion Support Office for technical reasons. On July 1, 2010, plaintiff served an Amended Summons and Complaint. Less than two weeks later, on July 13, defendant served an Amended Answer and a second Demand to Change Venue. Eight days later, on July 21, 2010, defendant filed the motion to change venue that is now before this Court.

The Rules Governing Venue

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 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; (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. Under CPLR § 501, a defendant can also move to change venue based on a written agreement fixing the place of trial.

If a defendant seeks to change venue as of right based on improper county under CPLR § 510(1), the defendant must first serve a Demand to Change Venue prior to or with the answer to the complaint in accordance with CPLR § 511(a) and then follow the requirements set forth under CPLR § 511(b). Specifically, if the plaintiff does

not consent to the proposed change of venue within five days of such a demand, the defendant has fifteen days from service of the demand 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 based on an improper county, but may still ask the court to use its discretion to change venue on one of the other statutory grounds. Siegel, D., *New York Practice*, § 123 (4th ed. 2005). In such a case, the time-sensitive demand procedures need not be followed, so long as a motion is made "within a reasonable time after commencement of the action." CPLR § 511(a).

Defendant's Motion Is Timely

Plaintiff argues that defendant's instant motion, filed on July 21, 2010, is untimely because it was not filed within 15 days of defendant's service of the June 1 Demand to Change Venue. Defendant asserts that it was sufficient that the original motion was timely served on June 11, within the 15 days of the Demand, even though that motion was not accepted by the clerk's office. In the alternative, he argues that the instant motion was timely served and properly filed within 15 days after he served a Demand to Change Venue in response to plaintiff's Amended Complaint.

Although plaintiff disputes both arguments, the Court need not determine whether the Demand procedures were followed because those procedures are not relevant here. In a case remarkably similar to the case at bar, the First Department unequivocally held that a motion to change venue pursuant to CPLR § 501 based on a written venue selection provision is timely so long as it is "brought within a reasonable time after commencement of the action," regardless of whether the Demand procedure was followed. *Hendrickson v. Birchwood Nursing Home Partnership*, 26 A.D.3d 187 (1st Dep't 2006).

In *Hendrickson*, Birchwood Nursing Home, the same defendant here or its affiliate, moved to change venue from New York County to Suffolk County based on the venue selection provision in the nursing home's Admission Agreement.² The motion was denied by Justice Leland DeGrasse by decision dated October 20, 2004 on the ground that defendant had failed to comply with the Demand procedures of CPLR § 511(b). Slip Op. Index No. 105432/04 (Sup. Ct., NY Co.). Citing to CPLR § 511(b), the First Department reversed, finding that defendant's motion (which had been filed a little more than four months after the action was commenced) was timely in that it was based on a written venue selection provision and "was brought within a reasonable time after commencement of the action." *Hendrickson*, 26 A.D.3d at 187.

Similarly here, defendant's motion to change venue is based on a written venue selection provision and was filed within a reasonable time (about three months) after the commencement of the action. Therefore, based on *Hendrickson*, which is controlling here, this Court finds that the motion is timely.

The Written Venue Selection Provision Is Controlling

In this motion, defendant seeks to change venue to Suffolk County based on paragraph XI(a) in the above-mentioned nursing home Admission Agreement signed by the decedent's spouse at the beginning of his stay. That paragraph, entitled "Governing Law", states in relevant part that:

Any and all actions arising out of or related to this Agreement shall be brought in, and the parties agree to exclusive jurisdiction of, the New York State Supreme Court, located in Suffolk County, New York.

² Although the *Hendrickson* decision is brief, a review of the motion papers filed in Supreme Court in that case reveals that the motion was based on an earlier but nearly identical version of the form Admission Agreement signed by the decedent's spouse in this case relating to the same nursing home or its affiliate.

Plaintiff opposes the motion, arguing that the Admission Agreement is primarily a financial agreement governing the collection of fees and, as such, does not control the venue selection for the current medical malpractice action.

As defendant correctly demonstrates, the Appellate Division found in the *Hendrickson* case discussed above that the identical venue selection provision in a nearly identical form Admission Agreement applied to set venue in a medical malpractice action. Indeed, the *Hendrickson* court could hardly have been more explicit, holding that the motion to change venue “should have been granted in view of the parties’ written agreement clearly fixing the place of trial in Suffolk County ... Plaintiff’s claim that the contract, including the venue provision, is unenforceable is not supported by the record, and we reject it.” 26 A.D.3d at 187-88 (citations omitted). While the Agreement here, like its predecessor in *Hendrickson*, is largely financial in nature, it also covers various elements of the patient’s care and treatment. Therefore, the provision setting venue in Suffolk County is enforceable and binding here, just as it was in *Hendrickson*.

Wholly without merit is plaintiff’s claim that the Admission Agreement is inapplicable because the parties to the Agreement differ from the parties to this litigation. The Agreement was signed by the spouse of Roderic Ellman and the company operating the nursing home. The plaintiff here is Nancy Ellman, as the administrator of Mr. Ellman’s estate, and the defendant is the entity that operates the nursing home. Paragraph XI(b) of the Admission Agreement states that: “This agreement shall be binding on the parties, their heirs, administrators, distributees, successors and assignees.” Thus, by its express terms, the Agreement is binding on

the parties to this litigation, including the Administrator of the decedent's estate.

Further, since Roderic Ellman was a third-party beneficiary of the Agreement, plaintiff cannot reasonably argue that the Agreement is not binding on the estate. See *Buhler v. French Woods Festival of the Reforming Arts, Inc.*, 154 A.D.2d 303, 304 (1st Dep't 1989)(cited in *Hendrickson*) (venue selection provisions are applicable and binding on third-party beneficiaries).

Accordingly, it is hereby

ORDERED that defendant's motion is granted and the venue of this action is changed from this Court to the Supreme Court, County of Suffolk, and upon service by the movant of a copy of this order with notice of entry and the payment of appropriate fees, if any, 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 Suffolk.

Dated: October 15, 2010

OCT 15 2010


J.S.C.
ALICE SCHLESINGER

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