

Herman v Gave

2010 NY Slip Op 33176(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 109676/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

IA PART 16
PART _____

Justice

Index Number : 109676/2010

HERMAN, STEVEN

vs.

GAVE, ASAF A.

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

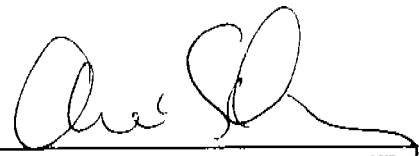
by defendant Kalman to change venue is denied in accordance with the accompanying memorandum decision.

FILED

NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

NOV 09 2010

Dated: November 9, 2010



ALICE SCHLESINGER *s.c.*

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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

STEVEN HERMAN, as Executor of the
Estate of JO ANN GAGLIARDI, deceased,
and STEVEN HERMAN, individually,

Plaintiff,

Index No. 109676/10
Motion Seq. No. 001

-against-

ASAF A. GAVE, UNITED MEDICAL SURGICAL,
P.C., ALDO GAMARRA, JEFFREY S. KALMAN and
STATEN ISLAND UNIVERSITY HOSPITAL,

Defendants.

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SCHLESINGER, J.

Defendant Jeffrey S. Kalman has moved in this medical malpractice action to change venue from New York County to Richmond County pursuant to CPLR § 510(1), claiming that plaintiff improperly placed venue based on the current New York residence of co-defendant Asaf A. Gave, rather than on his residence in Richmond at the time of the alleged negligence. Plaintiff opposes, arguing that Dr. Gave's current residence is a proper basis for placing venue in New York County.

Discussion

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. If venue is based on residence, "the place of trial shall be in the county in which one of the parties resided when it commenced" which, in the case of an individually-owned business, includes any county in which the business maintains its principal office. CPLR § 503.

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.

Venue was Properly Placed in New York County

According to defendant, venue in New York County is improper under CPLR § 510(1) because it is based on the current business residence of co-defendant Asaf A. Gave in New York County, rather than on his business residence at the time of the alleged malpractice in Richmond County.

Wholly without merit is defendant's argument that venue should be based on a party's residence at the time the action arose. Plaintiff correctly asserts that what is relevant for placement of venue is the residence of a party on the date the action commenced and not at the time of the alleged negligence. Indeed, the statute expressly states that "[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided *when it commenced*...." CPLR § 503(a) (emphasis added); see also, *Santulli v. Santulli*, 228 A.D.2d 247, 248 (1st Dep't 1996)(venue changed to Richmond County where plaintiff actually resided when action was commenced, as opposed to New York County where plaintiff rented an apartment that was not used). Defendant's reliance on outdated case law for the proposition that transitory actions should be venued in the county in which the action arose is misplaced, as both the governing statute and case law are clear.

Plaintiff amply demonstrates that co-defendant Gave maintained his business residence in New York County at the time the action commenced on or about July 22, 2010. Plaintiff provides a copy of Dr. Gave's business card; a July 20, 2010 print-out of Dr. Gave's profile on the Continuum Health Partners website, which lists his business address as 10 Union Square East, New York, New York; and a print-out of his profile on the America's Registry website showing that Dr. Gave is currently employed by Beth Israel Medical Center in New York County and was last affiliated with Staten Island University Hospital in 2009. (See Affirmation in Opposition, Exhs. A & B). Defendant Kalman has provided no evidence to the contrary. Notably, co-defendant Gave has neither disputed plaintiff's assertion that he resides in New York County, nor challenged the placement of venue in this county.

Since venue was properly placed in New York County based on the current residence of co-defendant Gave, CPLR § 510(1) cannot serve as a basis to change venue, and defendant may only seek discretionary relief.

Burden of Showing Witness Inconvenience has not Been Met

Although defendant does not cite CPLR § 510(3) as grounds for relief, he argues that the convenience of material witnesses, including himself, would be served by a change of venue to Richmond County, where the treatment at issue was provided.

When moving for a discretionary change of venue based on witness inconvenience, the moving party bears the burden of making a detailed evidentiary showing that the convenience of material witnesses would be better served by the change in venue. *Hernandez v. Rodriguez*, 5 A.D.3d 269, 270 (1st Dep't 2004). This

showing must include: (1) the identity of the proposed witnesses; (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced; (3) that the witnesses have been contacted and are available and willing to testify for the movant; and (4) the nature of the anticipated testimony and the manner in which it is material to the issues raised in the case. *Cardona v. Aggressive Heating Inc.*, 180 A.D.2d 572 (1st Dep't 2002), *citing O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169 (2d Dep't 1995). Only after such a detailed showing that material witnesses would in fact be inconvenienced will a change of venue be granted. *Hernandez*, 5 A.D.3d at 271.

In the instant case, defendant has failed to satisfy even the most basic of these factors. To meet his burden, defendant would have to provide affidavits from identified *non-party* witnesses. Instead, defendant simply proffers his own affidavit, in which he claims that a trial in New York County will inconvenience him because he has various commitments in Richmond County where he maintains an office and practices medicine. Defendant's affidavit is wholly insufficient as it fails to identify even a single non-party material witness who would be inconvenienced. Moreover, defendant's assertions regarding his own inconvenience are irrelevant because convenience to a party is not a factor in considering a discretionary motion to change venue. *Gissen v. Boy Scouts of America*, 26 A.D.3d 289, 291 (1st Dep't 2006), *citing Martinez v. Dutchess Landaq, Inc.*, 301 A.D.2d 424 (1st Dep't 2003). What is more, it cannot be said that travel from Richmond County to New York is burdensome. Defendant, in relying on generalized and conclusory assertions regarding potential witnesses, falls substantially short of meeting his evidentiary burden.

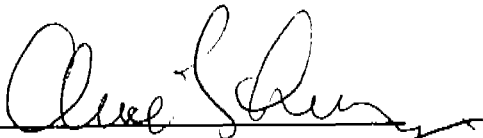
Accordingly, it is hereby

ORDERED that defendant's motion to change venue from New York County to Richmond County is denied and plaintiff's action shall proceed in New York County. The parties are directed to appear before the Court in Room 222 on December 15, 2010 at 9:30 a.m. for a preliminary conference. Plaintiff shall respond to all Demands for Bills of Particulars before that time.

This constitutes the decision and order of the Court.

Dated: November 9, 2010

NOV 09 2010



J.S.C.
ALICE SCHLESINGER

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