

Matter of Morris v Velickovic

2011 NY Slip Op 30091(U)

January 11, 2011

Sup Ct, New York County

Docket Number: 800032/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

~~PART~~ **IA** PART 16

Index Number : 800032/2010

MORRIS, GEORGE

vs.

VELICKOVIC, M.D., MIODRAG

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 Hudson Valley Hospital Center to change venue is denied in accordance with the accompanying memorandum decision.*

FILED

JAN 13 2011

NEW YORK COUNTY CLERK'S OFFICE

JAN 11 2011

Dated: _____

Alice Schlesinger

 ALICE SCHLESINGER, Es.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

In the Matter of the Application of
GEORGE MORRIS and ANITA MORRIS,

Plaintiffs,

Index No.800032/10
Motion Seq. No. 001, 002

-against-

MIODRAG VELICKOVIC, M.D, MIODRAG
VELICKOVIC, M.D., P.C., NARASIMHA SWAMY, M.D.
VALLEY SURGICAL, PLLC, MATTHEW GOLKAR,
M.D., DOUGLAS KAIDEN, M.D., and HUDSON
VALLEY HOSPITAL CENTER,

FILED

JAN 13 2011

Defendants.

-----X

SCHLESINGER, J.

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Hudson Valley Hospital Center ("HVHC") has moved in this medical malpractice action to change venue from New York County to Putnam County pursuant to CPLR § 510(1) and 503(d), claiming that plaintiffs improperly based venue on a New York County office address of co-defendant Dr. Miodrag Velickovic that is allegedly not his principal office. In a separate motion, defendants Dr. Douglas M. Kaiden, Dr. Narasimha Swamy, Dr. Matthew Golkar, and Valley Surgical, PLLC have also moved to change venue from New York County to Putnam County on the same ground. Plaintiffs oppose, arguing that venue was properly placed based on Dr. Velickovic's New York County office address.

Facts and Procedural History

Plaintiffs commenced this medical malpractice action on August 6, 2010 in New York County, designating venue based on defendant Miodrag Velickovic's office address at 5 East 98th Street, New York, New York. Although defendant HVHC

originally served a Verified Answer with a Demand to Change Venue from New York County to Westchester County where the alleged malpractice occurred, it moved fifteen days later to change venue to Putnam County where the plaintiffs reside. After serving Demands to Change Venue on September 7, 2010, September 10, 2010, and November 4, 2010, defendants Dr. Swamy, Dr. Golkar, Dr. Kaiden, and Valley Surgical filed a similar Motion to Change Venue to Putnam County on November 19, 2010.

Because Dr. Velickovic remained silent on this issue up until that point and because many questions remained regarding his principal office address, the Court, in a letter dated November 18, 2010, requested that Dr. Velickovic provide further information in an affidavit. Specifically, the court requested that Dr. Velickovic provide his personal residence, the location of his offices, the county where his professional corporation was incorporated, and his position on the motion.

Dr. Velickovic submitted an affidavit on November 30, 2010 in which he stated that he has resided in Westchester County since the commencement of the action and that his practice consists of two offices, one located at 1940 Commerce Street, suite 107, Yorktown Heights, New York in Westchester County and one located at 5 East 98th Street, 1st floor, New York, New York in New York County. (Velickovic Affidavit, ¶¶ 3, 4). Dr. Velickovic further indicated that he maintains hospital privileges at Northern Westchester Hospital in Westchester County and at Mt. Sinai Hospital in New York County. (Velickovic Aff., ¶ 5). Additionally, he confirmed in conclusory fashion that his professional corporation is incorporated in Westchester County, apparently relying on the New York State Department of State print-out in defendant HVHC's moving papers, which indicates that his professional corporation was registered in Westchester County. (Velickovic Aff., ¶ 6).

The Rules Governing Venue Selection

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.

If a defendant seeks to change venue as of right based on improper county under CPLR § 510(1), as is the case here, it is defendant's burden to establish that the designated county is improper. *Garced v. Clinton Arms Associates*, 58 A.D.3d 506, 509 (1st Dep't 2009). Additionally, the defendant must follow the specific requirements set forth in CPLR § 511(b). Specifically, the defendant must serve a demand for a change of venue on the plaintiff prior to or with the answer to the complaint. CPLR § 511(a). If the plaintiff does not consent to the proposed change 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, but may still ask the court to use its discretion. *Pittman v. Maher*, 202 A.D.2d 172, 175 (1st Dep't 1994).

Discussion

Although defendant HVHC and the second set of defendants have brought two separate motions, both rely on the same arguments and they will be addressed here

together.¹ It is defendants' position that plaintiffs improperly designated venue based on Dr. Velickovic's New York County office address because his principal office is located in Westchester County where his professional corporation is incorporated. Plaintiffs correctly point out that because Dr. Velickovic has been sued both as a corporate defendant (Miodrag Vlickovic M.D., P.C.) and as an individual defendant (Miodrag Velickovic M.D.), the principal office of his professional corporation is not controlling when determining the principal office of the individual defendant, which serves as the basis of venue here.

For purposes of venue, a professional person such as a physician is treated as an individually owned business. See Siegel, D., *New York Practice*, 119 (3rd ed. 1999). Under CPLR § 503(d) an individually owned business "shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides."

It is the movant's burden to establish that the designated county is improper. Therefore, the determining factor is whether the moving defendants here have met their burden of establishing that the principal office of Miodrag Velickovic, M.D. is located in Westchester County, as opposed to New York County where plaintiffs set venue when initiating this action.

Despite ample opportunity to do so, defendants have failed to meet this burden.

¹It is worth noting that the second motion is untimely with respect to defendants Dr. Swamy, Dr. Golkar, and Valley Surgical because they did not file the motion within the requisite 15 days from the service of their demands on September 7, 2010 and September 10, 2010. However, plaintiffs have not opposed on this ground and the Court will nonetheless address the merits of both motions, particularly since the second motion was timely as to Dr. Kaiden.

Defendants' sole reliance on a print-out from the New York State Department of State website is misplaced. The print-out, which lists 1940 Commerce St, Yorktown Heights, New York, in Westchester County, as the "Principal Executive Office" for Miodrag Vlickovic M.D., P.C., and as the address for the Chairman or Chief Executive Officer, speaks solely to the principal office of the professional corporation and fails to demonstrate that Westchester County is the principal office for Dr. Velickovic as an individual defendant.

Even more revealing is the fact that Dr. Velickovic was given an opportunity by this Court to identify his principal office and chose not to do so. Dr. Velickovic's affidavit affirmed that his practice consists of an office in Westchester County and an office in New York County, that he treats patients at both offices, and that he maintains hospital privileges at hospitals in both Westchester County and New York County. (Velickovic Aff., ¶¶ 4, 5). However, his affidavit was notably silent on issues such as the locale which he considers to be his principal office, where he conducts the majority of his work and spends the majority of his time, the approximate number of patients he sees at each office, where he earns the majority of his revenue, or any other factors that would identify which office constitutes his principal place of business.

Defendants' reliance on outdated case law for the proposition that transitory actions should be venued in the county in which the action arose is also misplaced. Both the governing statute and case law are clear that such considerations are only taken into account on a motion for a discretionary change of venue based on inconvenience to material witnesses. *See, e.g., O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 173-74 (2d. Dep't 1995).

Because the evidence presented falls substantially short of meeting defendants' burden of establishing that venue was improperly placed in New York County, defendants' motion is denied.

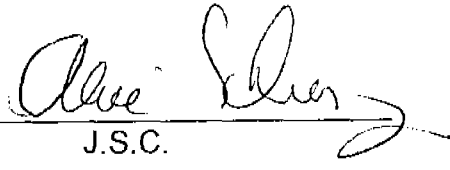
Accordingly, it is hereby

ORDERED that defendants' motions to change venue from New York County to Putnam County are denied and plaintiffs' action shall proceed in New York County.

This constitutes the decision and order of the Court.

Dated: January 11, 2011

JAN 11 2011


J.S.C.

ALICE SCHLESINGER

FILED

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