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

PRESENT: Joan B. Lobis PART 6

Index Number : 800064/2010
GORHAM, FLORA
VS.
MARKENSON, DAVID
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. _____
MOTION DATE 12/15/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-9
Replying Affidavits	10-11

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/25/11

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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FLORA GORHAM, as Administratrix of the Estate of Carissa St. Victor,

Plaintiff,

-against-

DAVID MARKENSON, OYA TUGAI, JAMI ERYN SHAPIRO, BINDU PUNNOOSE-GEORGE, MATTHEW WEISSMAN, NEW YORK MEDICAL COLLEGE and V. Doe MS III,

Defendants.

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Index No. 800064/10

Decision and Order

JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition. In Motion Sequence Number 001, defendant David Markenson, M.D. s/h/a David Markenson moves for an order transferring venue to Westchester County. In Motion Sequence Number 002, Jami Eryn Shapiro moves for an order dismissing the case against her. Before this motion was fully submitted, plaintiff agreed to discontinue her case against Ms. Shapiro; however, none of the other parties to this lawsuit will consent to the discontinuance by signing a stipulation. C.P.L.R. Rule 3217(a)(2). It cannot be determined from the parties' submission whether there are currently any other claims against Ms. Shapiro. Since a voluntary discontinuance is not available under Rule 3217(a), the court may order a discontinuance under Rules 3217(b) and (c). The court will permit plaintiff's action against Ms. Shapiro to be discontinued under Rule 3217(b); however, the discontinuance is without prejudice, pursuant to Rule 3217(c).

This case is being brought by the administratrix and paternal grandmother of an infant, Carissa St. Victor, who died in 2008. The complaint alleges that Carissa was the victim of

physical abuse which resulted in her death. Plaintiff alleges that the defendants were either aware that Carissa was the victim of physical abuse or were so negligent that they failed to determine that Carissa was the victim of physical abuse; that they had a statutory duty to report the abuse to the proper authorities; and that they failed to report the abuse. The complaint alleges that defendants' failure to determine and/or report that Carissa was the victim of physical abuse proximately caused Carissa to sustain further physical abuse that resulted in further injuries and death. As against the defendant medical providers, the complaint additionally alleges that they were negligent in the medical care they provided to Carissa and failed to properly diagnose her condition, such that she was caused to sustain severe and permanent personal injuries and death.

As to the motion for a venue transfer, Dr. Markenson served a demand for a change of venue , pursuant to C.P.L.R. Rule 511, on or about October 25, 2010, together with his answer. The demand sets forth that New York County is an improper venue because none of the parties to the action resided in New York County when the action was commenced. Plaintiff did not serve a written consent to the change of venue. See C.P.L.R. Rule 511(b). This motion was served on November 9, 2010, within the time frame permitted by Rule 511(b).

In her complaint, plaintiff designated New York County as the venue for her action based on Dr. Markenson's residence. In his motion, Dr. Markenson argues that venue is improper (C.P.L.R. § 510[1]) because he has resided in New Rochelle, Westchester County, for the past seven years. He also argues that a transfer to Westchester County is required in order to promote "the convenience of material witnesses and the ends of justice" (C.P.L.R. § 510[3]) because the events that gave rise to the action took place in Westchester County; Westchester County "contains a

preponderance of witnesses and parties" to the action; all records relating to the case are located in Westchester County; and the Westchester County court's calendar is "far less congested and a speedier trial may be obtained."

In opposition, plaintiff concedes that Dr. Markenson does not reside in New York County, but argues that New York County remains the proper venue because defendant Matthew Weissman, M.D., presently lives in New York County. Plaintiff's attorney annexes a copy of a Department of Motor Vehicles ("DMV") search and a New York Education Department, Office of the Professions verification search, to demonstrate that Dr. Weissman resides in New York County. The copy of the DMV abstract indicates that Dr. Weissman lives on the Upper West Side of Manhattan, in New York County.

In reply, Dr. Markenson appears to concede that venue in New York County is proper based on Dr. Weissman's residence (Dr. Weissman did not submit any papers on this motion). However, he continues to argue that this case should be changed to Westchester County in order to ease the congestion of cases in New York County; because the majority of witnesses and parties reside in Westchester County; and because the records are located in Westchester County.

Venue in New York County is proper based on Dr. Weissman's residence, so that branch of Dr. Markenson's motion seeking a venue transfer under C.P.L.R. § 510(1) is denied. As to Dr. Markenson's request for a venue transfer under § 510(3), the court has discretion to grant such a request upon submission of a "detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief." Jacobs v. Banks Shapiro Gettinger

Waldinger & Brennan, LLP, 9 A.D.3d 299 (1st Dep't 2004) (citations omitted); see also Cardona v. Aggressive Heating Inc., 180 A.D.2d 572 (1st Dep't 1992) (on a motion pursuant to § 510(3), "the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change."). Counsel makes no attempt to identify the names or addresses of any material nonparty witnesses who would be inconvenienced by venue in New York County; the subject of their testimony; or their willingness to testify. See Jacobs, 9 A.D.3d at 299. Additionally, "'the fact that the medical records relating to the alleged malpractice are located in [another county] demonstrates no real inconvenience since they could be mailed to the court.'" Nolan v. Mt. Vernon Hosp., 172 A.D.2d 368, 369 (1st Dep't 1991), quoting D'Argenio v. Monroe Radiological Assocs., P.C., 124 A.D.2d 541, 542 (2d Dep't 1986) (citations omitted). Therefore, Dr. Markenson's alternative request for a discretionary change of venue under § 510(3) is also denied. Accordingly, it is hereby

ORDERED that Motion Sequence Number 001 is denied; and it is further

ORDERED that Motion Sequence Number 002 is granted, to the extent that plaintiff's action against Jami Eryn Shapiro is discontinued under C.P.L.R. Rule 3217(b) and (c), and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 29, 2011, at 9:30 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

Dated: February 25, 2011

JOAN B. LOBIS, J.S.C.