

**Rothschild v Troutman Sanders LLP**

2011 NY Slip Op 30764(U)

March 15, 2011

Supreme Court, New York County

Docket Number: 111240/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

DR. GERTRUDE NEUMARK ROTHSCHILD,  
Plaintiff,

INDEX NO. 111240/10

- v -

MOTION SEQ. NO. 001

TROUTMAN SANDERS LLP, ALBERT JACOBS  
LLP, and ALBERT JACOBS,  
Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered were read on this motion by plaintiff pursuant to CPLR § 602 (a), to consolidate this action with two actions pending in Westchester County and defendants cross-move to consolidate this action with the Jacobs Action and Troutman Action and fix venue as Westchester County.

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

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

**FILED**  
PAPERS NUMBERED  
APR 01 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

In motion sequence 001, plaintiff moves, pursuant to CPLR § 602 (a), to consolidate this action with two actions pending in Westchester County, *Albert Jacobs LLP v Gertrude Neumark Rothschild*, index No. 20455/10 (the Jacobs Action) and *Troutman Sanders LLP v Gertrude Neumark Rothschild*, index No. 20456/10 (the Troutman Action) as related. Plaintiff also moves, pursuant to New York Judiciary Law § 475, for a determination that defendants do not have a lien on \$1,214,920.41 currently held in escrow and asks that the Court direct the escrow agent to release this money to the plaintiff.

Defendants Albert Jacobs LLP (Jacobs LLP) and Albert Jacobs cross-move to consolidate this action with the Jacobs Action and Troutman Action and fix venue as Westchester County. Defendant Troutman Sanders LLP (Troutman) also cross-moves to consolidate this action with the Jacobs Action and Troutman Action and fix venue as Westchester County.

## BACKGROUND

This action arises out of defendants' legal representation of the plaintiff in a series of lawsuits involving patents owned by the plaintiff. Plaintiff alleges that defendants misappropriated and misapplied escrow funds, marked up fees of temporary employees hired from outside agencies (legal and non-legal) to work on plaintiff's legal matters, double billed, charged excessive fees, and engaged in improper fee splitting.

Plaintiff was a scientist and the holder of a number of patents, including two patents involving light emitting diode (LED) technology. In October 2007, plaintiff retained defendant Albert Jacobs, Jr., who at the time was a partner at Dreier LLP, to represent her in a patent infringement action against Cree, Inc. in the United States District Court for the Southern District of New York (the Cree Action). Mr. Jacobs also billed plaintiff for work in connection with pursuing patent infringement claims before the International Trade Commission, as well as claims in Germany and Taiwan (the non-Cree Actions). In December 2008, Dreier LLP dissolved, and Mr. Jacobs formed Jacobs LLP. Mr. Jacobs continued to work on the Cree and non-Cree Actions. From December 2008 to December 2009, plaintiff's alleged legal fees owed to Jacobs LLP totaled \$9,256,594.06, of which \$7,251,894.06 was deemed paid.

In May 2009, Mr. Jacobs and Jacobs LLP allegedly began to use attorneys at defendant Troutman to work on plaintiff's cases without plaintiff's knowledge and consent. In July 2009, Mr. Jacobs allegedly joined Troutman<sup>1</sup> and continued as counsel of record in the Cree and non-Cree Actions.

On June 15, 2010, the Cree Action was settled. Mr. Jacobs drafted the settlement

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<sup>1</sup> Troutman takes the position that Mr. Jacobs did not become a partner at Troutman until November 1, 2009.

papers and directed that the settlement proceeds be paid to the Jacobs LLP escrow account. Plaintiff objected to that arrangement, and the parties ultimately agreed to have the proceeds held in escrow by Frankfurt Kurnit Klein & Selz, P.C. (FKKS), plaintiff's counsel in this action. The money remains there today.

On June 21, 2010, plaintiff discharged Mr. Jacobs and Troutman. On August 2, 2010, plaintiff, Jacobs, Troutman, and nonparty FKKS entered into an escrow agreement, acknowledging that the settlement funds from the Cree Action were placed in escrow in June 2010, and that defendants advised FKKS that they have claims against the money in escrow for legal fees in the Cree Action and the non-Cree Actions.

On August 20, 2010, the Jacobs Action and Troutman Action were filed in Westchester County against plaintiff. In the Jacobs Action, Mr. Jacobs and Jacobs LLP seek approximately \$1.9 million in unpaid legal fees and disbursements for their work on the Cree and non-Cree Actions. In the Troutman Action, Troutman seeks approximately \$2.4 million in unpaid legal fees and disbursements for their work on the Cree and non-Cree Actions. On August 23, 2010, plaintiff commenced this instant action in New York County. On September 13, 2010, plaintiff moved, by order to show cause, for an order consolidating this action with the Jacobs Action and the Troutman Action in New York County and for a determination that defendants do not have a lien on \$1,214,920.41 currently held in escrow. Defendants cross-move to consolidate this action with the Jacobs Action and Troutman Action and fix venue as Westchester County.

In November 2010, plaintiff passed away, and most recently, Diana Parker, Esq. was appointed as Executor of plaintiff's estate by the New York State Surrogate's Court, Westchester County, where plaintiff's last will and testament was submitted to probate.

### ANALYSIS

There is no dispute that this action should be consolidated with the Jacobs and Troutman Actions. All three actions are clearly related, as they arise out of a dispute involving the legal representation of plaintiff by the defendants, which involves common legal and factual questions (see CPLR § 602 [2]). The issue, therefore, is whether the venue should be placed in New York County or Westchester County.

Generally, "where actions commenced in different counties have been consolidated pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present" (*Mattia v Food Emporium, Inc.*, 259 AD2d 527, 527 [2d Dept 1999]; see also *Bernstein v Silverman*, 228 AD2d 325 [1st Dept 1996]). Here, plaintiff argues that venue should be placed in New York County, because most of the witnesses and documents are located in New York County. Specifically, plaintiff argues that several nonparty outside contractors, whose billable hours and fees are in issue in this action, are located in New York County, as well as the agencies that they worked for.

CPLR § 510 (3) authorizes a court to change venue for the convenience of material witnesses. However, "a motion for a change of venue under CPLR 510 (3) 'must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue'" (*Rosen v Uptown Gen. Contr., Inc.*, 72 AD3d 619, 620 [1st Dept 2010], quoting *Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579, 581 [1st Dept 2009]). Plaintiff has not satisfied this burden. At the very least, plaintiff does not state how these witnesses would be inconvenienced if venue were fixed in Westchester County. Plaintiff only states the names of the potential witnesses, their location, and the work they

perform in relation to these lawsuits. The court sees no reason to disturb the venue of the first-filed action, as plaintiff has not demonstrated that special circumstances exist. Further, the court does not find that there was bad-faith conduct rising to a level to disturb the first-to-file rule. Thus, plaintiff's motion is granted only to the extent of granting consolidation of this action with the Jacobs Action and the Troutman Action. Defendants' cross motions to consolidate this action with the Jacobs Action and the Troutman Action are granted in their entirety.

Plaintiff also moves, pursuant to New York Judiciary Law § 475, for a determination that defendants do not have a lien on \$1,214,920.41 currently held in escrow and asks that the Court direct the escrow agent to release this money to the plaintiff. However, as venue is now fixed in Westchester, plaintiff is directed to make her application seeking release of the escrow funds to the Westchester Court.

Accordingly, it is,

ORDERED that Dr. Gertrude Neumark Rothchild's motion is granted, in part, to the extent that the above-captioned action is consolidated for the purposes of joint trial and discovery with *Albert Jacobs LLP v Gertrude Neumark Rothschild*, Index No. 20455/10 (Westchester County) and *Troutman Sanders LLP v Gertrude Neumark Rothschild*, index No. 20456/10 (Westchester County); and it further,

ORDERED that the cross motions of Albert Jacobs LLP, Albert Jacobs, and Troutman Sanders LLP to consolidate this action with *Albert Jacobs LLP v Gertrude Neumark Rothschild*, index No. 20455/10 (Westchester County) and *Troutman Sanders LLP v Gertrude Neumark Rothschild*, index No. 20456/10 (Westchester County) and fix venue in Westchester County is granted; and it is further,

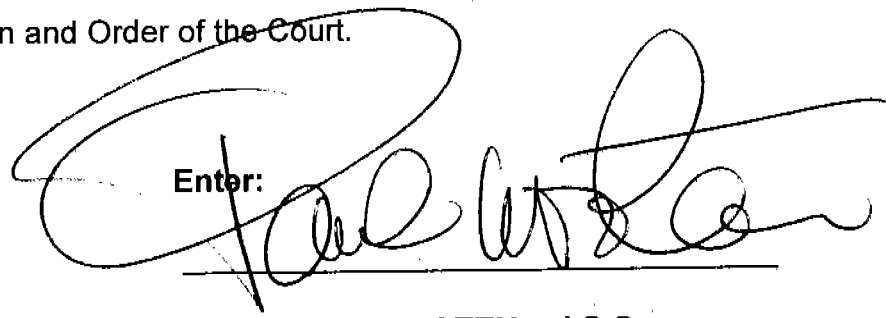
ORDERED that the venue of this action is changed from this Court to the Supreme

Court, County of Westchester, and upon service by defendants of a copy of this order with notice of entry and 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 Westchester; and it is further,

ORDERED that plaintiff is directed to make her application seeking release of the escrow funds to the Westchester Court.

This constitutes the Decision and Order of the Court.

Dated: 3-15-11

Enter: 

PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
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