

**Robbins v Lorraine, DeRosa & Morgan Stanley  
Smith Barney, LLC.**

2013 NY Slip Op 30893(U)

April 22, 2013

Sup Ct, New York County

Docket Number: 102945/2012

Judge: Joan A. Madden

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

PRESENT: Howe Joan A. Middle  
Justice

PART 11

Index Number : 102945/2012  
ROBBINS, LORRAINE S.  
vs  
DEROSA, LORRAINE  
Sequence Number : 002  
CHANGE VENUE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
attached Memorandum Decision + Order.

**FILED**  
APR 29 2013  
NEW YORK  
COUNTY CLERKS OFFICE

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

Dated: April 22, 2013

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

----- X  
The Estate of LORRAINE S. ROBBINS  
Plaintiff,

-against-

Decision and Order  
Index No. 102945/2012

LORRAINE, DEROSA and  
MORGAN STANLEY SMITH BARNEY, LLC.,

Defendant.

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Joan A. Madden, J.:

**FILED**

APR 29 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Lorraine DeRosa ("DeRosa") moves to change the venue of this action from this court to the Supreme Court, Erie County pursuant to CPLR 510(3). Plaintiff the Estate of Lorraine S. Robbins ("the Estate") opposes the motion.<sup>1</sup> For the reasons below, the motion is denied.

**BACKGROUND**

In this action, the Estate seeks declaratory relief for the title to a \$1.1 million dollar Morgan Stanley brokerage account ("the Account") formerly held by the now deceased Lorraine S. Robbins ("the Decedent") and to recover moneys that DeRosa allegedly obtained from the Decedent.

Prior to her death, the Decedent changed the beneficiary designation of the Account to DeRosa. Decedent's children, James S. Robbins ("Robbins") and Jennifer R. Hurdle ("Hurdle") were previously named as beneficiaries of the Account. DeRosa, who is the Decedent's first cousin once removed (i.e., DeRosa's mother is the Decedent's first cousin), is a resident of the State of New York, and resides at 1059 Sherry Drive, Grand Island, New York 14072, which is in Erie County. Morgan Stanley is a corporation with a principal place of business located at

<sup>1</sup> Defendant Morgan Stanley Smith Barney, LLC ("Morgan Stanley") does not oppose the motion.

1585 Broadway, New York, New York 10036 and is incorporated in the State of Delaware.

Robbins is a Virginia resident; Hurdle resides in Indiana.

In the summer of 2010, the Decedent's health began to deteriorate and Robbins arranged for the Decedent to move from her home in Winter Park, Florida to Alexandria, Virginia in order to be closer to Robbins' family. Around this time, the Decedent executed her will naming Robbins here personal representative and executor of her estate. Decedent also executed a General Durable Power of Attorney appointing Robbins as her attorney-in-fact.

The Decedent had been living in Alexandria for about a year when she decided to visit her first cousin, Evelyn O'Connor (and her husband), and their daughter, DeRosa, in Grand Island, New York in August of 2011. In the following months, the Estate alleges that DeRosa took advantage of the Decedent's diminished mental capacity and had the Decedent issue numerous checks totaling \$52,000 to Derosa, Louis DeRosa (DeRosa's husband), and Donna O'Connor (DeRosa's sister-in-law). The Decedent also named DeRosa the "payable on death" beneficiary of the Account. On May 26, 2012, the Decedent passed away at the age of 82.

On June 8, 2012, the Estate commenced this action in this court. Morgan Stanley's principal place of business was the basis of venue. On September 2, 2012, after defendants answered the complaint and discovery commenced, DeRosa made this motion to change venue pursuant to CPLR 510(3). DeRosa asserts that the venue of this action should be transferred to Erie County based on the convenience of material witnesses and the ends of justice. DeRosa maintains that Erie County is where she resides, where the action arose, where the Decedent received her medical care and treatment, and thus where numerous witnesses—physicians, healthcare providers, the estate attorney, additional non-party witnesses—reside. DeRosa further argues that retaining venue in New York County based on Morgan Stanley's principal place of business, is insufficient to outweigh the factors tying this action to Erie County. DeRosa also

notes that Robbins will have to travel to Erie County for the pending probate proceeding before the Erie County Surrogate's Court.

In support of her motion, DeRosa submits her own affidavit and the affidavits of two witnesses, accompanied by the Erie County addresses of these witnesses. Evelyn O'Connor states in her affidavit that she is the cousin of the Decedent and mother of DeRosa and would be inconvenienced if required to testify in New York County, as she is elderly and has numerous health problems. Deborah Kennedy-Rogoza ("Kennedy-Rogoza") states in her affidavit that she is a licensed attorney who represented the Decedent with respect to certain estate planning matters—including the preparation and execution of a will in March 2012 and the designation of DeRosa as the "payable-on-death" beneficiary to the Account—and would be inconvenienced if required to testify in New York County, as she works and resides in Erie County. DeRosa submits her own affidavit stating that she would be inconvenienced if required to travel to New York County as she works and resides in Erie County as well.

The Estate counters that New York County is the proper venue based on Morgan Stanley's designation of New York County as its principal place of business. See CPLR 503(a).<sup>2</sup> The Estate further asserts that this motion should be denied as DeRosa fails to demonstrate the inconvenience of material witnesses, and as DeRosa has already engaged in significant discovery and therefore the motion is untimely.

#### **DISCUSSION**

Where, as here, the venue chosen by a plaintiff is proper, a defendant may seek a discretionary change of venue pursuant to CPLR 510(3)<sup>3</sup> based on the convenience of material

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<sup>2</sup> CPLR 503(a) provides 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 was commenced." As a corporation, Morgan Stanley "shall be deemed a resident of the county in which its principal office is located." CPLR 503(c).

<sup>3</sup> CPLR 510(3) provides that "[t]he court, upon motion, may change the place of an action if the convenience of material witnesses and the ends of justice will be promoted by the

witnesses. The burden of establishing entitlement to discretionary change of venue is borne by the movant. Gluck v. Pond House Farm, Inc., 271 A.D.2d 334 (1st Dept 2000). The court also considers whether the motion is made a reasonable time after commencement of the action and if the parties have engaged in significant discovery. See Gissen v. Boy Scouts of Am., 26 A.D.3d 289 (1st Dept 2006). To demonstrate entitlement to a change of venue under CPLR 510(3), a defendant must submit affidavits from material witnesses that satisfy a four-part test. O'Brien v. Vassar Brothers Hospital, 207 A.D.2d 169 (2d Dept 1995); see also Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 A.D.3d 299 (1st Dept 2004).

The affidavits in support of the motion to change venue must contain (1) the names, addresses, and occupations of prospective witnesses, (2) the facts to which proposed witness will testify at trial, (3) a statement that the witnesses are in fact willing to testify, and (4) a statement indicating how the witnesses would be inconvenienced if a change of venue were not granted. O'Brien, 207 A.D.2d 169; compare, Kraft v. Kamalian, 290 A.D.2d 264 (1st Dept 2002) (denying defendant's motion to change venue where, *inter alia*, defendant did not satisfy the four criteria).

Even assuming that the motion was timely made, that discovery has been exchanged and for the reasons which follow, DeRosa has failed to make the requisite showing that she is entitled to a discretionary change in venue. The affidavits submitted by DeRosa do not meet the four-part test. Specifically, DeRosa fails to demonstrate how the witnesses would be inconvenienced if venue was retain in New York County. As to DeRosa, a party to this action, it has long been held "that the convenience of the parties or their employees is irrelevant and is not to be considered" in a motion to change venue. Katz v. Goodyear Tire & Rubber Co., 116 A.D.2d 506, 507 (1st Dept 1986); see also Gissen v. Boy Scouts of Am., 26 A.D.3d at 291. Nor

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change."

is the affidavit of Evelyn O'Connor, DeRosa's mother, properly considered as the convenience of a party's immediate family members should similarly be excluded from consideration. See Person-Aaron v. O'Connor, 167 A.D.2d 167 (1st Dept 1990) (“[N]either the convenience of parties nor that of members of their families may be considered.”).

Thus, the only affidavit to be considered for this motion is one from Kennedy-Rogoza, the attorney who prepared and rewrote the will. While Kennedy-Rogoza's affidavit provides most of the requisite information and facts, Kennedy-Rogoza's personal and financial hardship as a result of having to travel from Erie County to New York County is insufficient to warrant a change in venue. Colon v. Sears Roebuck & Co., Inc., 220 A.D.2d 280, 632 N.Y.S.2d 104, 105 (1st Dept 1995) (finding inconvenience from having to travel insufficient).

DeRosa also argues that other witnesses—healthcare providers—will be inconvenienced, but does not provide support for this argument.

Accordingly, the motion for a discretionary change in venue should be denied.

**CONCLUSION**

In view of the above, it is

ORDERED that the motion to change venue is denied; and it is further

ORDERED that the parties shall appear on May 30, 2013 at 9:30 am in Part 11, room 351, Centre Street, New York, NY for a preliminary conference.

**FILED**

Dated: April 23, 2013

APR 29 2013

**NEW YORK  
COUNTY CLERKS OFFICE**

J.S.C