

Cozby v Oswald

2013 NY Slip Op 31363(U)

May 29, 2013

Supreme Court, New York County

Docket Number: 805265/2012

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16
PART _____

PRESENT: _____
Justice

Index Number : 805265/2012
COZBY, ANDREA
vs.
OSWALD, D.C., STEPHEN F.
SEQUENCE NUMBER : 001
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~~ to change venue
is denied in accordance with the
accompanying memorandum decision.

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

MAY 29 2013

MAY 29 2013

Dated: _____

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

- 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

-----X
ANDREA COZBY,

Plaintiff,

-against-

Index No. 805265/12
Motion Seq. No. 001

STEPHEN F. OSWALD, D.C. and
JAMES F. MONKS, D.C.,

Defendants.

-----X
SCHLESINGER, J.:

Plaintiff Andrea Cozby commenced this medical malpractice action in September 2012 in connection with chiropractic treatment she had received from the defendants Stephen F. Oswald, D.C. and James F. Monks, D.C. during the period from August 2007 through July 2011. Before the Court at this time is a motion by defendant Dr. Oswald pursuant to CPLR §§ 503(d), 510(1), and 511(b) to change the place of trial from New York County to Rockland County on the ground that New York is not a proper county. Plaintiff has opposed the motion; the co-defendant Dr. Monks has taken no position.

Background Facts and Procedural History

When the plaintiff commenced this action, counsel designated New York County as the place of trial pursuant to CPLR §503, stating in the Summons with Notice that the “basis of the venue designated is the county in which defendant Stephen F. Oswald, D.C. maintains an office.” (Exh A). Along with his Answer, Dr. Oswald served plaintiff with a CPLR §511 demand to change venue to Rockland County on the ground that the county designated by the plaintiff was not a proper county. (Exh D). Plaintiff’s counsel responded with an affirmation asserting that New York County was the proper county

because Dr. Oswald “maintains a principal place of business located at 80 5th Avenue, Suite 1205, in the State, City and County of New York.” (Exh E, ¶3).

Dr. Oswald has now moved to change venue to Rockland County on the ground that plaintiff had improperly designated New York County as the place for trial, asserting correctly that CPLR § 503(d) provides that the place of residence for venue purposes is the place where the individually-owned business “has its principal office” or where the individual owner being sued “actually resides.” In support of the motion, Dr. Oswald has provided his affidavit confirming the address of his actual personal residence of 22 years in Rockland County. (Exh F). As to his “principal office” he states:

I maintain two offices: One located at 817 Chestnut Ridge Rd., Chestnut Ridge, New York 10977; and the other, a satellite office, located at 80 Fifth Avenue, Suite 1205, New York, New York 10011. ... I consider my principal place of business to be the Rockland County office for the following reasons: (1) I conduct the majority of my work at the Rockland County office; (2) I spend the majority of my time at the Rockland County office; (3) The majority of my patients are seen in the Rockland County office; and (4) The majority of my revenue is earned from the Rockland County office.

Although not directly relevant and not controverted in any way, he adds that he only treated the plaintiff in the Rockland County office and that none of the parties to this lawsuit reside in New York County.

In opposition, plaintiff asserts that Dr. Oswald's “principal office” is, in fact, located in New York County. In support of this assertion, counsel has presented a computer print-out of the license information filed by Dr. Oswald with the New York State Education Department Office of Professions. The printout states Dr. Oswald's complete name, his profession as a chiropractor, his license number, his date of

licensure (01/13/86), and that his registration is current through July 2015. As relevant here, the print-out also states: "Address: New York NY." Citing various trial court decisions, plaintiff's counsel argues here that the print-out is admissible and "sufficient to prove a defendant's place of business."¹

In reply, defendant Dr. Oswald argues that the print-out, while indicative of an office in New York County, is not dispositive on the issue of his "principal office" and fails to rebut his sworn affidavit on that point. Further, defense counsel seeks to distinguish the cases cited by plaintiff on the ground that they relate to print-outs from the Department of State for corporate entities, and not to print-outs from the Department of Education for an individually-owned business.

In a sur-reply, plaintiff seeks to confirm the basis for the New York County address in the print-out. Specifically, he offers a Certified Statement from Connie F. Mitchell, Clerk II of the New York State Department of Education Professional Licensing Services in which she attests that "the business address on file" for Dr. Oswald is 80 Fifth Avenue, Suite 1205, New York, NY. Significantly, however, nowhere does the affidavit use the phrase "principal office."

The Court held oral argument on the motion on March 13. At that time the Court requested further briefing on the import of the licensing print-out and the legal

¹ Plaintiff also argued that the motion was untimely as defense counsel, while timely serving by mail, had failed to electronically file his Answer and the venue documents. Defendant asserts, and court records confirm, that he electronically filed his motion within two business days of timely service by mail in compliance with the rules, and the Answer and relevant venue documents were electronically filed with the motion. The Court accepts the motion as timely and will consider it on the merits.

significance of the phrase “principal office.” Those additional papers have been submitted by the parties and reviewed by the Court, with both sides offering some additional authority to support their respective positions.

Discussion

As noted above, CPLR § 503(d) provides that venue in an action against an individually-owned business may be set in “any county in which it [the individually-owned business] has its principal office, as well as the county in which the ... individual owner ... being sued actually resides.” Case law has established that this provision applies in a case such as this one, where the defendant is a physician who maintains his own practice and the lawsuit relates to that practice. *See, e.g., Magrone v Herzog*, 304 AD2d 801 (2nd Dep’t 2003); *Shanahan v Klinginstein*, 280 AD2d 464 (2nd Dep’t 2001); *Harrington v Cramer*, 129 Misc.2d 489 (Sup. Ct., NY Co. 1985); *see also, Law v Friedman*, 60 AD2d 832 (2nd Dep’t 1978)(declining to apply §503(d) to a lawyer based on the location of his principal office where the suit did not involve the business of the law practice) . As Justice Rubin explained in *Harrington*, the “principal office” provision is “designed to give additional county residences to residents of this State for the purpose of determining the venue of an action” 129 Misc.2d at 490 (citation omitted).

The question vigorously debated here is what constitutes a “principal office,” as the statute does not include any definition, and neither party has cited a case directly on point.² Some guidance, however, is provided by CPLR § 503©, which governs venue in

² The cited cases are distinguishable because, for example, they deal with the service of process, rather than venue, or because residence was not a disputed issue.

cases involving corporations. Like subdivision (d) at issue here, subdivision (c) provides that a corporation is “deemed a resident of the county in which its principal office is located,” but it, too, includes no definition of “principal office.” Nevertheless, instructive case law exists relating to the principal office of corporations.

Interpreting CPLR §503(c), the First Department recently reaffirmed the binding nature of the address listed in a certificate of incorporation, reiterating that: “The designation of a county as the location of a corporation’s principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue ..., even if the corporation maintains an office or facility in another county ..., and even if it is a professional corporation” *Addo v Melnick*, 61 AD3d 453 (1st Dep’t 2009), citing *Conway v Gateway Assoc.*, 166 AD2d 388, 389 (1st Dep’t 1990); *Altidort v Louis*, 287 AD2d 669, 670 (2nd Dep’t 2001); and *Della Vecchia v Daniello*, 192 AD2d 415 (1st Dep’t 1993); see also *Kearney v Cappelli Enterprises, Inc.*, Slip Op., February 24, 2012, Index No. 104322/11 (Sup. Ct., NY Co.)(Scarpulla, J).

As noted above, defendant Dr. Oswald In his moving papers here offers his own affidavit in an attempt to persuade this Court that his “principal office” is located in Rockland County. In response, petitioner seeks to analogize to the aforementioned line of cases interpreting the statutory provision regarding corporations by arguing that the information filed by Dr. Oswald with the New York State Education Department Office of Professions, like a certificate of incorporation, is controlling. In addition to the printout confirming an address of “New York, NY”, counsel has provided a certified statement from the Clerk confirming that the precise address on file is 80 Fifth Avenue, Suite 1205, New York, NY.

This Court finds that the analogy to the certificate of incorporation is an apt one. Indeed, David Siegel in his New York Practice treatise makes precisely that point when discussing venue in suits against unincorporated associations. Like individually-owned businesses, such associations are governed by CPLR §503(d) and their residence is based on the location of the “principal office.” After citing *General Precision, Inc. v Ametek, Inc.*, 24 AD2d 757 (2nd Dep’t 1965), for the proposition that the address in a certificate of incorporation is controlling for venue purposes, Siegel turned to unincorporated associations and stated as follows:

If the particular unincorporated creature has filed a certificate with a state office, which an association may do (see Gen. Ass’n L. §18), the office listed in that paper should, by analogy to the *Ametek* case on corporations ... be deemed its residence.”

(Sec. 119, n 5., 5th ed. 2011). Here, Dr. Oswald has filed address information with a state officer pursuant to the Education Law as required to obtain a license, and the office listed should, by analogy, be deemed his principal office for venue purposes.

Even if not controlling, the defendant’s choice of address for his licensing information is significant. The notation that Dr. Oswald was first licensed in 1986 and that his current registration remains valid through July 2015 suggests that the registration is periodic. Presumably, if New York County was not his principal office, Dr. Oswald could have easily changed his registration to his Rockland County address. Indeed, as the plaintiff notes, Education Law §6502(5) requires that a licensee notify the Department of any change of address within thirty days of such change.

Citing *DeCicco v Cattani*, 5 AD3d 318 (1st Dep't 2004), defendant argues that his affidavit should suffice to establish his principal office and that website listings are not controlling. In *DeCicco*, the First Department affirmed the trial court's decision to change venue to Richmond County based on an affidavit from the defendant doctor that his principal office was located there. The court stated that the defendant' listing of his Manhattan address first on his letterhead and on medical-related websites, such as the New York State Directory of Physicians, was not dispositive.

First, the New York State professional licensing information offered by plaintiff here is qualitatively different than a physician's stationery or his listing in informational directories addressed to the general public. Here, Dr. Oswald provided the address information to the State for the purpose of renewing his professional license, as required by the Education Law. In that regard, the information is akin to that provided by a corporation to the Secretary of State for a certificate of incorporation.

As for Dr. Oswald's affidavit, *DeCicco* undeniably recognizes that a physician's affidavit can be persuasive on the issue of principal office. However, not all affidavits are sufficient; it is the level of detail and the convincing quality of the affidavit that is key. The burden is on the moving defendant to establish that the plaintiff's choice of venue was an improper one. *Singh v Empire Intl., Ltd.*, 95 AD3d 793 (1st Dep't 2012). A self-serving affidavit that is conclusory in nature is insufficient to satisfy that burden. Thus, in the recent case *Book v Horizon Asset Management*, 105 AD3d 661 (1st Dep't 2013), the appellate court reversed the trial court and granted the motion to change venue, finding that the plaintiff's self-serving and conclusory affidavit as to her residence was insufficient to establish residence in the face of evidence that she was living elsewhere.

Here, Dr. Oswald's affidavit similarly includes only self-serving and conclusory statements as to his practice, such as where he conducts the "majority" of his work, spends the "majority" of his time, sees the "majority" his patients, and earns the "majority" of his revenue. While these categories of information are certainly relevant (and appear to parrot a listing of relevant information given by way of example in this Court's decision in *Morris v Velickovic*, Slip Op. Index No. 800032/10, January 11, 2011), the affidavit is wholly lacking in evidentiary details that might make it persuasive. For example, no details at all are provided as to the number of work days and hours in each location, the number of employees, hospital affiliations, or any other detail that might give the Court an understanding of whether "majority" simply means 51%, or whether it means something more substantive. Absent such a level of detail, the affidavit fails to create an issue of fact, let alone control, as to issue of "principal office" when compared to the licensing information obtained from New York State. The movant has simply failed to meet his burden here.

Accordingly, it is hereby

ORDERED that the motion by defendant Dr. Oswald to change venue from New York County to Rockland County is denied, and plaintiff's action shall proceed in New York County. Counsel are directed to appear in Room 222 for a preliminary conference on Wednesday, June 26, 2013 at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: May 29, 2013

MAY 29 2013


J.S.C.

ALICE SCHLESINGER