

Berger v Shiau
2013 NY Slip Op 31502(U)
July 2, 2013
Sup Ct, New York County
Docket Number: 805162/12
Judge: Melvin L. Schweitzer
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

ALICE SCHLESINGER

IA PART 16

PRESENT: _____
Justice _____

PART _____

Index Number : 805162/2012
BERGER, GARY
vs
SHIAU, M.D., JOHN SOU-CHENG
Sequence Number : 001
DISMISS ACTION

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 *denied* and the *cross-motion* is granted in accordance with the accompanying memorandum decision.

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

Dated: JUL 02 2012

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
GARY BERGER AND MINDY BERGER,

Plaintiffs,

-against-

Index No. 805162/12
Motion Seq. No. 001

JOHN SOU-CHENG SHIAU, M.D., HEALTHCARE
ASSOCIATES IN MEDICINE, P.C., and
NEUROSCIENCE ASSOCIATES OF NEW YORK,

Defendants.

-----X
SCHLESINGER, J.:

Defendants John Sou-Cheng Shiau, M.D. and Healthcare Associates in Medicine, P.C. have moved for an order pursuant to CPLR §§ 3211(a) and 306-b dismissing this medical malpractice action based on plaintiffs' failure to obtain personal jurisdiction over the defendants or, in the alternative, directing a change of venue to Richmond County pursuant to CPLR §§ 510 and 511. Plaintiffs have cross-moved for an order pursuant to CPLR § 306-b extending their time to complete proper service upon good cause shown or in the interests of justice should the Court find that service was improper in any way.

Discussion

Plaintiffs commenced this action by filing a summons and complaint with the County Clerk on July 3, 2012. Pursuant to CPLR § 306-b, plaintiffs were required to complete service on the defendants within 120 days of that date, or by October 31, 2012 at the latest. Plaintiffs acknowledge in their cross-motion that the deadline was not met; service was made upon Dr. Shiau at his office on December 3, 2012 and on Healthcare Associates via the Secretary of State on or about November 21, 2012. However, plaintiffs' counsel asserts that the delay was due to the disruption in his

business caused by Hurricane Sandy. Under these circumstances, the Court finds that plaintiffs are entitled to an extension of time to complete service.

The next question is whether the service that was completed was otherwise proper. In his affidavit in support of his motion, Dr. Shiau acknowledges that service was completed by delivery to a person of suitable age and discretion at the doctor's actual place of business on Staten Island, and a copy was also mailed to that address (Exh C). Patricia DeLorenzo, Director of Compliance and Risk Management for Healthcare Associates in Medicine, P.C. confirms in her affidavit (Exh E) that, as the authorized agent for the corporation, she received the pleadings via service on the Secretary of State. Therefore, service on both defendants was completed in accordance with the CPLR, albeit late. By granting the cross-motion for an extension of time to serve, this Court deems the service proper *nunc pro tunc*, and personal jurisdiction has been acquired over the defendants.

The Court now turns to the issue of venue. Defendants assert that no basis exists to place venue in New York County pursuant to CPLR § 503(a) because no party resides here. Counsel urges that venue be transferred to Richmond County based on the principal offices of Dr. Shiau and Healthcare Associates there, as well as the personal residence of the plaintiffs there. Plaintiffs assert that they properly placed venue here in the first instance based on the residence of Dr. Shiau at 34 West 15th Street in Manhattan. However, the doctor asserts that he does not, in fact, live there.

According to the affidavit he submitted in support of the motion, Dr. Shiau did not live at the 15th Street address in Manhattan when this action was commenced in July 2012. Rather, he states: "From before July 3, 2012, through the present time, I have

only lived and resided at 312 23rd Street, Brooklyn, NY 11215." No further details were provided, nor was any documentation supplied to support that assertion.

In opposition, plaintiffs correctly assert that their choice of venue must be respected here unless defendants meet their burden of proving that the choice of New York County was improper under CPLR § 503. *Klein v Hershkowitz*, 303 AD2d 189, 190 (1st Dep't 2003). They argue that the self-serving affidavit by Dr. Shiau, uncorroborated by a single piece of evidence, fails to satisfy that burden, particularly in light of the evidence adduced by plaintiffs connecting Dr. Shiau to the Manhattan address. That evidence consists of a report prepared by the company *Accurint* on July 3, 2012 confirming the Manhattan address for Dr. Shiau for the period April 2003 through the date of the report, which is also the date the action was commenced (Exh B).

Upon receipt of the defendant's moving papers here, plaintiffs had *Accurint* perform another search on February 8, 2013 (Exh C). The report did not confirm any Brooklyn address for Dr. Shiau. On the contrary, for the first time the report revealed a cell phone number for Dr. Shiau registered to the Manhattan address that was previously found. Citing First Department cases such as *Collins v Glenwood Management Corp.*, 25 AD3d 447 (2006) and *Rivera v Jensen*, 307 AD2d 229 (2003), plaintiffs argue that the doctor's failure to produce "one scintilla of documentary evidence to corroborate Dr. Shiau's naked contentions" compels the denial of his motion, or at least an opportunity for plaintiffs to conduct discovery on the issue (¶ 42).

In response, Dr. Shiau produced an affidavit from Lloyd M. Friedman, Esq., an attorney retained by Dr. Shiau in May 2012 to represent him in a matrimonial action commenced by the doctor's wife Yukie Kano (Exh A). There Mr. Friedman states that

Dr. Shiau moved from 36 West 15th Street to 312 23rd Street, Apt. 2 in Brooklyn on May 21, 2012 and that Ms. Kano has retained exclusive occupancy of the apartment located at the Manhattan address since that time.

At oral argument, the Court decided to give Dr. Shiau a further opportunity to document his claim that he did not live in New York County when the action was commenced. In response, Dr. Shiau submitted another affidavit dated May 28, 2013. There he stated that he married Yukie Kano in 2003 and that in 2004 she alone purchased the cooperative apartment at 36 West 15th Street. The stock certificate and proprietary lease dated 2004 provided by Dr. Shiau confirm that fact. The doctor acknowledges, however, that the apartment was the marital residence from "2006 through April 15, 2012." He then adds:

On April 15, 2012, Yukie Kano and I separated, and I moved out of the 36 West 15th Street, New York, New York 10011 apartment and moved directly to 312 23rd Street, Brooklyn, NY 11215. I have not been to the property at 36 West 15th Street, New York, New York 10011 since I left on April 15, 2012. Since April 15, 2012, Yukie Kano has retained exclusive occupancy of that property. Therefore, on July 3, 2012, I was not a resident of New York County, but Kings County. On July 3, 2012, I did not retain any title to any property in New York County.

In his June 11, 2013 response, plaintiffs' counsel argues that Dr. Shiau has still failed to provide documentary evidence supporting his claim that he moved from New York County to Kings County a few months before this action was commenced.

This Court agrees with plaintiffs' assessment here. The plaintiff properly commenced this action in New York County pursuant to CPLR § 503(a) based on defendant's New York County residential address located after an investigation. The

burden was on the defendant to establish, through documentary evidence, that venue had been improperly placed because Dr. Shiau was no longer a resident of New York County at the time the action was commenced. Conclusory, self-serving denials of residence are not enough to meet the burden of establishing a change of residence. *Furth v ELRAC, Inc.* 11 AD3d 509, 510 (1st Dep't 2004); *see also, DeLuca v Ricci*, 194 AD2d 457, 458 (1st Dep't 1993).

Dr. Shiau has failed to come forward with a lease, a utility bill, a bank statement, or any other document confirming his residence in Brooklyn. The affidavit of his matrimonial counsel, presumably lacking in personal knowledge, does not suffice. The absence of documentation is particularly problematic in light of the fact that the doctor confirmed that he resided in New York County until shortly before this action was commenced and also that a records search found a cell phone registered to the doctor at that address on the date the action was commenced. The Court notes as well that Dr. Shiau was given more than an ample opportunity to establish his claims.

Accordingly, it is hereby

ORDERED that the motion by defendants John Sou-Cheng, M.D. and Healthcare Associates in Medicine, P.C. to change to dismiss for lack of personal jurisdiction, or in the alternative to change venue from New York County to Richmond County, is denied, and plaintiff's action shall proceed in New York County; and it is further

ORDERED that plaintiffs' cross-motion for an extension of time to complete service on the defendants is granted and the service is hereby deemed timely *nunc pro tunc*; and it is further

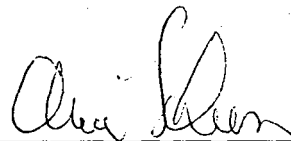
ORDERED that defendants shall serve and file their answer to the complaint within thirty (30) days of the date of this order; and it is further

ORDERED that all counsel shall appear in Room 222 for a preliminary conference on Wednesday, October 2, 2013 at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: July 2, 2013

JUL 02 2013



J.S.C.
ALICE SCHLESINGER