

Rosetti v Orthopedicsny, LLP
2015 NY Slip Op 31672(U)
August 24, 2015
Supreme Court, New York County
Docket Number: 805039/2015
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
RICHARD G. ROSETTI,

Plaintiff,

-against-

Index No. 805039/2015

Decision and Order

ORTHOPEDICSNY, LLP, (successor by merger to
Northeast Orthopedics, LLP) ORTHONY, LLP, KYLE
R. FLIK, M.D., CHRISTOPHER D. DECAMP, SETON
HEALTH SYSTEM, INC, AND ST. PETER'S HEALTH
PARTNERS,

Defendants.

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

In this medical malpractice action, defendants OrthopedicsNY, LLP (successor by merger to Northeast Orthopedics, LLP), OrthoNY, LLP, Kyle R. Flik, M.D., and Christopher D. DeCamp, M.D. (collectively, "the Ortho defendants") move, and defendants Seton Health System, Inc. and St. Peter's Health Partners (collectively, "the St. Peter's defendants") cross-move, for an order changing venue from New York County to Albany County. Plaintiff Richard G. Rosetti opposes the motion. For the reasons below, the Court grants the motion and denies the cross-motion as untimely.

According to the complaint, plaintiff has a residence in New York County. Around August 2, 2012, he fell and fractured his right wrist in Albany County. He alleges that he "received hospital and nursing care, treatment, examinations, emergency room care, and surgical procedures and/or operations" at St. Mary's Hospital in Albany. St. Mary's is owned and operated by Seton Health System, Incorporated, which has its place of business in Rensselaer County. Seton Health

System, in turn, allegedly joined Northeast Health and St. Peter's Health Care Services to create St. Peter's Health Partners. Defendants Dr. Flik and Dr. DeCamp, who are orthopedists, are both employees of defendants OrthoNY and OrthopedicsNY in Albany and rendered treatment to plaintiff at St. Mary's – which, as indicated, is owned and operated by the St. Peter's defendants.

In support of their motion, the Ortho defendants point out that plaintiff verified the January 29, 2015, complaint in Albany County. They note that the motion for change of venue is timely. They argue that the basis of venue – plaintiff's alleged residence at 450 West 17th Street in New York County – is improper because plaintiff actually resides in Albany. They submit documents showing that plaintiff owns a real estate business and a home builders business in Albany, and they submit an investigative report in which their investigator states that plaintiff's current mailing address is in Schenectady and that his previous addresses are in Albany and Schenectady. The report also states that plaintiff is registered to vote in Schenectady and that a DMV search revealed that he owned vehicles – the registrations of which have expired – that were registered in Albany. They further submit a printout of plaintiff's voter registration information substantiating the investigator's allegation that as of August 19, 2013, plaintiff was registered to vote in Albany County. They argue that even plaintiff's affidavit in response to their demand to change venue acknowledges that he spends less than half his time living in Manhattan.

The St. Peter's defendants' cross-motion is untimely, as plaintiff notes, but their papers can be considered in support of the Ortho defendants' motion. They argue that even if plaintiff resides in New York County – a contention they challenge – the Court should grant the

motion based on the convenience of the parties and witnesses, including the physicians and nurses involved in plaintiff's treatment, as well as the location of the documentary evidence of defendants.

Plaintiff opposes the motion to change venue, stating that New York County is an appropriate forum for this lawsuit. He challenges the report of the investigator, stating that he sold his allegedly current residence in Albany in 2014, but listed it for sale in 2012. He submits a copy of the deed of sale showing that he owns the apartment in New York County, and also submits his bicycle room agreement showing that he stores bicycles in apartment building's bicycle room.¹ In addition, plaintiff's affidavit in response to the original demand to change venue, to which defendants point to show that plaintiff resides in Manhattan for less than half of the year, states that he has owned the apartment in Manhattan since September 28, 2012, that he has had three corrective surgeries at the Hospital for Special Surgery in New York County, and that his treating physician and surgeon, who practices and has privileges in New York County, is a necessary witness – as are the staff members from the Hospital for Special Surgery who assisted in the treatment of plaintiff, potential expert witnesses, and fact witnesses familiar with his physical limitations.

Venue is proper in a county if one of the parties resides there at the time of the commencement of the action. CPLR § 503(a). In addition, a plaintiff “may have two residences for venue purposes.” Farrington v. Fordham Assoc., LLC, 129 A.D.3d 591, -- (1st Dep't 2015). Upon the motion of another party, the court has the power to change the place of trial if

¹ He additionally submits a Xeroxed copy of his Equinox gym membership card, which contains no information about the location of the gyms.

the venue is improper. CPLR § 510(1). The defendant must demonstrate that the plaintiff chose an improper venue. See Fiallos v. New York Univ. Hosp., 85 A.D.3d 678, 678 (1st Dep't 2011). If the defendant satisfies this burden the plaintiff must show his venue choice is proper. Young Sun Chung v. Kwah, 122 A.D.3d 729, 730 (2d Dep't 2014).

Here, the Ortho defendants have shown that venue is proper in Albany County. Also, through their evidence they have raised an issue of fact as to whether venue lies in New York County. Plaintiff, by his own implicit admission, resides in Albany County when he is not in New York County. Moreover, they have shown that he owns businesses there and that, even one year after the accident, he was registered to vote there. Finally, the accident occurred in Albany County and plaintiff's initial treatment – the treatment upon which he bases the lawsuit – took place there, and that witnesses, parties, and evidence is located there as well. See Wickman v. Pyramid Crossgates Co., 127 A.D.3d 530, 531 (1st Dep't 2015)(situs of injury “provides a basis for a discretionary change of venue”).

In response, plaintiff has established that he has resided at the Manhattan apartment part-time since September 28, 2012. He has also shown the convenience and appropriateness of the venue, due to the fact that he has undergone treatment in New York County and numerous witnesses are based here. As plaintiff resided part-time in Manhattan at the time of the commencement of the action, this is a sufficient basis for venue. See Kelly v. Karsenty, 117 A.D.3d 912, 912 (2nd Dep't 2014); Roman v. Brereton, 182 A.D.2d 556, 557 (1st Dep't 1992).

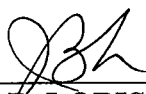
Therefore, it is

ORDERED that the motion is denied and the cross-motion is denied as untimely;
and it is further

ORDERED that the parties shall appear in Part 6, 60 Centre Street room 345, on
September 29, 2015, at 2:15 p.m. for a preliminary conference.

Dated: *Aug. 24*, 2015

ENTER:



JOAN B. LOBIS, J.S.C.