

**Kistenberg v Yao**

2015 NY Slip Op 31813(U)

September 24, 2015

Supreme Court, New York County

Docket Number: 805180/2015

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

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ELLIOT KISTENBERG and MARILYN KISTENBERG  
as Co-Administrators of the Estate of ROBERT  
KISTENBERG, deceased, and ELLIOT KISTENBERG  
and MARILYN KISTENBERG, individually,

Index No.: 805180/2015

Plaintiffs,

**DECISION**

-against-

KEVIN YAO, M.D., JONATHAN RASOULI, M.D.,  
and MOUNT SINAI HOSPITAL,

Defendants.

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MARTIN SHULMAN, J.:

In this medical malpractice action, defendants Kevin Yao, M.D. (Yao), Jonathan Rasouli (Rasouli), M.D. and Mount Sinai Hospital (Mount Sinai) (collectively Defendants) move,<sup>1</sup> pursuant to CPLR § 510 and 511, to change the venue of this action from Kings County to New York County. Plaintiffs Elliot Kistenberg and Marilyn Kistenberg, as co-administrators of the estate of Robert Kistenberg, and individually (collectively Plaintiffs), cross-move for an order granting costs and sanctions against Defendants.

In 2013, Plaintiffs commenced a medical malpractice action against Defendants in Kings County (Fuhrman Aff., Exh. 1).<sup>2</sup> That action was venued in Kings County

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<sup>1</sup> Yao moves to change venue by motion and Rasouli and Mount Sinai seek to change venue by cross motion.

<sup>2</sup> *Elliot Kistenberg and Marilyn Kistenberg as Co-Administrators of the Estate of Robert Kistenberg, deceased, and Elliot Kistenberg and Marilyn Kistenberg, individually v Kevin Yao, M.D., Jonathan Rasouli, M.D. and Mount Sinai Hospital, Kings County* Index No. 501039/2013.

based on Elliot Kistenberg's residence. In June 2013, after issue was joined, plaintiffs filed their Request for Judicial Intervention (RJI) and Notice of Medical Malpractice Action in Kings County (*id.*, Exh. 4). Thereafter, the case was assigned to the Honorable Laura Jacobson and a preliminary conference was held in Kings County on October 9, 2013 (*id.*, Exh. 5).

In 2014 and 2015, the parties conducted discovery, including the exchange of documents and examinations before trial. Pursuant to a stipulation dated March 3, 2015 Plaintiffs filed their note of issue in the Kings County action on May 15, 2014.

On or about May 1, 2015, Defendants filed the instant motion and cross-motion to change venue in New York County. It is undisputed that the RJI filed in New York County did not indicate that there was a related action in Kings County and/or that an RJI had previously been filed in this action (Fuhrman Aff., Exh. 9).

Plaintiffs argue that the motions to change venue must be denied because the Supreme Court, New York County lacks jurisdiction to hear them. Plaintiffs contend that, pursuant to 22 NYCRR §§ 202.3 (b)<sup>3</sup>, 202.8 (a)<sup>4</sup> and CPLR 2212 (d), the motions must be heard in Kings County where the action was commenced. Defendants take the position that the New York Supreme Court has jurisdiction to rule on their change of venue motions pursuant to CPLR § 2212 (a), which provides that a party can rightfully

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<sup>3</sup> 22 NYCRR § 202.3 (b) provides that once an RJI is filed and a judge is assigned to a matter the assigned judge "shall conduct all further proceedings therein."

<sup>4</sup> 22 NYCRR § 202.8 (a) states that all motions shall be returnable before the assigned judge.

bring a motion to change venue in a county adjoining the county where the action is triable.

### DISCUSSION

CPLR § 2212 (a), titled “Where motion made, in supreme court action” provides, in pertinent part:

(a) Motions on notice. A motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable.

By its terms, CPLR § 2212 (a) purports to offer a choice of counties in which to make a motion returnable in a supreme court action. That section allows motions to be made returnable in the county in which the action is pending, or in any other county in the same judicial district, or in any county physically adjoining the county where the action is pending. Accordingly, defendants are technically correct in their contention that CPLR § 2212 (a) allows their motion and cross motion to change venue to be noticed to be heard in New York County because New York County adjoins Kings County.

However, this anachronistic statute has come under repeated criticism (see *Baker, Voorhis & Co., Inc. v Heckman*, 28 AD2d 673 [1<sup>st</sup> Dept 1967] [it was not an abuse of discretion to refer a motion filed in Queens County to New York County where the action is filed]; *Sullivan & Donovan, L.L.P. v Bond*, 175 Misc 2d 386 [Sup Ct, Bronx County 1997]; *Cordero v Grant*, 95 Misc 2d 153 [Sup Ct, NY County 1978]; 2 Carmody-Wait 2d § 8:25 (2015); 3 NY Prac, Com Litig in New York State Courts § 29.5 [3d ed]).

Indeed, Professor David Siegel explains that CPLR § 2212 (a) is not consonant with the current individual assignment system (IAS):

The original and legitimate purpose of this surprisingly broad choice was to recognize the frequent unavailability of motion terms and permanently assigned justices in the more rural counties, a problem not met in the urban counties . . . . Whatever the motivations, the provision, at least until the advent of the IAS, continued to make for a lot of judge shopping.

The generous venue alternatives of CPLR 2212 (a) can't comfortably co-exist with a system that insists that all motions in a case go to but a single judge. Subdivision (d) of CPLR 2212 therefore confers on the chief administrator the power to withdraw the 2212 (a) alternatives . . . . In a case in which a judge has already been assigned, motions will presumably be following the judge thenceforth . . .

(Siegel, NY Prac. § 245 [5<sup>th</sup> ed]).

Thus, the advent of the individual assignment system, and the rules adopted to implement it, "have combined to rob the venue options of CPLR § 2212 (a) of their vitality. In a matter which has been assigned to a jurist under the Individual Assignment System, all motions are required to be returnable before that jurist" (3 NY Prac, Comm Litig in New York State Courts § 29:5 citing 22 NYCRR § 202.8 [a] and § 202.3 [b]).


Moreover, as noted in *Cordero v Grant* (95 Misc 2d at 155), there are significant reasons why the venue options provided in this section should be discontinued: 1) the rule permits forum and judge shopping for the movant's advantage; 2) "the procedure has a deleterious effect on an already overburdened motion calendar of this court"; and 3) the options allow attorneys to harass their adversaries who have offices in the county where the action was commenced.

Accordingly, for all of the above stated reasons, it is

ORDERED that defendant Kevin Yao, M.D.'s motion to change venue, defendant Jonathan Rasouli, M.D. and Mount Sinai Hospital's cross motion to change venue and plaintiffs Elliot Kistenberg and Marilyn Kistenberg's cross motion for costs and sanctions are denied without prejudice to renewal before Judge Laura Jacobson in Kings County.

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
September 24, 2015



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Hon. Martin Shulman, J.S.C.