Alvarez v Kooi
2018 NY Slip Op 32363(U)
September 19, 2018
Supreme Court, New York County
Docket Number: 805085/15
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11
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OMAR J. ALVAREZ and DIANA GRECEQUET-ALVAREZ, Index No: 805085/15

Plaintiffs,

-against-

PANG L. KOOI, M.D., R. WAYNE COTIE, M.D., CORTLAND REGIONAL MEDICAL CENTER, INC.,

Defendants.
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Joan A. Madden, J.

Defendant, Cortland Regional Medical Center ("CRMC") moves, pursuant to CPLR 510(3) to change the venue of this action from this court to the Supreme Court, Cortland County. Defendants Pang L. Kooi, M.D. and Wayne Cootie, M.D.[1] submit an affirmation in support of the motion. Plaintiffs oppose the motion.

Background

This is a medical malpractice action seeking damages in connection with the medical treatment of plaintiff Omar J. Alvarez ("Alvarez" or "Plaintiff") during 2012 and 2013, while he was incarcerated at Auburn Correctional Facility, in Cayuga County. During the relevant period, Dr. Kooi and Dr. Cootie were physicians employed by the State Correctional Facility in Onondaga County. It is alleged that Alvarez was rendered a paraplegic as a consequence of defendants' failure to timely diagnose and treat Hodgkin's lymphoma for which he received

[1]While this motion was pending, the court was notified that Dr. Cootie had died, and the action was thereafter stayed. By so-ordered stipulation dated September 13, 2018, the parties agreed to discontinue the action against Dr. Cootie or his estate. They further agreed that the discontinuation of the claims against Dr. Cootie was "with prejudice to plaintiff's ability to commence or re-commence any separate action against Dr. Cootie or his estate, but shall not affect the right of Plaintiffs, as Claimants in an action against the State of New York under Claim Number 12947, to allege and prove that as an agent of the State of New York certain acts or omissions of [Dr. Cootie] in rendering care and treatment to [plaintiff] constituted medical malpractice attributable to the State."

oncology treatment at SUNY Upstate University Hospital ("Upstate"). Immediately prior to his incarceration Alvarez resided in New York County. He next moved to Mohawk Correctional Facility located in Rome, New York, Oneida County. He is presently incarcerated at Five Points Correctional Facility in Romulus, New York, located in Seneca County.

At the time that CRMC served and filed its answer, it served a demand to change the venue of this action from this court to the Supreme Court, Cortland County. CRMC subsequently moved pursuant to CPLR 510(1), to change venue as a matter of right, asserting that New York County was an improper venue as it is not the county of plaintiff's residence. By decision and order dated August 18, 2015, the Supreme Court of Cortland County denied the motion, finding that New York County was plaintiff's residence for venue purposes based on evidence he resided there prior to his incarceration.

CRMC now moves for a discretionary change of venue, arguing that all relevant medical treatment provided to the plaintiff was performed by medical professionals in Cortland County, or within 30 to 90 minutes of Cortland County. CRMC also argues that Cortland County is a more convenient forum than New York County, which has no connection to the action and is between a four and seven hour drive from where the plaintiff received medical treatment. CRMC further asserts that in the interest of justice, this action should be transferred to Cortland County as it is a less congested forum than New York County.

In support of its motion, CRMC submits the affirmation of Bernard J. Poiesz, M.D., who states that he was "one of [Alvarez's] treating oncologists at Upstate since June 19, 2014 and subsequent to plaintiff being diagnosed with Hodgkins Lymphoma" (B. Poiesz Aff. ¶ 4). He further states that given his role in plaintiff's treatment he "may be called as a material witness...[and that] it would be substantially inconvenient both professional and personally, if I were required to travel to a deposition and trial in New York County" (Id ¶ 7). He also states

that he "practices medicine at least five days per week, during scheduled hours and ... provides on call coverage at Upstate, [and that] it would take approximately eight hours to drive round trip from my office to plaintiff's law firm in New York County; or to the New York Supreme Court, commuting by Amtrak would take.. in excess of twelve hours ...[and] flying from Syracuse would take ...nearly seven hours round trip" (Id ¶'s 8, 11).

CRMC also submits the affirmation of Michael Poiesz, M.D., who states that he "treated plaintiff regularly when he presented at Upstate...between November 15, 2013 and May 20, 2014, prior to and subsequent to his being diagnosed with Hodgkins Lymphoma" (M. Poiesz Aff. ¶ 4). He also states that he "may be called as a material witness...[and that] it would be substantially inconvenient both professional and personally, if [he] were required to travel to a deposition and trial in New York County" (Id. ¶ 7). Dr. Michael Poiesz currently resides in Fort Myers, Florida, Lee County and CRMC contends that the venue change will permit him to stay with Dr. Bernard Poiesz, his father, rather than in an unfamiliar hotel and County (Id. ¶ 11-12).

Plaintiffs oppose the motion, arguing that CRMC's "motion is nothing more than a forum shopping exercise," noting that CRMC's prior motion to change venue was denied. Plaintiffs also argue that the affirmations from the two physicians are facially defective as they do not include their addresses, and that there has been no showing that the two physicians have been designated as witnesses and have agreed to testify. Plaintiffs further argue the malpractice claim does not arise from the treatment Alvarez received at Upstate from Dr. Bernard Poiesz and Dr. Michael Poiesz where he was first treated in late 2013, and diagnosed with Hodgkin's Lymphoma Stage IV in December 2013, but rather is based on defendants' failure to timely diagnose and treat Alvarez prior to the Stage IV diagnosis. Plaintiffs therefore assert that the testimony of Dr. Bernard Poiesz and Dr. Michael Poiesz is neither material nor necessary to the critical issues in the action as these physicians were not involved in plaintiff's care at the time of

the September 10, 2012 biopsy, when plaintiffs allege that the Department of Pathology of CRMC failed to properly evaluate the surgical specimen of his axillary mass, and neither physician is qualified to testify as to the neurological sequelae suffered by plaintiff that resulted in his inability to walk or function below the umbilicus.

In reply, CRMC argues, *inter alia*, that contrary to plaintiffs' position, it has established that two Dr. Poieszs have agreed to testify on CRMC's behalf and will provide material testimony relevant to plaintiff's damages, pain and suffering and in particular plaintiff's improvement and progression (B. Poiesz Aff. ¶'s 4-6; M. Poiesz Aff ¶'s 4-6). CRMC also points to statements in the affirmation that Bernard Poiesz lives in Onondaga County (Bernard Poiesz Aff ¶ 1), and has a practice at Upstate which address is also in Onondaga County (Id.). It further argues that Cortland County is the proper venue since all the events underlying the action occurred there, and that the only connection to New York County is Alvarez's pre-incarceration residence. Finally, CRMC argues that a change of venue serves the interest of justice since all the parties, including plaintiff, work or live in Cortland County, or within 30 to 90 minutes of the county with the exception of plaintiff Diana Grecequet-Alvarez, who lives in Orange County, New York.

Defendants Dr. Kooi (and Dr.Cotie) filed an affirmation in support of CRMC's motion, arguing, *inter alia*, that they would be inconvenienced by a New York venue.

In their further opposition, plaintiffs argue, *inter alia*, that the court should not consider their affirmation in support and that, in any event, their arguments are without merit, since a discretionary change of venue may not be based on the convenience of parties, citing Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 AD3d 299 (1st Dept 2004).

Discussion

As it has been previously determined that New York County is a proper venue for this action, the issue on the motion is whether CRMC has met its burden of establishing that there is

a basis for a discretionary change of venue pursuant to CPLR 510 (3). CPLR 510(3) states, in relevant part, that "the court, upon motion, may change the place of trial of an action where the convenience of material witnesses and the ends of justice will be promoted by the change."

"Upon a motion pursuant to CPLR 510(3), movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change in venue." T.D.M v. Pipala, 223 AD2d 419,419 (1st Dept 1996). "The decision of whether to grant a change of venue based on the convenience of material witnesses is discretionary." See O'Brien v. Vassar Bros. Hosp., 207 AD2d 169, 171 (2d Dept 1995). To demonstrate entitlement to a discretionary change of venue pursuant to CPLR 510(3), the movant must submit affidavits which satisfy each element of a four- part test. Id. at 172.

> First the affidavit in support of a motion under this section must contain ...the names, addresses and occupations of the prospective witnesses.... Second, a party seeking a change of venue for the convenience of witnesses is also required to disclose the facts to which the proposed witnesses will testify at the trial, so that the court may judge whether the proposed evidence of the witnesses is necessary and material.... Third, the moving party must show that the witnesses for whose convenience a change of venue is sought are in fact willing to testify. Fourth, there must be a showing as to how the witnesses in question would in fact be inconvenienced in the event a change of venue were not granted.

Id., at 172-173 (internal citations and quotations omitted); see also Heinemann v. Grunfeld, 224 AD2d 204 (1st Dept 1996).

Here, CRMC has not satisfied the four part test. First, CRMC has failed to provide the address of the prospective witnesses Michael Poiesz and Bernard Poiesz but cites only their work addresses (B. Poiesz Affirmation ¶¶ 1, 7-17)(M. Poiesz Affidavit, ¶¶ 11-12). See Heinemann v. Grunfeld, 224 AD2d at 204 (denying discretionary change of venue when defendant failed to include complete addresses of the witnesses). CRMC also has not adequately established that the testimony of either physician would be material or necessary to the trial. In particular, the gravamen of this malpractice action is defendants' alleged failure to timely diagnose and treat plaintiff's Hodgkin's lymphoma, which is before Drs. Bernard and Michael

Poiesz treated plaintiff, and thus their testimony is not material to defendants' liability. Moreover, even assuming *arguendo*, that, as CRMC contends, Drs. Bernard and Michael Poiesz will provide testimony relevant to plaintiff's damages, and pain and suffering, testimony as to damages does not warrant a discretionary change of venue absent compelling circumstances, which have not been shown here. Wecht v. Glen Distributors Co., 112 AD2d 891, 893 (1st Dept 1985).

CRMC also has failed to demonstrate that Dr. Michael Poiesz and Dr. Bernard Poiesz are willing to testify. In their respective affidavits, each states that they "may be called as a material witness...[and that] it would be substantially inconvenient both professional and personally, if I were required to travel to a deposition" (B. Poiesz Aff. ¶ 7) (M. Poiesz Aff. ¶ 7). However, neither doctor states that he will be testifying; instead, each hypothesizes that they "may" be called as material witnesses.

As for CRMC's argument that the court should change venue to Cortland County because non-party witnesses would be inconvenienced absent venue change, such argument is unavailing. As for Michael Poiesz, he currently resides in Florida, and thus it cannot be said that he will be more burdened by testifying in New York County as opposed to Cortland County. As for Bernard Poiesz, even if he were inconvenienced by travel to New York County, such inconvenience alone would not be a sufficient basis to change venue, particularly as it has not been shown that he will testify or that his testimony is material.

CRMC also argues that changing the venue to Cortland County serves the ends of justice because the cause of action arose in Cortland County and all parties, with the exception of the derivative plaintiff, reside in Cortland County, or within 30 to 90 minutes thereof. Notably, however, the convenience of parties or their representatives is not a relevant consideration on a motion to change venue based on the convenience of material witness and the ends of justice. See O'Brien 207 AD2d at 173; Mei Ying Wu v. Waldbaum, Inc., 284 AD2d 434, 435 (2d Dept 2001).

In addition, while the situs of the medical treatment underlying plaintiff's injuries are

located in or near Cortland County, this fact does not support in a discretionary change of venue when, as here, the four part evidentiary requirement for a discretionary change of venue for the convenience of non-party witnesses has not been met. See Krochta v. On Time Delivery Service, Inc., 62 AD3d 579, 579 (1st Dept 2009)(denying change of venue to situs of plaintiff's injuries where movant had not satisfied four part test); Cardona v. Aggressive Heating, Inc., 180 AD2d 572 (1st Dept 1992)(noting that "a plaintiff who has designated a county of appropriate venue is under no obligation to make any showing that the county designated is in any way preferable to the one to which the change is sought unless and until the party seeking the change has made an adequate showing as to the convenience of material witnesses and the furtherance of justice").

Finally, with regard to CRMC's argument that venue should be changed to from New York County since Cortland County is less congested, this factor alone does not warrant a discretionary change in venue .[2] See Schapiro & Reich v. Fuchsberg, 172 AD2d 1080, 1080-1081 (4th Dept 1991)("attorney's affirmation suggesting that there is less calendar congestion in Westchester County is equivocal and, under the circumstances presented is not a basis for granting a change of venue pursuant to CPLR 510 (3)") .

Accordingly, the CRMC's motion for a discretionary change of venue is denied.

Conclusion

In view of the above, it is

ORDERED that CRMC's motion to change venue is denied.

DATED: September 19, 2018

J.S.C.
HON. JOAN A. MADDEN
J.S.C.

[2] In support of its position, CRMC relies on Callahan by Callahan v. Cortland Memorial Hosp., 127 AD2d 921,922 (3d Dept 1969). However, Callahan is not controlling here as the rural location of Cortland County was one of many factors considered by the Appellate Division in reversing the trial court's denial of the defendants' motion to change venue. CRMC has also failed provide an evidentiary basis for its argument that the action can be more efficiently litigated and tried in Cortland County.