

Mitchell v Mantica

2019 NY Slip Op 32485(U)

August 22, 2019

Supreme Court, Kings County

Docket Number: 522392/2018

Judge: Marsha L. Steinhardt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of August, 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

----- X

JANET MITCHELL,
Plaintiff,

- against -

Index No. 522392/2018

Motion Sequence Nos. 2-3

ROBERT MANTICA, M.D., MIDDLETOWN MEDICAL P.C.,
BON SECOURS COMMUNITY HOSPITAL, MARC J.
ROSENBLATT D.O., AND PAIN, SPINE & SPORTS
MEDICINE, P.C. and ORD PHSIATRY, P.C.,¹

Defendants.

----- X

The following papers numbered 1 to 13 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-4, 5 6, 7
Opposing Affidavits (Affirmations) _____	8-9 10-11
Reply Affidavits (Affirmations) _____	12 13

Defendants Marc J. Rosenblatt, D.O. (Dr. Rosenblatt) and Pain, Spine & Sports Medicine, P.C. (PSSM) move, in motion (mot.) sequence (seq.) 2, and defendant Bon Secours Community Hospital (Hospital) moves, in mot. seq. 3, all pursuant to CPLR 503, 510 and 511, for an order changing venue from Kings County to Orange County. For reasons more fully set forth below, the motions are denied with leave to renew.

¹The proper caption herein includes ORD Phsiatry, P.C. (ORD), as authorized in the court's short form orders dated March 7, 2019 and July 11, 2019.

Plaintiff's Allegations

Plaintiff, Janet Mitchell (plaintiff), commenced this medical malpractice action to recover for injuries allegedly sustained from the purported failures of defendant Robert Mantica, M.D. (Dr. Mantica), to obtain her informed consent and in performing the surgery and aftercare involved in her total left hip replacement. The surgery, allegedly without informed consent, occurred on December 27, 2016, when plaintiff was 58 years old, at the Hospital, and plaintiff was discharged on December 30, 2017. Dr. Mantica practiced as part of defendant Middletown Medical, P.C. (Middletown), a professional corporation in which he was an owner/officer/partner/employee. Dr. Rosenblatt saw plaintiff on February 16, 2017 and March 2, 2017 on referral from Dr. Mantica. Plaintiff claims that Dr. Rosenblatt failed on both visits to properly treat, test, diagnose, and/or refer her to a neurologist. Dr. Rosenblatt practiced as part of PSSM and ORD, professional corporations in which he was an owner/officer/partner/employee.

On November 6, 2018, plaintiff filed her summons and verified complaint and filed an amended verified complaint on January 17, 2019. Motion practice ensued, a second amended verified complaint was filed on April, 5, 2019 and the court's July 11, 2019 order granted plaintiff leave to serve a third amended complaint which still places venue in Kings County. These venue motions remain for determination.

Standards for a Change of Venue Motion

It is well settled law that plaintiffs are entitled to choose the venue of their actions. An improperly venued action does not strip the court of jurisdiction (*see Pike Co Inc. v County of*

Albany 75 AD3d 983, 985-986 [3d Dept 2010]). CPLR 503 (a) governs venue selection herein. It authorizes venue in a county where any party resided at the time the action was commenced or “the county in which a substantial part of the events or omissions giving rise to the claim occurred.” If a plaintiff’s venue selection violates the parameters of CPLR 503 (a), “plaintiff forfeited the right to choose venue” (*Nunez v Yonkers Racing Corp* 153 AD3d 1355,1356 [2d Dept 2017]; see also *Fisher v Finnegan-Curtis*, 8 AD3d 527, 528 [2d Dept 2004]; Siegel, NY Prac § 123; 2 Weinstein-Korn-Miller, NY Civ Prac ¶ 511.04). Hence, under such circumstances, if a defendant chooses a proper venue, it must be changed upon consent or by order upon motion (see CPLR 509, 510 and 511). Likewise, if the defendant is satisfied with venue that violates CPLR 503 then the improperly venued action will proceed (see CPLR 509). The court lacks jurisdiction to change venue sua sponte (see *Nunez*, 153 AD3d at 1357; *Fisher*, 8 AD3d at 528; *Nixon v. Federated Dept. Stores*, 170 AD 2d 659 [2d Dept 1999]).

Plaintiff based her venue selection on defendant PSSM’s residence at the time the action was commenced. “[T]he sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county” (*Kidd v 22-11 Realty*, 142 AD3d 488, 489 [2d Dept 2016] quoting *LLC Graziuso v 2060 Hylan Blvd. Rest. Corp.*, 300 AD2d 627, 627 [2d Dept 2002]). It is irrefutable that PSSM designated Kings County as its county of residence in its certificate of incorporation and that such designation has remained unchanged since 2005.

Dr. Rosenblatt and PSSM argue that they are entitled to change venue pursuant to CPLR 510 (1) because plaintiff’s inclusion of PSSM herein was solely to add a party with a Kings

County residence. They submit Dr. Rosenblatt's affidavit which states 1) he never practiced under PSSM; 2) that PSSM never functioned as a medical practice; 3) that he didn't know that PSSM was incorporated in Kings County; 4) that he never maintained an office in Kings County; 5) that he only kept the corporate name because he liked it and wanted to protect it for possible future use; 6) that designating Kings County as PSSM's residence was his attorney's or the Department of State's error, back in 2005;² 7) that he practiced out of ORD, which was incorporated in 2002 in Rockland County and 8) that ORD has a principal executive office in Suffern New York (which is within Rockland County) (*see* aff of Dr. Rosenblatt, sworn March 4, 2019 at 1-2).

However, no cross examination has occurred regarding this six paragraph affidavit, no preliminary conference nor discovery has occurred and thus no billing records have been exchanged. Therefore, it is premature to declare PSSM a nominal defendant and transfer venue. Plaintiff is thus entitled at this juncture to her facially proper choice of venue. "Since the defendant failed to establish that the county designated by the plaintiff in the first instance was improper, its motion to change venue... was properly denied" (*see Dylar v 930 Flushing, LLC*, 118 AD3d 742, 743 [2d Dept 2014]). Likewise, Hospital's motion, which adopts Dr. Rosenblatt's and PSSM's arguments, is equally unavailing.

Both motions also argue to change venue, pursuant to CPLR 510 (3), for the

²However, Dr. Rosenblatt, himself signed the certificate of incorporation [see opposing affirmation of plaintiff's counsel dated May 2, 2019 at top of 2 and certified copy of PSSM's certified incorporation certificate, annexed as exhibit A to aff of plaintiff's counsel, sworn February 21, 2019, annexed as exhibit J to opposing affirmation of plaintiff's counsel dated May 2, 2019]

convenience of nonparty witnesses. This basis is addressed to the court's sound discretion, and movants must present detailed information as to what these material witnesses would testify about and how it is burdensome for them to come to plaintiff's chosen venue.


"A party moving to change venue pursuant to CPLR 510 (3) must provide information about the prospective witnesses, including, but not limited to, their names and addresses, disclose the facts about which the proposed witnesses will testify at the trial, represent that the prospective witnesses are willing to testify, and state that the witnesses would be inconvenienced if the venue is not changed" (*Bikel v Bakertown Realty Group, Inc.*, 157 AD3d 924, 925 [2d Dept 2018]; *see also Lapidus v 1050 Tenants Corp.* 94 AD 3d 950. [2d Dept 2012]).

Both motions lack witness names and an overview about what would be such witnesses' expected testimony. The moving papers only contain general statements that the witnesses and records are in Orange County. Accordingly, at this early stage of the litigation, with no disclosure and no outline of the nonparty witnesses' expected testimony, it is

ORDERED that Dr. Rosenblatt's and Pain, Spine & Sports Medicine P.C.'s (PSSM's) motion to change venue from Kings County to Orange County, mot. seq. 2, is denied with leave to renew; and it is further

ORDERED that Bon Secours Community Hospital's motion to change venue from Kings County to Orange County, mot. seq. 3, is denied with leave to renew.

E N T E R,



J. S. C.

HON. MARSHA L. STEINHARDT