Tepper v Grace Plaza of Great Neck, Inc.
2020 NY Slip Op 31634(U)
April 13, 2020
Supreme Court, Kings County
Docket Number: 511012/2019
Judge: Loren Baily-Schiffman
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 and IAS Part 65 of the Supreme Court of the State of New York, County of Kings at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 13th day of April 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

----------X

JOHATHAN TEPPER and PETER TEPPER as Co-Administrators of the Estate of RITA TEPPER, Deceased,

Plaintiff,

- against -

GRACE PLAZA OF GREAT NECK, INC d/b/a GRACE PLAZA NURSING AND REHABILITATION CENTER, PINEGROVE MANOR II, LLC, GRAND GREAT NECK, LLC and BENJAMIN LANDA,

Defendants.

----------X

As required by CPLR §2219(a), the following papers were considered in the review of this motion to change venue.

	PAPERS NUMBERED
Notice of Motion, Affirmation and Exhibits	**1**
Affirmation in Opposition and Exhibits	**2**
Reply Affirmation and Exhibits	**3**

In this wrongful death action, defendants Pinegrove Manor II, LLC d/b/a Grace Plaza Nursing and Rehabilitation Center (hereinafter "Grace Plaza") and Benjamin Landa move pursuant to CPLR §§501, 510(1) and 511(a) the change venue from Kings County to Nassau County. The motion is based upon a forum selection clause in the signed Admissions Agreement between Rita Tepper and Grace Plaza which states that "[a]ny and all actions arising out of or related to this Agreement shall be brought in, and the parties agree to exclusive jurisdiction of, the New York State Supreme Court, located in Nassau County, New York". Plaintiff opposes the motion on the following bases:

- The subject Agreement is unverified and incomplete;
- Movants fail to support the motion with an Affidavit of a witness with personal knowledge;
- The venue provision at issue was not "clear, conspicuous, or reasonably communicated" and is, therefore, unenforceable;
- Kings County is a proper venue as Defendant Landa resides there;
- Discovery is on-going;
- Federal regulations prohibit the subject venue clause.

LAW

CPLR §510 provides that upon motion a court may change the venue of an action if 1) the county designated is not a proper county; 2) an impartial trial cannot be had in the proper county; or 3) the convenience of witnesses and the ends of justice require a change. Both the First and Second Departments have held that a written agreement to fix the place of trial shall be enforced by motion (CPLR §501) and the demand prerequisites of CPLR §511(a) and (b) need not be complied with in making such a motion. ***Medina ex rel Valentin v. Gold Crest Care Center, Inc., 117 AD3d 633 (1st Dept 2014); Puleo v. Shore View Center for Rehabilitation & Health Care, 132 AD3d 651, 652 (2d Dept 2015)***. "A contractual forum slection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy,, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." ***LSPA Enter., Inc. v. Jani-King of NY, Inc., 31 AD3d 394, 395 (2d Dept 2006)***.

The instant motion asserts several reasons why the subject Admissions Agreement is invalid which will be dealt with below. It is clear, however, that there is not reason to hold nursing home admissions agreements to a higher standard than any other contracts.

DISCUSSION

Plaintiff argues that the subject Admissions Agreement id unenforceable because no

Affidavit on personal knowledge is submitted attesting to the signing of the Agreement and the competency of Rita Tepper at the time the Agreement was signed. Moreover, plaintiff argues that the choice of forum provision in the Agreement to be valid must be in large typeface, bolded and capitalized and must also have been explained to the nursing home resident. To support these arguments, plaintiff cites to two (2) Supreme Court cases that are distinguishable on their facts. In ***Epps v Arabelo, 2019 WL 1777436 (Sup. Ct. Bx. Co, 2019)*** the Agreement at issue was never signed by the patient. ***Pecovic v Morningside Nursing Home Company, 2011 WL 12520585 (Sup. Ct. Bx. Co. 2011)*** concerned a plaintiff who did not understand English. Plaintiff cites to a third Supreme Court case, ***Ajilo v River Manor Corp., Index No. 31193/09 (Sup. Ct. Kings Co., 2011).*** There the court held that a forum selection clause in a similar Admissions Agreement related only to contract actions and not to an action for medical malpractice. The Second Department rejected has this argument. ***See Couvertier v Concourse Rehabilitation and Nursing, Inc., 117 AD2d 772 (2nd Dept 2014)***.

Defendants/movants submitted the Affidavit of Kimberly Soldano from Grace Plaza's Admissions Department in support of the motion. The Affidavit establishes that the Admissions Agreement annexed to the motion is a business record of Grace Plaza and thus, admissible and enforceable. That Ms. Soldano did not witness the signatures on the Agreement is irrelevant and purports to add a non-existent requirement to the enforceability o the Agreement. There is also no requirement that the document be signed by both parties to it at the same time, nor is movant required to establish the competency of Rita Tepper to understand and sign the Agreement. Plaintiff does not argue that Ms. Tepper was incompetent at the time the Agreement was signed or that she didn't sign it. Nor does plaintiff provide any law supporting these purported requirements.

Plaintiff argues that the Admissions Agreement is unconscionable because the nursing home waited for three (3) years after Rita Tepper's admission to have her sign an Admissions Agreement. This argument is rejected as it is not supported by the facts. Rita Tepper had several short term admissions to the nursing home and then was admitted on a long-term basis on March 1, 2016 at which time the Admissions Agreement was signed. Accordingly, the court holds that the Admissions Agreement is not unconscionable.

Plaintiff also argues that the instant motion is untimely. CPLR §511(a) governs the timeliness of motions to change the place of trial. It state as follows:

> "(a) Time for motion or demand. A demand under subdivision (b) for a change of place of trial on the ground that the county designated for that purpose if not a proper county shall be served with the answer or before the answer is served. A motion for a change of the place of trial on any other ground shall be made within a reasonable time after commencement of the action."

Here, plaintiff brought the instant action against Grace Plaza of Great Neck, Inc. and Benjamin Landa on May 16, 2019. Plaintiff did not sue Pinegrove Manor II, LLC, a signatory to the Admissions Agreement, until November 1, 2019. Answers were filed on December 26, 2019 and the instant motion was filed on January 28, 2020. Defendants/movants assert that no written discovery demands have been served on them. The court, therefore, holds that the instant motion was not untimely.

Plaintiff asserts that the subject forum selection clause is prohibited by federal regulations. Specifically, plaintiff cites to 42 CFR §483.15. Plaintiff cites no caselaw applying this regulation. As numerous cases in New York applying similar forum selection clauses in nursing home Admissions Agreements, the court declines to apply 42 CFR §483.15 to invalidate the subject forum selection clause.

Accordingly, IT IS HEREBY ORDERED that the motion of defendants, Pinegrove Manor II, LLC, d/b/a Grace Plaza Nursing and Rehabilitation Center and Benjamin Landa to change the venue of this action from Kings County to Nassau County is granted in all respects.

All issues not discussed herein have been rejected or are denied as moot.

This is the decision and Order of the court.

LOREN BAILY-SCHIFFMAN, JSC