

Butler v Eastchester Rehabilitation & Health Care Ctr.
2020 NY Slip Op 34567(U)
October 23, 2020
Supreme Court, Bronx County
Docket Number: 23171/2020E
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X Index No. 23171/2020 E

Reina Butler, Individually and as Executrix
of the Estate of Linda Bailey,

Plaintiff,

-against-

DECISION & ORDER

Eastchester Rehabilitation and Health
Care Center,

Defendant.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion for a change of venue pursuant to CPLR §§501 and 511.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

In the instant action, plaintiffs allege causes of action for negligence, medical malpractice, negligent hiring, wrongful death and negligent infliction of emotional distress in connection with the care and treatment of plaintiffs' decedent while she was a resident of Defendant Eastchester Rehabilitation and Health Care Center ("Eastchester").

Eastchester now moves for an Order, pursuant to CPLR §§501 and 511(a), directing a change of venue, pursuant to a written agreement, from Supreme Court, Bronx County to Supreme Court, Nassau County.

In support of the motion, Eastchester submitted, *inter alia*, the affidavit of Amanda Colon, Eastchester's Director of Admissions, an Admission Agreement and a Glossary to a document titled "Your Rights as a Nursing Home Resident in New York State and Nursing Home Responsibilities." In her affidavit, Amanda Colon states: She is involved in and familiar with all aspects of the operation of the facility, including the admissions process. Her affidavit is based on her personal knowledge of the admission process and the operations of Eastchester at

the time of Linda Bailey's admission in August 2017. At the time the Admission Agreement was executed, Ethelena Bailey Persons identified herself as both Linda Bailey's sister and her Designated Representative. A Designated Representative is someone recognized by New York State who can act on behalf of the resident. This includes participating in decisions and choices regarding the care, treatment and well-being of the resident, if such resident lacks the capacity to make decisions and choices. It is and was the custom and practice of Eastchester to have Designated Representatives sign Admission Agreements for residents who may not be able to understand the admission agreement due to their physical or mental status at the time of the admission. At the time Ethelena Bailey Persons signed the Admission Agreement, Eastchester's former Director of Admissions, Elisa Thomas, was present. The Admission Agreement was executed by Ms. Thomas on behalf of Eastchester. It was Eastchester's custom and practice to provide anyone signing the Admission Agreement with an opportunity to read and review the agreement. Personnel from Eastchester, including Ms. Thomas, as well as Colon, were available to answer any questions about the Admission Agreement, including any questions concerning the venue selection provision. Personnel from Eastchester were available to explain the Admission Agreement to the signing party.

The Admission Agreement, dated September 8, 2017, was signed by Ethelena Bailey Persons as the Designated Representative of her sister, Linda Bailey, on September 8, 2017. Section XI (a), titled Governing Law, provides that the "Agreement shall be governed by and construed in accordance with the laws of the State of New York without giving effect to conflict of law provisions. Any 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."

Designated Representative is defined in the Glossary as "[t]he individual or individuals designated to receive information and to assist and/or act on behalf of a particular resident to the extent permitted by New York State law. This is not the same as a health care agent. The designation occurs by a court of law if sought; by the resident if he or she has the capacity to make such a designation; or by family members and other parties who have an interest in the

well-being of the resident. The name of the designated representative must be noted in the resident's clinical record at the facility."

In opposition to the motion, plaintiffs' submitted, *inter alia*, the affidavits of Reina Butler and Ethelena Bailey Persons, a Health Care Proxy Form and Instructions, and a St. Luke's Hospital "Psychiatry Resident Brief Note." In her affidavit, Reina Butler states: She is Linda Bailey's daughter and is familiar with her time at Eastchester. Her mother was transferred from St. Luke's to Eastchester on August 11, 2017. Her mother had sought treatment at St. Luke's in July 2017 on her own because of a vision problem. It was determined that she had a stroke and suffered vision loss. While at St. Luke's her mother refused to undergo medical imaging testing. Butler wanted her mother to undergo the testing so she requested a psychiatric evaluation at St. Luke's to challenge her ability to refuse the test. This was done during her stay in July 2017. Pursuant to that evaluation, it was determined by St. Luke's that her mother was of sound mind and within her right to refuse medical testing. While at St. Luke's, Linda Bailey listed Butler as her Health Care Proxy and Butler's "other aunt," Diane Bailey as the alternate. After refusing further testing, Linda Bailey was transferred to Eastchester where she remained until she was transferred to Jacobi Medical Center in November 2017. Ethelena Bailey Persons signed the Admission Agreement because she was told by Eastchester that Linda Bailey "lacked capacity to complete admissions documents." Butler does not "understand how only a few weeks earlier St. Luke's had determined that [her] mother 'had capacity' to refuse treatment, but Eastchester determined that she did not." Butler also does not "understand why [she] was not advised that [her] mother lacked capacity." Butler opposes the transfer of venue because Eastchester "did not have [her] mother's consent to the Admission Agreement. . . [and] they have failed to explain why [her] mother did not sign the document herself and how they determined that she lacked capacity to sign on her own behalf." While the affidavit's first page is blank as to the County and State, a California Jurat With Affiant Statement attached to the affidavit indicates it was subscribed and sworn to (or affirmed) before a notary public in Los Angeles County, California on August 14, 2020. A Certificate of Conformity was not submitted.

In her affidavit, Ethelena Bailey Persons states: Her sister, Linda Bailey, was transferred from Mount Sinai Hospital to Eastchester on August 11, 2017. Bailey had sought treatment at St. Luke's Hospital on her own because of "a vision problem sudden blindness." Bailey refused surgery despite the recommendation of the hospital. Accordingly, a psychiatric evaluation was requested, but St. Luke's determined that she "had capacity." Bailey was then transferred to Eastchester, where she remained until she was transferred to Jacobi Medical Center on approximately November 5, 2017. On February 18, 2018, Bailey died while at Jacobi Medical Center. Persons reviewed the Admission Agreement and confirmed that she signed it on September 8, 2017 when she went to visit her sister at Eastchester. On September 7, 2017, Persons received a call from Amanda Colon and was told that her sister "lacks capacity to complete admissions documents." Colon then requested that Persons "immediately come to the nursing home and sign the document on her sister's behalf, and [she] did so the following day." Persons thought it "odd" that St. Luke's had determined that her sister "had capacity" a few days early [sic], but Eastchester determined that she did not." By the time Persons signed the Admission Agreement, "[her] sister, Diane had already been at Eastchester since August 11, 2017. Persons does not know "who did the paperwork and the admission from that date until [she] signed the document September 8, 2017." Persons does not recall speaking to Elsa Thomas or anyone at Eastchester "regarding what was contained in the document and [she] was not aware that any lawsuit filed against Eastchester . . . would have to be filed in Nassau County." At the time Persons signed the document her "only concern was for [her] sister's well-being and that she would be taken care of as her health and mental capacity seemed to be worsening." When she signed the document, Persons "did not have Power of Attorney of [her] sister Linda Bailey.

The Health Care Proxy documents include a cover page, a single-page "Health Care Proxy Form Instructions," and a single-page Health Care Proxy with handwritten appointments of Reina B. Butler as "health care agent" and Pamela Bailey as alternate "health care agent." The Instructions indicate that (7) Items are included with the Health Care Proxy Form, but the document submitted includes Items (1) through (4) only. The Instructions for Item (5) state that

the form is to be dated and signed by the person appointing the health care agent; Item (6) addresses any wishes or instructions about organ donation; and Item (7) states that two witnesses 18 years of age or older, who are not appointed as agent or alternate agent, must sign the Health Proxy Form. Plaintiffs submission did not include the signature of Linda Bailey or the signatures and names of any witnesses.

The St. Luke's "Hospital Psychiatry Resident Brief Note" includes page 1 only of a 10-page document. This page includes a "Reason for Consult" entry of "Capacity to refuse echocardiogram" and a portion of a "History of Present Illness" section. No conclusions are stated on this page.

In reply papers, Defendant submitted Eastchester "Progress Notes" for Linda Bailey. Defendant points to entries noting that Bailey had "impaired decision-making," "periods of confusion," alcohol induced dementia; Stage 5 chronic kidney disease; and that she had "depressive themes and paranoia." Defendant also references an entry noting that Bailey told staff that she wanted to leave the facility to go home where her son was "being held captive for ransom."

* * * * *

CPLR § 501 provides that "[s]ubject to the provisions of subdivision two of section 510, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." CPLR § 510 provides that a court, upon motion, may change the place of trial of an action where "there is reason to believe that an impartial trial cannot be had in the proper county."

Forum selection clauses in contracts are *prima facie* valid and enforceable unless the resisting party demonstrates that enforcement of the clause is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that 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. *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 640 N.Y.S.2d 479 (1996); *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 826 N.Y.S.2d 235 (1st Dept. 2006). Such clauses are enforced because they provide certainty

and predictability in the resolution of disputes. *Id.* Further, the burden of establishing that the selected forum is improper is a heavy one and rests on the party challenging the agreement. *Shah v. Shah*, 215 A.D.2d 287, 289, 626 N.Y.S.2d 786 (1st Dept. 1995).

Because this action arises out of or relates to Eastchester's duties and obligations under the Admission Agreement, the forum selection clause applies and the transfer of venue to Supreme Court, Nassau County is proper. Plaintiffs have failed to show that enforcement of the forum selection clause would violate public policy or that a trial in Nassau County would be so impracticable and inconvenient that they would be deprived of their day in court. Moreover, there is no allegation that the Admission Agreement was the result of fraud or overreaching. *Public Adm'r Bronx County v. Montefiore Med. Ctr.*, 93 A.D.3d 620, 941 N.Y.S.2d 104 (1st Dept. 2012).

Contrary to Ms. Butler's contention, it was not necessary for a health care agent to sign the Admission Agreement. Also, while Ms. Butler states that her mother completed the proxy form, she failed to submit a complete, signed proxy form. Further, it appears that Ms. Butler was in California at least when her mother was admitted to Eastchester. Absent from her affidavit is any statement that she was present in New York to have been able to sign any documents while her mother was either at St. Luke's or Eastchester. Moreover, in her affidavit Ms. Persons does not state that she would not have signed the Admission Agreement had she known that any court proceeding related to the Admission Agreement would have to be brought in Nassau County. Nor have plaintiffs demonstrated that Linda Bailey was capable of reading and signing the Admission Agreement. Indeed, all of the evidence indicates that Linda Bailey's eyesight was very poor and, therefore, it is unlikely that she would have been able to read or sign the Admissions Agreement.

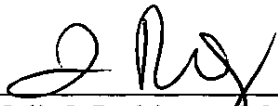
Accordingly, it is hereby

ORDERED that Eastchester's motion is granted, and venue of this action is changed from this Court to the Supreme Court, Nassau County. Upon service by Eastchester of a copy of this order with notice of entry and payment of the appropriate fees, if any, the Bronx County

Clerk is directed to transfer the papers on file in this matter to the Clerk of the Supreme Court, Nassau County; and it is further

ORDERED that Eastchester serve a copy of this order with notice of entry upon plaintiffs and the Bronx County Clerk within 20 days of entry.

Dated: Bronx, New York
October 23 2020



Hon. Julia I. Rodriguez, J.S.C.