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| Fulling v Mount Sinai Health Sys., Inc. |
| 2021 NY Slip Op 30854(U) |
| March 5, 2021 |
| Supreme Court, New York County |
| Docket Number: 805293/2019 |
| Judge: John J. Kelley |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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CARL FULLING,

Plaintiff,

- v -

MOUNT SINAI HEALTH SYSTEM, INC., MOUNT SINAI HEALTH NETWORK, LLC, MOUNT SINAI HOSPITALS GROUP, INC., SOUTH NASSAU COMMUNITIES HOSPITAL, GRAND SOUTH POINT, LLC. and BAYVIEW MANOR, LLC, doing business as SOUTH POINT PLAZA NURSING AND REHABILITATION CENTER,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 ,37, 38, 39, 44, 45, and 49 (Motion 002)

were read on this motions to/for TRANSFER VENUE.

In this action to recover damages for medical malpractice, the defendant South Nassau Communities Hospital (hereinafter SNCH) moves pursuant to CPLR 510(1) and 511(b) to transfer venue of the action from New York County to Nassau County on the ground that New York County is not a proper county for the place of trial. The defendant Bayview Manor, LLC, doing business as South Point Plaza Nursing and Rehabilitation Center (hereinafter South Point), separately moves pursuant to CPLR 501, 510(1), and 511(b) to transfer venue to Nassau County on the ground that a contractual venue provision requires the action to be prosecuted against it in Nassau County. The plaintiff opposes the motions. Although SNCH failed to demonstrate that it complied with the notice provisions set forth in CPLR 511, the court grants South Point’s motion because South Point’s contract with the plaintiff requires this action to be prosecuted against it in Nassau County. Upon the court’s consideration of all relevant factors, the entirety of the action is transferred to Nassau County,

DECISION AND ORDER

On September 6, 2019, the plaintiff, Carl Fulling, commenced this action in New York County, alleging that the defendants committed medical malpractice and negligence, and that they failed to obtain his informed consent for certain procedures in the course of providing medical, surgical, nursing, and rehabilitation care and treatment, first at the defendant SNCH in January 2017, and then at South Point beginning in November 2017. In early November 2019, this action was assigned to Justice Joan Madden. On November 11, 2019, SNCH made the instant motion to transfer venue; on November 25, 2019, South Point made its motion to transfer venue. The two motions initially were made returnable on December 3, 2019. In late January 2021, after the motions had been adjourned on several occasions, the action was reassigned to this court.

None of the papers filed by any of the parties to this action reflect the county of the plaintiff's residence. Both SNCH's and South Point's facilities are located in Nassau County. The defendants SNCH, Grand South Point, LLC (South Point's owner), and Bayview Manor, LLC (South Point's operator), all have filed certificates with the New York State Secretary of State designating Nassau County as their principal places of business. It is undisputed that all of the treatment rendered to the plaintiff was rendered in Nassau County and, thus, the acts or omissions that gave rise to this medical malpractice action occurred in Nassau County. In addition, when the plaintiff sought treatment and rehabilitation at South Point, he signed an Admission Agreement that contained a choice of venue clause specifying that the Supreme Court, Nassau County, was to be the court and venue for all actions arising from services rendered pursuant to the Admission Agreement.

The defendants Mount Sinai Health System Inc., Mount Sinai Health Network LLC, and Mount Sinai Hospitals Group Inc. (collectively the Mt. Sinai defendants), all of which were initially named as defendants in this action, have designated New York County as their places of incorporation or organization. Nonetheless, this court, by order dated March 5, 2021, granted the Mt. Sinai defendants' motion to dismiss the complaint as against them (SEQ 001) on the

ground that they were not proper parties. Therefore, at this juncture, all of the remaining defendants are residents of Nassau County.

In support of its motion, SNCH contends that, once the court dismissed the Mt. Sinai defendants from the action, New York County became an improper county in which to place venue (*see Chow v Long Is. R.R.*, 202 AD2d 154 [1st Dept 1994]). South Point contends that the venue selection clause in its Admission Agreement with the plaintiff requires any action against it to be prosecuted in Nassau County. In opposition to SNCH's motion, the plaintiff does not identify the county of his own residence, and does not argue that New York County is a proper county because he resides in that county. Rather, he asserts that, to the extent that the court would permit him to continue prosecuting the claims against the Mt. Sinai defendants, New York County is a proper county and that, to the extent that those defendants are dismissed from the action, SNCH failed to satisfy the notice requirements of CPLR 511 that constitute a condition precedent to a transfer based on the designation of an improper county. The plaintiff did not directly oppose South Point's motion and, thus, did not address its contention that the contractual venue selection clause is controlling.

In the first instance, South Point's motion was not a proper cross-motion because it did not seek relief against a moving party; instead, South Point's motion was, in effect, a separate motion (*see* CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214 requires such a separate motion to be made on at least eight days notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d

at 404). In any event, South Point uploaded its notice of cross-motion to the NYSCEF electronic filing system on November 25, 2019, and made its application returnable on December 3, 2019--exactly eight days prior to the return date. Therefore, South Point's motion can be heard as a properly noticed motion.

With respect to SNCH's motion, CPLR 511(a) requires that a defendant who seeks to transfer the venue of an action on the basis of improper venue must satisfy two requirements. First, under CPLR 511(a), the defendant must serve a demand for change of venue on that ground either prior to or with its answer. If a defendant satisfies this requirement, then, pursuant CPLR 511(b), it may move to transfer within 15 days of serving the demand. In this action, SNCH served and filed its answer on October 15, 2019, followed by an amended answer on same date. A review of the docket entries in NYSCEF reflects that SNCH did not serve a demand by electronically filing one with its answer, or at any time prior thereto, which would normally be the customary method of service in an electronically filed action such as the present one. On November 11, 2019, SNCH filed the papers constituting the instant motion to transfer venue, with a copy of a demand for change of venue attached as an exhibit. Although the copy of the demand annexed to the moving papers was dated October 15, 2019---the same date that SNCH served its answer and amended answer---this demand was not uploaded to NYSCEF until November 11, 2019. Moreover, SNCH does not submit an affidavit of service of the demand establishing that it was timely served by means other than electronic filing, such as personal delivery, regular mail, overnight delivery, facsimile transmission, or as an attachment to an e-mail message. SNCH has not provided any other proof that the demand for change of venue timely was served by the October 15, 2019 deadline. Consequently, SNCH has not satisfied its burden of demonstrating that it satisfied a statutory condition precedent to obtaining a change of venue on the ground that venue was placed in an improper county.

Nonetheless, where, as here, a defendant seeks a transfer of venue on a ground other than the plaintiff's designation of an improper county, there is no requirement that the defendant

serve a demand before or with its answer; rather, pursuant to CPLR 511(a), the defendant need only make such a motion to transfer within a “reasonable time.”

CPLR 501 provides that, unless there is reason to believe that an impartial trial cannot be had in a county designated in a written agreement, a “written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.” Forum selection clauses contained in written agreements are thus generally enforced, unless enforcement

“would be unreasonable and unjust or . . . the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.”

(*Camacho v IO Practiceware, Inc.*, 136 AD3d 415, 416 [1st Dept 2016], quoting *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]). Although the party seeking to enforce a forum selection clause has the initial burden of establishing that it is applicable to the underlying dispute (see *Schmelkin v Garfield*, 85 AD3d 755, 755-756 [2d Dept 2011]), once it has satisfied that burden, the party opposing enforcement of the clause must establish that its enforcement would be unreasonable, unjust, or unconscionable (see *Hunt v Landers*, 309 AD2d 900, 901 [2d Dept 2003]).

In support of its motion, South Point submits the plaintiff’s Admission Agreement, dated November 9, 2017, that was executed at the time he commenced rehabilitation at South Point. Section XI(a) of the Admission Agreement, entitled “Governing Law,” specifies 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.” Since the plaintiff alleges that his injuries were sustained, in part, while he was undergoing rehabilitation at South Point, South Point has met its burden of showing that the choice of venue provision is applicable and enforceable (see *Casale v Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436, 437 [2d Dept 2015] [enforcing venue selection clause in

nursing home admission agreement]; *Public Admin. Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620 [1st Dept 2012] [same]). The plaintiff, by failing expressly to address South Point's contention, has not presented any evidence that enforcement of this choice of venue clause would be unreasonable, unjust, or unconscionable. Moreover, in the papers that the plaintiff submitted in opposition to SNCH's motion, he did not assert or suggest that a transfer to Nassau County would impose an unreasonable burden upon him.

Inasmuch as South Point made its motion to transfer venue approximately two months after the action was commenced, its motion was made within a reasonable amount of time (see *Johnson v Cherry Grove Is. Mgt., Inc.*, 190 AD2d 598 [1st Dept 1993] [transfer motion made two months after the plaintiff finally satisfied its discovery obligations to the defendant, and two years after the commencement of the action, was not untimely]).

Therefore, South Point's motion to transfer venue pursuant to CPLR 501, CPLR 510(1) and CPLR 511(b) must be granted. A proper balancing of relevant factors, including the residence of the noncontracting defendants in Nassau County, the expressed desire of at least one of those defendants to litigate the matter in Nassau County, certainty and predictability in the resolution of disputes, and the avoidance of inconsistent judgments, warrants the transfer of the entire action to Nassau County, rather than the severance and transfer only of the claims asserted against South Point (see *New York State Workers' Compensation Bd. v Episcopal Church Home & Affiliates, Inc.*, 64 Misc 3d 176 [Sup Ct, Albany County 2019]).

Accordingly, it is

ORDERED that the motion of the defendant South Nassau Communities Hospital to transfer venue of this action from New York County to Nassau County is denied; and it is further,

ORDERED that the separate motion of the defendant Bayview Manor, LLC, doing business as South Point Plaza Nursing and Rehabilitation Center, incorrectly designated as a cross motion, to transfer venue of this action from New York County to Nassau County is

granted, without opposition, and the entire matter is transferred to the Supreme Court, Nassau County, for consideration and disposition; and it is further,

ORDERED that within 30 days after the entry of this order, the defendant Bayview Manor, LLC, doing business as South Point Plaza Nursing and Rehabilitation Center, shall file an EF-22 form and the statement required by CPLR 8019(c), and shall also serve them upon the New York County Clerk, as Clerk of the Supreme Court, New York County, along with a copy of this order and notice of entry of this order, and shall also serve a copy of this order and notice of entry of this order upon the Nassau County Clerk, as Clerk of the Supreme Court, Nassau County; and it is further,

ORDERED that upon service upon him of the EF-22 form, the statement required by CPLR 8019(c), and a copy of this order with notice of entry, the New York County Clerk, as Clerk of the Supreme Court, New York County, is directed to deliver to the Nassau County Clerk, as Clerk of the Supreme Court, Nassau County, all papers filed in the action entitled *Carl Fulling v. Mount Sinai Health System, Inc. et al.*, under New York County Index No. 805293/19, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

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| <u>3/5/2021</u> | | | <u>JOHN J. KELLEY, J.S.C.</u> |
| DATE | | | |
| MOTION 1: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> GRANTED IN PART |
| | | <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input checked="" type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |
| MOTION 2: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> GRANTED IN PART |
| | | <input type="checkbox"/> DENIED | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input checked="" type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |