

Matter of Cortex Tel., LLC v New York State Dept. of Health
2022 NY Slip Op 30059(U)
January 11, 2022
Supreme Court, New York County
Docket Number: 155606/2021
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 56M

Justice

INDEX NO. 155606/2021

MOTION DATE 11/15/2021

MOTION SEQ. NO. 001

In the Matter of

CORTEX TELEVISION, LLC, doing business as THE HEALTHCARE CHANNEL

Petitioner,

- v -

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34

were read on this motion to/for ARTICLE 78//X-MOTION CHANGE VENUE

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of a June 10, 2021 New York State Department of Health (NYS DOH) Records Access Appeals Officer's determination denying its administrative appeal of a May 25, 2021 NYS DOH Records Access Officer's (RAO) decision. The RAO's decision had denied, in part, the petitioner's request for agency records pursuant the Freedom of Information Law (Public Officers Law § 84, et seq.; hereinafter FOIL). The NYS DOH answers the petition, submits the administrative records, and cross-moves pursuant to CPLR 506(b), 510(1), and 511(b) to transfer venue of this proceeding from New York County to Albany County. The petitioner opposes the cross motion. The cross motion is granted, and venue is transferred to Albany County.

CPLR 510(a) provides that one ground for a change of venue is that "the county designated for that purpose is not a proper county." Pursuant to CPLR 511(b), where a defendant or respondent contends that the venue designated by the plaintiff or petitioner is improper,

"The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper."

The written demand to change the place of trial on the ground of improper venue, as set forth in CPR 511(b), "shall be served with the answer or before the answer is served" (CPLR 511[a]).

Here, the NYS DOH served its written demand to change the place of trial on the ground of improper venue before it served an answer. The service of the demand was thus timely made.

The NYS DOH made the instant cross motion to change venue 14 days after it served its demand to change venue, and thus within the 15 days required by CPLR 511(b). Hence, the cross motion is timely.

A CPLR article 78 proceeding "shall be brought in the supreme court in the county specified in subdivision (b) of [CPLR] section 506 except as that subdivision otherwise provides" (CPLR 7804[b]). CPLR 506(b) provides that

"A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located."

Although the petitioner's FOIL requests sought documents referable to hospital records concerning the memorialization and reporting of COVID-19 cases for some hospitals in New York County, for the purposes of FOIL determinations, the term "material events" does not encompass the underlying occurrences that generated the agency records that are sought. Rather, material events in the context of an agency's FOIL determination are limited to where the records are stored, the office to which the FOIL request was made, and the place where deliberations and determinations concerning that request were conducted and concluded (see

Matter of Donofrio v City of New York, 2019 Misc LEXIS 8731, *4 [Sup Ct, N.Y. County, Nov. 27, 2019 [Kelley, J.]; *Matter New York Racing Assoc. v State of N.Y. Div. of Budget*, 2009 NY Slip Op 31605[U], 2009 NY Misc LEXIS 4000 [Sup Ct, N.Y. County, Jul. 13, 2009]; *but see Matter of Hughes Hubbard & Reed, LLP v Civilian Complaint Review Bd.*, 53 Misc 3d 947, 952 [Sup Ct, Kings County 2016] [reaching contrary conclusion]; *cf. Matter of Phillips v Dennison*, 41 AD3d 17, 23-24 [1st Dept 2007] [in CPLR article 78 proceeding challenging parole board determination, venue is proper only in the judicial district where the determination complained of took place or where the respondent's principal office is located, not the county where the inmate committed the underlying crimes and/or was convicted]; *Matter of Howard v New York State Bd. of Parole*, 5 AD3d 271, 272 [1st Dept 2004] [same]).

It is undisputed that the NYS DOH maintains its principal office in Albany County, that it undertook its deliberations and made its determination in Albany County, and that any records collected or generated by the NYS DOH that are responsive to the petitioner's FOIL request are stored in the NYS DOH's computers in Albany County. The only connection that this dispute has with New York County is that some hospitals in New York County may have dispatched documents from their computers in New York County to the NYS DOH in Albany County.

In light of the foregoing, it is

ORDERED that the New York State Department of Health's cross motion to transfer venue of this action from New York County to Albany County is granted, and the matter is transferred to the Supreme Court, Albany County, for consideration and disposition; and it is further,

ORDERED that within 30 days after the entry of this order, the respondent New York State Department of Health 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 Albany County Clerk, as Clerk of the Supreme Court, Albany 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 Albany County Clerk, as Clerk of the Supreme Court, Albany County, all papers filed in the proceeding entitled *Matter of Cortex Television, LLC, doing business as The Healthcare Channel.*, under New York County Index No. 155606/2021, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

1/11/2022

DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED		NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
	<input type="checkbox"/>			REFERENCE	REFERENCE