

Knight v New York & Presbyt. Hosp.
2022 NY Slip Op 31048(U)
March 30, 2022
Supreme Court, New York County
Docket Number: Index No. 805224/2021
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X
JAMES KNIGHT, as administrator of the estate of PAMELA
KNIGHT,

Plaintiff,

INDEX NO. 805224/2021

MOTION DATE 02/01/2022

MOTION SEQ. NO. 001

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL,
AMSTERDAM NURSING HOME CORP., and DEWITT
REHABILITATION AND NURSING CENTER, INC., doing
business as UPPER EAST SIDE REHABILITATION AND
NURSING CENTER,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18,
19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38

were read on this motion to/for CHANGE VENUE.

In this action to recover damages for medical malpractice and wrongful death, the defendant Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center (Dewitt), moves pursuant to CPLR 501, 510, and 511 to transfer the place of trial of this action from New York County to Nassau County on the ground that the plaintiff's decedent entered into agreements with it that contained venue selection clauses designating Nassau County as the place of trial. The plaintiff opposes the motion. The motion is granted, and the action is transferred to the Supreme Court, Nassau County.

The plaintiff commenced this action on July 22, 2021, designating New York County as the place of trial, based on the residence of the parties, as his decedent was a resident of New York County when she died, he was issued letters of administration by the Surrogate's Court, New York County, and all of the defendants designated New York County as their principal place of business in their filings with the New York State Secretary of State. Dewitt answered the complaint on September 13, 2021, and simultaneously served a demand to change venue

from New York County to Nassau County, alleging that two admission agreements executed by the plaintiff's decedent, dated February 12, 2019 and March 24, 2019, respectively, contained venue selection provisions designating Nassau County as the place of trial of any action commenced by her or on her behalf against Dewitt.

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 to change venue before or with its answer; rather, "[a] motion for change of place of trial on any other grounds [than the designation of an improper county] shall be made within a reasonable time after commencement of the action" (CPLR 511[a]). Moreover, the time limitations for making a motion that are set forth in CPLR 511(b) are not applicable to motions to change venue based on the ground asserted here. In any event, Dewitt answered the complaint on September 13, 2021, simultaneously served a demand to change venue from New York County to Nassau County, and made its motion on September 22, 2021, only nine days later. Hence, the motion was made within a reasonable time after commencement of the action (see CPLR 511[a]).

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]).

Dewitt 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]).

Although the plaintiff does not contend that enforcement of the venue selection clause would be unreasonable, unjust, or unconscionable, he contends that the court should not enforce the clause because his decedent did not actually sign the agreements, and that the signatures that purport to be hers were executed by someone else. Specifically, the plaintiff claims that the signatures on the admission agreement do not look like those of his decedent, and he asks the court to compare those signatures with what he claims to be an "exemplar" signature, although he identifies neither the document from which the exemplar was extracted nor the date when that document was signed. In fact, the copy submitted to the court appears to be yellowed with age. The plaintiff nonetheless asserts that the smaller signatures on the 2019 admission agreements, when his decedent was elderly and infirm, are variously straight or slanted, and do not match the earlier, undated exemplar.

"Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). On this motion to transfer venue, the court may not make a finding of fact as to whether the signatures on the subject agreements are or are not the decedent's genuine signatures. The plaintiff makes no claim to be a handwriting expert. Nonetheless, "although an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation" (*id.*), the plaintiff, in opposition to Dewitt's motion, "failed to submit evidence sufficient to raise a

triable issue of fact," as "[h]e provided only a bald assertion that the signature on the [agreements] was a forgery" (*Ulm I Holding Corp. v Antell*, 155 AD3d 585, 586 [1st Dept 2017]; see *82-90 Broadway Realty Corp. v New York Supermarket, Inc.*, 154 AD3d 797, 799 [2d Dept 2017]; *Bronsnick v Brisman*, 30 AD3d 224, 224 [1st Dept 2006]; *Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 54 [1st Dept 2004]). The plaintiff has failed to account for the possibility that his decedent's signature changed as she aged and became infirm. Even where a handwriting expert *is* retained, the expert's "failure to consider the possibility that changes in a person's signature might occur as one ages or for other non-nefarious reasons is indefensible" (*Matter of Smith v Sullivan*, 38 Misc 3d 727, 742 [Sup Ct, Orange County 2012]; see *Matter of Felder v Storobin*, 100 AD3d 11, 15 [2d Dept 2012] [handwriting expert conceded that a person's signature may change with time and age]).

Therefore, Dewitt'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 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 Dewitt (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 Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center, to transfer venue of this action from New York County to Nassau County is granted, 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 Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing 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 *James Knight v The New York and Presbyterian Hospital, et al.*, under New York County Index No. 805224/2021, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

3/30/2022
DATE


JOHN J. KELLEY, J.S.C.

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