

**Byrd v Upper E. Side Rehabilitation & Nursing Ctr.**

2022 NY Slip Op 31222(U)

April 11, 2022

Supreme Court, New York County

Docket Number: Index No. 805274/2021

Judge: John J. Kelley

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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*

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 HENRIETTA BYRD INDEX NO. 805274/2021  
 MOTION DATE 02/02/2022  
 MOTION SEQ. NO. 001

Plaintiff,

- v -

UPPER EAST SIDE REHABILITATION AND NURSING  
 CENTER,

**AMENDED DECISION + ORDER  
 ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for CHANGE VENUE

**The court's prior decision and order, dated April 1, 2022, is recalled and vacated, upon the court's own motion, to reflect that the plaintiff submitted opposition to the motion, and the following order is substituted therefor:**

In this action to recover damages for medical malpractice and wrongful death, the defendant, Upper East Side Rehabilitation and Nursing Center, 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 entered into an agreement with it that contained a venue selection clause designating Nassau County as the place of trial of any action that she commenced against it. 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 September 9, 2021, designating New York County as the place of trial, based on her own residence in New York County. The defendant answered the complaint on October 11, 2021, and simultaneously served a demand to change venue from New York County to Nassau County, alleging that the January 22, 2021 admission

agreement executed by the plaintiff contained a venue selection provision designating Nassau County as the place of trial of any action that she commenced against it.

Where, as here, a defendant seeks a transfer of venue on a ground other than the plaintiff's designation of an improper county, including a transfer based on an agreement fixing the place of trial, there is no requirement that the defendant serve a demand to change venue before or with its answer (*see Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d 633, 634 [1st Dept 2014]). Moreover, the time limitations for making a motion based on improper venue that are set forth in CPLR 511(b) are not applicable to motions to change venue based on an agreement fixing the place of trial, as "[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]; *see Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d at 634). In any event, the defendant made this motion on October 22, 2021, only 11 days after serving its answer and demand to change venue. 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]).

The defendant has met its burden of showing that the choice of venue provision in the subject admission agreement 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]). In opposition, the plaintiff failed to show that enforcement of the venue selection clause would be unjust, as the mere fact that she was elderly and fragile when she signed the agreement does not constitute proof that she signed it under duress, or that she would not have signed it if she knew that all actions against the defendant would have to be commenced in Nassau County. Hence, the defendant's motion to transfer venue pursuant to CPLR 501, CPLR 510(1) and CPLR 511(b) must be granted.

Accordingly, it is

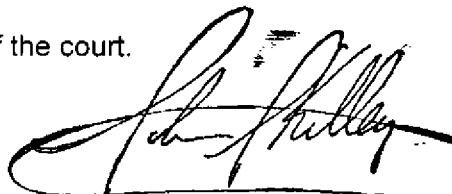
ORDERED that the motion of the defendant Upper East Side Rehabilitation and Nursing Center to transfer venue of this action from New York County to Nassau County is granted, and the action is transferred to the Supreme Court, Nassau County, for consideration and disposition; and it is further,

ORDERED that within 30 days after the entry of this order, the defendant 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 *Henrietta Byrd v Upper East Side Rehabilitation and Nursing Center* under New York County Index No. 805274/2021, and certified copies of all minutes and entries.

This constitutes the Amended Decision and Order of the court.



JOHN J. KELLEY, J.S.C.

4/11/2022

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: