

**Gibbs v River Manor Corp.**

2022 NY Slip Op 31271(U)

April 12, 2022

Supreme Court, Kings County

Docket Number: Index No. 514224/2020

Judge: Bernard J. Graham

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

LYNNORA GIBBS, as Administratrix of the  
Estate of THOMAS LETT, and LYNNORA GIBBS  
Individually,

Index No.: 514224/2020

Plaintiff(s),

**DECISION/ORDER**

-against-

RIVER MANOR CORP. d/b/a ATRIUM CENTER FOR  
REHABILITATION AND NURSING,

Hon. Bernard J. Graham  
Supreme Court Justice

Defendants

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion and cross-motion to: direct a change of venue from Kings County to Nassau County, pursuant to CPLR §§ 501.**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits & Cross-motion.....	3
Replying Affidavits.....	4
Exhibits.....	
Other: ..... (memo).....	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, River Manor Corp. d/b/a Atrium Center for Rehabilitation and Nursing (“River Manor”) has moved, (seq. 2), pursuant to CPLR §501, for an Order transferring this action from Kings County Supreme Court to Nassau County Supreme Court upon the grounds that Nassau County and not Kings County is the proper venue based upon the forum selection clause in the Admissions Agreement.

Counsel for the plaintiff Lynnora Gibbs, as Administrator of the Estate of Thomas Lett, and Lynnora Gibbs Individually (“plaintiff”), has opposed the relief sought by the defendant in this Motion to change the venue of this action to Nassau County. In opposing the relief, counsel asserts that this Court should afford no force and effect to the Admission Agreement which Thomas Lett (“decedent”) allegedly executed. It is alleged

that the decedent was not of sound mind when he was provided with an Admission Agreement to sign as he lacked the capacity to understand the contents of said Agreement including the forum selection clause.

Background:

On or about August 5, 2020, an action was commenced on behalf of the proposed Administrator for decedent's Estate, by the filing of a summons and complaint with the Clerk's office of Kings County. In said complaint, the plaintiff seeks to recover damages based upon alleged medical malpractice, common law negligence, violations of New York Public Health Law § 2801-d and § 2803-c, as well as wrongful death which arose out of the alleged failure of the defendant to provide sufficient nursing home care to the decedent.

Prior to filing an answer, counsel for the defendant moved by Motion dated January 12, 2021, to dismiss the plaintiff's action based upon the lack of capacity of the proposed Administrator to commence this action. However, when Letters of Administration were issued to Lynnora Gibbs who was appointed as the Administrator of the Estate of Thomas Lett by the Kings County Surrogate's Court, counsel for the defendant withdrew their motion. A stipulation was executed by the attorneys for the respective parties, dated August 19, 2021, which provided for an amendment of the caption to reflect the change of Lynnora Gibbs' status from Proposed Administrator to Administrator, and defendant was afforded an extension of time within which to answer the complaint.

Thereafter, issue was joined on behalf of the defendants, by the service of their verified answer dated September 10, 2021 which answer contained twenty affirmative defenses, including improper venue, the basis of which was the venue selection clause in the Admissions Agreement.

Facts:

The decedent was a resident of River Manor, located in Brooklyn, New York from October 4, 2017 through July 28, 2018, which residency was briefly interrupted when the decedent was transferred to Brookdale Hospital on or about October 13, 2017, where he was diagnosed with an altered mental state. At the time of decedent's admission to River Manor, he was seventy-eight years old and had a medical history of dementia, difficulty walking with an unsteady gait and seizure disorder (see Progress Notes of defendant annexed as NYSCEF Doc. No. 45).

The Admission Agreement, which is the subject of this Motion, was allegedly executed on October 16, 2017 by the decedent and Doreen Simpson on behalf of the defendant.<sup>1</sup> The Agreement included a clause which provided that the jurisdiction of any action arising out of or related to the Agreement shall be brought in state court in New York in the county of Nassau (Paragraph 12F):

Parties' Contentions:

Here, the Court is presented with the issue as to whether the venue should be transferred from Kings County to Nassau County.

In support of the motion by River Manor, counsel argues that proper venue is in Nassau County, pursuant to CPLR §501, based upon the forum selection clause in the Admission Agreement signed by the decedent.

Plaintiff, by her attorneys, opposes River Manor's motion, arguing the movant failed to establish that Nassau County is the proper venue because the Admission Agreement has not been authenticated. Plaintiff also claims the decedent lacked the requisite mental capacity to enter into the Admission Agreement at the time it was executed.

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<sup>1</sup> The agreement was allegedly executed twelve days after decedent's initial admission and following decedent's return from Brookdale Hospital.

Discussion:

The validity of venue selection clauses is generally upheld absent evidence that their incorporation into an agreement resulted from fraud or overreaching, was unreasonable or unfair, would contravene some strong public policy of the forum, or deprive litigants of their day in court. Premium Risk Group, Inc. v Legion Ins. Co., 294 AD2d 345, 346, 741 NYS2d 563 [2d Dept 2002]. The venue selection clauses contained in nursing home admission agreements have been upheld as enforceable under this standard. See Puleo v Shore View Ctr. For Rehab & Health Care, 132 AD3d 651, 17 NYS3d 501 [2d Dept 2015].

However, River Manor has failed to authenticate the Admission Agreement the decedent purportedly signed. Generally, unless the issue is conceded, a contract is not enforceable against an individual “unless sufficient evidence has been introduced to sustain a finding that the [individual] was in fact the signer.” Andreyeva v Haym Solomon Home for the Aged, LLC, 190 AD3d 810 [2d Dept 2021], citing Richardson on Evidence §9-101; 2 McCormick on Evidence §221 [8<sup>th</sup> ed]. “The requirement of evidence of authenticity may be satisfied...[b]y the testimony of a witness who was present at the time and saw the person make or sign the instrument.” Andreyeva v Haym Solomon Home for the Aged, LLC, 190 AD3d 810 [2d Dept 2021], citing Richardson on Evidence §9-103; 2 McCormick on Evidence §222 [8<sup>th</sup> ed]. Here, the defendant has not submitted an affidavit from an employee of defendant’s facility with personal knowledge of the facts and circumstances<sup>2</sup> of the purported signing of the Admission Agreement, or an employee of defendant’s facility that is familiar with the custom and practice of executing such an agreement at the facility. As the defendant failed to authenticate the Admission Agreement containing the forum selection clause, it is unenforceable and insufficient to sustain the defendant’s burden of demonstrating the existence of “[a] written agreement fixing [the] place of trial.” CPLR §501; Andreyeva v Haym Solomon Home for the Aged, LLC, 190 AD3d 810 [2d Dept 2021]; see Amica Mut. Ins. Co. v

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<sup>2</sup> The Court notes that, at the time the Admission Agreement was purportedly signed by the decedent, he had recently been discharged from the hospital with altered mental status and had a dementia diagnosis.

Kingston Oil Supply Corp., 134 AD3d 750 [2d Dept 2015]; Wunsch v AMF Bowling Ctr., Inc., 236 AD2d 467 [2d Dept 1997]; Lane Crawford Jewelry Ctr., Inc. v Han, 222 AD2d 214 [2d Dept 1995].

This Court has further considered the circumstances surrounding the alleged execution of the Admission Agreement on October 16, 2017, which was signed twelve days after the decedent's initial admission to River Manor. This signing allegedly occurred following a brief stay at Brookdale Hospital, where the decedent was diagnosed with an altered mental state. There is further evidence adduced from the medical records from River Manor that the decedent had dementia, which calls into question whether the decedent had the capacity to comprehend the language contained in the Admission Agreement. The progress notes from River Manor of October 16, 2017, indicate that the decedent had a neurology consult in which it was noted that the patient had a history of dementia, he was "not aware of the present month or year or date," and he had a "senile gait disorder likely related to his frontal dementia."

Given the recognized duty of the courts to protect "a litigant actually incompetent but not yet judicially declared as such," it would be against public policy to enforce the Admission Agreement. In re Willie L.C., 65 AD3d 683 [2d Dept 2009]; *see* Shad v Shad, 167 AD2d 532 [2d Dept 1990]. The primary concern is for the best interests of the incapacitated person. In re Rudick, 278 AD2d 328 [2d Dept 2000].

Based on the foregoing, this Court will afford no force and effect to the Admission Agreement and the terms contained therein. As such, the forum selection clause, which is the basis of defendant's seeking to change venue from Kings County to Nassau County will not be enforced.

Conclusion:

Accordingly, defendants' motion which seeks an Order of this Court to transfer the venue of this action from Supreme Court Kings County to Supreme Court Nassau County is denied.

This shall constitute the decision and order of this Court.

Dated: April 12, 2022  
Brooklyn, New York

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM