

Davis v Alarcon

2022 NY Slip Op 31387(U)

April 25, 2022

Supreme Court, New York County

Docket Number: Index No. 805042/2017

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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

MICHAEL DAVIS and ALYSSA DAVIS,

Plaintiffs,

INDEX NO. 805042/2017

MOTION DATE 04/18/2022

MOTION SEQ. NO. 010

- v -

GABRIEL ALARCON, D.O., COLUMBIA MEMORIAL
FAMILY CARE-VALATIE, THE COLUMBIA MEMORIAL
HOSPITAL, LISA GALATI, M.D., STEVEN PARNES, M.D.,
UNIVERSITY EAR NOSE & THROAT OF
NORTHEASTERN NEW YORK, LLP, MICHAEL KORTBUS,
M.D., HUDSON ENT, P.C., TODD DOYLE, M.D., NEW
YORK ONCOLOGY HEMATOLOGY, P.C., ALBANY
MEDICAL CENTER HOSPITAL, and MEMORIAL
HOSPITAL FOR THE TREATMENT OF CANCER AND
ALLIED DISEASES,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 010) 399, 400, 401, 402, 403, 404, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 420, 421

were read on this motion to/for CHANGE VENUE.

In this action to recover damages for medical malpractice, the defendants Albany Medical Center Hospital and Lisa Galati, M.D. (together the AMCH defendants), move pursuant to CPLR 510(1) and 511(b) to transfer venue of the action from New York County to Albany County on the ground that New York County is no longer a proper county for the place of trial. The defendants Todd Doyle, M.D., and New York Oncology Hematology, P.C. (together the NYOH defendants), separately move, in papers incorrectly denominated as a cross motion, for the same relief. The plaintiffs oppose the motions and purportedly cross-move to retain venue in New York County. The motions are granted, the cross motion is denied, and the action is transferred to the Supreme Court, Albany County.

In the first instance, the NYOH defendants' motion was not a proper cross-motion because that application did not seek relief against a moving party; instead, their 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). Although the NYOH defendants uploaded their notice of cross-motion to the NYSCEF electronic filing system on April 11, 2022, and made their application returnable on April 18, 2022---only seven days prior to the return date---they sought the exact same relief as the AMCH defendants on the same ground as the AMCH defendants. Hence, there is no prejudice to the plaintiffs if the court considers the NYOH defendants' motion as if it were timely and properly noticed.

The plaintiffs are residents of Greene County. Their initial basis for placing venue in New York County was the "Defendant's Residence," as the defendant Memorial Hospital for Cancer and Allied Diseases, also known as Memorial Sloan Kettering Cancer Center (MSKCC), is located in Manhattan. Three of the defendants reside in Columbia County, two reside in Dutchess County, and six reside in Albany County. By order dated February 24, 2022, this court, among other things, awarded summary judgment dismissing the complaint against the defendant Steven Parnes, M.D. (SEQ 005). By order dated February 25, 2022, this court awarded summary judgment dismissing the complaint against the defendants Gabriel Alarcon, D.O., Columbia Memorial Family Care-Valatie, and The Columbia Memorial Hospital (SEQ 006). By order dated March 1, 2022, this court awarded summary judgment dismissing the complaint against MSKCC (SEQ 007). By order dated March 8, 2022, this court awarded

summary judgment dismissing the complaint against the defendants Michael Kortbus, M.D., and Hudson ENT, P.C. (SEQ 009). Consequently, the only defendants remaining in the action are the AMCH defendants, the NYOH defendants, and University Ear Nose & Throat of Northeastern New York, LLP, all of whom reside in Albany County.

Contrary to the plaintiffs' contention, when venue is premised on solely upon one party's residence, and that party is dismissed from the action, venue no longer properly lies in the county of that party's residence (*see Halina Yin Fong Chow v Long Is. R.R. Co.*, 202 AD2d 154, 155 [1st Dept 1994]). This is the result regardless of whether the party was dismissed from the action because it was an improper party (*see Scuzorzo v Safdar*, 134 AD3d 511, 511 [1st Dept 2015]; *Halina Yin Fong Chow v Long Is. R.R. Co.*, 202 AD2d at 155), because it prevailed on a motion pursuant to CPLR 3211(a)(7) (*see Gramazio v Borda, Wallace & Witty*, 181 AD2d 428, 429 [1st Dept 1992]), or because it was awarded summary judgment dismissing the complaint against it (*see Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 556 [1st Dept 2011]; *Caplin v Ranhofer*, 167 AD2d 155, 157-158 [1st Dept 1990]; *Mitts v H.I.P. of Greater New York*, 104 AD2d 318, 319 [1st Dept 1984]). Moreover, the AMCH defendants made their motion to transfer venue on March 28, 2022 (*see* CPLR 2211), less than four weeks after MSKCC was dismissed from the action. Since the motion was "promptly" made, it was not "untimely" (*Caplin v Ranhofer*, 167 AD2d at 157 [venue transfer motion was timely where it was made five months after the only defendant who resided in New York County was awarded summary judgment]).

The plaintiff's purported cross motion to retain venue in New York County must be denied, as it merely constitutes opposition to the motions to change venue. As such, it does not seek any affirmative relief and, hence, is not the proper subject of a cross motion (*see Koegler v Amraly*, 2020 NY Slip Op 50858[U], 68 Misc 3d 1204[A] [Sup Ct, N.Y. County, Jul. 22, 2020]).

In light of the foregoing, it is

ORDERED that, on the court's own motion, the caption is amended to read as follows:

-----X

MICHAEL DAVIS and ALYSSA DAVIS,

Plaintiffs,

v.

LISA GALATI, M.D., UNIVERSITY EAR NOSE & THROAT
OF NORTHEASTERN NEW YORK, LLP, TODD DOYLE,
M.D., NEW YORK ONCOLOGY HEMATOLOGY, P.C., and
ALBANY MEDICAL CENTER HOSPITAL,

Defendants.

-----X

and it is further,

ORDERED that the motion of the defendants Albany Medical Center Hospital and Lisa Galati, M.D., and the separate motion of the defendants Todd Doyle, M.D., and New York Oncology Hematology, P.C., to transfer venue of this action from New York County to Albany County are granted; and it is further,

ORDERED that the plaintiffs' cross motion is denied; and it is further,

ORDERED that within 30 days after the entry of this order, the defendants Albany Medical Center Hospital and Lisa Galati, M.D.,

(a) shall file an EF-22 form and the statement required by CPLR 8019(c) by uploading them to the NYSCEF system, and

(b) shall serve copies of the EF-22 form and the statement required by CPLR 8019(c) upon the New York County Clerk, as Clerk of the Supreme Court, New York County, along with a copy of this order with notice of entry of this order, and

(c) shall also serve a copy of this order with notice of entry of this order upon the Albany County Clerk, as Clerk of the Supreme Court, Albany County, and

(d) shall also serve of copy of this order with notice of entry upon the Trial Support Office, 60 Centre Street, Room 148, New York, New York 10007, after which the Clerk of the Court shall amend the court records accordingly;

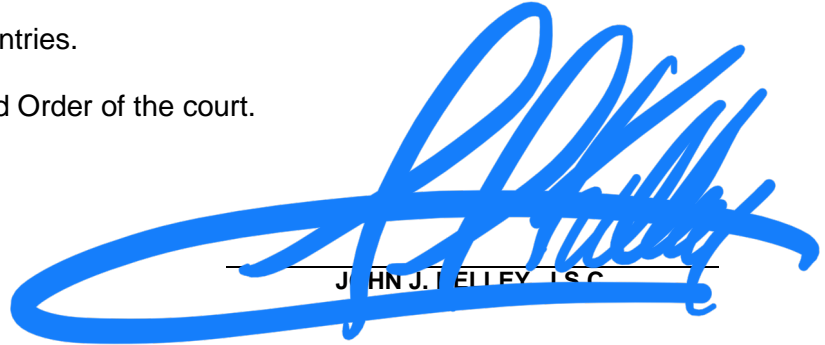
and it is further,

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 action entitled *Michael Davis, et ano. v. Gabriel Alarcon, D.O., et al.*, under New York County Index No. 805042/2017, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

4/25/2022
DATE


JOHN J. ELLEY, J.S.C.

MOTION 1:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<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"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<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
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED			<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<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