

<b>Knight v New York &amp; Presbyt. Hosp.</b>
2022 NY Slip Op 32611(U)
July 29, 2022
Supreme Court, New York County
Docket Number: Index No. 805224/2021
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*

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

Plaintiff,

**INDEX NO.** 805224/2021

**MOTION DATE** 05/25/2022

**MOTION SEQ. NO.** 002

- 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**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves pursuant to CPLR 2221(d) for leave to reargue his opposition to the motion of the defendant Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center (Dewitt), to transfer venue of this action to Nassau County. By order dated March 30, 2022, this court had granted Dewitt's motion and directed the transfer of the action to the Supreme Court, Nassau County, on the ground that the plaintiff's decedent had executed an admission agreement containing a venue selection clause, requiring all disputes against Dewitt arising from her admission there to be litigated in Nassau County. Dewitt opposes the reargument motion. Reargument is granted, but, upon reargument, the court adheres to its determination in the March 30, 2022 order.

In the first instance, although the court granted Dewitt's motion to transfer venue, Dewitt has yet to comply with the court's directive that it serve, upon the New York County Clerk, a copy of this order with notice of entry, and file an EF-22 form that includes the required notice

pursuant to CPLR 8019(c). In the absence of that notice, the County Clerk is not obligated to transfer the case file and docket entries to the Nassau County Clerk and, hence, the County Clerk has yet to do so. As a consequence, the action remains assigned to this court, rather than assigned to a justice in the Supreme Court, Nassau County. Accordingly, this court remains “available” to entertain the motion, and retains authority to decide it, either as the court that issued the initial order (see CPLR 2221[a]) or as the court presently assigned to the action (see CPLR 2221[b]; 22 NYCRR 202.8[a]; *Matter of New York State Urban Dev. Corp. [Fallsite, LLC]*, 85 AD3d 1723, 1724 [4th Dept 2011]; see also *Matter of Quattrone v Erie 2-Chautauqua-Cattaraugus Bd. of Coop. Educ. Servs.*, 148 AD3d 1553, 1554 [4th Dept 2017]; *Billings v Berkshire Mut. Ins., Co.*, 133 AD2d 919, 919-920 [3d Dept 1987]).

The branch of the motion seeking leave to reargue is granted, inasmuch as the court did not address certain arguments presented to it in connection with the prior application (see CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Upon reargument, however, the court adheres to its determination in its March 30, 2022 order.

Contrary to the plaintiff’s contention, upon consideration of the decision and order of the Appellate Division, Second Department, in *Andreyeva v Haym Solomon Home for the Aged, LLC*, (190 AD3d 801 [2d Dept 2021]), this court concludes that a change in outcome is not warranted. In that matter, the Second Department affirmed an order denying a nursing home’s motion to transfer venue, based on a venue selection clause in an admissions agreement, upon concluding that the nursing home had the burden of establishing that the patient’s signature was authentic, and that the nursing home failed to satisfy that burden (*cf. Sherrod v Mount Sinai St Luke’s*, 204 AD3d 1053 [2d Dept 2022] [issue of authenticity of patient’s signature was unpreserved for appellate review; forum selection clause contained in a contract is prima facie valid and enforceable, but only with respect to the parties to that contract, and it was “undisputed” that the plaintiff’s decedent did not execute the admission agreement]).

If those were the only Appellate Division rulings germane to the dispute here, and neither the First Department nor the Court of Appeals had weighed in on the issue, this court agrees with the plaintiff that it would be bound to apply the precedent established in those Second Department decisions (see *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). That is not the case here. While the court recognizes that “the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it” (*Paz v Singer Co.*, 151 AD2d 234, 235 [1st Dept 1989]), the plaintiff here argues that his decedent’s signatures were forged, and both the Court of Appeals and the First Department have ruled that the burden is on the person alleging a forgery to establish that a contract was indeed forged (see *Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]; *Ulm I Holding Corp. v Antell*, 155 AD3d 585, 586 [1st 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]; see also *People ex rel. Baker v Warden, Rikers Island Corr. Facility*, 17 AD3d 266, 267 [1st Dept 2005] [it was the petitioner’s burden to establish that he did not execute an agreement waiving his right to a preliminary parole revocation hearing, and not the respondent’s burden to establish that he did execute it]).

The First Department has long recognized that forgery is an affirmative defense (see *Proner v Julien & Schlesinger, P.C.*, 214 AD2d 460, 460-461 [1st Dept 1995]) and that the party asserting an affirmative defense bears the burden of proof with respect thereto (see *Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290, 290 [1st Dept 1991]). The Second Department itself historically has characterized forgery as an affirmative defense (see *JPMorgan Chase Bank, N.A. v Garcete*, 203 AD3d 1149, 1151 [2d Dept 2022]; cf. *Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1124 [4th Dept 2006]). The Second Department’s holdings in *Andreyeva* and *Sherrod*, however, effectively invert this longstanding rule of law, and require the proponent of a contract to demonstrate the absence of forgery as a necessary element in any proceeding to enforce the terms of the contract. Since this approach is at odds with that adopted by the First Department, this court is not bound to apply it. Rather, this court is bound

to apply the precedent articulated by the Court of Appeals and the First Department concerning which party has the burden of proving or disproving the validity, authenticity, or genuineness of a signature on an agreement.

The court notes that Dewitt relies on the affidavit of an employee who described Dewitt's procedures for executing admissions agreements, and averred that the presence of a fellow employee's signature on the subject agreements is proof that the latter witnessed the patient signing the agreements. In *Andreyeva*, the Second Department discounted the evidentiary value of a similar affidavit from a nursing home employee who did not personally witness the patient signing the agreement. In light of this court's determination that the plaintiff has the burden of establishing that the signature was forged, it is irrelevant that Dewitt's affiant did not personally witness the plaintiff's decedent in the act of signing the admission agreements.

Finally, the court notes that the decedent's signatures on the several agreements were inscribed via an electronic document signature pad, which almost invariably will make a person's signature appear different than the same person's signature on a piece of paper.

Accordingly, it is

ORDERED that the motion is granted to the extent that leave to reargue is granted, the motion is otherwise denied, and, upon reargument, the court adheres to the determination in its order dated March 30, 2022 granting 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.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

7/29/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE