

O'Malley v Mt. Sinai W.

2023 NY Slip Op 32517(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 805419/2021

Judge: Kathy J. King

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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. KATHY J. KING **PART** **06**

Justice

-----X

EDWARD O'MALLEY,

Plaintiff,

- v -

MT. SINAI WEST, UPPER EAST SIDE REHABILITATION
AND NURSING CENTER,

Defendants.

-----X

INDEX NO. 805419/2021

MOTION DATE 04/11/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29

were read on this motion to/for CHANGE VENUE.

Upon the foregoing papers, defendant Dewitt Rehabilitation and Nursing Center, Inc. d/b/a Upper East Side Rehabilitation and Nursing Center (“Dewitt”) moves, pursuant to CPLR §§ 501, 510 and 511, for an order changing venue in this action from Supreme Court, New York County to Supreme Court, Nassau County. Co-defendant, St. Luke's-Roosevelt Hospital Center s/h/a Mount Sinai West, does not oppose to the motion.

Plaintiff submits opposition to the motion.

This action arises from the care and treatment rendered to plaintiff while he was a patient at Dewitt, following a brain hemorrhage and stroke which resulted in right-sided hemiparesis. Plaintiff alleges he sustained a severe bed sore while under the care of Dewitt from March 18, 2021 through July 22, 2021.

Dewitt argues that plaintiff commenced the action improperly in New York County, since the provisions of an Admission Agreement (“Agreement”) executed by plaintiff, designated Nassau County as the proper venue. In support of the motion, Dewitt submits a copy of the

executed Agreement. The relevant provision of the Agreement regarding venue is contained in section XII, entitled “GENERAL PROVISIONS” which states:

(b) Governing Law and Dispute Resolution: This Agreement shall be governed by and construed in accordance with the laws of the State of New York, excluding, however, any provision which would impede the application of the Federal Arbitration Act. In the event the arbitration Agreement is held to be void, unenforceable or the parties mutually agree to waive it, the parties agree that litigation arising hereunder shall be submitted to the exclusive jurisdiction of the state courts in the County of Nassau, State of New York or the United States District Court for the Eastern District of New York, and that each party agrees to personal jurisdiction in such courts and waives any objection which he/she/it may have now or hereafter to the laying of the venue of such action or proceeding and irrevocably submits to the jurisdiction of any such court in any such suit, action or proceeding.

CPLR § 501 provides that “[s]ubject to the provisions of subdivision two of section five hundred ten and section five hundred fourteen of this article, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.” A venue selection clause in an admission agreement only requires that an action arise from or relate to the agreement (*Medina ex rel. Valentin v Gold Crest Care Ctr., Inc.*, 117 AD3d 633, 634 [1st Dept 2014]). Moreover, such a clause is enforceable unless the plaintiff demonstrates “that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching” (*Bhonlay v Raquette Lake Camps, Inc.*, 120 AD3d 1015, 1016 [1st Dept 2014]; see *Molino v Sagamore*, 105 AD3d 922, 923 [2d Dept 2013]). A party challenging the clause is required to show that “the selected forum would be so gravely difficult that [plaintiff] would, for all practical purposes, be deprived of [his] day in court” (*Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836 [2d Dept 2009]), quoting *LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2d Dept 2006] [internal quotation marks omitted]).

Firstly, contrary to plaintiff's argument, defendant is not bound by the time limit requirements of CPLR § 511, and was not required to serve a demand for a change of venue before making the motion, since the relief sought is based on the terms of the written Agreement.¹

Further, the Court finds that plaintiff, in opposition, has failed to show that enforcement of the venue selection clause would be unreasonable, unjust, or in contravention of public policy. Plaintiff also demonstrated that inclusion of the clause in the admission agreement was not the result of fraud or overreaching. A review of the affidavit of Admissions Advocate Gabriella Faggiolo in support of the motion, establishes that although she has no independent recollection of the plaintiff, her signature is on the Agreement, and she was present when plaintiff signed it. Ms. Faggiolo avers that it is the custom and practice of Admissions Advocates at the facility to speak with the patient to determine whether they are oriented and whether the resident typically signs documentation or whether a family member typically signs on his/her behalf. If the resident is responsive and conversing appropriately, the Admissions Advocate goes on to review every page of the Agreement with the patient, and personally witness the patient execute all signature pages, which is done via DocuSign. Based on her review of the Agreement, Ms. Faggiolo avers that she would have reviewed every page of the Agreement with plaintiff, and would have answered any questions he may have had, in accordance with Dewitt's custom and practice in March of 2021.

The Court does not consider the affirmation of plaintiff's nephew-in-law, Sebastian Bliffeld, submitted in opposition, since he is not a party designated under CPLR § 2106 to submit an affirmation. Mr. Bliffeld is a New York licensed Marriage and Family Therapist.

¹ The Court notes that, contrary to plaintiff's assertions, defendant's submissions demonstrate compliance with CPLR § 511, even though such compliance is not required in these circumstances.

Under CPLR § 2106 only an attorney, physician, osteopath or dentist, authorized by law to practice in the state may submit a statement subscribed and affirmed under penalty of perjury in lieu of, and with the same force and effect as an affidavit.

Accordingly, it is hereby,

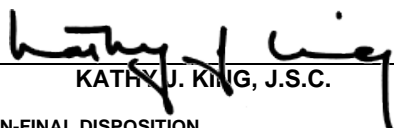
ORDERED, that the motion of defendant, Upper East Side Rehabilitation and Nursing Center, is granted; and it is further

ORDERED, that the County Clerk of New York County is directed to transfer the file to the County Clerk of Nassau County upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED, that defendant serve a copy of this order with notice of entry upon the plaintiff and the Clerk of this Court.

This constitutes the Decision and Order of the Court.

7/14/2023
DATE


KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE