

**Slater v Harlem Ctr. for Nursing & Rehabilitation,
LLC**

2023 NY Slip Op 33451(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 805083/2022

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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MICHELLE SLATER, as Administratrix of the Estate of
HARRY SLATER, deceased, and MICHELLE SLATER,
Individually,

Plaintiff,

INDEX NO. 805083/2022
MOTION DATE 06/01/2023
MOTION SEQ. NO. 001

- v -

HARLEM CENTER FOR NURSING AND
REHABILITATION, LLC. and 'JANE DOE' 1 THROUGH 100
and 'JOHN DOE' 1 THROUGH 100, FICTITIOUS NAMES
OF EMPLOYEES, AGENTS, REPRESENTATIVES AND/OR
SERVANTS OF HARLEM CENTER FOR NURSING AND
REHABILITATION, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24,
25, 26, 27, 28, 31

were read on this motion to/for CHANGE VENUE.

In this action to recover damages, inter alia, for nursing home negligence, medical malpractice, breach of contract, and wrongful death, the defendant Harlem Center for Nursing and Rehabilitation, LLC (Harlem 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's decedent entered into an agreement with it that contained a venue selection clause designating Nassau County as the place of trial. The plaintiff opposes the motion. The motion is denied.

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, as a general matter, 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]). Initially, however, the party seeking to enforce a forum selection clause must establish that the agreement containing the clause had actually been entered into (see *Knight v New York & Presbyterian Hosp.*, ____AD3d____, 2023 NY Slip Op 04258 [1st Dept, Aug. 10, 2023])

The plaintiff argues that the motion should be denied on the ground that her decedent was disabled and incompetent at the time that he allegedly executed the admission agreement, and that he thus did not have capacity to enter into a contract. She contends that, as a consequence, there was no agreement between her decedent and Harlem Center that may be enforced. Whether this allegation is true or not, the plaintiff has asserted a cause of action to recover for breach of contract, thus relying in her complaint on the very same agreement that she says never was formed. Consequently, the court rejects that argument. Nonetheless, under constraint of the recent decision of the Appellate Division, First Department, in *Knight v New York & Presbyterian Hosp.* (____AD3d____, 2023 NY Slip Op 04258 [1st Dept, Aug. 10, 2023]), this court must deny Harlem Center’s motion because it failed to establish the existence, authenticity, and genuineness of the alleged admission agreement, specifically with respect to the electronic signature imprints found on the subject agreement that were purported to have been made by the plaintiff’s decedent.

In *Knight*, the plaintiff had commenced a nursing home negligence action similar to the instant matter in New York County against a nursing home, among others, alleging that the nursing home was incorporated and had its principal place of business in New York County. That nursing home had generated two separate admission agreements in connection with the plaintiff's decedent, both of which contained forum selection clauses requiring all actions arising from disputes under the agreements to be commenced in Nassau County. The nursing home moved to transfer venue to Nassau County, based upon the forum selection clauses. The plaintiff opposed the motion on the ground that his decedent's signatures, which appeared on the agreements as handwritten initials, had been forged. Although the plaintiff did not submit an affidavit from a handwriting expert, he submitted what he claimed was an exemplar of his decedent's signature, made in fountain pen on an unidentified, undated, and yellowing paper. In an order entered March 31, 2022, this court, held that the plaintiff did not satisfy his burden of establishing that the initials on the admission agreement were indeed forged, granted the nursing home's motion, and transferred venue to Nassau County (*see Knight v New York & Presbyterian Hosp.*, 2022 NY Slip Op 31048[U], 2022 NY Misc LEXIS 1601 [Sup Ct, N.Y. County, Mar. 31, 2022] [Kelley, J.]). The plaintiff appealed and moved for leave to reargue.

In opposition to the reargument motion, the nursing home submitted the affidavit of an employee, who described the nursing home's customs and procedures for generating and executing admission agreements, but it did not submit the affidavit of a person who actually witnessed the decedent in the act of executing the agreements. This court granted the plaintiff leave to reargue, but adhered to its determination, concluding that a recent Second Department decision (*Andreyeva v Haym Solomon Home for the Aged, LLC*, 190 AD3d 801 [2d Dept 2021]), which placed the burden of establishing the absence of forgery on the proponent of an executory contract, had deviated from longstanding First Department and Court of Appeals' precedent holding that forgery is a defense, and that the party arguing that a signature was forged had the burden of establishing the forgery (*see Knight v New York & Presbyterian Hosp.*,

2022 NY Slip Op 32611[U], 2022 NY Misc LEXIS 3583 [Sup Ct, N.Y. County, Jul. 29, 2022] [Kelley, J.].

The First Department thereafter reversed this court's March 31, 2022 order, and denied the motion to transfer venue. The First Department noted that, while a contractual forum selection clause is prima facie valid and enforceable, absent a showing that it is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the designated forum would be so difficult as to deprive the challenging party of its day in court,

“[n]onetheless, 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]; accord e.g. *Amica Mut. Ins. Co. v Kingston Oil Supply Corp.*, 134 AD3d 750, 752 [2d Dept 2015]). This requires, in the first instance, authentication of the purported writing (see *Clarke v American Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019]; *Bermudez v Ruiz*, 185 AD2d 212, 214, [1st Dept 1992]; see generally Prince, Richardson on Evidence § 9-101). Authentication may be effected by various means, including, for example, by certificate of acknowledgment (see CPLR 4538), by comparison of handwriting (see CPLR 4536), or by the testimony of a person who witnessed the signing of the document (see *Andreyeva v Haym Solomon Home for the Aged, LLC*, 190 AD3d 801, 802 [2d Dept 2021])

(*Knight v New York & Presbyterian Hosp.*, 2023 NY Slip Op 04258, *2 [emphasis added]). Over a two-justice dissent, in which the dissenters asserted that the majority had overruled longstanding precedent that had placed the burden of proof on the party alleging a forgery, the majority concluded not only that the party seeking to enforce the contract has the burden of establishing the existence, genuineness, and authenticity of an executed contract, including the genuineness and authenticity of a party's signature, but that satisfying this burden was necessary to make a prima facie showing of enforceability. In other words, to establish, prima facie, that a contract exists and is enforceable, the proponent of the contract must now demonstrate the absence of forgery.

The First Department noted that, in support of its motion, the nursing home had submitted the affidavit of its admissions director, along with copies of the admissions agreements, but that the admissions director conceded that she was not present during the

signing of the admissions agreements, and “attested only to her understanding of how admissions agreements were usually signed; she had no actual knowledge of how the agreements bearing decedent’s name came to be signed” (*id.*). Moreover, the Court noted that the admissions director “did not describe any protocols governing the use of the DocuSign” electronic signature pad that had clearly been used by someone to sign the decedent’s initials (*id.* at, *2-3). Accordingly, the First Department concluded that the admission director’s affidavit “cannot serve to authenticate the agreements,” and explained that the nursing home “did not seek to authenticate decedent’s signature by any other means, such as a certificate of acknowledgment or a handwriting exemplar. Since [the nursing home] failed to authenticate the agreements, it correspondingly failed to show that the forum selection clauses set forth in those documents are enforceable against plaintiff” (*id.* at *3).

“Since [the nursing home] has not at this juncture established that any valid contract was made with decedent, the forum selection clause contained in the admission agreements does not come into play (*see Andreyeva*, 190 AD3d at 802; *see also DeSola Group*, 199 AD2d at 141-142). [The nursing home’s] motion to change venue should be denied”

(*id.*).

Similarly, in the instant matter, the patient’s purported signature that appears on the subject admission agreement consists simply of computer-generated typeface, stating that the agreement was “E-SIGNED by Harry Slater on 2020-02-04 16:31:16 GMT.” It was electronically countersigned on behalf of Harlem Center by Rafael Saldivia approximately 70 minutes *prior* to the decedent’s purported electronic execution of the agreement. Harlem Center did not submit the affidavit of Saldivia, or any other person who may have witnessed the decedent electronically signing the admission agreement or who may have had personal knowledge of whether the decedent did, in fact, electronically sign the agreement, but only an affidavit from its administrator, describing its “custom and practice” in presenting admission agreements to new residents, having them review such agreements, and having them sign them. This is the same type of affidavit that the First Department found completely insufficient in *Knight*. Since Harlem


Center has not at this juncture established that any valid contract was made with the decedent, the forum selection clause contained in the admission agreement does not come into play.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

10/4/2023
DATE



JOHN J. KELLEY, J.S.C.

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