

Panford v Lenox Hill Hosp.

2024 NY Slip Op 32908(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 805337/2023

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: <u>HON. JOHN J. KELLEY</u> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>ABA PANFORD, as Administratrix of the Estate of MARY HUBBARD, and ABA PANFORD, Individually,</p> <p style="text-align: center;">Plaintiff,</p>	PART 56M INDEX NO. <u>805337/2023</u> MOTION DATE <u>04/08/2024</u> MOTION SEQ. NO. <u>001</u>
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- v -

LENOX HILL HOSPITAL, DEWITT REHABILITATION AND NURSING, INC., doing business as UPPER EAST SIDE REHABILITATION AND NURSING CENTER, and AMSTERDAM NURSING HOME CORPORATION (1992), doing business as AMSTERDAM NURSING HOME,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for CHANGE VENUE.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, common-law negligence, and nursing home negligence pursuant to the Public Health Law, the defendant Dewitt Rehabilitation and Nursing, Inc., doing business as Upper East Side Rehabilitation and Nursing Center (Dewitt), 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 and her 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.*, 219 AD3d 75 [1st Dept 2023], *lv to appeal granted*, 2023 NY Slip Op 76653[U] [App Div, 1st Dept, Nov. 14, 2023]).

The plaintiff argues that the motion should be denied on the ground that neither she nor her decedent executed the admission agreement. She contends that, as a consequence, there was no agreement in effect that may be enforced. Under constraint of the decision of the Appellate Division, First Department, in *Knight v New York & Presbyterian Hosp.* (219 AD3d 75 [1st Dept 2023]), this court must deny Dewitt’s motion because it failed to establish the existence, authenticity, and genuineness of the alleged admission agreement, specifically with respect to the electronic initial imprints found on the subject agreement that were purported to have been made by the plaintiff and the decedent.

In *Knight*, the plaintiff had commenced a nursing home negligence action similar to the instant matter in New York County against Dewitt, among others, alleging that Dewitt was incorporated and had its principal place of business in New York County. Dewitt 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. Dewitt 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 Dewitt'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, Dewitt submitted the affidavit of an employee, who described its 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.*, 219 AD3d at 78 [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 existed and was enforceable, the proponent of the contract must now demonstrate the absence of forgery.

The First Department noted that, in support of its motion, Dewitt 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.* at 79). 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.*). 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.*).

"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.* at 82).

Similarly, in the instant matter, the purported initials of the plaintiff and her decedent that appeared on the subject admission agreement consisted simply of computer-replicated handwriting, with a notation that the agreement was "docu-signed." It was electronically countersigned on behalf of Dewitt by Gabriella Faggiola. Dewitt did not submit the affidavit of Faggiola, and it did not submit the affidavit any other person who may have witnessed the plaintiff or the decedent electronically signing the admission agreement, or who may have had personal knowledge of whether the decedent or the plaintiff did, in fact, electronically sign the agreement, but only an affidavit from its attorney, which has no evidentiary value (*see Tribbs v 326-338 E. 100th, LLC*, 215 AD3d 480, 480 [1st Dept 2023]; *Aames Capital Corp. v Ford*, 294 AD2d 134, 134 [1st Dept 2002]). Since Dewitt has not at this juncture established that any valid contract was made either with the plaintiff or with her decedent, the forum selection clause contained in the admission agreement does not come into play.

The court notes that, on November 14, 2023, the First Department granted Dewitt leave to appeal its decision and order to the Court of Appeals. The matter has been fully briefed before the Court of Appeals, and that Court has scheduled oral argument thereon for October 15, 2024, at 2:00 p.m. Hence, the denial here is without prejudice to renewal if the Court of

Appeals' determination on that appeal constitutes a change of law that would alter the outcome here.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

8/16/2024
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: