

**Cromwell v Boro Park Operating Co., LLC**

2025 NY Slip Op 30202(U)

January 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 511464/2024

Judge: Ellen M. Spodek

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.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17<sup>th</sup> day of January 2025

**P R E S E N T:**

HON. ELLEN M. SPODEK, Justice

-----X  
VERONICA CROMWELL, as Administrator of the Estate of JESSE HERRING, Deceased,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No. 511464/2024

BORO PARK OPERATING CO., LLC, HEALTHCARE, BORO PARK CENTER FOR REHAB and HEALTHCARE, PROSPECT PARK OPERATING, LLC d/b/a BROOKLYN CENTER FOR REHABILITATION AND RESIDENTIAL HEALTH CARE, PROVIDENCE CARE INC. d/b/a BROOKLYN GARDENS NURSING AND REHABILITATION CENTER, BROOKLYN GARDENS NURSING AND REHABILITATION CENTER, ONE BROOKLYN HEALTH SYSTEM, INC. d/b/a INTERFAITH MEDICAL CENTER, INTERFAITH MEDICAL CENTER,

Defendants

-----X

**Papers**

**Numbered**

Notice of Motion/Cross Motion and Affidavit.....	<u>1</u>
Answering Affidavits.....	<u>2-3</u>
Replying Affidavits .....	<u>4</u>

Upon the foregoing papers, Defendants BORO PARK OPERATING CO, LLC s/h/a BORO PARK OPERATING CO, LLC d/b/a BORO PARK CENTER FOR REHAB AND HEALTHCARE ("Boro Park") and PROSPECT PARK OPERATING, LLC s/h/a

PROSPECT PARK OPERATING, LLC d/b/a BROOKLYN CENTER FOR REHABILITATION AND RESIDENTIAL HEALTH CARE, BROOKLYN CENTER FOR REHABILITATION AND RESIDENTIAL HEALTH CARE (“Brooklyn Ctr.”) (collectively “BP defendants”) move, pursuant to CPLR §§ 501, 510 and 511 to change the venue of this action from Kings County to Nassau County, and pursuant to CPLR 511(d) directing the Clerk of the Supreme Court, Kings County to deliver to the Clerk of the Supreme Court, Nassau County, all papers filed in this action and certified copies of all minutes and entries. Plaintiff VERONICA CROMWELL, as Administrator of the Estate of JESSE HERRING, Deceased, opposes the motion. Defendants ONE BROOKLYN HEALTH SYSTEM, INC. d/b/a INTERFAITH MEDICAL CENTER, and INTERFAITH MEDICAL CENTER (“One Brooklyn”) also oppose the motion.<sup>1</sup>

Plaintiff commenced this medical malpractice lawsuit via summons and complaint on April 22, 2024. Defendants filed their answers, and on August 13, 2024 the BP defendants moved to change venue from Kings County to Nassau County pursuant to a forum selection clause in an admissions agreement. Plaintiff’s brother, Jessie Herring, was a resident at Boro Park from March 31, 2022 to May 4, 2022, when he was transferred to Brooklyn Ctr., where he resided from May 4, 2022 to October 27, 2022. Upon his admission to Boro Park, he signed an admission agreement which contained a forum selection clause. The clause states that “the Parties agree that venue for all disputes shall be governed by the laws of the State of New York, County of Nassau.” Def. mot., Exh. G and Exh. I, pg. 15 sec. 18. BP defendants argue that the forum selection

---

<sup>1</sup> Defendants Providence Care Inc. d/b/a Brooklyn Gardens Nursing and Rehabilitation Center and Brooklyn Gardens Nursing and Rehabilitation Center initially opposed the motion, however the opposition was withdrawn via letter to the court dated October 21, 2024. NYSCEF doc. 48.

clause governs this medical malpractice action and the case should be transferred to Nassau County.

Plaintiff argues that the motion to change venue was untimely pursuant to CPLR §511 (a) and §511 (b), as the BP defendants were required to serve a written demand to change the place of venue prior to making the motion to change venue, and the failure to do so means that the motion is untimely. Plaintiff also contends that the Dead Man Statute in CPLR §4519 bars any evidence from interested parties concerning transactions which took place with the decedent which would be against the decedent's interest. Plaintiff further argues that the BP defendants only submitted affidavits from interested witnesses, which discussed the signing of the admissions agreement by the decedent. Plaintiff asserts that there needed to be evidence from an uninterested witness to authenticate the admissions agreement, and as a result the decedent's signature on the agreement was not properly authenticated. Plaintiff contends that her brother had a limited ability to read or write and a speech impediment, and the affirmations submitted by the BP defendants do not show that they were qualified to assess the decedent's cognitive abilities to understand what he was signing. Plaintiff states that she was Mr. Herring's healthcare proxy and should have been consulted about the admissions agreement. Plaintiff also argues that the language of the forum selection clause was vague and ambiguous and therefore unenforceable. She asserts that the phrase "the laws of the State of New York" and "County of Nassau" are ambiguous, as Nassau County is a local jurisdiction which is governed by New York State law. She also contends that the term "disputes" is vague because it does not specifically state whether it applies to personal injury/medical malpractice actions.

Defendants One Brooklyn also oppose the motion. One Brooklyn argues that since they were not a party to the admission agreements between the BP defendants and Mr. Herring, they do not consent to the change of venue and it would be against public policy to force them to agree to the forum selection clause. One Brooklyn also argues that there is no nexus between Nassau County and the decedent or any of the defendants, as all of the care at issue occurred in Kings County.

#### DISCUSSION

Pursuant to CPLR §511(a), the BP defendants were not required to serve the plaintiff with a written demand to change venue, as the defendants were seeking the change based on a contractual clause. *See Puleo v. Shore View Center for Rehabilitation and Health Care*, 132 AD2d 651, 652 (2d Dept 2015).

“A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in Court.” *Id.*

According to CPLR §514(2), “In any contract involving the sale, lease or otherwise providing of consumer goods, any portion of the contract or any clause which purports to designate, restrict, or limit the venue in which a claim shall be adjudicated or arbitrated shall be deemed void as against public policy.” The CPLR defines “consumer goods” as “goods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer. CPLR §514(1) The Court finds that the contract at issue in

this case was a contract for consumer services, as an admission agreement to become a resident at a rehabilitation and healthcare center. CPLR §514 clearly applies to the contract in this case. The legislative history of CPLR §514 shows that the concern behind the section was consumers being faced with contracts which contained “unbargained for venue clauses, typically buried in fine print” and which would “effectively deny the consumers the ability to enforce their legal rights.” See *NY Bill Jacket, 2021 A.B. 2505, Ch. 556*. The impetus for the change was specifically aimed at court rulings which have held “mandatory venue clauses to be ‘prima facie valid and enforceable’ unless specifically shown by the challenging party to be in contravention of public policy or unless it is shown that a trial in the selected forum would be ‘so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court’”. *Id.* This case presents the exact situation that the legislature was concerned about, a consumer being presented with a contract with an unbargained for forum selection clause buried in fine print. The Court finds that the forum selection clause in this case is not valid and is unenforceable pursuant to CPLR §514. Without the forum selection clause, there is no other connection to Nassau County in this case, and the case shall remain in Kings County.

Assuming *arguendo* that the Court found the forum selection clause was valid, it would not be enforceable in this case, as it would be against public policy to enforce it against a defendant who was not a party to the admissions agreement which contained the forum selection clause. One Brooklyn was not a party to the admission agreements and it would be against public policy to force them to have to change venue in this case when they do not consent to the change of venue.

In addition, questions have been raised about whether or not Mr. Herring was competent at the time that the admissions agreements were signed. This raises an issue of fact and if the forum selection clause was found to be valid, would have necessitated a hearing to determine his competency to sign the agreements which contained the clause. As there is no valid forum selection clause, there is no need for such a hearing.

The motion to change venue is denied.

This constitutes the decision and order of the Court.

ENTER,



JSC

HON. ELLEN M SPODEK