

Long Island Orthotics & Prosthetics, Inc. v A Step Ahead Prosthetics, LLC

2012 NY Slip Op 30840(U)

March 27, 2012

Sup Ct, Nassau County

Docket Number: 015522-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**LONG ISLAND ORTHOTICS & PROSTHETICS,
INC.,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 015522-11
Motion Seq. No: 1
Submission Date: 2/24/12**

**A STEP AHEAD PROSTHETICS, LLC, a New
York limited liability company, ERIK SCHAFFER,
DANIEL KLEPNER, M.H. MANDELBAUM
ORTHOTIC & PROSTHETIC SERVICES, INC., a
New York business corporation, and MARTIN H.
MANDELBAUM,**

Defendants.

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The following papers having been read on this motion:

- Notice of Motion, Affirmations in Support and Exhibits.....x**
- Kurtz Affirmation in Support.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendants M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. ("MHM") and Martin H. Mandelbaum ("Mandelbaum") on December 22, 2011 and submitted on February 24, 2012. For the reasons set forth below, the Court grants the motion and directs that the venue of the above-captioned action is transferred to the Supreme Court of Suffolk County, New York.

A. Relief Sought

Defendants MHM and Mandelbaum (“Moving Defendants”) move for an Order, pursuant to CPLR § 510(3), changing the venue of this lawsuit to Suffolk County.

Plaintiff Long Island Orthotics & Prosthetics, Inc. (“Plaintiff”) opposes the motion.

B. The Parties’ History

The Verified Complaint (“Complaint”) in the above-captioned action (“Instant Action”) (Ex. A to Lewis Aff. in Opp.) alleges that Defendants gained unauthorized access to Plaintiff’s confidential patient information and used that information to their benefit. The Complaint in the Instant Action (“Instant Complaint”) contains six (6) causes of action: 1) conversion against all Defendants, 2) aiding and abetting conversion against Defendants MHM and Mandelbaum, 3) misappropriation against all Defendants, 4) aiding and abetting misappropriation against Defendants MHM and Mandelbaum, 5) trespass against all Defendants, and 6) aiding and abetting trespass against Defendants MHM and Mandelbaum.

Counsel for the Moving Defendants submits that the transfer of the Instant Action to Suffolk County is appropriate in light of the fact that there are three (3) related actions (“Related Actions”) pending in Suffolk County involving Marc Werner (“Werner”), the President of Plaintiff corporation, and the Moving Defendants. The Related Actions are 1) *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v. Carl Werner*, Suffolk County Index No. 25256/09 (“Restrictive Covenant Lawsuit”), 2) *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v. Carl Werner and Marc Werner*, Suffolk County Index No. 22222/10, and 3) *Carl Werner v. M.H. Mandelbaum Orthotic & Prosthetic Services, Inc., and Martin H. Mandelbaum*, Suffolk County Index No. 22370/10. The second and third Related Actions are referred to as the “Share Transfer Lawsuits.” The Related Actions are pending before the Honorable Elizabeth Emerson in the Supreme Court of Suffolk County (“Justice Emerson”).

In an August 21, 2009 Affidavit in Support submitted in connection with the Restrictive Covenant Lawsuit (Ex. A to Wilson Aff. in Supp.), Mandelbaum affirms *inter alia* that 1) he formed MHM in 1987; 2) MHM operates a facility in Port Jefferson, Suffolk County, New York; 3) MHM draws most of its patients from Suffolk County, and the balance from Nassau and Queens Counties; 4) Werner joined MHM in 1991 and the parties entered into a Shareholders

Agreement in 2004 which included a restrictive covenant; 5) Werner resigned from MHM in 2009 (“Resignation”); and 6) following his Resignation, Werner a) breached the restrictive covenant by setting up a competing practice and soliciting MHM’s referral sources and patients; b) made defamatory statements about Mandelbaum; and c) misappropriated electronic records and data of MHM.

In the Share Transfer Lawsuits (Ex. E to Wilson Aff. in Supp.), the plaintiffs seek declaratory judgments concerning their rights under the Shareholders Agreement in light of Werner’s alleged transfer (“Transfer”) of his interest in MHM to his father Carl Werner (“Carl”) following the Resignation. Counsel for Moving Defendants affirms that on October 26, 2011, Justice Emerson conducted a framed issue hearing to determine the validity of the Transfer and directed the parties to submit post-hearing briefs. Five (5) days after this hearing was conducted, Plaintiff filed the Instant Action.

C. The Parties’ Positions

Moving Defendants submit that the Instant Action should be transferred to Suffolk County for the following reasons: 1) as the Instant Action is based on documents obtained over objection and subject to certain qualifications in the Related Action, “the consistency of discovery, evidentiary, and substantive rulings among the four litigations is implicated” (Breitenbach Aff. in Supp. at ¶ 24); 2) Suffolk County is the more appropriate venue for the Instant Action in light of the fact that the litigation involves documents obtained in the Related Actions, all pending before Justice Emerson; 3) a transfer of venue to Suffolk County promotes the convenience of prospective nonparty witnesses, specifically the patients (“Patients”) listed in Plaintiff’s Patient information,¹ about whom Werner was questioned at his deposition in the Restrictive Covenant Lawsuit, all of whom reside in Suffolk County; and 4) D. James Marketing, the Moving Defendants’ marketing firm to which they allegedly transferred Plaintiff’s Patient information, is located in Suffolk County.

Defendants A Step Ahead Prosthetics, LLC, Erik Schaffer and Daniel Klepner (“ASA Defendants”) submit an Affidavit in Support of the motion. The ASA Defendants submit that 1) the transfer of the Instant Action to Suffolk County is appropriate to promote the convenience

¹ Counsel for Moving Defendants affirms that, in light of Plaintiff’s assertion that the Patient information is confidential, the Patients’ names and addresses are not provided (Breitenbach Aff. in Supp. at n. 3).

of witnesses and judicial economy, particularly in light of Justice Emerson's familiarity with the dispute among the parties, and will not prejudice the Plaintiff; and 2) the allegations in the Instant Complaint overlap with several issues in the Restrictive Covenant Lawsuit, including whether Defendants improperly obtained and used Patient information.

Plaintiffs oppose the motion submitting that "[t]he only connection between the facts at issue in this action and the [Related Actions] is that the latter provided the backdrop for the discovery of defendants' malfeasance [emphasis in original]. There are no common issues to be litigated; there is no common discovery; and contrary to Mandelbaum's repeated and incorrect assertion, there are no common parties to those actions other than Mandelbaum" (Lewis Aff. in Opp. at ¶ 4). Plaintiffs submit that the transfer of the Instant Action to Suffolk County is inappropriate in light of the fact that 1) Defendants' unauthorized possession of the confidential Patient list at issue has already been established by virtue of certain admissions by Defendants; 2) Plaintiff and the Moving Defendants are the only parties in common in the Instant and Related Actions; 3) despite Mandelbaum's refusal to appear for a deposition in a Related Action to explain his possession of Plaintiff's Patient list, Plaintiff has independently developed facts to warrant the commencement and prosecution of the Instant Action; 4) venue of the Instant Action in Nassau County is proper in light of the fact that Defendant Klepner is a Nassau County resident and Defendant ASAP maintains its principal office in Nassau County; 5) Moving Defendants have failed to submit a list of witnesses it expects to call or provide other relevant information regarding those witnesses' testimony, which Moving Defendants could have provided under seal to protect the confidentiality of the Patient witnesses; 6) the alleged "hacking" activities that underlie the Instant Action were, upon information and belief, performed from a location in Nassau County; 7) Nassau County is a more convenient forum for non-party witnesses, including Amanda Gaynor who is a former employee of ASAP and a resident of Nassau County, whom Plaintiff intends to call to testify regarding instant message communications that Defendant Klepner sent to her; 8) Nassau County is a convenient forum for Futura International ("Futura"), a prospective witness, which is a foreign entity which has already accepted service of a non-party subpoena in the Instant Action and produced responsive documents, reflecting its willingness to appear for proceedings in this venue; 9) Nassau County is a more convenient forum for Plaintiff and its counsel; and 10) the questions in the Related

Action, related to the validity of the Transfer and enforceability of the restrictive covenant, are not relevant to the Instant Action. Plaintiff also submits that it only anticipates calling a “handful” of Patients to testify (Lewis Aff. in Opp. at ¶ 24) as to whether the Defendants solicited them because Defendants should have relevant records regarding their marketing efforts and Plaintiff has records regarding the Patients it lost after Defendants’ alleged solicitation efforts. Thus, Plaintiff contends, the need to call the Patients is “speculative at best” (*id.*).

In reply, Moving Defendants submit that the sole basis for the Instant Action is the emergence of the Patient List in the Related Actions. Moving Defendants contend that Plaintiff’s purpose in filing the Instant Action is “to attempt to aid its weakened liability position in [the Related Actions] by somehow gaining leverage in a different venue, with a different action” (Moving Ds’ Reply Memo. of Law at p. 2). Moving Defendants argue, further, that Plaintiff elected not to file the Instant Action in Suffolk County to avoid having Justice Emerson rule on discovery issues in tandem with the Related Actions.

Moving Defendants emphasize again that the Patients, who reside in Suffolk County, will be inconvenienced if they are required to travel to Nassau County for depositions and trial, particularly in light of the fact that Justice Emerson can easily address all relevant issues in the Instant and Related Actions. Moving Defendants also assert that, since the filing of this motion, they have learned from documentation provided by Futura in the Instant Action that Werner solicited Mandelbaum’s former employee Sean Rapp (“Rapp”), in violation of the Shareholders Agreement, notwithstanding Werner’s denial that he ever employed Rapp. Moving Defendants submit that this information suggests that Werner’s testimony denying Rapp’s employment with Plaintiff was false and supports the allegation in the Restrictive Covenant Lawsuit that Rapp was solicited. Moving Defendants submit this is further evidence of the overlapping nature of the Instant and Related Actions, warranting the litigation of all of the Actions in the same venue.

Finally, Moving Defendants contend that they have set forth the material facts about which the Patients will testify which includes 1) whether Defendants solicited them; 2) whether and to what extent they gave permission to Defendants to possess the information at issue; and 3) whether Defendants contacted them following the alleged acquisition of Plaintiff’s Patient information. Moving Defendants submit that testimony from the Patients is necessary to substantiate or refute Plaintiff’s claims.

RULING OF THE COURT

Pursuant to CPLR § 510(3), the court, upon motion, may change the place of trial of an action where the convenience of material witnesses and the ends of justice will be promoted by the change. A party moving for a change of venue pursuant to CPLR § 510(3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change. *McManmon v. York Hill Housing, Inc.*, 73 A.D.3d 1137, 1138 (2d Dept. 2010), quoting *Rochester Drug Coop., Inc. v. Marcott Pharmacy N. Corp.*, 15 A.D.3d 899, 900 (4th Dept. 2005) (internal quotation marks omitted). In doing so, the moving party must set forth 1) the names, addresses, and occupations of numerous prospective witnesses, 2) the facts to which the witnesses will testify at trial, so that the court may judge whether the proposed evidence of the witnesses is necessary and material, 3) a statement that the witnesses are willing to testify, and 4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed. *Id.*, quoting *Walsh v. Mystic Tank Lines Corp.*, 51 A.D.3d 908 (2d Dept. 2008).

The Court grants the motion based on the Court's conclusion that the Patients are material witnesses in the Restrictive Covenant and Instant Actions whose convenience would be better served by the transfer of the Instant Action to Suffolk County. Moving Defendants have identified the Patients and asserted, without contradiction, that all of the Patients are residents of Suffolk County. In light of the potentially confidential nature of the identity of the Patients, Moving Defendants have understandably declined to name them. Moving Defendants have articulated the facts about which the Patients will testify at trial and their testimony is clearly relevant in the Instant and Restrictive Covenant Actions which center on allegations that the parties improperly solicited the Patients. Under these circumstances, where all of the Patients reside in Suffolk County, their testimony is already needed in a pending Action in Suffolk County, and there are potential confidentiality implications in revealing their identities and obtaining their input regarding which venue would be most convenient for them, there is a basis for the Court to conclude that the Patients would be greatly inconvenienced if the venue of the Instant Action were not changed, even without a formal statement from the Patients. The Court also concludes that the transfer of this action to Suffolk County promotes the ends of justice by virtue of Justice Emerson's intimate knowledge of the relevant issues and parties and extensive involvement in the Related Actions which overlap with the Instant Action.

Accordingly, the Court grants the motion and it is hereby:

ORDERED, that the venue of the above entitled action be and is hereby changed from the County of Nassau to the County of Suffolk; and it is further

ORDERED, that upon the entry of this Order, the County Clerk of the County of Nassau shall forthwith deliver to the County Clerk of the County of Suffolk all papers filed in the above entitled proceeding and the County Clerk of the County of Suffolk shall assign a new index number thereto; and it is further

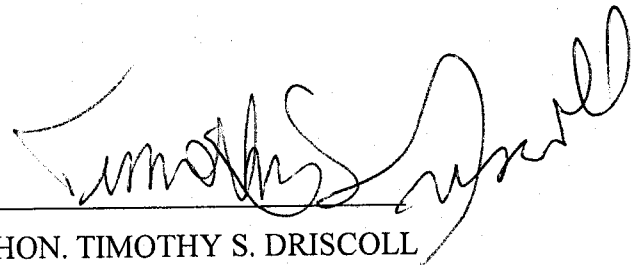
ORDERED, that all subsequent proceedings be conducted in the Supreme Court, County of Suffolk as if such jurisdiction had been designated as the original venue.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
March 27, 2012


HON. TIMOTHY S. DRISCOLL

J.S.C.

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ENTERED

MAR 29 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**