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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

RENA BERGER,

- v -

KATHERINE JAY SHEN, M.D.,

INDEX NO. 100876/09

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to change venue is denied in accordance with the accompanying memorandum decision.

FILED

APR 30 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: APR 23 2012

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RENA BERGER and RUSSELL HART,

Plaintiffs,

-against-

Index No. 100876/09
Motion Seq. No. 005

KATHERINE JOY SHEN, M.D., AUDREY LYNN HALPERN, M.D., and THE WESTCHESTER MEDICAL GROUP, P.C.,

Defendants.

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SCHLESINGER, J.:

The instant motion by defendants Katherine Joy Shen, M.D., and The Westchester Medical Group, P.C., to change venue to Westchester County presents an interesting twist on the general rule that a venue change is required when the claims asserted against the only defendant with a New York residence are dismissed. The plaintiff and the moving defendants here both rely on the same cases, but each party gives the cases a different spin.

Procedural History and Background Facts

When plaintiffs commenced this action in January 2009, they designated New York County as the place of trial pursuant to CPLR §503 based on the residence of then defendant Dr. Audrey Lynn Halpern on West 23rd Street in Manhattan. Later that year, Dr. Halpern moved and defendants Dr. Shen and Westchester Medical cross-moved to change venue to Westchester County pursuant to CPLR §510(3) on the ground that "the convenience of material witnesses and the ends of justice will be promoted by the change." Defendants alleged that all parties, other than Dr. Halpern, resided in Westchester County and that the alleged malpractice had occurred there, even though subsequent treatment had been provided in New York County.

By decision dated July 23, 2009, this Court denied the motion, finding that the defendants had failed to meet their burden of proving the very specific requirements of the statute relating to witness convenience (see Exh A to Opposition). The facts underlying this action are detailed in that prior motion decision and are summarized here.

In February 2007 the defendant Dr. Shen, an otolaryngologist employed by defendant Westchester Medical, performed a functional endoscopic sinus surgery on plaintiff Rena Berger. Soon after the surgery, plaintiff began experiencing a loss of her sense of taste and disturbances in her sense of smell known as anosomia. Her primary care physician then referred her to Dr. Halpern, a neurologist who also was employed by Westchester Medical.

In September 2007 Dr. Halpern offered a diagnosis of anosomia secondary to post-operative scarring and suggested that plaintiff consult another otolaryngologist. In October the plaintiff consulted non-party Dr. Joseph Jacobs at NYU Medical Center who thereafter performed an endoscopic repair of a defect in the roof of plaintiff's right ethmoid sinus that he had detected by performing a CT scan. Plaintiff maintains that the surgery negligently performed by Dr. Shen caused her injury and that Dr. Halpern failed to properly diagnose and treat it.

Plaintiff commenced this action in January 2009 and filed a Note of Issue on July 18, 2011 upon the completion of discovery. Dr. Halpern then timely moved for summary judgment by motion returnable October 6, 2011. By stipulation dated November 18, 2011, plaintiff discontinued the action against Dr. Halpern, and Dr. Halpern then

withdrew his summary judgment motion the following month. At a pre-trial conference on January 11, counsel for the remaining defendants Dr. Shen and Westchester Medical indicated their intent to move to change venue based on the discontinuance against Dr. Halpern, the only party with a New York residence. The Court directed that counsel promptly file an Order to Show Cause seeking that relief, which is the motion before the Court today.

Discussion

The rules governing venue are set forth in Article 5 of the CPLR. Pursuant to section 509, the place of trial "shall be in the county designated by the plaintiff," unless the parties agree or the court orders otherwise. The plaintiff may properly designate venue based on the residence of a single party, even if the residences of all other parties and the alleged malpractice or other events at issue in the case are based in a different county. CPLR § 503(a); *Martinez v Tsung,* 14 AD3d 399 (1st Dep't 2005).

The residence of the party is determined "when [the action] is commenced." CPLR § 503(a). However, as the moving defendants correctly note here, the First Department has repeatedly held that, in those cases in which venue was properly based in the first instance on the residence of a single party and all claims against that party are thereafter voluntarily discontinued or dismissed, a change of venue is justified pursuant to CPLR § 510(1) on the ground that the county designated is not a proper county. *See, e.g., Crew v St. Joseph's Med. Ctr.*, 19AD3d 205 (1st Dep't 2005)(trial court properly changed venue following voluntary discontinuance against sole party with Bronx residence); *Clase v Sidoti*, 20 AD3d 330 (1st Dep't 2005)(reversed trial court and granted change of venue when plaintiff voluntarily discontinued claims against sole

party with Bronx residence); *Caplin v Ranhofer*, 167 AD2d 155 (1st Dep't 1990)(affirmed trial court's change of venue following grant of summary judgment dismissing claims against only party with New York residence); *Halina Yin Fong Chow v Long Is. R. R.*, 202 AD2d 154 (1st Dep't 1994)(trial court erred in denying motion to change venue after all claims had been dismissed against the only party with a New York residence).

However, the discontinuance or dismissal of claims against the only party with a New York residence does not strip the court of its authority to proceed or mandate a change of venue in all circumstances. So, for example, in *Moracho v Open Door Family Medial Center, Inc., et al.*, 79 AD3d 581 (1st Dep't 2010), the First Department reversed the trial court and reinstated venue in the county originally selected by the plaintiff, even though all claims had been dismissed against the party whose residence had been the basis for venue, because the defendants had delayed unnecessarily in making the motion. Similarly, the Second Department affirmed the denial of a motion to change venue following the settlement of all claims against the only parties with a Westchester residence, finding that the movant had "not demonstrated that these defendants were improper parties to the action ...." *Pickering v Westchester County Health Care Corporation, et al.*, 21 Misc.3d 1130 (Sup. Ct., Westchester Co. 2006), *aff'd* 41 AD3d 454 (2nd Dep't 2007).

Plaintiff's counsel here argues that defendants' motion to change venue must be denied because defendants have failed to meet their burden of demonstrating that Dr. Halpern was an "improper party," and he artfully distinguishes the various cases cited by defendants on that ground. For example, in *Crew*, the court found that plaintiffs had voluntarily discontinued their case against the sole defendant with the Bronx County

residence "because they determined him to be 'legally blameless,' rendering him an improper party from the beginning." 19 AD3d at 206. In *Clase*, the "plaintiff acknowledged that she had no claim against Montefiore" by discontinuing the action as against it with prejudice after a trial date had been selected and then repeatedly adjourned. 20 AD3d at 331. In *Caplin*, summary judgment was granted to New York Hospital dismissing all claims on the merits based on a finding of "no liability." 167 AD2d at 157. Similarly in *Chow*, summary judgment was granted to the MTA, which had been found to be an "improper party." 202 AD2d at 155.

The situation here is distinctly different, plaintiff asserts, as the decision to voluntarily discontinue the claims against Dr. Halpern, rather than oppose the doctor's summary judgment motion, was in no way an acknowledgment that Dr. Halpern was "legally blameless" or an "improper party." Nor has a factual or judicial finding been made exonerating Dr. Halpern. In his Affirmation in Opposition to the motion to change venue, plaintiff's counsel indicated that he discontinued the action against Dr. Halpern not because the doctor was blameless but instead because plaintiff preferred to pursue claims based on Dr. Halpern's negligence by proceeding against the doctor's employer. Specifically, counsel explained his reasoning as follows (at ¶¶8-9):

> In discontinuing their action against said defendant [Dr. Halpern], plaintiffs simply made a strategic decision to proceed with their stronger case against defendant KATHERINE JOY SHEN, MD who initially caused the injuries to plaintiff RENA BERGER during the course of a botched nasal surgery. Although plaintiffs voluntarily discontinued as to defendant AUDREY LYNN HALPERN, plaintiffs did not under any circumstances withdraw its claim that defendant WESTCHESTER MEDICAL GROUP, P.C. by defendants KATHERINE JOY SHEN and AUDREY LYNN HALPERN, M.D. negligently failed to diagnose and timely

> treat plaintiff RENA BERGER'S injuries following surgery. Specifically, the negligence of defendant AUDREY LYNN HALPERN in failing to diagnose and timely treat can be directly attributed to defendant WESTCHESTER MEDICAL GROUP, P.C., which was a practice that employed both of the individually named defendants, and without the necessity of having a separate attorney representing her .... From a tactical standpoint, plaintiffs simply did not believe it would be cost effective to continue prosecuting defendant AUDREY LYNN HALPERN, M.D. because any departures committed by her would in any event be attributed to her employer, defendant WESTCHESTER MEDICAL GROUP, P.C.[1]

Plaintiff's strategy is wholly consistent with the governing law. As the First Department indicated in *Pace v Hazel Towers, Inc.*, 183 AD2d 588 (1992):

> The general rule governing a release given to an employee is stated in *Riviello v Waldron* (47 NY2d 297, 307), in which the court held that "section 15-108 of the General Obligations Law does not foreclose a plaintiff negligently injured by an employee from recovering against an employer on a theory of vicarious liability despite the plaintiff's prior execution of a release running to the negligent employee."

In *Pace*, plaintiff claimed he had been injured by the negligent administration of an injection by an individual defendant nurse in the employ of the defendant hospital. Just before the jury was sworn in, plaintiff discontinued the action with prejudice against the nurse and proceeded against the defendant hospital only. At the close of trial, the hospital moved for dismissal, arguing that the discontinuance against the nurse foreclosed a determination that the hospital was vicariously liable. The trial court

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[1] Plaintiff also argues that, pursuant to the principle of *res judicata*, this Court's July 23, 2009 decision denying a change of venue bars the defendants from making this motion. This Court disagrees. As defendants note, the initial motion was based on claims of witness convenience, whereas this motion, which could only be made after a change in circumstances, is based on Dr. Halpern's alleged improper party status.

granted the motion and the First Department reversed based on *Riviello,* finding that the release of the nurse did not bar claims against the hospital predicated on negligence by the nurse under the theory of *respondeat superior. See also, Marus v Village Medical, et al.*, 51 AD3d 879, 880 (2nd Dep't 2009)(while a discontinuance with prejudice against an individual employee defendant has *res judicata* consequences to the extent that it prohibits the assertion of the same claim in another action against the employee, it does not foreclose the plaintiff from pursuing a claim against the employer based upon a theory of vicarious liability).

This Court is persuaded by the plaintiff's reasoning. Although plaintiff has discontinued the action against Dr. Halpern, she intends to — and is legally permitted to — seek compensation for injuries negligently caused or contributed to by Dr. Halpern by pursuing the action against the doctor's employer Westchester Medical Group, P.C. under the theory of *respondeat superior.* As such, the moving defendants have failed to establish that Dr. Halpern was an improper party when the action was commenced, and they are not entitled to a change in venue.

Accordingly, it is hereby

ORDERED that the motion by defendants Dr. Shen and Westchester Medical to change venue from New York County to Westchester County is denied. Counsel shall appear on May 9, 2012 at 9:30 a.m. prepared to select a trial date. This constitutes the decision and order of the Court.

Dated: April 23, 2012

J.S.C.
ALICE SCHLESINGER