

**Ledesma v Kur**

2017 NY Slip Op 30669(U)

April 5, 2017

Supreme Court, New York County

Docket Number: 805336/16

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

-----X  
LEIBNITZ LEDESMA,

Index No: 805336/16

Plaintiff,

-against-

BENJAMIN R. KUR, DDS AND  
WESTCHESTER ORAL & MAXILLOFACIAL  
ASSOCIATES, PLLC,

Defendants.

-----X  
**Joan A. Madden, J.**

Defendants move, pursuant to CPLR 510 and 511 to change the venue of this action from this court to the Supreme Court, Westchester County. Plaintiff opposes the motion, which is denied for the reasons below.

Background

This is a dental malpractice action seeking damages in connection with plaintiff's dental treatment provided by defendants. The summons indicates that the basis for venue in New York is the defendants' principal place of business.

Defendants move to change venue as a matter of right, asserting that plaintiff improperly brought this action in New York county since the defendants' dental practice is located in Westchester County and has never been located in New York County. In support of their position, defendants' submit the affidavit of defendant Dr. Benjamin Kur, in which he states that he is the sole owner of defendant Westchester Oral & Maxillofacial Associates, LLC (Westchester Oral), and that from its inception Westchester Oral has always been located in Westchester County. Dr Kur further states that at the time Westchester Oral was formed "I self-filed incorporation documents [and] [a]t that time, I had an apartment in New York County and

listed New York County as the county of incorporation. I no longer have that apartment and I resided in Westchester County at the time of treatment of plaintiff in this matter (Kur Aff. ¶ 6). Defendants also rely on the affidavit of their accountant who also states that the practice has always been in Westchester County.

Defendants also note that plaintiff resides in Rockland County and that the only connection between the action and New York County is that Westchester Oral “appears to be incorporated in New York County.” Defendants further argue that the parties and witnesses would be inconvenienced by the prosecution of this action in New York County since Dr. Kur lives and works in Westchester County, and the practice’s dental assistants live and work there as well.

Plaintiff counters that venue in New York County is proper based on the filing with the Department of State, Division of Corporation, which shows that the principal place of business for Westchester Oral is New York County. Plaintiff also notes that the filing was never amended to reflect that Westchester Oral was located in Westchester County. Moreover, plaintiff argues that even though defendants’ current operations are in Westchester County, this fact is irrelevant as a corporation’s only residence for venue purposes is the principal place of business designated on its certificate of incorporation. Plaintiff further argues that defendants have failed to meet their burden of proving New York County is an inappropriate venue based on the convenience of witnesses.

In reply, defendants submit the affidavit of an employee of Westchester Oral who states that it would be inconvenient for her to testify in New York County.

#### Discussion

In general, under the CPLR, venue is based on the residence of the parties at the time of

the commencement of an action. See CPLR 503(a) (providing that “[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by plaintiff”); Kaplinsky v. Associated YM-YWHA’s of Greater N.Y., 154 AD2d 576 (2d Dept 1989) (plaintiff improperly commenced action in Queens County based on allegation that cause of action arose there) .

CPLR 503(c) provides that “[a] domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located....” It is well-established that ““for venue purposes a foreign corporation’s designation of the location of its office in its statement filed with the Secretary of State constitutes a designation of its residence for venue purposes.” Nadle v L.O. Realty Corp., 286 AD2d 130, 132 (1<sup>st</sup> Dept 2001)(internal quotations and citations omitted); See, also, Marko v Culinary Institute of America, 245 AD2d 212 (1<sup>st</sup> Dept 1997)(same). Similarly, a limited liability company, like Westchester Oral is considered “a resident of the county where the LLC’s principal office is located” as listed with the Secretary of State. Johanson v. J.B. Hunt Transp., Inc., 15 AD3d 268, 269 (1<sup>st</sup> Dept 2005).

Here, there is no dispute that New York County is designated as the principal place of business on the certificate filed with the Secretary of State, and that such designation has not been amended. Under these circumstances, New York is an appropriate venue for this action, and the motion to change venue as a matter of right under CPLR 510 (1) is denied. See Velasquez v. Delaware River Valley Lease Corp., 18 AD3d 359, 360 (1<sup>st</sup> Dept 2005)(where certificate of incorporation was never amended to change principal place of business the original designation governs).

Defendants' motion is also unavailing to the extent it seeks a discretionary change of venue pursuant to CPLR 510 (3). Even assuming *arguendo* that the court were to consider the employee's affidavit submitted for the first time in reply, such affidavit is insufficient to meet defendants' burden of showing that a discretionary change of venue is warranted. Although defendant's employee is a potential witness, her reliance on her own convenience is misplaced as the convenience of a party or its representative generally does not provide a basis for changing venue. See O'Brien v. Vassar Bros. Hosp., 207 AD2d 169, 173 (2d Dept 1995); Schapiro & Reich v. Fuchsberg, 172 AD2d 1080 (4<sup>th</sup> Dept 1991).

Conclusion

Accordingly, it is

ORDERED that defendants' motion to change venue is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 27, 2017 at

~~9:30~~<sup>11:00</sup> am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: ~~April 5, 2014~~

April 5, 2014

  
HON. JOAN A. MADDEN  
J.S.C.  
J.S.C.