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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 800020/2012
LOPEZ, MICHAEL
vs.
ELI ANKER, M.D.
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memorandum decision, and venue shall remain in New York County.

FILED
DEC 20 2012
NEW YORK
COUNTY CLERK'S OFFICE

DEC 18 2012

Dated: _____

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

MICHAEL LOPEZ,

Plaintiff,

-against-

Index No. 800020/12
Motion Seq. No. 001

ELI ANKER, M.D., ELI ANKER, M.D., P.C., and GOOD SAMARITAN HOSPITAL,

Defendants.

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SCHLESINGER, J.:

The instant motion by defendant Eli Anker, M.D., and his P.C. to change venue to Suffolk County presents a somewhat unique issue: can the time limits set forth in CPLR §511(b) for a motion to change venue based on the plaintiff's designation of a purportedly improper county be extended by an order of a Justice of the State Supreme Court? For the reasons stated below, this Court agrees with the plaintiff that the law in the First Department compels this Court to answer the question in the negative and to deny the defendants' motion to change venue as untimely.

Procedural History and Background Facts

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).

In this medical malpractice action, plaintiff designated venue in New York County based upon the residence of defendant Eli Anker, M.D., at 203 Third Avenue, Apt. 3K, in Manhattan. In accordance with CPLR §511(b), when the Anker defendants served an

Answer to the plaintiff's Complaint, each also served a Demand to Change Venue to Suffolk County on the ground that plaintiff had improperly designated New York County as the place for trial (Motion, Exh D). The Demands were dated March 5, 2012 and were served on that date. Also in accordance with CPLR §511(b), plaintiff responded to the Anker Demands by serving an Affidavit of Proper Venue within two days, on March 7, 2012 (Exh E). There counsel indicated that he was relying for his venue designation on the Manhattan residence of Dr. Anker that he had discovered during an investigation.

The Anker defendants then moved in the Supreme Court, Suffolk County, to change venue to that county based on plaintiff's choice of a purportedly improper county (Exh F). In support of the motion, Dr. Anker submitted an affidavit stating that the Manhattan address was the residence of his son, whose mortgage Dr. Anker had co-signed; however, Dr. Anker himself has resided in Suffolk County for 32 years.

By decision and order dated April 27, 2012, the Hon. Paul J. Baisley, Jr. presiding in the Supreme Court, Suffolk County, denied the defendants' motion to change venue (Exh G). After reciting the procedural history of the case as detailed above, Justice Baisley held that the denial was mandated because the motion had been made in the wrong county:

> Notwithstanding the defendants' evidentiary showing, this Court is constrained to deny the motion. Where, as here, a plaintiff submits a timely affidavit pursuant to the demand procedure of CPLR 511(b), and the affidavit contains representations concerning the residency of the parties sufficient to establish that the plaintiff's choice of venue was proper ..., a defendant may not avail itself of the statute's unique option of making the motion to change venue in the transferee county but, instead, must make the motion in accordance with the usual rules of motion practice — that is , in the county of original venue ....

In addition, and significantly for this motion, Justice Baisley further stated in his decision that the motion was being "denied without prejudice to timely renewal before the Supreme Court, New York County." No discussion of this point was included in this decretal paragraph.

Plaintiff served the decision with Notice of Entry on May 8, 2012. Less than ten days later, on May 17, the Anker defendants served the instant motion. Plaintiff has opposed on the ground that the motion is untimely under the statute, while defendants rely on the extension of time granted by Justice Baisley in his decision to argue that the motion is timely.

Discussion

CPLR § 511 sets forth very specific requirements governing a defendant's motion to change venue on the ground that the plaintiff has allegedly designated an improper county. Where, as here, the plaintiff has provided an affidavit in response to defendant's Demand to Change Venue and the affidavit sets forth a good faith basis for the venue designation, the defendant's time to move is very limited; that is, "the defendant may move to change the place of trial within fifteen days after service of the demand [to change venue]." CPLR § 511 (b). In addition, the statute expressly provides that where, as here, the plaintiff has provided an affidavit, the defendant may not "notice such motion to be heard as if the action were pending in the county he specified ..." but must instead notice the motion in the county designated by the plaintiff.

Here, there is no dispute that the defendant initially moved in the wrong county, Suffolk County. It is also undisputed that the motion later filed by the defendant in New York County was not filed within the fifteen days provided by the statute, but was filed

within the extended time provided in the decision of Suffolk County Justice Baisley as quoted above. The dispute centers on the issue whether that subsequent filing in New York County was timely under the terms of CPLR § 511(b).

The First Department has consistently held that the time requirements in CPLR § 511(b) are mandatory. Thus, for example, in *Pittman v Maher,* 202 AD2d 172 (1st Dep't 1994), cited by the plaintiff here, the Appellate Division reversed the trial court and denied the defendant's motion to change venue, which had been granted based on a finding that venue had been improperly placed in Bronx County when no party in fact resided there. After reviewing the time requirements in the statute and finding they had not been satisfied, the court unequivocally found that the motion had to be denied as "untimely under the statute." *Id.* at 174. In so doing, the court emphasized the mandatory nature of the time requirements, stating that:

> This Court has declined to construe this statutory time requirement as merely directory ... and has required compliance unless it is demonstrated that the *plaintiffs* have made "misleading statements as to their actual residence" ...

Id. (emphasis in original, citations omitted). The court further rejected the notion that a trial court could properly grant an untimely motion "in view of the explicit statutory requirements, even assuming the inherent power of the court to exercise its discretion ..." *Id.* at 175-76.

Since the *Pittman* decision was issued in 1994, the First Department has repeatedly reiterated that the time requirements in CPLR § 511(b) are mandatory, absent some type of misleading statement by the plaintiff. Thus, for example, in *Kurfis v Shore Towers Condominium,* 48 AD3d 300 (1st Dep't 2008), the appellate court not only

reversed the trial court and denied the motion to change venue, but it emphasized that the trial could be held in Bronx County, even though the venue was improper, because the motion to change venue was untimely and there was "no jurisdictional impediment to trial being conducted in Bronx County." *Accord, Castillo v Metropolitan Laundry Mach. Co.*, 299 AD2d 247 (1st Dep't 2002); *Siwek v Phillips, 71 AD3d 469* (1st Dep't 2010); *Prato v Arzt*, 79 AD3d 622 (1st Dep't 2010)(an untimely motion to change venue must be denied).

In various cases, the Appellate Division has recognized that an exception to the rule may be granted if the trial court finds that the plaintiff has made misleading statements. *See, e.g., Pittman, Castillo, Prato* and *Kurfis, supra.* However, no basis exists in the case at bar for granting such an exception. No evidence exists, nor does the defendant even claim, that the plaintiff made a misleading statement. Quite the contrary, the plaintiff relied on a public record, a mortgage document, that suggested that Dr. Anker resided in Manhattan. It is irrelevant that Dr. Anker, in fact, lives in Suffolk; an untimely motion may not be considered on the merits.

Defendant Anker is not saved by the fact that his initial motion was timely made because that motion was improperly noticed in Suffolk County. The Appellate Division rejected any notion of such a second chance to move in *Singh v Becher,* 249 AD2d 154 (1st Dep't 1998). The defendants there improperly noticed their motion in Schenectady County and then withdrew it. The plaintiff later moved for summary judgment in New York County where the case was venued, and the defendant cross-moved to change venue to Schenectady County. The court denied the cross-motion as untimely, even though the first motion had been timely made, albeit in an improper county.

When granting the Anker defendants an extension of time to renew their motion in New York County, Justice Baisley did cite a Second Department decision which lends some support to the decision; namely, *United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc. v Young Men's & Young Women's Hebrew Assn., Inc.,* 30 AD3d 504 (2nd Dep't 2006). There, the Second Department reversed the trial court and denied the motion to change venue. Similar to the facts here, the motion had been made in Putnam County to transfer venue there from New York County on the ground that New York was an improper county. Because the plaintiff had filed an affidavit in response to the defendant's Demand to Change Venue, the appellate court held that pursuant to "CPLR 511(b), the [moving] Association was required to make its motion to transfer venue in the Supreme Court, New York County, where the action was pending [and] the Supreme Court, Putnam County, lacked jurisdiction to hear and determine the Association's motion to transfer venue. ..."

As relevant here, in the decretal paragraph, the Appellate Division granted the moving defendant an extension of time to move in the proper county, stating that:

> The order is reversed, on the law, with costs, the motion is denied with leave to the defendant Young Men's and Young Women's Hebrew Association to move, within 30 days upon service on them of a copy of this decision and order, in the Supreme Court, New York County ...

However, the court did not discuss, nor cite any authority for, that unusual provision.

It is unclear whether the Second Department still follows that rule. As recently as 2011 in *7 Columbus Ave. Corp. V Town of Hempstead,* 85 AD3d 1038, 1038 (2nd Dep't 2011), the court cited *United Jewish Appeal,* but only for the proposition that a court lacks jurisdiction to hear and determine a venue motion when made in the improper

county. While the *Columbus* court reversed the trial court and denied the motion to change venue because the motion had been made in the improper county, the court did *not* grant the defendant an extension of time to make its motion in the proper county; the motion was simply denied.

But whether or not the Second Department is backing away from its prior decision, the fact remains that the First Department has always held that the time requirements in CPLR §511(b) are mandatory. The Anker defendants have not cited a single decision issued by the First Department where the appellate court has granted an extension of time to a defendant who has moved in the wrong county. Since such a notion is inherently inconsistent with the principle espoused in this Department that the time requirements in CPLR § 511(b) are mandatory and must be strictly applied, this Court will necessarily follow the holdings in this Department and deny the defendants' motion as untimely.

Accordingly, it is hereby

ORDERED that the motion by defendants Eli Anker, M.D., and Eli Anker, M.D., P.C., to change venue from New York County to Suffolk County is denied.

This constitutes the decision and order of the Court.

Dated: December 18, 2012

DEC 18 2012

DEC 18 2012

FILED

DEC 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.
ALICE SCHLESINGER