

Jopal Bronx, LLC v Schwartz
2018 NY Slip Op 30148(U)
January 25, 2018
Supreme Court, New York County
Docket Number: 651973/2017
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

Jopal Bronx, LLC d/b/a Workmen’s Circle
Multicare Center,

Plaintiff,

Index No.
651973/2017

Decision and
Order

- against -

Mot. Seq. 001

Donna Schwartz and Eric Garfen,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Jopal Bronx, LLC d/b/a Workmen’s Circle Multicare Center (“Workmen’s Circle”) commenced this action against defendants Donna Schwartz (“Schwartz”) and Eric Garfen (“Garfen”) (collectively, “Defendants”). The complaint alleges a breach of the Admission Agreement. Workmen’s Circle alleges that Schwartz agreed to pay for the room, board and skilled nursing care services that she received from Workmen’s Circle, Schwartz received these services, and breached the Admission Agreement by failing to pay for them. The complaint alleges damages in the sum of \$26,255.00.

On May 15, 2017, Defendants served an Answer with Counterclaim denying the allegations of the complaint and alleging negligence by Workmen’s Circle. On July 28, 2017, Workmen’s Circle served a Verified Answer to Defendants’ Counterclaim.

On July 28, 2018, Workmen’s Circle served a Demand to Change Venue pursuant to CPLR §501, 510, and 511(b). Defendants objected to the demand.

Workmen’s Circle now moves pursuant to CPLR §501, 510 and 511(b) to change the place of trial of this action from New York County to Nassau County.

Workmen's Circle asserts that while it chose New York County as the venue to commence this action because that is where the defendants reside, the imposition of the counterclaim by Defendants requires venue to be transferred from New York to Nassau County as the counterclaim arises out of the Admission Agreement. Defendants oppose. Defendants argue that since Workmen's Circle itself brought the action in New York County despite the venue selection clause of the Admission Agreement, Workmen's Circle knowingly waived it and should be bound by its decision. Defendants further argue that Garfen did not sign the Admission Agreement containing the provision. Defendants further argue that Schwartz lacked the capacity to sign the Admission Agreement. Defendants further contend that they are both elderly, sick, bedridden, and under daily medical care, and should not be forced to travel to Nassau County.

CPLR § 510(1) permits a court, upon motion, to change the place of trial of an action where "the county designated for that purpose is not a proper county." (CPLR § 510[1]). Pursuant to CPLR § 511, a party seeking to change the place of trial upon the ground of improper venue, "shall serve a written demand that the action be tried in a county he specifies as proper." (CPLR § 511[b]). This statute further provides:

Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

(CPLR § 511[b]).

CPLR §503(a) provides that venue is proper in the county in which one of the parties resided when the action was commenced. CPLR § 503(a).

"Although a counterclaim does not ordinarily affect venue, the assertion of a counterclaim subject to mandatory venue requirements will govern venue." *Schemitsch v. Valley Enterprises Parks & Realty LLC*, 33 Misc. 3d 1237(A), 941 N.Y.S.2d 541 [Sup. Ct. Queens County 2011]. (see *Sterling Commercial Corp. v.*

Bradford, 32 A.D.2d 952 [2nd Dept.1969] [the demand for judgment in the counterclaim affected title to real property requiring a change of venue to the county where the property was located]; *Zaczek v. Zaczek*, 27 Misc.2d 740 [Sup Ct Nassau County], *aff'd*, 14 A.D.2d 808 [2d Dept 1961] [defendant granted change of venue where his counterclaim sought partition]; *Nicoletto v. Pettit Supply Corp. of Huntington*, 254 A.D.2d 750 [2nd Dept.1938] [defendant granted change of venue where counterclaim brought the action within the scope of statutory venue provisions].

“If a plaintiff selects an improper venue, and this selection is challenged by the defendant, the plaintiff then forfeits the right to select venue.” *Lynch v. Cyprus Sash & Door Co., Inc.*, 272 A.D.2d 260, 261 [1st Dept 2000]). *See also IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 A.D.3d 464 ([1st Dept 2016]); *Montilla v. River Park Associates*, 282 A.D.2d 389 ([1st Dept 2001]).

“[P]arties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract.” (*Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 [1996]). Forum selection clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable. (*Id.* [listing cases]).

Here, the Admission Agreement states on page 10:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York. Any and all actions arising out of or related to this Agreement, including all actions for personal injury or negligence, shall be brought in, and the parties agree to exclusive jurisdiction of, the New York State Supreme Court located in Nassau County, New York, but if a Court deems such jurisdiction to be improper, then the parties agree that the jurisdiction of this matter should be properly set in the Supreme court of Westchester.

Here, both Workmen’s Center’s claim for breach of the Admission Agreement, and Defendants’ counterclaim for negligence are “actions arising out of or related to this Agreement, including all actions for personal injury or negligence.” As such, the parties had agreed in the Admission Agreement that Nassau County was the proper venue. However, rather than bring the action in

Nassau County in accordance with the Admission Agreement, Workmen's Circle brought the action in New York County. Workmen's Center argues that Defendants' assertion of the counterclaim for negligence mandates that the case be transferred to Nassau County in accordance with the venue provision of the Admission Agreement. However, Workmen's Center's own claim against Defendants was also subject to the same venue provision and Workmen's Center proceeded to bring its action against New York County where it will now stay.

Wherefore it is hereby,

ORDERED that Workmen's Center's motion to change the venue is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 6, 2018 in Part 6, located at 71 Thomas Street, Room 205.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: JANUARY 25, 2018



Eileen A. Rakower, J.S.C.