

<b>Howard v Dewitt Rehabilitation &amp; Nursing Ctr.</b>
2018 NY Slip Op 31392(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 800008/16
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

----- X INDEX NO. 800008/16

SUSANNA HOWARD, Administrator  
of the Estate of MARY HOWARD, deceased,

Plaintiff

-against-

DEWITT REHABILITATION AND NURSING CENTER,  
INC., d/b/a UPPER EAST SIDE REHABILITATION  
AND NURSING CENTER,

Defendant.

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JOAN A. MADDEN, J.:

In this action for negligence, wrongful death and medical malpractice, defendant Dewitt Rehabilitation and Nursing Center, Inc., d/b/a Upper East Side Rehabilitation and Nursing Center (Dewitt) moves to change venue of this action from this court to the Supreme Court, Westchester County based on a forum selection clause. Plaintiff opposes the motion.

The decedent, Mary Howard, was transferred to Dewitt on January 4, 2016, after she had a tracheotomy in October 2015, at Mount Sinai hospital. On January 11, 2016, the decedent, who was 64 years-old, died after she allegedly suffocated due to the negligence of Dewitt’s personnel in handling her tracheotomy tube.

Dewitt now moves to change venue of this action based on a forum selection clause in the Admission Agreement (“the Agreement”) signed by decedent when she was admitted to Dewitt. The clause on which Dewitt relies states:

(a)...In the event this arbitration requirement is held to be void, unenforceable or the parties mutually agree to waive it, the parties agree that litigation arising hereunder shall be submitted to the exclusive jurisdiction of the state courts in the county of Westchester, State of New York or the United States District Court for the Southern District of New York, White Plains Courthouse, and that each party agrees to personal jurisdiction in such courts and waives any objection he/she/it may have now or hereafter to the laying of the venue of such action or

proceeding and irrevocably submits to the jurisdiction of any such court in any such suit, action or proceeding....

Plaintiff opposes the motion, arguing that the forum selection clause should not be enforced as it places venue of this action in a county with no connection with this action, particularly as Dewitt is located in Manhattan, and that the sole purpose of the clause is to give Dewitt a better chance of success at trial. Plaintiff also argues the forum selection clause in the Agreement is unenforceable as the decedent was a victim of overreaching and the forum selection clause is unjust, *citing Puleo v. South View Center*, 132 AD3d 651, 652 (2d Dept 2015)(holding that forum selection clauses are valid unless “it is shown ...to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching..”).

In support of her opposition, plaintiff, the daughter of the decedent and the administrator of her estate, submits her affidavit in which she states that she was not present when her mother signed the Agreement, and that it should not be enforced since her mother could not read the provision or speak. With respect her ability to see the provision, which was in fairly small print on the back of the Agreement, plaintiff states that her mother did not have her glasses at the nursing home, since they were apparently lost when she changed rooms, and without her glasses, “it is impossible that my mother could have read those words, even if she had wanted to” (Plaintiff’s Aff. ¶ 6). As for her ability to speak, plaintiff states that since her mother “had a tracheotomy tube ... the only way she spoke was by moving her lips without a sound [and] she could only move her lips to talk to close friends and family [and that] [i]t is utterly impossible that she would have been able to voice any objections to the agreement, or ask any questions of people she did not know.” (Id ¶ 7). Plaintiff also states that her mother had a stroke approximately 17 years before her death and that since that time her writing was very limited

and notes that with respect to her mother's signature on the Agreement, "the 'Y' in Mary is partly cut off and the 'W' in Howard is also cut off."

Plaintiff alternatively argues that if the forum selection clause is found to be valid that it should not be enforced against plaintiff's estate on the wrongful death claim brought by plaintiff who did not sign the Agreement and should not be bound by it.<sup>1</sup>

In reply, Dewitt argues that plaintiff and the estate are bound by the Agreement, which provides that "[t]his Agreement shall be binding on the parties, their heirs, administrators, distributees, successors and assigns." Dewitt also argues that there is insufficient evidence that decedent was unable to sign the Agreement due to incapacity, noting that her medical records did not show that she was suffering from dementia or that she lacked mental capacity to sign her name. In addition, Dewitt points out that plaintiff's arguments that she was unable to read the Agreement or sign her name are unsupported by any medical evidence.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" Puleo v. Shore View Center for Rehabilitation and Health Care, 132 AD2d 651, 652 (2d Dept 2015)(internal citations and quotations omitted).

The courts have generally enforced forum selection clauses in admission agreements to nursing homes. See e.g. Medina v. Gold Crest Care Center, 117 AD3d 633 (1<sup>st</sup> Dept 2014)(reversing trial court and finding forum selection clause in admission agreement between

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<sup>1</sup>Plaintiff also argues that the clause is not enforceable as Dewitt failed to provide Attachments A, B, and Exhibit 1 to the Agreement; however, as Dewitt points out in reply these aspects of the Agreement are not relevant to the enforcement of the forum selection clause.

nursing home and patient was enforceable when signed by plaintiff as attorney-in-fact for her grandmother); Puleo v. Shore View Center for Rehabilitation and Health Care, 132 AD2d at 652 (estate failed to show forum selection clause in nursing home admissions agreement signed by the patient's daughter was the product of fraud or overreaching); Public Administrator Bronx County v. Montefiore Medical Center, 93 AD3d 620, 621 (1<sup>st</sup> Dept 2012)(forum selection clause in nursing home contract was enforceable absent a showing that its enforcement would violate public policy or that a trial in the forum "would be so impracticable and inconvenient that [plaintiff] would be deprived of his day in court").

That said, however, the circumstances of this action are distinguishable from those cases as the record here raises issues of fact as to whether the forum selection clause in the Agreement is invalid as the product of overreaching. In particular, while in Medina supra and Puleo supra, the nursing home admission agreement was signed, respectively, by the nursing home resident's attorney-in fact and daughter, in this case the nursing home resident signed the agreement. Moreover, contrary to Dewitt's position, the absence of medical evidence that decedent was incapacitated at the time she signed the Agreement, is not conclusive since plaintiff has submitted evidence that when decedent was admitted to Dewitt, she had a tracheotomy tube, which severely limited her ability to communicate, and did not have her glasses, without which she could not read. This evidence is sufficient to warrant a hearing as to whether the forum selection clause should be invalidated as the product of overreaching. See generally, Puleo v. Shore View Center for Rehabilitation and Health Care, 132 AD2d at 652; 7B Carmody-Wait 2d § 48:5.

In view of the above, it is

ORDERED that Dewitt's motion is granted only to the extent of directing that a hearing

be held regarding the validity of the forum selection clause in the Agreement and, in particular, the circumstances surrounding decedent's execution of the Agreement, including her mental and physical condition at the time she executed the Agreement; and it is further

ORDERED that the hearing shall be held on February 8, 2018, at 2:30 pm in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 2, 2018

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