

Thau v Dewitt Rehabilitation & Nursing Ctr., Inc.
2022 NY Slip Op 32521(U)
July 27, 2022
Supreme Court, New York County
Docket Number: Index No. 805007/2022
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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BARBARA THAU,

Plaintiff,

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC.,
doing business as UPPER EAST SIDE REHABILITATION
AND NURSING CENTER and UPPER EAST SIDE
REHABILITATION AND NURSING CENTER,

Defendants.

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INDEX NO. 805007/2022
MOTION DATE 05/20/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22

were read on this motion to/for CHANGE VENUE.

In this action to recover damages for medical malpractice and wrongful death, the defendants together move pursuant to CPLR 501, 510, and 511 to transfer the place of trial of this action from New York County to Nassau County on the ground that the plaintiff entered into an agreement with it that contained a venue selection clause designating Nassau County as the place of trial of any action that she commenced against it. The plaintiff opposes the motion. The motion is granted, and the action is transferred to the Supreme Court, Nassau County.

The plaintiff commenced this action on January 6, 2022, designating New York County as the place of trial, based on her own residence in New York County. The defendant answered the complaint on March 21, 2022, and simultaneously served a demand to change venue from New York County to Nassau County. In the demand, the defendants alleged that the provisions of CPLR 501, which generally require the enforcement of a written agreement fixing the place of trial, were applicable to this action. On March 23, 2022, the plaintiff's attorney served an affirmation pursuant to CPLR 511(b), attesting that New York County was a proper place of trial,

based upon the plaintiff's residence at the time that the action was commenced. The defendants made the instant motion on April 4, 2022 (see CPLR 2211).

Although the defendants' demand to change venue alleged that New York County was an "improper" county, that is not the case. Rather, a transfer that is sought on the ground that an agreement fixes the place of trial is a distinct ground for the transfer of venue (see *Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d 633, 634 [1st Dept 2014]). Where, as here, a defendant seeks a transfer of venue on a ground other than the plaintiff's designation of an improper county, including a transfer based on an agreement fixing the place of trial, there is no requirement that the defendant serve a demand to change venue before or with its answer (see *id.*). Moreover, the time limitations for making a motion based on improper venue that are set forth in CPLR 511(b) are not applicable to motions to change venue based on an agreement fixing the place of trial, as "[a] motion for change of place of trial on any other grounds [than the designation of an improper county] shall be made within a reasonable time after commencement of the action" (CPLR 511[a]; see *Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d at 634). In any event, the defendants made this motion on April 4, 2022, only 14 days after serving their answer and demand to change venue. Hence, the motion was made within a reasonable time after commencement of the action (see CPLR 511[a]).

CPLR 501 provides that, unless there is reason to believe that an impartial trial cannot be had in a county designated in a written agreement, a "written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." Forum selection clauses contained in written agreements are thus generally enforced, unless enforcement

"would be unreasonable and unjust or . . . the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."

(*Camacho v IO Practiceware, Inc.*, 136 AD3d 415, 416 [1st Dept 2016], quoting *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]). Although the party seeking to enforce a forum selection clause has the initial burden of establishing that it is applicable to the underlying dispute (see *Schmelkin v Garfield*, 85 AD3d 755, 755-756 [2d Dept 2011]), once it has satisfied that burden, the party opposing enforcement of the clause must establish that its enforcement would be unreasonable, unjust, or unconscionable (see *Hunt v Landers*, 309 AD2d 900, 901 [2d Dept 2003]).

The defendants have met their burden of showing that the choice of venue provision in the subject admission agreement is applicable and enforceable (see *Casale v Sheepshead Nursing & Rehabilitation Ctr.*, 131 AD3d 436, 437 [2d Dept 2015] [enforcing venue selection clause in nursing home admission agreement]; *Public Admin. Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620 [1st Dept 2012] [same]; *Byrd v Upper E. Side Rehabilitation & Nursing Ctr.*, 2022 NY Slip Op 31222[U], 2022 NY Misc LEXIS 1868 [Sup Ct, N.Y. County, Apr. 11, 2022] [Kelley, J.] [enforcing venue selection clause in favor the same defendants named in the instant action, based on agreement identical to the agreement in the instant action]).

In opposition, the plaintiff failed to demonstrate that enforcement of the venue selection clause would be unjust. Rather, she argued that, in accordance with the terms of the agreement, the venue selection clause had not been triggered. She quoted from the agreement, which provided. at Section XII(b), that

“[t]his Agreement shall be governed by and construed in accordance with the laws of the State of New York, excluding, however, any provision which would impede the application of the Federal Arbitration Act. In the event the arbitration agreement 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 Nassau.”

She contended that, inasmuch as the arbitration provision has not been found to be void, and the parties have not mutually agreed to waive arbitration, the venue selection clause cannot be effectuated.

In the first instance, the plaintiff never executed the independent arbitration agreement described in the admission agreement. Hence, contrary to the plaintiff's contention, the parties have effected a waiver of their purported right to arbitrate the dispute, as "the obligation to arbitrate depends on an *agreement to arbitrate*" (*People of State of N.Y. v Coventry First, LLC*, 13 NY3d 108, 113 [2009]). Even had the plaintiff executed the arbitration agreement, her election to litigate the matter by commencing this action would have constituted a waiver of the right to arbitrate the dispute (*see Matter of City of Yonkers v Cassidy*, 44 NY2d 784, 785 [1978]; *Matter of Zimmerman v Cohen*, 236 NY 15, 18-19 [1923]), and the defendants' failure to defend the action on the ground that the matter was subject to arbitration would have constituted a waiver of their right to arbitrate the dispute as well (*see Rusch Factors, Inc. v Fairview Mfg. Co.*, 34 AD2d 635, 635-636 [1st Dept 1970]). Since the parties waived any right to arbitration, the venue selection clause was triggered, and defendants' motion to transfer venue pursuant to CPLR 501, CPLR 510(1) and CPLR 511(b) must be granted.

Accordingly, it is

ORDERED that the defendants' motion to transfer venue of this action from New York County to Nassau County is granted, and the action is transferred to the Supreme Court, Nassau County, for consideration and disposition; and it is further,

ORDERED that within 30 days after the entry of this order, the defendants shall file an EF-22 form and the statement required by CPLR 8019(c), and shall also serve them upon the New York County Clerk, as Clerk of the Supreme Court, New York County, along with a copy of this order and notice of entry of this order, and shall also serve a copy of this order and notice of entry of this order upon the Nassau County Clerk, as Clerk of the Supreme Court, Nassau County; and it is further,

ORDERED that upon service upon him of the EF-22 form, the statement required by CPLR 8019(c), and a copy of this order with notice of entry, the New York County Clerk, as Clerk of the Supreme Court, New York County, is directed to deliver to the Nassau County

Clerk, as Clerk of the Supreme Court, Nassau County, all papers filed in the action entitled *Barbara Thau v Dewitt Rehabilitation and Nursing Center, Inc., doing business Upper East Side Rehabilitation and Nursing Center, et ano.*, under New York County Index No. 805007/2022, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

7/27/2022
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

OTHER

APPLICATION:

GRANTED

SETTLE ORDER

GRANTED IN PART

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE