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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

RACQUEL LIVIDINI,

Plaintiff-Appellant,

against

HAROLD L. GOLDSTEIN, D.P.M., VINAI PRAKASH, D.P.M.,
RYE AMBULATORY SURGERY CENTER, L.L.C.
and WESTMED MEDICAL GROUP, P.C.,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT RACQUEL LIVIDINI

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POINT I

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PRELIMINARY STATEMENT

Plaintiff-appellant, Raquel Lividini, appeals from the decisions and orders of Supreme Court, Bronx County (R. 8, 10),[1] which erroneously granted defendants-respondents' motions and cross-motion to change the venue of this podiatric malpractice action from Bronx County, despite the fact that the first-named defendant, Harold Goldstein, D.P.M., had represented in his official podiatric license registration filings with the State of New York that his professional business address was in Bronx County. (R. 141-142) Indeed, it was apparent that he had done so repeatedly for years.

Instead, the court in its decision simply relied on Goldstein's conclusory and incomplete statements in an affidavit he submitted to support his motion to change plaintiff's properly-selected venue to Westchester County, holding that Goldstein's principal place of business was in Westchester. (R. 8, 10) A copy of Goldstein's affidavit, which was relied upon by all defendants in support of each of their respective motions, is contained in the Record at pp. 40-42.[2]

The finding below was improper. Goldstein's affidavit flatly contradicted his state license filings. (R. 141-142) Having held himself out as practicing podiatric

[1] References to "(R.___)" are to the Record on Appeal.

[2] Literally the only additional support any other defendant offered was an affidavit by defendant WestMed's Medical Director that Goldstein was its "employee." (R. 82, ¶5) However, neither he nor Goldstein provided any details or documentation regarding the nature or extent of

medicine in Bronx County, Goldstein should have been bound by that designation and estopped from asserting that his principal place of business was elsewhere.

Indeed, the courts of this state have consistently held that a person or entity is bound by the address they designate in official state filings, regardless of whether their principal place of business or residence is actually in a different county. See, *e.g.*, Fix v. B&B Mall Assocs., 118 A.D.3d 477 (1st Dept. 2014) The lower court should have followed this precedent and denied all of the motions and cross-motion without consideration of Goldstein's affidavit.[3]

Moreover, even if it had been proper for the court to consider the affidavit, as a matter of law it was insufficient to establish that Goldstein's principal place of business was not in Bronx County. Not only did the affidavit contradict his official registration filings – an inconsistency Goldstein never addressed or attempted to explain – there was other, substantial proof in the record that he had significant business interests and activities in the Bronx, which included at least one office in the Bronx and his claim that he saw some 175 patients per month in the Bronx. (R. 41, ¶6). The affidavit was also insufficient because no documentary evidence was

the employment, his earnings, his hours or even the number of years he had purportedly worked there.

[3] Defendants Rye Ambulatory Surgery Center and WestMed also moved for a change of venue based on the convenience of material witnesses and ends of justice. (R. 45) The lower court, however, did not address that issue. In any event, as is more fully set forth in Point I. subsection "c", *infra*, defendants utterly failed to make the requisite showing that a change of venue was warranted on those grounds.

submitted to support his convenient and conclusory claims that all that proof aside, his principal place of business was actually in Westchester.

Given that each of the three venue applications depended upon Goldstein's affidavit as the basis for changing the place of trial and that none offered any such supporting proof, all defendants failed to meet their respective *prima facie* burdens to establish that Goldstein's principal place of business was not in Bronx County at the time the action was commenced.

Accordingly, the lower court's orders should be reversed.

QUESTIONS PRESENTED

1. Did plaintiff properly select Bronx County as the venue for trial pursuant to CPLR §503(d) based on defendant Goldstein's official podiatric license registration filings with the N.Y.S. Education Department attesting that his principal place of business was in the Bronx?

The lower court incorrectly answered this question "no."

2. Did movants below meet their burden of proof and establish that Dr. Goldstein did not maintain a principal place of business in Bronx County despite his professional registration filings, where Goldstein's supporting affidavit was conclusory and incomplete, no documentary proof was submitted to support his claim that Westchester County was his principal place of business and the record demonstrated that, in fact, he conducted significant professional and business activities in Bronx County?

The lower court incorrectly answered this question "yes."

STATEMENT OF FACTS

Plaintiff-appellant, Raquel Lividini, commenced this action on January 18, 2018 by e-filing a Summons and Verified Complaint with the Bronx County Clerk. (R. 19-26) The Summons stated that her basis for venue was "defendants' principal place of business."

On March 22, 2018, defendant-respondent, Harold Goldstein, D.P.M., e-filed and served an answer to the complaint. (R. 27-33) Simultaneously, he e-filed and served a Demand for Change of Venue, asserting that venue should be changed to Westchester County. (R. 34-35)

On March 26, 2018, well within five days of that demand, plaintiff e-filed and served an Affidavit objecting to any change of venue, asserting that venue in Bronx County had been properly selected based upon an investigation conducted by plaintiff's counsel and that service of the summons and complaint had been properly made at his Bronx place of business. (R. 37-39)

Subsequently, Answers were received and similar change of venue demands were filed by defendants-respondents Vinai Prakash, D.P.M., Rye Ambulatory Surgery Center and Westmed Medical Group, P.C., (R. 65-80, 111-117). Plaintiff then timely filed and served affidavits objecting to any change of venue, again asserting that trial in Bronx County was proper based upon the investigation by plaintiff-appellant's counsel. (R. 88-93, 119-121)

a. Goldstein's N.Y.S. license registration filings and other proof established that he had significant business interests in Bronx County.

Plaintiff's investigation produced documentation, *inter alia*, that Goldstein, in his then current professional license registration filing with the N.Y.S. Education Department ("NYSED"), effective through November 2018, had affirmatively represented that he maintained a professional office or practice in "Bronx, NY." No other county or address was mentioned. A true copy of the printout from the "Verification" section of the N.Y.S. Education Department's Office of the Professions is included in the Record at R. 141.[4]

Further investigation established that Goldstein had listed the address of St. Barnabas Hospital, 4422 Third Avenue, Bronx, NY 10457, as his principal business address with NYSED. (R. 142, a copy of the certification from NYSED verifying Goldstein's filing information).

In addition, the then-current printout from the online directory of St. Barnabas Hospital (a/k/a SBH Health System), showed that Goldstein maintained an active office for the practice of medicine at 2016 Bronxdale Avenue, Suite 202, Bronx, NY 10462. (R. 146-147) He was also listed as St. Barnabas's Assistant Director of its

[4] At its top,7 the NYSED printout states that "[t]he information furnished at this website is from the Office of Professions' official database and is updated daily, Monday through Friday. The Office of Professions considers this information to be a secure, primary source for license verification." (emphasis added).

podiatry residency program. *Id.* The link to that website is: *http://www.sbhny.org/staff/harold-l-goldstein/*.[5]

Relying upon that information, Goldstein was served with the Summons and Verified Complaint via a person of suitable age and discretion at that very address, 2016 Bronxdale Avenue, Bronx, NY 10462. (See, R. 143, copy of affidavit of service). His answer asserted no defense that service there had been improper or defective.

Hence, based on the clear results of the investigation by counsel's office, a documented legal and factual basis existed for properly selecting Bronx County as the place for trial of this matter based upon Goldstein's principal place of business.

b. Goldstein's conclusory, unsupported affidavit.

Despite this unimpeachable proof which originated from Goldstein himself, he moved to change venue to Westchester County (R. 11-44), relying upon a carefully tailored – but wholly conclusory and incomplete – affidavit which contradicted his statutorily-mandated professional filings and the other proof in the record. (R. 40-42)

[5] As of the filing of this Brief, both the St. Barnabas listing and Goldstein's NYSED filings remain the same. In fact, Goldstein re-filed his NYSED information since he submitted his affidavit, as it now states that he is "registered through last day of: 11/21." (emphasis added) See, *http://www.nysed.gov/coms/op001/opsc2a?profcd=65&plicno=004891&namechk=GOL*.

Further, most of the factual assertions in Goldstein's Affidavit, such as the amount of his income purportedly earned from his Westchester practice and the days and hours allegedly spent at his Westchester offices, were unsupported by any proof. *Id.* Goldstein also asserted that he had been employed by defendant WestMed for the past 21 years, but provided no supporting proof for that claim even though such documentation should have easily been available. *Id.* See, also, fn. 4, *supra*

Of equal note is that Goldstein did not explain or address why, if his principal office had been in Westchester for so long, he had so recently designated Bronx County as his principal business address in his license filings with the State. *Id.* According to the NYSED Office of the Professions website, a licensee must renew his registration every three years.

Goldstein claimed also that he worked 3½ days, a total of 30 hours each week, at WestMed, treating 350-400 patients there each month, and that he derived 75% of his income from his Westchester practice. (R. 41, ¶¶5-6) Again, no proof supported any of those claims.

Goldstein further asserted that he worked two afternoons each week at St. Barnabas Hospital clinics in the Bronx, seeing another 150 patients per month there. Unlike his description of his Westchester activities, however, he offered no details as to which days of the week or what hours he spent in the Bronx, much less any corroborating documentation. (R. 41, ¶6) He also admitted to seeing another 20-25

patients per month at his office on Bronxdale Avenue in the Bronx but, yet again, offered no details as to the days or hours spent at that office, much less any supporting evidence. *Id.*

In short, Goldstein claimed that he saw 575 patients every month at various clinics and offices – more than 25 each work day – without even accounting for time for a single surgery. In fact, the absence of any details describing when or how often Goldstein conducted his surgeries is just another of the many reasons his affidavit raised more questions than it answered, in addition to contradicting his State filings.

c. The decisions and orders by the lower court.

Despite this, the lower court nevertheless decided that Goldstein's affidavit alone was sufficient to establish that he did not principally practice in Bronx County and granted defendants' motions and cross-motion to change venue to Westchester County. (R. 8, 10) The court did not address plaintiff's amply supported argument that Goldstein should have been estopped from challenging venue in Bronx County given his NYSED license registration filings. The court also did not address the arguments made by Rye Ambulatory Surgery and Westmed that they were entitled to a discretionary change of venue pursuant to CPLR §510(3).

We respectfully submit that the lower court erred in failing to find that venue was properly laid in Bronx County based on Goldstein's principal place of

business as set forth in his registration filings. The lower court also erred in finding that Goldstein's unsupported affidavit which contradicted those filings was sufficient to establish as a matter of law that his principal place of business was in Westchester despite those filings and the other proof showing his substantial business activities and interests in the Bronx. Hence, both orders should be reversed and venue should be restored to Bronx County.

POINT I

DEFENDANTS' MOTIONS AND CROSS-MOTION TO CHANGE THE VENUE OF THIS MATTER FROM BRONX COUNTY TO WESTCHESTER COUNTY SHOULD HAVE BEEN DENIED.

As demonstrated herein, the documentary proof, including Goldstein's own registration filings with NYSED made long before this case was commenced, established that plaintiff properly designated Bronx County for trial. The evidence submitted demonstrated that Goldstein had attested that his principal place of business for the practice of podiatry was – and had been for years – in Bronx County. Those filings alone should have estopped Goldstein from claiming he had a principal place of business anywhere else.

Even if his filings were somehow not considered binding, defendants-appellants nevertheless failed to establish that none of the parties resided in Bronx County when this action was commenced, as was their *prima facie* burden upon any such application. While it is not disputed that defendants Prakash, the surgery center and WestMed were not Bronx residents for venue purposes, each of those defendants relied wholly upon Goldstein's affidavit for the same claim that his principle place of business was not in the Bronx.

Thus, each failed to demonstrate that his place of business was not in Bronx County when the summons and complaint were filed. That fatal deficiency of proof

alone mandated denial of each of the motions irrespective of the sufficiency or merits of plaintiff's opposing papers.

Finally, defendants failed to make any part of the requisite showing to be entitled to a change of venue for the convenience of material witnesses and the ends of justice pursuant to CPLR §510(3).

In light of the foregoing, plaintiff properly selected Bronx County for trial pursuant to CPLR §503(a) and (d) relying upon Goldstein's affirmative representations as to his principal place of business. Defendants' applications should all have been denied.

a. Goldstein's registration filings with the NYSED are binding and estop him from claiming that he has a principal place of business outside the Bronx.

Plaintiff's selection of Bronx County for trial was proper based upon Goldstein's affirmative designation of Bronx County as his principal place of business with the NYSED. Furthermore, the proof – including statements in his affidavit – demonstrated that Goldstein practices podiatry at multiple locations in the Bronx, including his own office at 2016 Bronxdale Avenue, as well as at St. Barnabas Hospital, where he not only has privileges to operate but sees dozens of patients each month and serves and is publicly advertised as Assistant Director of its podiatric residency program.

CPLR §503(a) permits venue to be placed in any county where one of the parties resided at the time of the action's commencement. It is well-settled that for venue purposes, a person may have more than one residence and pursuant to CPLR §503(d), an unincorporated, individually-owned business, such as Goldstein's practice, has two residences for venue purposes, in the county where the business has its principal office and in the county where the individual resides.

This provision applies to an unincorporated, individual physician – here, Goldstein – sued for malpractice. See, Young Sun Chung v. Kwah, 122 A.D.3d 729 (2nd Dept. 2014) [proper venue for action against physician sued in his capacity as a medical doctor is county of residence or where his principal office is located]. See also, Cozby v. Oswald, 2013 WL 2367163 (Sup. Ct., N.Y. Cnty., Schlesinger J. 2013); Harrington v. Cramer, 129 Misc.2d 489 (Sup Ct., N.Y. Cnty., Rubin, J. 1985).

At bar, Goldstein filed his mandatory licensing information with the Office of the Professions of the N.Y.S. Education Department affirmatively representing that his principal office for the practice of podiatry was in Bronx County. Such applications must be sworn to or affirmed (see, Education Law §6501-b), and notice of any change of address for the principal place of business must be given

> "within thirty days of such change. Failure to register or provide such notice within one hundred eighty days of such change shall be willful failure under section sixty-five hundred thirty of this chapter.

Education Law §6502(5) (emphasis added). Section 6530 defines "Professional Misconduct," providing the bases for licensing disciplinary violations.

Thus, Goldstein submitted to the lower court a sworn statement which flatly contradicted his sworn, mandatory, professional licensing filings. He also admitted that he practices regularly at multiple locations in Bronx County and sees some 175 patients each month in the Bronx.

Based upon the foregoing, venue was properly placed in Bronx County. Directly on point is Cozby v. Oswald, 2013 WL 2367163 (Sup. Ct., N.Y. Cnty., Schlesinger J. 2013). There, plaintiff sued defendants for chiropractic malpractice and placed venue in New York County based upon the principal office address of defendant Oswald. Thereafter, after having served a timely demand, defendant moved to change venue to Rockland County, asserting that Oswald's principal office was in Rockland even though he admittedly maintained a "satellite" office in New York County. In support, Oswald submitted an affidavit claiming that the "majority" of his chiropractic services were provided to patients, including plaintiff there, in Rockland County and that he had also been a resident of Rockland for 22 years.

In opposition, plaintiff there submitted proof – as here – that according [illegible] filings with NYSED's Office of the Professions, defendant had listed [illegible] address as being in New York, NY, and that this controlled [illegible] urged that the address listed on the state filing was not disp[illegible]

Defendant's motion to change venue was denied. The court ruled that pursuant to CPLR §503(d), an action against an individual physician sued in his professional capacity may be venued either in the county of his residence or in the county where his principal office is located. The Court held that just as with a corporation, a physician who lists his principal office in a specific county in his filings with the NYSED is bound by his designation. It noted further that pursuant to Education Law §6502(5), a licensee physician must notify NYSED of any change of address within 30 days. Since defendant there had held himself out as having his principal office in New York County and had not changed his address with NYSED, plaintiff's selection of New York County for trial had been proper.

The facts here are identical. Goldstein affirmatively specified his professional address with NYSED's Office of the Professions – the governmental licensing authority for his profession – as being in the Bronx. He never changed that address – and has since re-filed the same designation. If, in fact, at some time he had made Westchester County his principal place of practice – which seems highly unlikely given his three offices and his prominent teaching position in the Bronx – he is guilty of Professional Misconduct under §6530.

Dr. Goldstein should be bound by his designation and his attempt now to claim a different principal office location to move the trial of this case against him must be rejected. See, Janis v. Janson Supermarkets, LLC, 161 A.D.3d 480(1st Dept. 2018)

[defendant's designation of New York County as its place of business in its application to Secretary of State was controlling for venue purposes even if it had not actual office in New York County]; Darbeau v. 136 West 3rd Street, LLC, 144 A.D.3d 420 (1st Dept. (2016) [plaintiff properly selected Bronx County as place of venue based on address defendant listed with Department of Motor Vehicles]; Job v. Subaru Leasing, 30 A.D.3d 159 (1st Dept. 2006) [foreign corporation bound by designation of New York County as its principal place of business in filings with Secretary of State even though it had no office in county]; Della Vecchia v. Daniello, 192 A.D.2d 415 (1st Dept. 1993) [professional corporation bound by designation of Bronx County as its principal place of business]; Gonzalez v. Weiss, 38 A.D.3d 492 (2nd Dept. 2007) [plaintiff properly placed venue in Kings County based on addresses of defendants contained in police report]; Furth v. Elrac, Inc., 11 A.D.3d 509 (2nd Dept. 2004) [plaintiff properly selected venue based on defendant driver's address as set forth on police report]; Furlow v. Braebrun, 259 A.D.2d 417 (1st Dept. 1999) [conclusory affidavits by plaintiffs insufficient to rebut addresses listed in DMV records].[6]

[6] Indeed, Goldstein's efforts in his affidavit to contradict, without explanation, his affirmative statements in his official state licensing registration should be treated as "feigned" for purposes of defeating venue; his affidavit should be rejected accordingly. See, *e.g.*, Garzon-Victoria v. Okolo, 116 A.D.3d 558, 983 N.Y.S.2d 718 (1st Dept. 2014); Colon v. Vals Ocean Pac. Sea Food, Inc., 157 A.D.3d 462, 66 N.Y.S.3d 445 (1st Dept. 2018); Steigelman v. Transervice Lease Corp., 145 A.D.3d 439, 42 N.Y.S.3d 146 (1st Dept. 2016); Telfeyen v. City of New York, 40

b. Defendants, having relied solely upon Goldstein's deficient affidavit, have equally failed to meet their prima facie burden of establishing that none of the parties resided in Bronx County when this action was commenced.

To prevail on a CPLR §510(1) motion to change venue as of right, a defendant must demonstrate in his/her moving papers that plaintiff's choice of venue was improper and that the movant's choice is proper. See, Kidd v. 22-11 Realty, LLC, 142 A.D.3d 488, 35 N.Y.S.3d 719 (2nd Dept. 2016); Deas v. Ahmed, 120 A.D.3d 750, 991 N.Y.S. 661 (2nd Dept. 2014); Gonzalez v. Sun Moon Enterprises Corp., 53 A.D.3d 526, 861 N.Y.S.2d 401 (2nd Dept. 2008).

At bar, there can be no question that plaintiff's designation *ab initio* of Bronx County was proper based on Goldstein's registration filings.

Hence, to rebut the presumption of proper venue created by those filings – assuming this Court finds that the filings are somehow not binding upon Goldstein – defendants must establish that plaintiff's venue selection was improper by showing that none of the parties to the action was a resident of the county chosen by plaintiff when the action was commenced. Kidd v. 22-11 Realty, LLC, *supra*; Gonzalez v. Sun Moon Enterprises Corp., *supra*. Darbeau v. 136 West 3rd Street, LLC, *supra*. Gonzalez v. Weiss, *supra*; Furth v. Elrac, Inc., *supra*.

A.D.3d 372, 836 N.Y.S.2d 71 (1st Dept. 2007); Lebron v. Mensah, 2018 N.Y.Slip. Op. 03521 (2nd Dept. 2018).

Here, defendants clearly failed to meet their burden. While plaintiff and defendants Rye Ambulatory and Westmed appear to be residents of Westchester and Prakash appears to reside now in the State of Washington, all defendants failed to submit sufficient proof that Goldstein's principal office was not in Bronx County at the time the action was commenced. All the "proof" consisted solely of Goldstein's self-serving, conclusory and incomplete affidavit, unsupported by any extrinsic proof, and contradicted by his own filings made before this lawsuit existed. The only other "fact" offered was WestMed's Medical Director's assertion in an affidavit that Goldstein was an employee of WestMed, for some unspecified portion of his professional activities.

Courts have consistently held that where a party has affirmatively provided a specific residence or business address to a governmental body or official, a conclusory affidavit by that same party – such as Goldstein's here – that he/she was actually a resident or had a principal office or place of business in a different county, absent any supporting documentation, is insufficient as a matter of law to establish that venue was improperly laid or that he/she was a resident of the county claimed.

Directly on point is Broderick v. R.Y. Management Co., Inc., 13 A.D.3d 197, 786 N.Y.S.2d 484 (1st Dept. 2004) There, defendant moved to change venue from Bronx County to New York County, based upon an affidavit claiming that its principal and only office was in New York County. No documentation was

submitted to support that claim. The court held that the affidavit was "insufficient evidence" to establish that venue had been improperly placed in Bronx County, particularly in light of documentation submitted by plaintiff that defendant did, in fact, have offices at two different Bronx locations.

Similarly, in Hernandez v. Seminatore, 48 A.D.3d 851 (1st Dept. 2008), this Court rejected a plaintiff's attempts to establish via an affidavit that he resided in Bronx County, not Ulster County, the county listed as his place of residence on his driver's license, "absen[t] … any probative documentary evidence showing a Bronx residence when the action was commenced." See also, Darbeau v. 136 West 3rd Street, LLC, *supra* [defendant's affidavit claiming that he lived in Queens County was "insufficient to satisfy burden of showing that venue chosen by plaintiff was improper," given DMV records showing defendant resided in Bronx.] See also, Labissiere v. Roland, 231 A.D.2d 687 (2nd Dept. 1996).

Similarly, at bar Goldstein claimed in his Affidavit, in a conclusory and deliberately selective manner, that his principal place of business was in Westchester, but provided not an iota of documentary evidence to support that claim. Further, he failed to provide an adequate description of his Bronx activities, effectively precluding plaintiff or the Court from confirming the veracity of his claims.

In marked contradistinction, plaintiff here submitted official, certified copies of State documents filed by Goldstein himself in which he affirmatively stated that

his principal office was in Bronx County. Added to this was proof, conceded by Goldstein to be accurate, that he presently has at least two active places of business in Bronx County. Hence, in accordance with Broderick, Hernandez and Darbeau, *supra*, Goldstein's motion should have been denied.

Myriad other cases support the conclusion that defendants at bar failed to establish that venue in Bronx County was improperly selected. See, *e.g.*, Fix v. B&B Mall Associates, Inc., 118 A.D.3d 477 (1st Dept. 2014) [conclusory affidavit, unsupported by documentary evidence, insufficient to establish *prima facie* that defendant's office was actually located in Westchester, not the Bronx; further, even if defendant had met its initial burden, plaintiff established in opposition that defendant had an office address in Bronx and designated Bronx County as its place of business with Secretary of State, requiring denial of motion]; Singh v. Empire International, Ltd., 95 A.D.3d 793 (1st Dept. 2012) ["conclusory affidavit attesting to a Queens County residency, unsupported by documentation of such residency, was insufficient to satisfy defendant's initial burden of showing that the venue chosen by plaintiff was improper."]; Book v. Horizon Asset Management, 105 A.D.3d 661 (1st Dept. 2013) [self-serving and conclusory affidavit with no supporting documentation claiming a Bronx residence was insufficient to establish residency for venue purposes]; Furlow v. Braebrun, *supra* [plaintiffs' conclusory affidavits attesting to Bronx residency, unsupported by any documentation, insufficient to rebut motor vehicle records

showing plaintiffs resided in Westchester County]; Gonzalez v. Weiss, *supra* [conclusory affidavits insufficient to establish that defendants were not residents of Kings County at time action commenced].[7]

Since defendants failed to meet their *prima facie* burden of establishing that Goldstein was not a resident of Bronx County when the action was commenced, their motions to change venue to Westchester County must be denied.

c. ***Defendants have failed to establish that the convenience of witnesses or ends of justice required a change of venue to Westchester County.***

Defendants-appellants Rye Ambulatory Surgery and WestMed also argued below that venue should be changed to Westchester County for the convenience of material witnesses, as well as for the ends of justice, pursuant to CPLR §510(3). While the lower court failed to address those issues, defendants each equally failed to establish a *prima facie* entitlement to any such relief.

[7] Apparently well aware of the case law so destructive of Goldstein's contrived position, his counsel argued below that an affidavit – alone – can be sufficient to establish residency, citing Morris v. Velickovic, 2011 N.Y. Slip Op. 30091 (S.Ct., N.Y. Cnty 2011). However, even a cursory review of that decision shows that the Court there rejected as insufficient a conclusory affidavit by the defendant-doctor that his principal office was in Westchester, not New York County. While the Court did note that the affidavit contained no facts establishing a principal office in either county, there was no holding that such an affidavit alone would have been sufficient proof. Counsel also omitted that unlike here, there was documentation showing that the defendant-doctor had a professional corporation which had formally designated Westchester County as its principal place of business.

Indeed, it is more than well-settled that a party seeking a change of venue on these grounds bears a heavy burden which must be satisfied before any such application may be granted. As the Appellate Division has stated:

> "A change of venue based on convenience of witnesses may only be granted after there has been a detailed evidentiary showing that the convenience of non-party witnesses would in fact be served by the granting of such relief (citations omitted). The affidavit in support of such a motion must contain the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted." (emphasis added)

Jacobs v. Banks, Shapiro, Gettinger, Waldinger & Brennan, 9 A.D.3d 299, 780 N.Y.S.2d 582 (1st Dept. 2004); Parker v Ferraro, 61 A.D.3d 470 (1st Dept. 2009); see also, O'Brien v. Vassar Bros. Hospital, 207 A.D.2d 169, 622 N.Y.S.2d 284 (2nd Dept. 1995), actually cited by defendants below.

Defendants did not remotely approach, let alone meet their burden. Instead, they simply offered some general statements, via their counsel, that "any witnesses designated to testify on behalf of the institutional defendants would maintain an office in Westchester County." (R. 50) The convenience, however, of those "institutional defendants" – defendants Rye Ambulatory and WestMed – is irrelevant as a matter of law as a basis for changing venue for convenience of witnesses. Parker v. Ferraro, *supra* [defendant driver's inconvenience is "not a factor for consideration"

on a motion for a discretionary change of venue.]. See also, Jacobs v. Banks, Shapiro, Gettinger, Waldinger, Brennan, LLP, *supra* [defendant's failure to indicate that non-party witnesses had been contacted or to describe how they would be inconvenienced was insufficient as a matter of law to establish that change of venue was necessary for convenience of witnesses]; Timan v. Sayegh, 49 A.D.3d 274, 854 N.Y.S.2d 338 (1st Dept. 2008)["mere general statements as to witness inconvenience are not enough"]; Forte v. Weiner, 165 A.D.2d 278, 564 N.Y.S.2d 6 (1st Dept. 1990).

At bar, not a single witness, party or non-party, was specifically identified as being inconvenienced by having to travel from Westchester County to adjacent Bronx County for trial. Certainly, Goldstein, the primary defendant, would not be inconvenienced by having to testify in Bronx County since he affirmatively attested that he practices in the Bronx regularly.

Furthermore, that treatment may have occurred in Westchester, that Goldstein, a party, may reside in Westchester or that unspecified records may be maintained in Westchester are all irrelevant to the threshold question of whether plaintiff properly selected venue based upon Goldstein's principal place of business, as expressly permitted by statute. See, Herrara v Conley, 52 A.D.3d 218 (1st Dept. 2008) [omission of proof that witnesses would have been inconvenienced by trial in Bronx County, and failure by defendants to identify any such witnesses, would have been fatal to any application by defendants for a discretionary change of venue from

Bronx County to Westchester even though plaintiff and one defendant resided in Westchester, treatment occurred in Westchester and remaining defendants resided in different counties]; see also, Peoples v. Vohra, 113 A.D.3d 664 (2nd Dept. 2014).

Nor do any of the cases cited by defendants below require a different result. While the courts in Pavesi v. Salzberg, 57 A.D.3d 750 (2nd Dept. 2008) and Giambona v. Stein, 233 A.D.2d 274 (1st Dept. 1996), both granted changes of venue for convenience of witnesses, §510(3), neither case described the proof submitted there to support either of those applications. Hence, it would be improper to assume that those courts granted such relief in the absence of a proper evidentiary showing mandated by applicable case law.

Finally, defendants cited the decision in White v. Fagan, Queens County Index No. 701826, a matter also being prosecuted by plaintiff-appellant's counsel, to support their argument for a change of venue for convenience of witnesses here. White, however, did not involve any question regarding convenience of any witnesses. Rather, the issue was whether the defendant-doctor or his professional corporation – he was not a sole proprietor as Goldstein is – were residents of Nassau or Queens. The court found that because the physician resided in Nassau County and his professional corporation had formally designated Nassau as its principal place of business in its filings with the Secretary of State, Nassau County was the proper venue.

Hence, when properly analyzed, White actually supports plaintiff's choice here of Bronx County for trial, since the court in White found that location of the principal office designated by defendant professional corporation in N.Y.S. corporate filings – not the actual office location – was controlling. Here, Goldstein, who does not have a P.C., is bound by the county he affirmatively designated for his professional practice, Bronx, rather than the county he so conveniently swore was actually where his principal place of business was located.

CONCLUSION

Defendant Goldstein's licensing filings attesting that his principal place of business for his practice of podiatry was in Bronx County provided a proper basis for plaintiff's choice of venue as of right. It is inarguable that for purposes of venue, an individual, unincorporated professional may have two venue residences, his/her actual place of residence and his/her principal place of business.

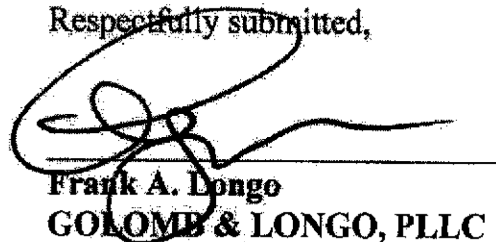
Since, plaintiff properly selected venue based on those filings, Goldstein and the other defendants were required to demonstrate by admissible documentary proof that venue was improperly laid. They did not, instead relying exclusively upon Goldstein's deficient and incomplete affidavit which did not even offer any explanation as to why his license filings were purportedly incorrect or should not have bound him.

Finally, defendants identified no non-party witnesses, much less that any non-party witness would be inconvenienced by having to appear in Bronx County.

Based upon the foregoing, all three applications to change the venue of this matter from Bronx County to Westchester County should have been denied, with prejudice.

Dated: New York, NY
January 25, 2019

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

RACQUEL LIVIDINI,

Plaintiff-Appellant,

against

HAROLD L. GOLDSTEIN, D.P.M., VINAI PRAKASH, D.P.M.,
RYE AMBULATORY SURGERY CENTER, L.L.C.
and WESTMED MEDICAL GROUP, P.C.,

Defendants-Respondents.

1. The index number of the case in the Court below is 20675/18E.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, Bronx County.
4. This action was commenced on or about January 18, 2018, by the filing of a Summons and Verified Complaint. Issue was joined by service of a Verified Answer of Harold L. Goldstein, D.P.M. on or about March 22, 2018. A Verified Answer of Rye Ambulatory Surgery Center, LLC was served on or about April 2, 2018. A Verified Answer of Westmed Medical Group, P.C. was served on or about April 2, 2018. A Verified Answer of Vinai Prakash, D.P.M. was served on or about April 19, 2018.
5. The nature and object of the action: podiatric malpractice.
6. The appeals are from the Decisions and Orders of the Honorable Joseph Capella, dated July 20, 2018.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.