

EXHIBIT D

To be Argued by:
JENNIE M. LUNDMAN
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
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 DEFENDANT-RESPONDENT
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PRELIMINARY STATEMENT

In this podiatric medical malpractice action, Defendant-Respondent Harold Goldstein, D.P.M. (hereinafter “Dr. Goldstein”) respectfully submits this brief in opposition to the appeal by Plaintiff-Appellant, Rachel Lividini (hereinafter “plaintiff”), from the Order of the Honorable Joseph Capella, Justice of the Supreme Court, Bronx County, entered July 26, 2018, which granted the motions of Dr. Goldstein and Defendants Rye Ambulatory Surgery Center, L.L.C., (hereinafter, “Rye”) and Westmed Medical Group P.C., (hereinafter, “Westmed”) pursuant to CPLR §§ 503, 510 and 511 to transfer the venue of this matter from Bronx County to Westchester County and granted the cross-motion of Defendant Vinai Prakash, D.P.M. for the same relief.

As will be fully demonstrated below, the Order of the Supreme Court was providently determined and should be affirmed in all respects. In commencing this action, plaintiff incorrectly selected Bronx County as venue based solely on a claim that Dr. Goldstein’s purported “primary place of business” was located in Bronx County. Plaintiff’s sole basis for asserting that Dr. Goldstein’s principal place of business is Dr. Goldstein’s filing of his podiatric medical license registration renewal with the New York State Department of Education, (hereinafter, “NYSDOE”) which lists a Bronx County address.

The Supreme Court disagreed and granted the defendants-respondents' motions to transfer venue from Bronx County to Westchester County. It correctly held that the defendants-respondents established and plaintiff-appellant failed to refute, that although Dr. Goldstein has affiliations with Bronx County, his principal place of business is in Westchester County. In coming to this decision, the lower court properly relied upon Dr. Goldstein's detailed Affidavit which overwhelmingly demonstrated that he is employed in Westchester County, he treats the majority of his patients in Westchester County and over 75% of his income is derived from said employment in Westchester County.

In New York, residence, for the purpose of venue, is conferred upon corporations and individuals alike by the CPLR. The CPLR is very clear with respect to what constitutes residency for individually owned businesses for purposes of venue. CPLR §503(d) specifically states, in pertinent part, "A partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides." Courts have held that this provision applies to individually named physicians. *See Young Sun Chung, Kwah*, 122 A.D.3d 729, 730 (2d Dep't 2014).ⁱ

In determining where a medical practitioner's professional place of business is located, courts have consistently accepted Affidavits submitted on behalf of the

respective physician(s)/medical practitioner(s) to establish his or her principal place of business where the Affidavits are sufficiently detailed and explanatory. *See DiCicco v. Cattani* 5 A.D.3d 318, 773 N.Y.S.2d 558, 559 (1st Dep't 2009); *Magrone v. Herzog*, 304 A.D.2d 801, 757 N.Y.S.2d 866 (2d Dep't 2003); *Pasley v. St. Agnes Hosp.*, 244 A.D.2d 469, 655 N.Y.S.2d 908 (2d Dep't 1997). Courts have long held that a multitude of factors are considered when attempting to determine what constitutes a private physician's principal place of business. Affidavits by named medical practitioners are utilized by the parties and the Courts alike to establish the respective practitioner's principal place of business by setting forth who the respective physician's employer is, where his or her office is physically located, how much of his/her income is derived from a particular office, treatment center and/or hospital and how much time is spent rendering medical care and treatment in a particular county. *See Cozby v. Oswald*, 2013 N.Y. Misc Lexis 2672 (1st Dept. 2013). It is quite common for medical professionals to render care to patients in multiple locations, across multiple counties and even states, whilst still maintaining one location as his or her principal place of business.

In the instant matter, it is undisputed that Dr. Goldstein does not maintain his own private practice, but rather he is employed by Westmed for the past 21 years. R. 40. Westmed is incorporated in Westchester County and maintains several offices throughout Westchester County. R. 40. Dr. Goldstein works at two different

Westmed locations, both located in Westchester County. R. 41. Additionally, all of the surgeries performed by Dr. Goldstein are done at Rye Ambulatory Surgery Center also located in Westchester County. R. 41. Furthermore, there is no dispute that all of the care Dr. Goldstein rendered to the plaintiff in the instant action occurred solely in Westchester County at Westmed and Rye Ambulatory Center. R. 41-42.

The Affidavit submitted by Dr. Goldstein in support of his application to transfer venue from Bronx County to Westchester County set forth his employment status, his schedule for seeing patients, an estimation of how many patients he sees in the specific offices he renders podiatric medical care out of, and the percentage of income he derives from his practice in Westchester County compared to his Bronx County practice. R. 40-42. The fact that his Affidavit supports his position that his principal place of business is in fact Westchester County does not make it unreliable or self-serving.

Nowhere in the CPLR does it state that an address listed on a NY State medical or podiatric license renewal or registration form constitutes a physician's principal place of business. Moreover, nowhere in the NYSDOE does it require a designation of a practitioner's principal place of business when filing a medical license registration and/or a medical license renewal. The mere fact that Dr. Goldstein used a Bronx County clinic address wherein he sees 20-25 patients per

month does not deem said address to be the location of his principal place of business and is not the equivalent of an affirmative designation of Dr. Goldstein's principal place of business. R. 41. It is simply a mailing address for an address Dr. Goldstein is associated with. R. 41. Thus, Plaintiff-Appellant's suggestion that Dr. Goldstein is possibly subject to professional misconduct by virtue of listing an incorrect address on his license renewal or submitting an untruthful Affidavit stating that his principal place of business is in Westchester County in contradiction to his license registration filings for purposes of forum shopping is disingenuous at best.

Furthermore, it is not in dispute that Dr. Goldstein resides in Westchester County and as will be set forth in more detail below, his principal place of business is also in Westchester County. The corporate defendants, Rye and Westmed's respective Westchester County residencies are not in dispute. Similarly, plaintiff's Westchester County residency is also not in dispute.

There being no party residing in Bronx County, the defendants-respondents satisfied the *prima facie* burden and timely served a demand to change of venue to Westchester County as the proper county. Thereafter, Dr. Goldstein timely moved to change of venue, providing an Affidavit from Dr. Goldstein that at all times relevant to this action he resided in Westchester County, his principal place of business is located in Westchester County and he never provided treatment to plaintiff in Bronx County.

In response, plaintiff failed to adequately establish that Dr. Goldstein's medical office in Bronx County is his "principal office" as is required by CPLR § 503(d) to substantiate residence for placing proper venue. The Supreme Court thus correctly determined that in selecting an improper county plaintiff forfeited the right to choose venue, and appropriately concluded that defendants were entitled to removal of the action to Westchester County, the county in which Dr. Goldstein actually resides and where he maintains his principal place of business. As such, it is respectfully submitted that the Supreme Court correctly granted the defendants-respondents' motions.

COUNTER-QUESTIONS PRESENTED

1. Did Dr. Goldstein satisfy his burden in establishing that his principal place of business is located in Westchester County such that Bronx County was appropriately deemed an improper venue by the lower court? Yes.
2. Should this Court affirm the lower court's decisions and orders granting defendants-respondents' motions to transfer venue from Bronx County to Westchester County where all of the treatment rendered to plaintiff-appellant in the instant action occurred in Westchester County, none of the parties to

the action are residents of Bronx County or have their respective principal places of business in Bronx County? Yes

COUNTER-STATEMENT OF RELEVANT FACTS

This action was commenced by the filing of a Summons and Verified Complaint dated January 18, 2018. R 19-26. Venue was placed in Bronx County by plaintiff based upon a claim in the Summons that “Defendant Harold L. Goldstein, D.P.M.’s principal place of business [is] located 2016 Bronxdale Avenue, Bronx, New York 10462. R 17-18. Per the Summons, plaintiff-appellant is a resident of Westchester County. R 19.

Pursuant to CPLR § 511(a) and (b), Dr. Goldstein served a “Demand for Change of Venue” together with his Verified Answer on March 22, 2018, indicating Bronx County is not a proper county, and demanded the action be transferred to Westchester County which Dr. Goldstein specified as proper. R 29-34. On April 2, 2018 codefendants WestMed and Rye served their respective Verified Answers and Demands to Change Venue demanding the action be transferred from Bronx County to Westchester County. R 65-79.

On March 26, 2018, plaintiff-appellant served an Affidavit objecting to any change in venue asserting that Bronx County was properly selected based upon Dr. Goldstein’s alleged principal place of business being located at 2016 Bronxdale

Avenue, Bronx, New York 10462 and that Dr. Goldstein was served with the Summons and Complaint at that address. R. 37-38.

On April 17, 2018, co-defendants WestMed and Rye cross-moved to transfer the venue of this action from Bronx to Westchester County. R 1-7. They furnished a sworn Affidavit by Dr. Steven Meixler, Director of Westmed Medical Group, P.C. and Rye Ambulatory Surgery Center, LLC stating that both entities are Westchester Corporations and maintain their principal place of business in Westchester County. R. 45-94. Codefendant Dr. Prakash also cross-moved for the same relief. R. 96-118.

In the alternative, defendants-respondents Westmed and Rye moved for a change of venue pursuant to CPLR §§ 510(3) and 511 to transfer the venue of this action from Bronx to Westchester County on the grounds that a change of venue to Westchester County would promote the conveniens of material witnesses and the ends of justice. R. 47-43. In support of their position, defendant-respondents Westmed and Rye pointed out that the underlying alleged malpractice had no connection to Bronx County, all documentary evidence and potential witnesses are located in Westchester County and Westchester County is the county where the institutional defendants and Dr. Goldstein maintain their principal places of businesses.

Thereafter, on April 4, 2018, Dr. Goldstein timely moved pursuant to CPLR §§ 503, 510 and 511 to transfer the venue of this action from Bronx to Westchester

County. R 11-44. Dr. Goldstein provided a sworn Affidavit, under oath, stating that from the time this action was commenced through the time of the making of the affidavit, he resided at 293 Surrey Drive, New Rochelle, New York 10804, his principal place of business is in Westchester County and that during the same period he never provided treatment to plaintiff at any location outside of Westchester County. R. 40-42.

On June 4, 2018, plaintiff-appellant opposed the motions claiming that Bronx County is the proper venue because the defendants-respondents failed to establish that Dr. Goldstein is not a resident of Bronx County for venue purposes. R. 122-123. Plaintiff-appellant further opposed the motions arguing that Bronx County is a proper venue as Dr. Goldstein listed a Bronx County address on his license registration filing with the New York State Department of Health. Finally, plaintiff-appellant argued that the defendant-respondents failed to establish that the convenience of material witnesses warranted a change of venue pursuant to CPLR §§ 510(3) and 511. R. 136-140.

Plaintiff-appellant's assertion that Dr. Goldstein's listing of a Bronx County address on his license registration filings with the NYSDOE constitute a designation of said address as his principal place of business is without merit as there is no statutory requirement for a medical professional to designate his or her principal place of business on a medical license registration or renewal filing. Other than

simply stating it as fact, plaintiff-appellant has failed to provide any statutes or case law to support this notion. What is more, the CPLR is what governs what constitutes an individual practitioner's residence for purpose of venue. CPLR §503(d) is very clear and provides that "the place of residence for venue purposes is the place where the "individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides". *Emphasis added*.

Plaintiff-appellant further contends that even if Dr. Goldstein's listing of a Bronx address on his license renewal application is insufficient for establishing his residency in the Bronx, Dr. Goldstein's Affidavit in support of the motion to change venue is self-serving and conclusory. This argument must also fail as Courts have consistently held that an Affidavit, such as the one submitted by Dr. Goldstein herein, setting forth a detailed summary of a practitioner's practice is sufficient to establish his or her principal place of business for purposes of venue.

Contrary to plaintiff-appellant's contention, Dr. Goldstein's Affidavit is specific and thorough in explaining why his principal place of business is located in Westchester County. As required, the Affidavit explicitly details Dr. Goldstein's podiatric practice in an effort to demonstrate where the bulk of his practice is generated from. Specifically, Dr. Goldstein's Affidavit sets forth his employment by a Westchester County corporation, codefendant Westmed for the past 21 years. (R.

40). Through the course of his employment, Dr. Goldstein renders podiatric medical care to patients at two Westmed locations, 1 Theall Road, Rye, New York 10580 and 201 Westchester Avenue, White Plains, New York. He also performs surgeries at Rye Ambulatory Center, also located at 1 Theall Road, Rye, New York 10580. R.

41. Notably, all three of these facilities are located in Westchester County. What is more, Dr. Goldstein only treated the plaintiff-appellant at the aforementioned Westmed locations and the surgery at issue in this matter occurred at Rye Ambulatory Center. R. 41-42.

Furthermore, Dr. Goldstein's Affidavit lays out in specific detail his work schedule which effectively demonstrates that the majority of the patients he sees and surgeries he performs are through his employment by Westmed. Specifically, Dr. Goldstein sees approximately 350-400 patients per month at the Westmed offices on Monday, Tuesday, Wednesday and Fridays totaling approximately 30 hours per week. R. 41. Moreover, Dr. Goldstein, a podiatric surgeon, exclusively performs surgeries at Rye Ambulatory Center. R. 41.

In marked contrast, Dr. Goldstein sees only 20-25 patients per month at Bronx Park Medical Pavilion located at 2016 Bronxdale Avenue, Bronx, New York, the address plaintiff-appellant purportedly claims to be Dr. Goldstein's principal place of business. R. 41. Dr. Goldstein, as is the case with many practitioners, maintains privileges at both White Plains Hospital (located in Westchester County) and St.

Barnabas Hospital (located in Bronx County). R. 41. Additionally, Dr. Goldstein spends two afternoons per week supervising podiatric residents at two St. Barnabas Clinics wherein approximately 150 patients per month are seen. R. 41. Dr. Goldstein's Affidavit further sets forth the fact that over 75% of his income is derived from the patients he treats through the course of his employment by Westmed.

Dr. Goldstein's Affidavit clearly evidences the fact that the majority of his time is spent seeing and treating patients in Westchester County. This fact, when taken into consideration with the indisputable facts of his employment by Westmed, a Westchester corporation, his domicile in Westchester County and his treatment of the plaintiff in Westchester County overwhelmingly supports Dr. Goldstein's position that his principal place of business is located in Westchester County, such that venue in Bronx County is improper.

Defendants served their respective Reply papers to plaintiff-appellant's opposition papers in further support of defendants' respective motions to transfer venue to Westchester County. R 150-157.

By Order dated July 20, 2018, the Supreme Court granted the defendants' motions to transfer venue to Westchester County. R 5-10. In its Order, the Supreme Court stated that "Dr. Goldstein sufficiently describes why his principal place of business is at WestMed Medical Group in Westchester County. In opposition, the

evidence submitted by plaintiff merely demonstrates that Dr. Goldstein is affiliated with St. Barnabas Hospital in the Bronx.” R. 8.

Based upon the above and the reasons set forth below, the plaintiff-appellant’s Appeal must be denied in its entirety, as a matter of law.

POINT I

PLAINTIFF’S BASIS FOR PLACING VENUE IN BRONX COUNTY IS SUBSTANTIVELY FLAWED.

- a. As no parties to this action reside in Bronx County, the lower court correctly deemed Bronx County to be an improper venue.

Venue is a proper in a county if one of the parties resides there at the time of the commencement of the action. CPLR §503(a). CPLR §503(c) provides that a “domestic corporation...shall be deemed a resident of the county in which its principal office is located.” Courts have held that where a physician is sued in his or her capacity as a medical doctor, the county of an individual’s principal office is a proper venue for claims arising out of that business. *See Young Sun Chung*, 122 A.D.3d 730.

“The Court upon motion, may change the place of trial of an action where...the county designated for that purpose is not a proper county[.]” CPLR § 501(1). When making such a motion, the defendant must demonstrate that the plaintiff chose an improper venue. *Fiallos v. New York Univ. Hosp.*, 85

A.D.3d 678 (1st Dep't 2011). If the defendant satisfies this burden, the plaintiff must show that his or her venue choice is proper or the motion will be granted.

Young Sun Chung, 122 A.D.3d 730.

Defendants-respondents satisfied their initial burden of showing that Bronx County was an improper venue and that Westchester County was a proper venue. Specifically, they established that all treatment rendered to plaintiff-appellant (a resident of Westchester County) was provided in Westchester County; Dr. Prakash is a resident of Washington State; Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C. have principal places of businesses in Westchester County; and Dr. Goldstein (a resident of Westchester County and employee of Westmed) maintains his principal place of business in Westchester County. R. 41, 81-87.

b. An Address Listed in a Medical Professional's License Registration Filing with the New York State Department of Education is not a Designation of the Respective Practitioner's Principal Place Of Business.

A physician's residence, for venue purposes, is established by CPLR 503(d) as either the place of his or her domicile or the location of his or her principal place of business. *Pasley v. St. Agnes Hospital* 244 A.D.2d 469, 469; *DiCicco v. Cattani*, 5 A.D.3d 318, 773 N.Y.S. 2d 558, 559 (1st Dep't 2009). In the instant matter, Dr. Goldstein has met the *prima facie* burden of proving that

his principal place of business is in Westchester County at the Westmed locations such that the Supreme Court correctly granted his motion to transfer venue from Bronx to Westchester County.

Plaintiff-Appellant unsuccessfully attempts to argue that an address listed in a physician's filing of a license with the NYSDOE is tantamount to affirmatively designating said address as his/her principal place of business such that Dr. Goldstein should be estopped from claiming that his principal place of business is elsewhere. Plaintiff-Appellant's brief consistently describes Dr. Goldstein as having listed various Bronx County addresses as his "principal place of business", but there is no evidence produced by plaintiff that shows that Dr. Goldstein ever made such a designation. There is absolutely no statutory support in either the CPLR or the NYSDOE for plaintiff-appellant's position that the address provided in a physician's license registration filings with the NYSDOE is his or her principal place of business.

Plaintiff-Appellant misguidedly relies on the fact that in addition to having a Bronx County address on Dr. Goldstein's NYSDOE license registration filings, Dr. Goldstein has business interests in Bronx County. The standard for establishing residency for purposes of venue is not whether an individual physician has business interests or treats patients in a particular county, but rather where the physician's principal place of business is located.

In the instant matter, it cannot be disputed that Dr. Goldstein is employed by a Westchester Corporation, sees the majority of his patients in Westchester County, including the plaintiff-appellant herein, and derives the bulk of his income from his treatment of patients in Westchester County. Accordingly, there is no basis for finding that his principal place of business is located in Bronx County.

Plaintiff-Appellant's argument also relies upon the faulty premise that corporations and corporate filings with the Secretary of State, wherein they designate their principal place of business, is analogous to an individual physician's license registration filings with the NYSDOE such that the address that the physician lists is his or her principal place of business. Thus, plaintiff-appellant concludes that Dr. Goldstein designated Bronx County as his principal place of business in his filing of his license registration with the NYSDOE. This argument is not supported by any statutes or binding case law. Plaintiff-appellant simply repeats this premise throughout her brief as if it were a true statement.

Plaintiff-appellant further argues that given the foregoing, the lower court erred in not following the precedent of holding a corporate defendant bound to the venue selected in its corporate filings established by such cases as *Fix v. B&B Mall Associates*, 118 A.D. 3d 477, 987 N.Y.S. 2d 384 (1st Dept.

2014); *Janis v. Janson Supermarkets, LLC*, 161 A.D.3d 480 (1st Dept. 2018); *Darbeau v. 136 West 3rd Street, LLC*, 144 A.D.3d 420, 41 N.Y.S.3d 17 (1st Dept. 2016); *Job v. Subaru Leasing*, 30 A.d.3d 159 (1st Dept. 2006). All of the foregoing cases concern corporations being bound by venues each selected as their principal place of business in their filings of their respective corporate certificates with the Secretary of State. None of the foregoing cases concern an individual medical practitioner and the implications of filing a license registration and listing a particular address with the NYSDOE. Thus, none are on point nor can any be deemed precedent for the case herein.

To lend further support to her position, the plaintiff-appellant relies on a Supreme Court decision by the Honorable Alice Schlesinger in *Cozby v. Oswald*, wherein Judge Schlesinger denied the defendant physicians' motions to change venue from New York County to Richmond County due to defendant Dr. Oswald allegedly maintaining his principal place of business in New York County. Contrary to plaintiff-appellant's assertions, Judge Schlesinger did not base her decision solely on the fact that Dr. Oswald had a New York County address listed in his license registration filings with the NYSDOE. Rather, it is clear from Judge Schlesinger's decision that although she considered the license filings when making her decision, she then went on to discuss, at length, the insufficiency of Dr. Oswald's Affidavit. Judge Schlesinger

concluded that the defendants did not meet their burden in proving that Richmond County was Dr. Oswald's principal place of business and consequently she denied their motions. 2013 N.Y. Misc. Lexis 2672 (1st Dept. 2013). In marked contrast, Dr. Goldstein's signed Affidavit outlines, with specificity, the basis for his principal place of business being located in Westchester County.

c. Dr. Goldstein's Affidavit in Support of the Motion to Change Venue Was Sufficiently Detailed To Establish His Principal Place Of Business Being In Westchester County.

Courts have consistently relied upon Physician Affidavits to establish where a physician's principal place of business is located when determining residency for venue purposes. *See DiCicco v. Cattani*, 2009 NY. App. Div. Lexis 1421, 773 N.Y.S.2d 558 (2d Dept. 2009) [lower court's decision to grant defendant's motion to change venue was upheld on the ground that defendant's Affidavit sufficiently demonstrated that his principal office is located in the requested jurisdiction where the alleged malpractice occurred]; *see also Pasley v. St. Agnes Hosp.*, 244 A.D.2d 469, 469, 665 N.Y.S.2d 908 (2d Dept. 2009) [Court held that the Affidavits of the respondent physicians were sufficient to demonstrate that their principal medical offices are located in Westchester County...Supreme Court did not err in granting the respondents' motion for a

change of venue as a matter of right on the ground that all of the parties to this action reside in Westchester].

Plaintiff's reliance on *Broderick v. R.Y. Management* to establish that an Affidavit is insufficient to establish a party's principal place of business is not persuasive. 13 A.D. 3d 197, 197, 789 N.Y.S2d 484, 484 (1st Dept. 2004). The facts in that case are markedly distinct from the instant matter. In *Broderick* the corporate defendant submitted an Affidavit stating that it had only one office in NY County. This was contradicted by evidence introduced by plaintiff showing that the defendant had two offices in Bronx County. Thus, the Court denied defendant's motion to change venue given the defendant's disingenuous statements and the falsehoods contained in the Affidavit. The Court's decision was not based upon the premise that an Affidavit, without more, is insufficient to establish a party's principal place of business for purposes of venue.

What is more, the defendant in *Broderick* the plaintiff introduced evidence that the defendant's Affidavit was false. Unlike *Broderick*, the plaintiff-appellant in the instant matter has not provided any such evidence that would in any way undermine the veracity of Dr. Goldstein's Affidavit. Moreover, the plaintiff-appellant has not contested any of the facts laid out by Dr. Goldstein's Affidavit including Dr. Goldstein's domicile in Westchester

County, his employment by Westmed, the number of patients he sees in Westchester County or the fact that all of the care and treatment rendered to the plaintiff-appellant occurred in Westchester County.

In the case herein, there has been no cover-up or attempt to conceal the truth. Dr. Goldstein's Affidavit is thorough and addresses all the points courts look for in determining a party's principal place of business. Dr. Goldstein has made no attempt to minimize his connections to Bronx County. To the contrary he willingly provided the fact that he maintains privileges at St. Barnabas Hospital, oversees residents in Bronx County and sees 20-25 patients at a clinic in the Bronx in his Affidavit.

Notwithstanding the foregoing, Dr. Goldstein's Affidavit also provides all of his contacts and business interests in Westchester County as well. The incontrovertible facts are that he sees at least two times as many patients in Westchester County as compared to Bronx County, he is employed by Westmed, conducts surgeries only at Rye Ambulatory Center, derives over 75% of his income through his employment by Westmed, maintains privileges at White Plains Hospital and resides in Westchester County.

Courts have held that a physician's Affidavit that is detailed and informative will be sufficient to establish the respective party's principal place of business. Specifically, the Court in *Cozby v. Oswald* held that

of detail and the convincing quality of the affidavit that is key...” 2013 N.Y. Misc. Lexis 2672 (1st Dept. 2013). The Court in *Matter of Morris v. Velickovic*, laid out some of the requirements for a successful Affidavit which would include “which...office [the defendant physician] considers to be his principal office, where he conducts the majority of his work and spends the majority of his time, the approximate number of patients he sees at each office, where he earns the majority of his revenue, or any other factors that would identify which office constitutes his principal place of business. 2011 N.Y.S. Misc. Lexis 2626 (1st Dept. 2011).

Based upon the foregoing, it is clear that Dr. Goldstein conclusively established that his principal place of business is located in Westchester County. The Affidavit submitted on behalf of Dr. Goldstein in support of his motion to change venue is sufficiently detailed such that it is clear that the bulk of his practice occurs in Westchester County. Dr. Goldstein’s Affidavit addressed all of the pertinent questions that prior Courts have deemed significant for determining where a respective physician’s principal place of business is located. Specifically, Dr. Goldstein’s Affidavit conforms to the *Matter of Morris* Court’s requirements exactly. As set forth above, Dr. Goldstein’s Affidavit sets forth that he considers his principal place of business to be in Westchester County and that he has been employed as a podiatrist by

Westmed at two office locations in Westchester County for the past 21 years. Dr. Goldstein's Affidavit also sets forth his work schedule outlining how many hours he spends per day at which particular office in Westchester. His Affidavit further sets forth his hospital affiliations with St. Barnabas Hospital located in the Bronx and White Plains Hospital located in Westchester County. The Affidavit also provides an estimate of the number of patients Dr. Goldstein sees in Westchester County per month (approximately 350-400) as compared to the 20-25 patients per month Dr. Goldstein sees at the Bronx Park Medical pavilion. Dr. Goldstein's Affidavit also sets forth that he supervises podiatric residents at two St. Barnabas clinics where approximately 150 patients/month are seen.

Based upon the number of days per week Dr. Goldstein works in Westchester County as well as the number of patients he sees in Westchester County, as set forth in Dr. Goldstein's Affidavit, it is clear that he spends the majority of his time working in Westchester County. Moreover, he lives in Westchester County, is employed in Westchester County, treated the plaintiff in Westchester County and derives more than 75% of his income from his endeavors in Westchester County. Additionally, all of the services he performs are at Rye Ambulatory Center in Westchester County.

Given the foregoing, it is evident that plaintiff's assertions that Dr. Goldstein's Affidavit is self-serving and conclusory is baseless and without merit. The Court in *Cozby* specifically laid out the deficiencies with the Affidavit provided by defendant Dr. Oswald supporting his motion for a change of venue. 2013 N.Y. Misc. Lexis 2672 (1st Dept. 2013). These deficiencies included the fact that the Affidavit contained conclusory statements as to his practice such as "he conducts the 'majority' of his time, sees the 'majority' of his patients, and earns the 'majority' of his revenue." *Id.* The Court went on to state that the Affidavit "is wholly lacking in evidentiary details that might make it persuasive. For example, no details at all are provided as to the number of work days and hours in each location, the number of employees, hospital affiliations, or any other detail that might give the Court an understanding of whether 'majority' simply means 51% , or whether it means something more substantive." *Id.*

In marked contrast to Dr. Oswald's Affidavit in the *Cozby* case, Dr. Goldstein's Affidavit is extremely detailed and provides actual numbers and percentages such that the Court can readily see where Dr. Goldstein spends the majority of his practice and where his income is derived from. Moreover, despite plaintiff-appellant's assertions that the Court in *Cozby* required documentary evidence to support Dr. Oswald's Affidavit, this is simply not

true. The Court in *Cozby* specifically delineated the fact that “evidentiary details” were missing from the Affidavit, not that documentary evidence was needed to prove the statements made under oath, by a physician, in an Affidavit. In the instant matter, Dr. Goldstein’s Affidavit contains all of the requisite evidentiary details, including the number of patients he sees, the days and hours he works in Westchester County, the percentage of his income derived from his Westchester County practice, his hospital affiliations and where he performs surgeries.

Given the fact that Dr. Goldstein’s NYSDOE license registration filings is not dispositive as to where his principal place of business is located, coupled with his detailed and thorough affidavit outlining that Westchester County is where his principal place of business is, defendants have successfully established that there being no parties residing in Bronx County, the matter was correctly moved to Westchester County.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Order of the Supreme Court should be affirmed in all respects, and that this Court should grant such other and further relief as it deems just, equitable and proper.

Dated: New York, New York
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Yours, etc.

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