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February 20, 2020

Hon. John P. Asiello  
Chief Clerk and Legal Counsel to the Court  
State of New York  
Court of Appeals  
20 Eagle Street  
Albany, New York 12207-1095

Re: Lividini v. Goldstein  
APL-2019-00235  
Our File No.: 685-1105

Dear Mr. Asiello:

Under section 500.11 of the Court of Appeals Rules of Practice, Defendants-Appellants Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C. offer this letter submission as to the merits of this appeal. Accompanying this letter are copies of the Record on Appeal and the parties' Appellate Division briefs. Pursuant to section 500.11(f), Appellants adopt and reserve all of the arguments in their Appellate Division briefs (as well as the briefs of the co-defendants Vinai Prakash, D.P.M. and Harold L. Goldstein, D.P.M) to the extent these arguments are not repeated below.

A. Background

Westchester Medical Group, P.C., doing business as Westmed Medical Group, P.C. and Rye Ambulatory Surgery Center, LLC (collectively “Westmed”), is a multispecialty medical practice, staffed by 500 physicians and advanced care providers and 1,500 clinical employees, with thirteen office locations in Westchester County, New York, and Fairfield County, Connecticut.<sup>1</sup> Rye Ambulatory Surgery Center is an outpatient healthcare facility located in Rye, New York.<sup>2</sup> Both entities have their principal places of business in Westchester County. Both entities list Westchester addresses with the Department of State, Division of Corporations for service of process (R. 81-87).<sup>3</sup>

This appeal comes to this Court for review upon an Order of the Appellate Division, First Department dated November 26, 2019 on the following certified question: “Was the order of this Court, which reversed the order of Supreme Court, properly made?”

We would frame the issue more specifically as follows:

In a medical malpractice action, all of the parties reside in Westchester County, the medical treatment at issue occurred in Westchester County, and the individual defendants were sued based on their actions as employees of corporations having their principal place of business in

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<sup>1</sup> See <https://www.westmedgroup.com/about-us/> (visited Feb. 19, 2020).

<sup>2</sup> See [http://ryeasc.com/about\\_us.aspx](http://ryeasc.com/about_us.aspx) (visited Feb. 19, 2020).

<sup>3</sup> Numerals in parentheses preceded by “R.” refer to the pages of the Record on Appeal.

Westchester County. Was venue properly placed in Bronx County merely because one individual defendant listed a Bronx County address with a licensing agency?

Plaintiff Racquel Lividini, a resident of Westchester County (R. 19) commenced this podiatric malpractice action in Bronx County based on “defendants’ principal place of business” (R. 56). Although none of the parties reside or have their principal place of business in Bronx County, and all medical treatment was rendered in Westchester County, Plaintiff chose Bronx County because Defendant Dr. Harold L. Goldstein listed a Bronx address when he registered his license with the New York State Education Department.<sup>4</sup>

In an Order entered July 26, 2018, Supreme Court, Bronx County granted motions to transfer venue from Bronx County to Westchester County, holding that Dr. Goldstein’s principal place of business for venue purposes is in Westchester County. The court relied on Dr. Goldstein’s affidavit in which Dr. Goldstein explained that (1) he resides in Westchester County; (2) he provided all podiatric care to Ms. Lividini in Westchester County; (3) he is employed by Westmed Medical Group, P.C., a corporation with its principal place of business in Westchester County; (4) he renders podiatric care to his Westmed patients in offices located in

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<sup>4</sup> Co-defendant Vinai Prakash, D.P.M. was a resident of the State of Washington (R. 99-100, 109).

Westchester County; (5) he performs podiatric surgery at Rye Ambulatory Center, L.L.C., a corporation with its principal place of business in Westchester County; and (6) over seventy-five percent of his income is derived from podiatric care provided in Westchester County (R. 41). Dr. Goldstein added that a small percentage of his practice (twenty to twenty-five patients a month) is devoted to working in Bronx County based on his affiliation with non-party St. Barnabas Hospital (R. 41).

Westmed's medical director, Steven M. Meixner, M.D. also submitted an affirmation in which he attested that Westchester Medical Group, P.C.'s ("d/b/a Westmed Medical Group, P.C and The Rye Ambulatory Surgery Center, LLC") principal place of business and principal office is located at 2700 Westchester Avenue, 2nd Floor Purchase, New York, 10577 and that Westmed does not maintain any offices in Bronx County. Dr. Meixner added that Dr. Harold Goldstein is an employee of Westchester Medical Group, P.C., practicing at locations in Rye and White Plains in Westchester County, and that Plaintiff was treated at those locations (R. 81-83).

In opposition to the motions, Plaintiff argued that Bronx County was a proper venue because Defendants failed to establish that Dr. Goldstein was not a resident of Bronx County for venue purposes (R. 122-23). Plaintiff asserted that her choice of venue was proper because Dr. Goldstein's principal place of business is in Bronx

County (R. 123-24). Plaintiff based this claim on Dr. Goldstein’s listing of “Bronx, NY” as his address on his official license registration with the New York State Education Department (“NYSED”) (R. 141) and the fact that Dr. Goldstein occasionally sees patients at St. Barnabas Hospital (R. 124).

In a 3-2 majority decision dated August 20, 2019, the Appellate Division, First Department reversed the lower court’s order, returning the action to Bronx County. The majority ruled that Dr. Goldstein failed to show that plaintiff’s designation of Bronx County was improper because Dr. Goldstein’s affidavit was “devoid of supporting documentation of residency.” *Lividini v. Goldstein*, 175 A.D.3d 420, 422 (1st Dep’t 2019).

The majority further held that plaintiff sufficiently rebutted defendants’ proof by submitting Dr. Goldstein’s New York State Education Department (NYSED) physician license registration, which listed only a Bronx address. *Id.* After observing that under CPLR §503(a) a party may reside in more than one county, and that under CPLR §503(d) venue can be placed in the county where an individually owned business has its principal office, the majority held that plaintiff offered enough evidence - namely the NYSED listing and Dr. Goldstein’s affiliation with St. Barnabas Hospital - that Dr. Goldstein was a “resident” of Bronx County for venue purposes. *Id.* at 423.

Two justices (Singh and Friedman, J.) dissented.

First, the dissent observed that venue based on individual residence under CPLR §503(a) does not apply in a situation where it is undisputed that none of the parties reside in Bronx County. *Id* at 424 (Singh and Friedman dissenting).

Second, addressing the applicability of CPLR §503(d), the dissent relied on *Young Sun Chung v. Kwah*, 122 A.D.3d 729 (2d Dep’t 2014), in which the Second Department held that the county of an individually named physician’s principal office is a proper venue under CPLR §503(d) for claims arising out of that business. The dissent observed that “[m]erely listing a mailing address with a regulatory agency in order to obtain a license to practice medicine in New York is not proof of a licensee’s principal place of business.” *Id* at 424-25 (Singh and Friedman dissenting). The dissent further observed that on its face the NYSED does not state that Bronx County is Dr. Goldstein’s principal place of business. *Id* at 426.

Finally, the dissent held that the majority’s holding conflicts with *DiCicco v. Cattani*, 5 A.D.3d 318 (1st Dep’t 2004). In *DeCicco*, a different panel of First Department judges held that a change of venue motion was properly granted where (1) “defendant’s affidavit sufficiently demonstrates that his principal office is located in Staten Island, where, we note, the alleged malpractice occurred” and (2) plaintiff merely relied on evidence that “defendant’s letterhead and Web site list his

Manhattan address first, or that other medical-related Web sites, including the New York State Directory of Physicians, provide only the Manhattan address.” *DiCicco*, 5 A.D.3d at 318.

This appeal -- in which Bronx County has no nexus to the underlying claims save one individual defendant’s minor affiliation with an unrelated employer in Bronx County -- thus allows this Court to clarify the moving party’s burden of proof when venue is contested and to clarify the meaning of “residence” and “principal place of business” when an individual physician is sued for medical malpractice.

B. The Moving Parties Made an Adequate Showing In Support of the Motion.

As a general matter, we do not challenge the Appellate Division majority’s assertion that the party seeking a change in venue has the burden of demonstrating that the plaintiff’s choice of venue was improper. *Lividini*, 175 A.D.3d at 421 (citing CPLR 510(1); 511(b)). But the majority also appears to have created a new and unduly stringent burden of proof in holding that Dr. Goldstein’s affidavit was insufficient to prove that Plaintiff’s designation of Bronx County was improper in the absence of “supporting documentation.” *Id* at 422.

Consistent with the weight of the authorities cited below, this Court should hold that Dr. Goldstein’s affidavit, in which he explained his employment relationship with Westmed and that he treats the vast majority of his patients in

Westchester County, was detailed enough to establish that he was a resident of Westchester County and that his principal place of business was in Westchester County. *See DiCicco*, 5 A.D.3d at 318 (holding that motion to change venue was properly granted on the basis of defendant’s affidavit, which sufficiently demonstrated that his principal office was located in Staten Island, where the alleged malpractice occurred); *Pasley v. St. Agnes Hosp.*, 244 A.D.2d 469 (2d Dep’t 1997) (holding that defendants’ affidavits were sufficient to demonstrate that their principal medical offices were located in Westchester County); *Kielczewski v. Pinnacle Restoration Corp.*, 226 A.D.2d 211 (1st Dep’t 1996) (holding that although defendant general partnership’s business certificate listed as its office “c/o” a Bronx County address, trial court properly considered the affidavits of the general partners that the partnership’s principal office has always been in New Jersey or Westchester County, in finding that none of the parties reside in Bronx County).

Arguably, the result should be different if a moving party’s affidavit is facially insufficient. Indeed, in each of the cases cited by the majority in the Appellate Division (*see Lividini*, 175 A.D.3d at 422) the movant relied on what were described as “conclusory” affidavits, containing bare statements pertaining to residency or principal place of business. These affidavits were deemed inadequate particularly in light of contradictory documentary evidence supporting not only the plaintiff’s



original choice of venue, but also suggesting that the moving party's bare denials were disingenuous in nature. *See Fix v. B & B Mall Assoc., Inc.*, 118 A.D.3d 477 (1st Dep't 2014) (holding that affidavit by corporate defendant's president averring that its principal place of business was in Westchester County and denying that it maintains a place of business or office in Bronx County was insufficient on its face and in contrast to plaintiff's submission of documentary evidence that defendant had an office address in Bronx County and defendant's own reliance on a receipt from the New York State Department of State, which also indicated that it had designated Bronx County as its principal place of business); *Singh v. Empire Intl., Ltd.*, 95 A.D.3d 793 (1st Dep't 2012) (holding that defendant's "conclusory" affidavit attesting to a Queens County residency was insufficient in contrast to plaintiff's submission of a police accident report showing that all parties, including defendant, had addresses outside of New York State at the time of the accident, permitting plaintiff to designate any county as the venue for trial); *Broderick v. R.Y. Mgmt. Co.*, 13 A.D.3d 197 (1st Dep't 2004) (affidavits by general partner in defendant partnership stating that defendant's principal and only office was in New York County was deemed insufficient and "disingenuous" in light of documentary evidence offered by plaintiff in opposition to motion showing that defendant maintained two offices in Bronx County); *see also, Harvey v. Ogunfowora*, —

A.D.3d \_\_\_, 2020 NY Slip Op 00264 (2d Dep't Jan. 15, 2020) (holding that moving defendants' reliance on an affirmation of counsel instead of their own affidavits attesting to their places of residence did not satisfy defendant's initial burden of proving that plaintiff's choice of venue was improper).

Here, in contrast, Dr. Goldstein's sworn, detailed, non-conclusory affidavit plainly showed that Plaintiff chose the wrong venue when she designated Bronx County on the assumption that Bronx County was Dr. Goldstein's principal place of business. Further, Dr. Goldstein's affidavit was supported by Dr. Meixner's affirmation (with supporting documents) attesting that Westmed has its principal place of business in Westchester County and that Dr. Goldstein, in his capacity as a Westmed employee, treated Plaintiff, a Westmed patient, at Westmed locations in Westchester County.

C. None of the Defendants Have Their Principal Place of Business in Bronx County (CPLR §503(c), (d)).

Plaintiff designated Bronx County as the venue on the basis of “defendants’ principal place of business” in that county (R. 19).<sup>5</sup>

CPLR §503 (Venue based on residence) provides in pertinent part:

(c) Corporation. A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier, shall also be deemed a resident of the county where the cause of action arose.

(d) Unincorporated association, partnership, or individually-owned business. A president or treasurer of an unincorporated association, suing or being sued on behalf of the association, shall be deemed a resident of any county in which the association has its principal office, as well as the county in which he actually resides. 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.

As it is undisputed the corporate entity Westmed has its principal office in Westchester County, there was no basis for placing venue in Bronx County under CPLR §503(c). The dispositive issue is whether Dr. Goldstein, a Westmed

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<sup>5</sup> Plaintiff did not designate venue on the basis of the abode, as opposed to the principal location of a business, of any of natural persons who have been named in this action. *See* CPLR §503(a); *Addo v. Melnick*, 61 A.D.3d 453 (1st Dep’t 2009) (holding that the residence of a natural person is his or her abode, not his or her office). In any event, it is undisputed that Plaintiff and Dr. Goldstein lived in Westchester County and Dr. Prakash lived in the State of Washington when this action was commenced.

employee, who was sued individually for his treatment of Plaintiff, a Westmed patient, in Westchester County, was a “resident” of Bronx County under CPLR §503(d). The Appellate Division has 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 v. Kwah*, 122 A.D.3d 729, 730 (2d Dep’t 2014) (emphasis added); see also *Castro-Recio v. Rottenberg*, 287 A.D.2d 532 (2d Dep’t 2001); *Shanahan v. Klingenstein*, 280 A.D.2d 464 (2d Dep’t 2001).

To our knowledge, other than the majority here, no New York appellate court has held that venue under CPLR §503(d), on the basis of the residence of an “individually-owned business,” can be designated in a county where the individual’s principal office was *not* located and where the plaintiff asserts claims *not* arising out of that business.

On the contrary, in *Magrone v. Herzog*, 304 A.D.2d 801 (2d Dep’t 2003), the Appellate Division held that plaintiffs improperly placed the venue of a medical malpractice action in Kings County based on the existence of defendant’s office in that county. The court held that “[a]lthough Herzog maintained a medical office in Kings County, the defendants established that Herzog maintained his *principal* medical office in Richmond County, and *that is where the alleged malpractice*

occurred.” *Magrone*, 304 A.D.2d at 802 (emphasis added); *see also DiCicco*, 5 A.D.3d at 318 (affirming change of venue to Richmond County where individually named physician maintained his principal office and was where the alleged malpractice occurred); *Jacobson v. Gaffney*, 178 A.D.3d 1026 (2d Dep’t 2019) (affirming change of venue from Dutchess to Tompkins County where individually-named physician’s principal office and actual residence were located in Tompkins County).

Here, Dr. Goldstein devoted most of his practice to treating Westmed patients in Westchester County. Moreover, the claims in this action arise from that aspect of his practice. Plaintiff was treated exclusively by Westmed, Dr. Goldstein, and Dr. Prakash in Westchester County. This suit has no connection to Dr. Goldstein’s limited presence in Bronx County based on his affiliation with St. Barnabas Hospital. *See Berman v. Gucciardo*, 50 A.D.3d 717 (2d Dep’t 2008) (holding that plaintiff improperly placed venue in Queens County under CPLR §503(d) based on the purported Forest Hills business address of his law practice where the action was not commenced on behalf of or related to the plaintiff’s law practice); *Friedman v. Law*, 60 A.D.2d 832 (2d Dep’t 1978) (holding that venue in Kings County was improper where the real property at issue was located in New York County, all of the parties resided in that county, the witnesses were located in

that county, and the only contact with Kings County was the fact that plaintiff maintained an office in that county for the practice of law, which was not his principal place of business and was not related to the real property dispute); *Venuti v. Novelli*, 179 A.D.2d 477 (1st Dep't 1992) (holding that venue was improperly placed in Bronx County where defendant's video repair business in Bronx County was unrelated to a property maintenance business in Westchester County or the Westchester County property where the accident at issue occurred). The mere fact that Dr. Goldstein's listed a Bronx County address in his NYSED license registration did not negate his showing that his principal place of business was in Westchester County. *See DiCicco*, 5 A.D.3d at 318); *Kielczewski*, 226 A.D.2d at 212.

D. A Change In Venue Would Be Consistent With the Recent Amendment to CPLR §503(a).

Finally, transferring this action to Westchester County would be consistent with a recent amendment of CPLR §503(a). As amended in 2017, the statute now places the location of the events at issue on equal footing with a party's residence.

The current version of statute provides:

Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A

party resident in more than one county shall be deemed a resident of each such county.

The purpose of the amendment was to “allow for the venue used in a civil action to be the same county in which a substantial part of the event occurred.”

Assembly Mem, Bill Jacket , L 2017, ch 366, at 1.). The sponsoring memorandum explains that

[i]n civil actions, venue refers to the correct county in which to bring an action. In New York State, in the absence of a prior agreement, the option on where to place venue are restrictive. [Except in certain circumstances], choice of venue is limited to the county of residence of one of the parties. A problem arises if both plaintiff and defendant are residents of a different county from the county in which the cause of action arose. In that case, proper venue is either in the county of residence of the plaintiff or defendant, but not where the incident occurred. This means that, absent residence of a party in the subject county, that county’s court system has no authority to hear controversies about unsafe premises, unsafe worksites, unsafe driving and a myriad of other scenarios within its borders. Nor are jurors from the subject community, with the most interest in setting community standards, able to hear such controversies. In addition, witnesses are often located in [the] county where the events that are the subject of the action occurred. *Id.*

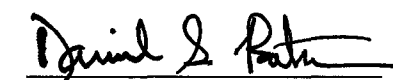
The memorandum adds that the amendment would bring New York in conformance with federal law, which allows venue “in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred’ 28 U.S.C. §1391(b)(2).”

Here, Westchester County is where all of the medical treatment at issue was rendered and where Westmed, a large healthcare organization, is located. Jurors in Westchester County have the most interest in deciding whether the care and treatment rendered to Plaintiff by Westmed, its affiliates, and employees was consistent with community standards.

E. Conclusion

Accordingly, the certified question should be answered in the negative. We respectfully request that the Order of the Appellate Division, First Department be reversed and that this action be transferred to the Supreme Court, Westchester County.

Respectfully submitted,

  
Daniel S. Ratner

DSR:ot  
Enclosures

cc: All Counsel of Record



**CERTIFICATE OF COMPLIANCE**

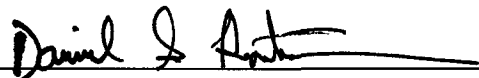
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By:   
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