

APL-2019-00235

To be Argued By:
DANIEL S. RATNER
(Time Requested: 15 Minutes)

Court of Appeals
of the
State of New York

RACQUEL LIVIDINI,

Plaintiff-Respondent,

– against –

HAROLD L. GOLDSTEIN, D.P.M. and VINAI PRAKASH, D.P.M.,

Defendants-Respondents,

– and –

RYE AMBULATORY SURGERY CENTER, L.L.C.
and WESTMED MEDICAL GROUP, P.C.,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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STATEMENT

Defendants-Appellants Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C. (collectively “Westmed”) offer this reply brief in further support of their appeal from the Order of the Appellate Division, First Department reversing the trial court’s order and returning this medical malpractice action to Bronx County.

In her opposing brief, Plaintiff does not deny that Dr. Goldstein, the only party with any tie to Bronx County, has been sued in his individual capacity arising from his status as an employee of Westmed, which is located in Westchester County. Plaintiff’s argument that Bronx County is a proper venue merely because Dr. Goldstein treated some patients in Bronx County and registered a mailing address in Bronx County should be rejected. There is no evidence that any party lived in or had a principal office in Bronx County when this action was commenced.

Further, Defendants made an adequate showing in support of the motion to change venue. Where, as here, the moving party offers a detailed, non-conclusory sworn affidavit in support of the motion, there need be no *per se* requirement that the motion be supported by additional documentary evidence. If, however, there remain credibility issues based on the moving and opposing

submissions, the proper relief is to order a hearing, not to summarily deny the motion.

REPLY ARGUMENT

A. Plaintiff Misstates The Record

At the outset, there are a number of misstatements in Plaintiff's brief.

Dr. Goldstein treats 350-400 patients per month in Westchester County as an employee of Westmed. 75% of his income is derived from his practice in Westchester County, where he performs all of his surgeries at a Westmed location in Rye (R39). Dr. Goldstein also treats 20-25 patients per month in Bronx County, or about 5% of the total estimated 425 patients he treats every month in the two counties. Two afternoons each week he supervises podiatric residents at a Bronx County clinic "where 150 patients per month are seen" (R39).

Contrary to Plaintiff's representation, Dr. Goldstein did not state that he worked "several days every week" in Bronx County or that he "treated at least 150 patients per month" in Bronx County (Brief for Plaintiff-Respondent ["Pl. Br.,"] at 1 citing R39, 144-45) (emphasis in Plaintiff's brief). Further, Plaintiff did not rebut Dr. Goldstein's sworn declaration that 75% of his revenue was derived

from treating patients in Westchester County and that he treated Plaintiff at Westmed's building in Westchester County.

Also contrary to Plaintiff's assertion at page 5 of her brief, St. Barnabas Hospital in Bronx County was not listed as Dr. Goldstein's "principal office with NYSED." Pl. Br. at 5 (citing R140). In the cited document, the State Education Department, Office of the Professions merely certified that Dr. Goldstein is "currently registered from an address" at St. Barnabas Hospital (R140). A related printout vaguely states: "Address: Bronx NY" (R139). Most significant, neither document describes Dr. Goldstein's registered Bronx County address as his principal place of business. As noted, Dr. Goldstein's affidavit in which he swore that he mainly practices and derives revenue from treating Westmed patients in Westchester County was not rebutted.

Nor was there any legal requirement that Dr. Goldstein register his principal office, as opposed to a mailing address, for licensing purposes. Education Law §6502(5) states in pertinent part that "Licensees shall notify the department of any change of name or *mailing address* within thirty days of such change" (emphasis added). Plaintiff's selective quotation and use of an ellipsis in citing this statute (*see* Pl. Br. at 10) is misleading. The statute specifically refers to

the professional's mailing address, not the principal place of business, for the purpose of registering and maintaining a professional license.

Similarly, the Regulations of the Commissioner of Education governing licensing and registration of professionals do not require that applicants register their principal place of business. Rather, the regulations anticipate that licensees will practice in more than one office. Section 59.8(c) states that

Registration certificates shall be conspicuously displayed by each licensee in *each office in which the profession is practiced*. In instances where licensees regularly practice at more than one professional office, registration certificates shall be obtained for each office bearing the licensee's name and the exact address of each such office upon making proper application to the department and submitting a fee. Where practice is carried on in other than individual offices, each licensee shall have a current registration certificate available for inspection at all times. 8 NYCRR § 59.8(c) (emphasis added).¹

Finally, there is no basis for Plaintiff's assertion that Dr. Goldstein's failure to seek leave to appeal to this Court means he "effectively conceded" that venue was properly placed in Bronx County. Pl. Br. at 2 n 3. The record is silent as to why Dr. Goldstein did not seek permission to appeal, and, in any event,

¹ See <http://www.op.nysed.gov/title8/part59.htm>.

Westmed, a Westchester County entity which treated Plaintiff in Westchester County, has a valid interest in a change of venue to Westchester County.

B. The Principal Offices of Dr. Goldstein and His Employer, Westmed, Were Located in Westchester County, Notwithstanding the Bronx County Listing in Dr. Goldstein's License Registration.

With the above clarified, we turn to Plaintiff's assertion that Dr. Goldstein's listing of a Bronx County address in "official State or governmental filings" was "sufficient and binding proof of residency, professional or otherwise, for purposes of establishing proper venue ..." (Pl. Br. at 10-11). Plaintiff cites numerous cases in support of this proposition, all of which are distinguishable.

In *Janis v Janson Supermarkets, LLC*, 161 AD3d 470 (1st Dept 2018) and *Dreyer-Arnou v Ambrosio and Co., Inc.*, 181 AD3d 651 (2d Dept 2020) (cited at Pl. Br. at 11), the issue was whether venue could be premised on a corporate defendant's designation of New York County as its place of business in its certificate of incorporation. The Appellate Division ruled that venue was properly placed in that county under CPLR §503(c) based on the corporate defendants' designation, under Business Corporation Law §1304(a)(5), as the "county within this state [where] its office is to be located." See also *Vecchia v Daniello*, 192 AD2d 415 (1st Dept 1993) (accord); *Pinos v Clinton Café & Deli, Inc.*, 139 AD2d 1034 (2d Dept 2016) (accord).

Here, there is no dispute that Westmed, the corporate defendant, has its principal office in Westchester County. These cases therefore actually support our position that Westchester County was the proper venue and that there was no basis for placing venue in Bronx County under CPLR §503(c).

In *Gonzalez v Weiss*, 38 AD3d 492 (2d Dept 2007) and *Furth v Elrac, Inc.*, 11 AD3d 509 (2d Dept 2004) (cited at Pl. Br. at 12), the issue was whether venue was properly placed on the basis of the personal residences of individual defendants based on the address the defendants provided in police accident reports. Similarly, in *Darbeau v 136 West 3rd Street, LLC*, 144 AD3d 420 (1st Dept 2016), the defendant was bound by his listing of a Bronx County address with the Department of Motor Vehicles as his personal residence.

Here, in contrast, there is no evidence that any party lives in Bronx County.

At pages 12 and 14 of her brief, Plaintiff also relies on a number of precedents holding that service of process under CPLR §308(2) may be made at a business address listed by or held out by the defendant as the defendant's "actual place of business." See *Day v Davis*, 47 AD3d 750 (2d Dept 2008) (holding that personal jurisdiction over defendant attorney was properly established by service of process at defendant's professional address provided to the Office of Court

Administration); *Vid v Kaufman*, 282 AD2d 739 (2d Dept 2001) (service upon individual physician was proper where physician was served at address of his former professional corporation based on ongoing telephone listing and presence of physician's name on signs in the building lobby and professional corporation's office door); *Melton v. Brotman Foot Care Group*, 198 AD2d 481 (2d Dept 1993) (service proper where process was mailed to address listed by defendant podiatrists with the Department of Education).

Here, Dr. Goldstein did not deny that Bronx County was an “actual place of business” for purposes of service of process under CPLR §308(2) (stating that personal service shall be made by “delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business”).

What Dr. Goldstein did deny, however, was that Bronx County was the location of his *principal* office for *venue* purposes under CPLR §§503(c) and (d). Unlike CPLR §308(2), which allows service of process to be made at an “actual” place of business, the venue statute limits venue to counties where a party

“actually resides” or has its “principal office.” See CPLR § 503(c), (d). See *Magrone v. Herzog*, 304 AD2d 801 (2d Dept 2003) (changing venue from county where individual physician maintained a medical office to county where physician maintained his principal medical office and where the alleged malpractice occurred). *Magrone*, 304 A.D.2d at 802 (emphasis added); see also *Jacobson v Gaffney*, 178 AD3d 1026 (2d Dept 2019); *DiCicco v Cattani*, 5 AD3d 318 (1st Dept 2014).

Notably, Plaintiff does not challenge the rule adopted by the Appellate Division, and followed by the dissent below, to the effect that where a physician is sued individually in his or her professional capacity, “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 AD3d 729, 730 (2d Dept 2014) (emphasis added); *Lividini v Goldstein*, 175 AD3d 420, 425 (1st Dept 2019) (Singh) and Friedman dissenting); see also *Castro-Recio v Rottenberg*, 287 AD2d 532 (2d Dept 2001); *Shanahan v Klingenstein*, 280 AD2d 464 (2d Dep’t 2001).

Here, Dr. Goldstein’s principal office for venue purposes was indisputably located in Westchester County because that is where he principally treats his patients and because the claim at issue arises from his care and treatment of a Westmed patient at a Westmed office located in Westchester County. See

Berman v Gucciardo, 50 AD3d 717 (2d Dept 2008); *Venuti v Novelli*, 179 AD2d 477 (1st Dept 1992); *Friedman v Law*, 60 AD2d 832 (2d Dept 1978).²

C. Defendants Met Their Burden of Proof

Next, Plaintiff maintains that defendants' failure to offer "documentary proof" in support Dr. Goldstein's sworn declaration that his principal office is in Westchester County was "fatal" to their motion to change venue. Pl. Br. at 16.

We agree with Plaintiff that a merely "conclusory" party affidavit in support of a motion to change venue would be inadequate to sustain the moving party's burden of proof. *See Fix v. B & B Mall Assoc., Inc.*, 118 AD3d 477 (1st Dept 2014); *Singh v Empire Intl., Ltd.*, 95 AD3d 793 (1st Dept 2012); *Broderick v R.Y. Mgmt. Co.*, 13 AD3d 197 (1st Dept 2004); *Harvey v Ogunfowora*, 179 AD3d 775 (2d Dept 2020)

But Plaintiff offers no valid reason why a detailed affidavit, standing alone, should not suffice. Here, Dr. Goldstein's affidavit, in which he explained his employment relationship with Westmed and stated that he treats the vast

² The trial court decision in *Crozby v Oswald*, 2013 NY Slip Op 31363(U), 2013 WL 2367163, 2013 N.Y. Misc. LEXIS 2672 (Sup. Ct. N.Y. Cnty. 2013), discussed at page 13 of Plaintiff's brief, is distinguishable. There, plaintiff sued a chiropractor for malpractice, placing venue in New York County because the chiropractor listed a New York County address in his license registration. The court held that this listing satisfied the principal office requirement of CPLR § 503(d), but the difference here is that the claims against Dr. Goldstein arise out of his relationship with the corporate entity, Westmed, which has its principal office in Westchester County, and not his unrelated affiliations in Bronx County.

majority of his patients in Westchester County, was detailed enough to establish that he was a resident of Westchester County and that his principal office was in Westchester County. See *DiCicco v Cattani*, 5 A.D.3d 318 (1st Dept 2014); *Pasley v St. Agnes Hosp.*, 244 AD2d 469 (2d Dept 1997); *Kielczewski v. Pinnacle Restoration Corp.*, 226 A.D.2d 211 (1st Dept 1996). None of the cases cited at pages 16-19 of Plaintiff's brief impose a *per se* rule that change of venue motions must be supported by "documentary" evidence above and beyond a detailed party affidavit.

At worst, if there is any question about the credibility of the parties' showing in support of or in opposition to a motion for a change of venue, the proper relief would be to order a hearing, as opposed to summarily denying the motion. See e.g., *Crovato v H&M Hennes & Mauritz, L.P.*, 140 AD3d 490 (1st Dept 2016); *Collins v Glenwood Mgt. Corp.*, 25 AD3d 447 (1st Dept 2006).

In *Crovato*, the Appellate Division held that the denial of defendants' motion to change venue from Bronx County to Westchester County without a hearing was an improvident exercise of discretion on the ground that plaintiff's assertion that he resided at the Bronx residence that he co-owned with his fiancée, while buttressed by the affidavits of his fiancée and a neighbor, was not supported by any objective documentation. The court held that because these affidavits were subject to credibility challenges, a hearing should have been ordered to address and

resolve that issue of fact. *Crovato*, 140 AD3d at 491. Similarly, in *Collins* a motion for a change of venue was remanded for a hearing to resolve credibility issues raised by party and witness affidavits offered in support of and in opposition to the motion. *Collins*, 25 AD3d at 449-50.

CONCLUSION

For all of the foregoing reasons, the Order of the Appellate Division, First Department should be reversed and the venue of this action should be transferred to Westchester County. Alternatively, the motion should be remanded to the Supreme Court, Bronx County for a hearing with respect to the location of Dr. Goldstein's primary office.

Dated: White Plains, New York
October 20, 2020

Respectfully submitted,

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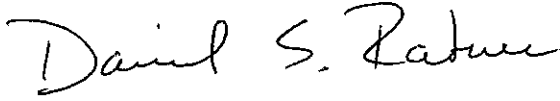
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