

Colvin v New You Bariatric Group, LLC

2024 NY Slip Op 34027(U)

November 14, 2024

Supreme Court, New York County

Docket Number: Index No. 154686/2023

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

-----X

DYSHAWN COLVIN

Plaintiff,

- v -

NEW YOU BARIATRIC GROUP, LLC,

Defendant.

-----X

INDEX NO. 154686/2023

MOTION DATE 04/09/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for CHANGE VENUE.

Before the Court is the defendant’s renewed motion to change venue from New York County to Nassau County, pursuant to *CPLR §§510(1) and 511(b)(i)*. Plaintiff opposed the motion. Defendant submitted a reply. Based upon the foregoing papers, the defendant’s motion is decided accordingly.

In the complaint, plaintiff Dyshawn Colvin (“plaintiff”), alleges that he was employed by defendant, New You Bariatric Group, LLC (“defendant”) as a manual worker from July 2022 through January 18, 2023, and he earned a regular rate of about \$19.00 an hour. Plaintiff claims, *inter alia*, that the defendant failed to pay plaintiff, and all those similarly situated as class members, their wages, including overtime and non-overtime weekly wages. (*NYSCEF Doc No. 25*).

Discussion

Pursuant to *CPLR §503*, “[e]xcept 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.” *CPLR §503(a)*. In addition, “[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[.]” *CPLR §503(c)*.

According to *CPLR §510(1)*, one ground for a change of venue is that “the county designated for that purpose is not a proper county.” *See, CPLR §510(1); Bernstein v. Tietz*, No. 453250/2022, 2023 WL 3075249, at *1 (N.Y. Sup. Ct. Apr. 25, 2023). Pursuant to *CPLR §511(b)*, “[t]he defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter, the defendant may move to change the place of trial within fifteen days after

service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.”

Here, the defendant properly submitted a written demand to plaintiff to change venue, as provided under *CPLR §511(b)*. (See, *NYSCEF Doc. No. 27*). In the demand, the defendant states that the venue of New York is improper because (i) Nassau County has exclusive jurisdiction to hear all disputes; (ii) the Plaintiff does not reside and the Defendant does not maintain its principal place of business in New York County; (iii) the Plaintiff did not work in New York County, and (iv) due to the fact that New York County is not the county in which any of the events or omissions giving rise to the claim occurred.

In opposition to the renewed motion, plaintiff, incorporates and reiterates his papers and arguments made in defendant’s previously filed motion to change venue. Plaintiff submits the attorney affirmation of Abdul Hassan (*NYSCEF Doc. No. 33*), the complaint (*NYSCEF Doc. No. 34*), and a google printout of an overview of “New York Bariatric Group” (*NYSCEF Doc. No. 34*).

The First Department acknowledges that although “designation of venue in the county in which a corporate defendant's principal place of business is located is proper..., for venue purposes, the corporation's designation of a county as the location of its principal office in its certificate of incorporation is controlling.” *Mulqueen v. Live*, 111 A.D.3d 585 (1st Dep’t 2013); see, *Krochta v On Time Delivery Serv., Inc.*, 62 A.D.3d 579 (1st Dep’t 2009); see also, *Petti v. Keyspan Gas E. Corp.*, 2020 N.Y. Slip Op. 31754[U], 21 (N.Y. Sup Ct, Kings County 2020). Here, the defendant submits that the Defendant is a foreign limited liability company incorporated under the laws of the State of Delaware with a principal place of business located at 125 Mineola Avenue, Suite 200, Roslyn Heights, New York 11577, as designated in its application for authority to conduct business filed with the New York State Department of State the New York State. (See, *NYSCEF Doc. No. 28*).

Thus, the Court finds that Nassau County is the proper venue because Nassau County: 1) is where a substantial part of the events or omissions giving rise to the claim occurred; 2) is where the plaintiff was employed, 3) is where the defendant maintains its primary place of business; and 4) has exclusive jurisdiction to hear all disputes related to plaintiff’s employment, pursuant to the terms of plaintiff’s Offer Letter. In his affirmation, Dr. Garber attests, that defendant New You is a Delaware Corporation that is duly authorized to conduct business in the State of New York, with a principal place of business located at 125 Mineola Avenue, Suite 200, Roslyn Heights, New York 11577. Dr. Garber attests that the Plaintiff resides in Queens County according to the Complaint. In addition, Dr. Garber attests that the Offer Letter to the Plaintiff, which was created in the ordinary course of business, designated that the Nassau County Supreme Court will have exclusive jurisdiction over employment disputes involving defendant. Lastly, Dr. Garber attests that this matter has no connection with New York County. Furthermore, the Offer Letter submitted by defendant includes a Choice of Law and Forum clause, which states: “[t]he parties agree that

(i) this Agreement and all matters concerning your employment with the Company and/or the termination of such employment (except as otherwise may be provided in writing signed by you and an authorized representative of the Company) shall be governed and construed by and in accordance with the laws of the State of New York, without reference to its principles of the conflicts of laws, and (ii) **any dispute concerning or arising out of this Agreement and such other matters shall be tried exclusively in an appropriate state or federal court in Nassau County, New York.**” (Emphasis added).

Plaintiff argues, *inter alia*, that “there is a presumption that Plaintiff’s choice of venue is correct, and that Defendant as the movant has the burden of proving otherwise with sufficient, competent and admissible evidence on a motion to change venue.” Plaintiff argues that the defendant failed to meet its *prima facie* burden to demonstrate that plaintiff’s choice of venue is improper, pursuant to *CPLR §510(1)*, because defendant failed to provide information, including how many offices the defendant has, how it operates, how much time is spent at the location, how many patients are treated, and how much income and revenue are generated. Plaintiff cites to the New York Court of Appeals decision in *Lividini v. Goldstein*, 37 N.Y.3d 1047, 1049, 176 N.E.3d 690, 691–92 (2021), which “held that regulatory/administrative filings and conclusory statements do not control the venue issue, and instead, a fact-based analysis based on the actual operations and revenues of the business, controls[.]” (*NYSCEF Doc. No. 34*).

In reply, defendant argues, *inter alia*, that the plaintiff failed to present any evidence in admissible form to meet his burden to establish that the venue of this case in New York would be proper. Defendant argues that the attorney submitted an unauthenticated print screen text message that “could be to anyone, and without the Affidavit of the Plaintiff, has no evidentiary value.” The defendant also argues that since the complaint is unverified, the plaintiff’s attorney cannot rely on the contents to overcome plaintiff’s defective opposition papers. To the contrary, the defendant argues, *inter alia*, that the Court of Appeals in *Lividini, supra*, “rejected the plaintiff’s argument that she could base venue in the Bronx because the defendant maintained an office in the Bronx. The Court of Appeals stated that basing venue in an improper county simply because the defendant maintained an office in that county would be tantamount to the Court in “read[ing] the phrase ‘principal office’ out of [CPLR 503].”

This Court finds that the plaintiff in this case is distinguishable from the plaintiff in the *Lividini* case, which was a New York Limited Liability Company and Professional Corporation. Here, plaintiff is a foreign limited liability corporation. Defendant contends that “the sole residency of a foreign corporation or a foreign limited liability company for venue purposes is the county where its principal office is located as designated in its application for authority to conduct business filed with the New York State Department of State, regardless of where it transacts business or maintains its actual principal place of business or facility.” Defendant argues that the Plaintiff does not dispute that the defendant’s “principal office” designated with the New York State Department of State is in Nassau County.

Accordingly, it is hereby

ORDERED that defendant New You Bariatric Group, LLC’s motion to change the venue of the instant action from New York County to Nassau County is GRANTED, and it is further

ORDERED that within 30 days from entry of this Order, counsel for movant shall serve a copy of this Order with notice of entry upon plaintiff and the Clerk of this Court; and it is further

ORDERED that, upon receipt of this order with Notice of Entry, the Clerk of the Supreme Court of the State of New York, New York County is directed to transfer this Court file to the Clerk of the Nassau County Supreme Court; and it is further

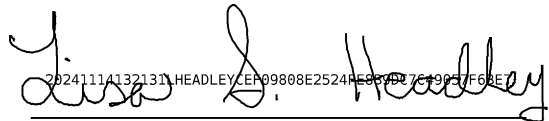
ORDERED, that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Nassau County Supreme Court to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible as the “E-Filing” page on the court’s website); and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

11/14/2024
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: