

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Johnson v. Finkelstein

2016 N.Y. Slip Op. 08507 (N.Y. Ct. App. 2016) · No. 2015-03271 · Decided December 21, 2016

SUMMARY

The Appellate Division, Second Department, affirmed an order denying the defendants’ motion to change venue from Kings County to New York County in a medical malpractice and lack-of-informed-consent action. The court held that the defendants failed to establish prima facie that the plaintiff was not a Kings County resident when the action was commenced, so the burden did not shift to the plaintiff.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Ruth C. Balkin, J.P.; Thomas A. Dickerson, J.; Hector D. LaSalle, J.; Francesca E. Connolly, J.
JURISDICTION	New York
DECIDED	December 21, 2016
DOCKET	2015-03271
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed, as limited by their brief, from the portion of an order denying their motion to change venue from Kings County to New York County.
STANDARD OF REVIEW	The appellate court reviewed whether defendants established prima facie entitlement to a venue change by demonstrating that plaintiff was not a Kings County resident when the action commenced.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion; the opinion states that it is uncorrected and subject to revision before publication in the Official Reports.
PARTIES	Seth Finkelstein, et al., Defendants v. Gale Johnson, Plaintiff

TOPICS

venue

medical malpractice

informed consent

civil procedure

appellate procedure

PRACTICE AREAS

civil procedure

venue

medical malpractice

informed consent

QUESTIONS PRESENTED

1. Whether defendants established prima facie that the plaintiff was not a resident of Kings County when the action was commenced, warranting a change of venue to New York County under CPLR 503(a).
2. Whether a party may have more than one residence for purposes of venue.

HOLDINGS

1. Defendants failed to demonstrate prima facie that the plaintiff was not a resident of Kings County when she commenced the action; therefore, the burden did not shift to the plaintiff to establish her Kings County residence, and the motion to change venue was properly denied.
2. For venue purposes, a residence is a place where a party stays for some time with a bona fide intent to retain it as a residence for some length of time and with some degree of permanency, and a party may have more than one residence.

KEY QUOTATIONS

*“For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency” (*1)*

FACTUAL BACKGROUND

The plaintiff brought an action for damages arising from alleged medical malpractice and lack of informed consent. She commenced the action in Kings County based on her claimed residence there. Defendants relied principally on her deposition testimony, arguing that it showed she lacked a fixed Kings County address before commencement and had moved to Florida the week before commencement.

PROCEDURAL HISTORY

The plaintiff commenced a medical-malpractice and lack-of-informed-consent action in Kings County, relying on her alleged Kings County residence for venue. Defendants moved under CPLR 503(a) to transfer the action to New York County, asserting that plaintiff was not a Kings County resident when the action was commenced. The Supreme Court, Kings County, denied the motion, and the Appellate Division affirmed that portion of the order.

DISPOSITION

affirmed

CASES CITED

- Ellis v. Wirshba, 18 AD3d 805, 805

- Patton v. Malychev, 132 AD3d 829, 830
- Forbes v. Rubinovich, 94 AD3d 809, 810
- Farrington v. Fordham Assoc., LLC, 129 AD3d 591, 592
- Chehab v. Roitman, 120 AD3d 736, 737-738
- Deas v. Ahmed, 120 AD3d 750, 751

OPINION

PER CURIAM.

Johnson v Finkelstein (2016 NY Slip Op 08507) Johnson v Finkelstein 2016 NY Slip Op 08507 Decided on December 21, 2016 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on December 21, 2016 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department RUTH C. BALKIN, J.P.

THOMAS A. DICKERSON HECTOR D. LASALLE FRANCESCA E. CONNOLLY, JJ. 2015-03271 (Index No. 10997/13) [*1]Gale Johnson, respondent, vSeth Finkelstein, etc., et al., appellants. Aaronson Rappaport Feinstein & Deutsch, LLP, New York, NY (Steven C. Mandell of counsel), for appellants. Sanocki, Newman & Turret, LLP, New York, NY (David B. Turret and Carl B. Tegtmeier of counsel), for respondent.

DECISION & ORDER In an action to recover damages for medical malpractice and lack of informed consent, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Dabiri, J.), dated November 21, 2014, as denied their motion to change venue of the action from Kings County to New York County. ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action in Kings County seeking to recover damages for medical malpractice allegedly committed in New York County. She claimed venue in Kings County on the basis of her residence there. The defendants moved for a change of venue to New York County on the ground that the plaintiff was not a resident of Kings County on the date she commenced the action.

The Supreme Court, inter alia, denied the defendants' motion, and the defendants appeal. CPLR 503(a) provides, in relevant part, that "the place of trial shall be in the county in which one of the parties resided when it was commenced." "For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency" (Ellis v Wirshba, 18 AD3d 805, 805; see Patton v Malychev, 132 AD3d 829, 830; Forbes v Rubinovich, 94 AD3d 809, 810).

In the context of venue, a party may have more than one residence (see CPLR 503[a]; *Patton v Malychev*, 132 AD3d at 830). Here, in seeking to prove that the plaintiff was not a resident of Kings County when she commenced the action, the defendants submitted, among other things, her deposition testimony, which, they asserted, demonstrated a lack of a fixed address in Kings County in the period of time leading up to the commencement of the action, as well as her relocation to Florida the week before commencement.

However, taken as a whole and in context, the defendants' evidence failed to [*2]demonstrate prima facie that the plaintiff was not a resident of Kings County when she commenced this action (see *Farrington v Fordham Assoc., LLC*, 129 AD3d 591, 592; *Chehab v Roitman*, 120 AD3d 736, 737-738). Consequently, the burden never shifted to the plaintiff to demonstrate that she was, in fact, a resident of Kings County at the time of commencement (see *Deas v Ahmed*, 120 AD3d 750, 751; cf. *Forbes v Rubinovich*, 94 AD3d at 810).

Accordingly, the Supreme Court properly denied the defendants' motion to change venue (see *Farrington v Fordham Assoc., LLC*, 129 AD3d at 592). BALKIN, J.P., DICKERSON, LASALLE and CONNOLLY, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court