

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15213
Y/cb

_____AD3d_____

Submitted - April 11, 2007

WILLIAM F. MASTRO, J.P.
DAVID S. RITTER
PETER B. SKELOS
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-10109

DECISION & ORDER

Yitzchok Frankel, appellant, v Moshe Stavsky, et al.,
respondents.

(Index No. 749/06)

Michael Stewart Frankel, New York, N.Y. (Richard H. Bliss of counsel), for
appellant.

Kaufman Dolowich Schneider Bianco & Voluck, LLP, Woodbury, N.Y. (Richard M.
Howard and Jeffrey A. Meyer of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, defamation, and
tortious interference with contract, the plaintiff appeals, as limited by his brief, from so much of an
order of the Supreme Court, Kings County (Schmidt, J.), dated September 9, 2006, as granted that
branch of the defendants' motion which was, in effect, pursuant to CPLR 510(3) to change the venue
of the action to Nassau County.

ORDERED that the order is reversed insofar as appealed from, on the law and in the
exercise of discretion, with costs, that branch of the motion which was, in effect, to change the venue
of the action to Nassau County is denied, and the Clerk of the Supreme Court, Nassau County, is
directed to deliver to the Clerk of the Supreme Court, Kings County, all papers filed in this action and
certified copies of all minutes and entries (*see* CPLR 511[d]).

Even though the defendants' notice of motion and "wherefore" clause did not formally
and specifically request relief pursuant to CPLR 510(3) (*see* CPLR 2214[a]; *Arriaga v Michael Laub*

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Co., 233 AD2d 244, 245), a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party (*see HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774; *Matter of LiMandri*, 171 AD2d 747; *Pace v Perk*, 81 AD2d 444, 456). Excluding from consideration the convenience of the parties, which is irrelevant to a determination of a change of venue pursuant to CPLR 510(3) (*see Mei Ying Wu v Waldbaum, Inc.*, 284 AD2d 434, 435; *McAdoo v Levinson*, 143 AD2d 819, 820), the papers failed to demonstrate that the nonparty witness for whose convenience the change of venue was sought was willing to testify on the defendants' behalf, and failed to specify the nature and materiality of her anticipated testimony (*see Shindler v Warf*, 24 AD3d 429; *Gaiimo v Hastings*, 19 AD3d 365; *Rich v O'Connor*, 212 AD2d 767). Accordingly, the Supreme Court improvidently exercised its discretion in granting relief pursuant to CPLR 510 (3) by changing the venue of the action from Kings County to Nassau County (*see O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169).

MASTRO, J.P., RITTER, SKELOS, CARNI and McCARTHY, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court