

**Liere v Wide Awake Farms, LLC**

2016 NY Slip Op 31511 (U)

November 28, 2016

Sup Ct, Suffolk County

Docket Number: 13818-1999

Judge: Ralph F. Costello

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SHORT FORM ORDER

INDEX NO. 13818-1999

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXVII SUFFOLK COUNTY

PRESENT :

Honorable Ralph F. Costello

JOHN LIERE, WAYNE DUPREE and  
JUSTIN DUPREE,

Plaintiffs,

-against-

WIDE AWAKE FARMS, LLC and  
JACOB HAY,

Defendants

R/D 4-30-02  
S/D 6-11-02  
Motion No. 007-MG

PLAINTIFF'S ATTORNEY  
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Upon reading and filing the following papers relative to this matter: (1) Cross Motion dated April 30, 2002 by plaintiffs John Liere, Wayne Dupree and Justin Dupree seeking an Order pursuant to CPLR §510(2) changing venue of the action from Suffolk County to Nassau County; (2) Plaintiff Wayne Dupree's Affirmation in Support of said Motion dated April 30, 2002; (3) Plaintiff's Amended Complaint; (4) Plaintiff's Memorandum of Law in Support of said Motion dated April 30, 2002; (5) Defendant's Verified Answer; (6) Michael G. Walsh's Affidavit in Opposition to Plaintiff's Cross-Motion for Change of Venue; (7) Stephen R. Angel's Reply Affidavit, and all the

exhibits annexed thereto, and the matter having been submitted to the Court, and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the Cross-Motion is decided as follows: it is

ORDERED that the Cross-Motion by plaintiff seeking a change of venue pursuant to CPLR §510(2) is hereby granted; and it is further

**ORDERED**, that this file shall be transferred to Supreme Court, Nassau County and an index number shall be assigned by the Nassau County Clerk.

Plaintiff's action is based on the alleged breach of an assignment of a contract for the sale of land in the Town of Southampton between plaintiff/purchaser John Liere and defendant/seller Jacob Hay. Mr. Liere purchased the property from Mr. Hay and assigned 50 percent of his interest to Justin Dupree and 50 percent to Wide Awake Farms LLC. Wide Awake was to subdivide the land then convey approximately 13 acres to Wayne Dupree for use in connection with his landscape nursery business. Mr. Liere was represented by Edward D. Burke, Esq. who is now a Justice of the Court of Claims and an Acting Supreme Court Justice assigned to Part 9 of this Court. Justice Burke also acted as attorney-in-fact for assignee Wide Awake Farms, LLC and assignor John Liere. Seller Hay's attorney, Martin R. Gilmartin, Esq. was told by then attorney Burke to convey title to said property in Wide Awake's name only. Wide Awake then refused to convey the 13 acres of subdivided land to Wayne Dupree and instituted proceedings to have Wayne Dupree evicted from said 13 acres that he had been using. Mr. Liere and plaintiffs Wayne and Justin Dupree brought a claim against Mr. Hay and Wide Awake Farms LLC based upon their alleged breach of this assignment. Justice Burke will almost certainly be called as a witness in this case. Plaintiff Liere has also instituted a malpractice action against Justice Burke for his role in the transaction.

A motion to change venue pursuant to CPLR §510 is granted or denied based on the sound discretion of the Court. Frank v. Martuue 285 AD2d 938 (3<sup>rd</sup> Dept., 2001). Because this case involves an Acting Supreme Court Justice the plaintiff's motion to change venue to Nassau County is granted.

In order to protect the Court's reputation from the slightest appearance of impropriety or favoritism it is within the trial court's sound discretion to change venue when a case involves an action Justice, either as a party, Rothwax, et al v. Spicehandler et al 161 AD2d 425 (1<sup>st</sup> Dept, 1990), or a non-party, Amann v. Caccese 223 AD2d 663 (2<sup>nd</sup> Dept., 1996). If a case involves a Justice of the Court either as a plaintiff or defendant it is well within the Court's discretion to change the venue of the action in order to avoid the appearance of partiality. DeLuca v. CBS, Inc., et al 481 NYS2d 425 (2<sup>nd</sup> Dept., 1984); see also Rothwax, supra. Likewise, when it appears that the impartiality of the Court may be questioned because a Justice, as a non-party, may have an interest in the action because one of the parties has a special relationship with him or her, it is within the Court's discretion to change venue. Bernstein v. Greene, 61 AD2d 827 (2<sup>nd</sup> Dept., 1978; Milazzo v. Long Island Lighting Company, 106 AD2d 495 (2<sup>nd</sup> Dept., 1984); see also Amann, supra.

Although not every relationship to a Justice necessitates the transfer of an action, it is within the sound discretion of the Court to grant a motion to change venue when it appears that the impartiality of the Court may be questioned. Milazzo, supra. Where the plaintiff was a former law secretary to two Justices in the Supreme Court of Kings County venue was changed to New York County in order to avoid the appearance of impropriety. Id.

In this case Edward D. Burke is a Suffolk County Court of Claims Justice and an Acting Supreme Court Justice. Although his involvement in the case is not as a party, but rather a non-party witness, it is well within the Court's discretion to grant the plaintiff's Motion to change venue pursuant to CPLR §510(2). Justice Burke will almost certainly be called as a witness in this action and the outcome of this litigation may have an impact on the malpractice action pending against him. Although none of the parties to the action is related to Justice Burke, Justice Burke has acted as attorney-in-fact for both the plaintiffs John Liere and Justin Dupree and for the defendant Wide Awake Farms, LLC. While this relationship to the parties may not be improper, in order to avoid the appearance of impropriety the plaintiff's Motion to change venue is granted.

The foregoing constitutes the complete Order of the Court in this matter. Counsel for the movant is directed to serve a copy

of this Order with notice of entry upon all other counsel and the Clerks of Nassau and Suffolk County within ten days of receipt of same.

**RALPH F. COSTELLO**

Dated: August 28, 2002

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J.S.C.

Check One \_\_\_\_\_ Final Disposition \_\_\_\_\_ Non-Final Disposition