

Martinez v Estate of Nicolino

2007 NY Slip Op 30261(U)

March 14, 2007

Supreme Court, New York County

Docket Number: 0111909

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

EDWIN MARTINEZ

INDEX NO. 111909/05

MOTION DATE 3-14-07

- v -

MOTION SEQ. NO. 001

ESTATE OF MICHAEL NICOLINO, et al.

MOTION CAL. NO. 61

The following papers, numbered 1 to 4 were read on this Motion and Cross-Motion to Change Venue pursuant to CPLR 510(3).

	<u>PAPERS NUMBERED</u>
Notice of Motion – Affidavits – Exhibits	<u>1</u>
Affirmation in Opposition to Motion	<u>2</u>
Notice of Cross-Motion- Affidavits - Exhibits	<u>3</u>
Affirmation In Reply	<u>4</u>

Cross-Motion: Yes No

This personal injury action arises from a motor vehicle accident which occurred on December 5, 2004, on Interstate 684 in Westchester County. The plaintiff, Edwin Martinez, alleges that fumes inside the truck he was driving caused him to become dizzy and lose control of the vehicle, which came to a stop partially on the roadway. It was thereafter struck by a vehicle being driven by Michael Nicolini, who died from his injuries.

On or about August 25, 2005, the plaintiff, a resident of Westchester County, commenced this action in New York County against (1) the estate of Michael Nicolini, (2) Superior Sales and Service, Inc., who, the plaintiff alleges, had attempted to service the plaintiff's truck at the request of plaintiff's employer, but failed to remedy the fumes, and (3) El Diario/La Prensa and NYP Holdings, Inc., Nicolini's employers. Venue was premised on the principal place of business of defendants El Diario/La Prensa and NYP Holdings, who are no longer parties to this action. On October 18, 2005, defendant Superior Sales and Service, Inc. served plaintiff with a demand to change venue to Westchester County. Plaintiff did not consent. See CPLR 511(b).

Defendant Superior Sales and Service, Inc. now moves to change venue to

Westchester County pursuant to CPLR 510(3), on the ground that the convenience of all material witnesses and the ends of justice will be served by the change. This defendant argues that Westchester County is not only where its own offices are located, but is also the place of plaintiff's residence, the location of plaintiff's employer, Misti's Transport, Inc., the place where the accident occurred and the place of residence of five identified non-party witnesses who were recently discovered and whose testimony is necessary to establish the condition and repair history of the plaintiff's truck. The movants allege that it is only recently that Misti's Transport, by its principal Nestor Fernandez, was deposed and provided the names of these non-party witnesses. The movants point out that designation of New York County as the place of trial was based on the place of business of parties who are no longer in the case. They further argue that a related action was recently commenced in Westchester County by the Administrator of Michael Nicolini's estate against Mitsi's Transport and Edwin Martinex, plaintiff herein, and that they intend to move for a joint trial in Westchester County.

In opposition, the plaintiff argues that the main motion is untimely inasmuch as it was made sixteen months after the action was commenced. He did not submit papers in opposition to the cross-motion.

It is well settled that venue is generally based on the residence of one of the parties (see CPLR 503[a]), and that "upon a proper showing a transitory action may also be brought in the county where the cause of action arose when such promotes the convenience of witnesses." Oquendo v Nationwide Insurance Company, 270 AD2d 174, 176 (1st Dept. 2000), *quoting Freeman v Suk Ho Chun*, 179 AD2d 437). Thus, it is often held that an action arising from a car accident ought to be tried in the county where the accident occurred. See Shetty v Volvo Cars, ---AD3d-- - , 2007WL610657 (1st Dept. March 1, 2007); Goercke v Kyun, 273 AD2d 110 (1st Dept. 2000); Ford v Servistar Corp., 133 AD2d 23 (1st Dept. 1987). Here, the residence of the plaintiff and most parties and witnesses are in Westchester and Westchester is where the accident occurred. In addition to the other factors cited by the movants and set forth above, the court notes that Michael Nicolini was also a resident of Westchester County (see CPLR 503[b]) and that defendant Superior Sales and Service, Inc. served plaintiff with a demand to change venue to Westchester County just two months after the action was commenced.

While the plaintiff is correct in arguing that a motion to change venue must be made "within a reasonable time after commencement of the action" (CPLR 511[a]), it is also true that the motion can be made any time before trial. See Gangi v DaimlerChrysler Corp., 14 AD3d 482 (2nd Dept. 2005); Gennaro v Grossfeld, 186 AD2d 18 (2nd Dept. 1992). An untimely motion pursuant to CPLR 511(a) lies within the discretion of the court, and may be granted upon evidence of the plaintiff's bad faith commencement of the action in an improper venue (Castillo v Metropolitan Laundry Machinery, Co., Inc., 29 AD2d 247 [1st Dept. 2002] or where, as here, the delay in bring the motion is "outweighed by the factors favoring

the transfer." Gennaro v Grossfeld, supra [three-year delay outweighed by sole nexus to transferring county was that it was former residence of plaintiff]; compare lassinski v Vassiliev, 220 AD2d 372 (1st Dept. 1995) [two-year delay not excused where movant did not identify proposed witnesses and nature of their proposed testimony].

Accordingly, the court finds that the convenience of material witnesses and the ends of justice will be promoted by changing venue of this action to Westchester County. See CPLR 510(3); lassinski v Vassiliev, supra.

For these reasons and upon the foregoing papers, it is

ORDERED that the motion and cross-motion are granted and it is further,

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Westchester, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the Decision and Order of the Court.

Enter:

Dated: March 14, 2007


Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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