

Vinson v WAM Prop. Mgmt., Inc.

2009 NY Slip Op 30728(U)

March 31, 2009

Supreme Court, New York County

Docket Number: 114301/06

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justitia

Index Number : 114301/2006
VINSON, JAMES
VS.
WAM PROPERTY MANAGEMENT
SEQUENCE NUMBER : 002
CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants WAM Property Management, Inc. and Marino Family Limited Partnership seeking to change venue from New York County to Nassau County, pursuant to CPLR §509 and/or §511(a), is granted; and it is further

ORDERED that defendants WAM Property Management, Inc. and Marino Family Limited Partnership serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

FILED

APR 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/31/09

[Signature]

CAROL EDMEAD S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
JAMES VINSON and ELLEN VINSON,

Plaintiffs,

Index No. 114301/06

-against-

DECISION/ORDER

WAM PROPERTY MANAGEMENT, INC., MARINO
FAMILY LIMITED PARTNERSHIP, NEW YORK
COMMUNITY BANCORP, INC., LONG ISLAND
COMMERCIAL BANK FOUNDATION and
PATRICIA MARINO,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED

APR 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiffs James Vinson ("plaintiff") and Ellen Vinson (collectively "plaintiffs") seek damages from defendants WAM Property Management, Inc. ("WAM"), Marino Family Limited Partnership ("MFLP"), New York Community Bancorp, Inc., Long Island Commercial Bank Foundation, and Patricia Marino ("Ms. Marino"), resulting from plaintiff's trip and fall in a parking lot at 390 North Broadway, Jericho, New York ("the premises").

Defendants WAM and MFLP (collectively "defendants") now move to change venue from New York County to Nassau County, pursuant to CPLR §509 and/or §511(a).

Plaintiffs' Complaint

Plaintiffs allege that on or about January 12, 2004, plaintiff was at the premises, when he slipped and fell, sustaining serious injuries. Plaintiffs contend that defendants possessed, maintained and/or controlled the premises, and that they created a defective and dangerous

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condition at said premises. Plaintiffs also contend that defendants' negligence was a proximate cause of plaintiff's injuries. Plaintiff's wife, Ellen Vinson, suffered the loss of society, services and consortium from plaintiff as a result of defendants' negligence.

Defendants' Motion

Defendants contend that the designation of New York County as the venue of this action was based on the alleged residence of Ms. Marino in New York County. The action against Ms. Marino has since been discontinued. As such, there is no longer any basis for venue in New York County. All of the remaining parties to this action, including plaintiff and his treating doctors, reside in either Nassau County or Suffolk County. Moreover, the alleged accident occurred in Nassau County.

Defendants argue that the joinder of Ms. Marino as a defendant was a "specious pretext and stratagem to avoid venue of this action in Nassau County" (Motion, ¶ 9). But for the naming of a resident of New York County as a defendant, this action could never have been venued in New York County, they argue. In the first instance, this action should have been venued in either Nassau County or Suffolk County.

The premises where the accident occurred is in Nassau County. The premises is owned by MFLP and managed by WAM¹. William A. Marino, the president of WAM and a member of MFLP, attests that neither WAM nor MFLP has any legal relationship to New York County upon which venue in New York County can be based. Neither defendant owns property, manages any property, has an office, or has a telephone listing in New York County. In short, neither WAM

¹See Exh. D, a copy of the deed by which MFLP acquired title to the premises, and Exh. E, affidavit of William A. Marino.

[* 4]
nor MFLP has any legal presence in New York County that would support venue in New York County.

Plaintiffs' Opposition

Plaintiffs argue that at the time this action was commenced, Ms. Marino was a resident of New York County. Therefore, in the first instance, venue in New York County was proper.

Plaintiffs further argue that defendants never served a Demand to Change Venue, pursuant to CPLR §511(a). Such a Demand requires service prior to or with service of the Answer. Further, defendants did not move within fifteen days of service of such a Demand. As such, defendants' motion pursuant to CPLR §511 is impermissible, plaintiffs argue.

Plaintiffs further argue that defendants failed to demonstrate their entitlement to relief pursuant to CPLR §510. Defendants make no claim for discretionary relief under CPLR §510, and defendants have failed to set forth the necessary information to demonstrate entitlement to relief under that provision. Therefore, defendants' motion should be denied.

Defendants' Reply

Defendants argue that, contrary to plaintiffs' contentions, a Demand to Change Venue was served. Defendant New York Community Bancorp, Inc. served a Demand to Change Venue and then followed up with a motion (*see* Motion Sequence # 1 in the Court's records). Plaintiffs opposed the motion, citing the residence of Ms. Marino in New York County. On that basis, the motion to change venue was withdrawn, with leave to renew. In view of plaintiffs' subsequent discontinuance of their claims against Ms. Marino, defendants now renew and revisit the issue of venue.

Analysis

According to CPLR §509, “the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511.” According to CPLR §511(a) and (b), the demand for change of venue must be served with an answer or before an answer in a timely manner. But it is well settled that while the failure to make a timely motion for a change of venue deprives a defendant of obtaining a change of venue as a matter of right, it does not “preclude defendant from applying for a change in the court’s discretion” (*Reichenbach v Corn Exchange Bank Trust Co.*, 249 AD 539, 540-541 [1st Dept 1937]). Further, a motion to change venue is not untimely if it is made promptly after an action against a defendant has been discontinued (*Caplin v Ranhofer*, 167 AD2d 155, 157-158 [1st Dept 1990]).

The First Department consistently has granted motions for change of venue where venue originally was based on one party and the action against that party was subsequently discontinued (*Gramazio v Borda, Wallace & Witty*, 181 AD2d 428, 429 [1st Dept 1992] [“In light of the dismissal of the action against defendant Aetna, venue was properly transferred to Suffolk County where all the remaining parties reside” (*id.*, citing *Mitts v H.I.P. of Greater N. Y.*, 104 AD2d 318, 319 [1st Dept 1984])]; see also *Chow v Long Island R.R.*, 202 AD2d 154, 155 [1st Dept 1994] [approving change of venue from New York County to Nassau County]; *Crew v St. Joseph’s Medical Center*, 19 AD3d 205, 206 [1st Dept 2005] [motion to change venue to Westchester County granted where defendant’s Bronx County residence provided initial justification for venue, and the action against the Bronx County defendant was discontinued]). The First Department also has held that “[u]nless there are cogent reasons to direct otherwise,

ordinarily the venue of a transitory action should be in the county *where the cause of action arose*" (*Brunner v Joubert*, 118 AD2d 424, 425 [1st Dept 1986] (*emphasis added*)) [holding that Nassau County was the proper venue because the accident "occurred in Nassau County; all the eyewitnesses to the accident live or work in Nassau County; plaintiff was taken to a Nassau County hospital for treatment immediately following the accident; the accident was investigated by Nassau County police; and the vehicle was initially inspected in Nassau County" (*id.*)].

Upon a motion by defendant to change venue, defendant bears the burden to establish that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v Pahlavi*, 62 NY2d 474, 479, *cert denied* 469 U.S. 1108, 105 S Ct 783 [1984]; *Clark v Michael Ahem Production Service, Inc.* 181 AD2d 514 [1st Dept 1993]; *Bradley v Plaisted*, 277 AD 620 [3^d Dept 1951], *lv denied*, 278 AD 127). Here, defendants have demonstrated that, in light of the discontinuance of the action against Ms. Marino, plaintiffs' choice of forum is not appropriate.

The venue of this action originally was based on the residence of Ms. Marino in New York County (see Summons, p.1, defendants' Exh. B). Defendants have demonstrated that on May 8, 2008, the action against Ms. Marino was discontinued via stipulation of all of the parties (Stipulation, defendants' Exh. A). Defendants further have demonstrated, and plaintiffs do not deny, that the remaining parties to this action, including plaintiff and his treating doctors, reside in either Nassau County or Suffolk County (Motion, pp. 4-5). The accident occurred in Nassau County (Complaint, ¶ 64). Therefore, as New York County no longer has any legal nexus to the cause of action, and Nassau County is the county where the cause of action arose, Nassau County is the proper venue (*Brunner v Joubert*, 118 AD2d 424, 425 [1st Dept 1986]).

Conclusion

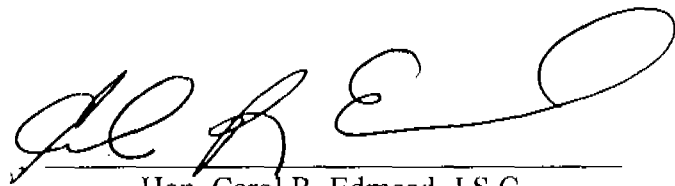
Based on the foregoing, it is hereby

ORDERED that the motion of defendants WAM Property Management, Inc. and Marino Family Limited Partnership seeking to change venue from New York County to Nassau County, pursuant to CPLR §509 and/or §511(a), is granted; and it is further

ORDERED that defendants WAM Property Management, Inc. and Marino Family Limited Partnership serve a copy of this order with notice of entry upon all parties within 20 days of entry.

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Dated: March 31, 2009



Hon. Carol R. Edmead, J.S.C.
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