

Coughlin v Sarraf

2010 NY Slip Op 30332(U)

February 17, 2010

Supreme Court, New York County

Docket Number: 113756/09

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Jennifer Coughlin,

INDEX NO. 113756/09

- v -

MOTION DATE _____

Harris Sarraf

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	_____	<u>PAPERS NUMBERED</u>
Answering Affidavits -- Exhibits	_____	_____
Replying Affidavits	_____	_____

FILED

FEB 19 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Harris Sarraf and 214 E. 83 Street Realty, LLC for an order, pursuant to CPLR §511, to change the venue of this action brought by plaintiff Jennifer Coughlin is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, March 30, 2010 at 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 2/17/2010

[Signature]
J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
JENNIFER COUGHLIN,

Plaintiff,

Index No. 113756/09

-against-

DECISION/ORDER

HARRIS SARRAF and 214 E. 83 STREET REALTY, LLC

Defendants.

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

MEMORANDUM DECISION

In this personal injury action brought by plaintiff Jennifer Coughlin (“plaintiff”), defendants Harris Sarraf (“Mr. Sarraf”) and 214 E. 83 Street Realty, LLC (“Realty”) (collectively “defendants”) move for an order, pursuant to CPLR §511, to change venue to Westchester County.

Background

Plaintiff commenced this action through the service of a Summons and Complaint on September 30, 2009. Her Summons lists the basis of venue as her residence, 214 East 83rd Street, Apt. 5A, New York, New York 10028. In her Complaint, plaintiff alleges that Mr. Sarraf is the owner of 214 East 83rd Street, New York, New York (the “premises”), and Realty is the management company of the premises. Plaintiff further alleges that on or about July 2, 2009, as a result of defendants’ negligence, she fell down an interior staircase of the premises, and suffered serious injuries.

Defendants contend that, pursuant to CPLR §503(a), venue is based on the parties’ residence at the time of commencement of the action. For corporations such as Realty, residency

is determined by the county where its principal place of business is listed on its certificate of incorporation (*see* CPLR §503[c]). As Mr. Sarraf resides at 10 Forthill Lane, Scarsdale, New York, New York, 10583, and Realty is a domestic limited liability company incorporated in Westchester County, with its principal office in Westchester County, defendants' residency is Westchester County.

Citing caselaw, defendants further contend that a defendant is entitled to a change of venue from the venue chosen by plaintiff, if, shortly after an action is commenced, the plaintiff moves from the residence that served as the basis for venue at the time of commencement. Such an act evidences a plaintiff's lack of intent to retain the residence as a permanent residence. Citing the affidavit of Mr. Sarraf, defendants argue that plaintiff's lease regarding the premises was terminated in October 2009, and plaintiff moved out of said premises on October 31, 2009, and now lives in Pennsylvania (*see* the "Sarraf Affd."). Therefore, plaintiff's address at the time the instant matter was commenced cannot be deemed plaintiff's residence, because she did not possess the requisite intent to retain the residence for some length of time and with some degree of permanency. Given that plaintiff is now a Pennsylvania domiciliary with no residency in any county within New York State, the only proper county for venue is Westchester County, defendants argue.

In opposition, plaintiff distinguishes the caselaw on which defendants rely, on the ground that in those cases, it was clear that the plaintiff was never a *bona fide* resident of the county wherein the action initially was venued. The courts rejected such attempts to manufacture or manipulate venue by temporarily relocating to the chosen venue. In contrast, plaintiff was a longstanding resident and domiciliary of New York County, where she lived, worked, received

her paychecks, and filed her income tax returns (*see* the "Coughlin Affd."). Plaintiff did not temporarily move or relocate to New York County for the specific purpose of establishing venue therein, nor did she utilize the home of a family member or office as a temporary stopover for the purpose of creating a sham venue. The mere fact that plaintiff relocated outside of New York County after commencing this action is irrelevant for venue purposes, plaintiff argues.

Plaintiff further contends that venue is preferred in the county where the cause of action arose. Plaintiff's accident occurred in New York County, and the accident situs is within the management and/or ownership of defendants. Thus, New York County is the proper venue.

In reply, defendants point out that they are not contending that plaintiff's New York County residency was a sham. Instead, they are arguing that, based on recent caselaw, New York County is an improper venue. The Coughlin Affd. makes clear that the instant matter was commenced on September 30, 2009 at 12:49 p.m., and that plaintiff vacated her New York County residence on September 30, 2009 at approximately 8:00 p.m., mere hours after the Summons and Complaint were filed. Therefore, it cannot be said that plaintiff intended to retain her New York County residence with any permanency whatsoever at the time this matter was commenced. Instead, plaintiff had every intention of abandoning her New York County residence and had already made arrangements for an alternative residence.

Further, defendants distinguish the caselaw plaintiff cites, and contests plaintiff's argument that venue is preferred in the county wherein the cause of action arose. While the importance of the situs of an accident for venue purposes is relevant in regards to the convenience of witnesses, defendants are not seeking a change of venue based upon the convenience of witnesses, but instead upon the contention that Westchester County is the only

proper venue in this matter. As such, plaintiff's argument regarding the situs of the accident is irrelevant for the purpose of defeating defendants' motion.

Discussion

Change of Venue

For the Supreme Court of the State of New York, the prescribed venue of an action is codified at and statutorily authorized by Article 5 of the CPLR. The statutory scheme provides that "notwithstanding the provisions of this article, 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 of the court upon motion or by consent" (CPLR §509). As such, unless the parties have by prior written agreement fixed the venue of an action, CPLR Article 5 permits the plaintiff the right to make the initial selection of an appropriate venue (*see* CPLR §§501, 503, 509; *Medicorp v Avis Corp.*, 122 Misc 2d 813 [1984]).

Pursuant to CPLR §503(a), venue is predicated upon the residence of one of the parties at the time the action is commenced, not where the cause of action arose (*Addo v Melnick*, 61 AD3d 453, 453 [1st Dept 2009]). However, CPLR §510(1) provides that the "court, upon motion, may change the place of trial of an action where: the county designated for that purpose is not a proper county." And, it is settled that upon a motion by defendants to change said venue, defendants bear 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 (*New York Racing Ass'n, Inc. v State of New York Div. of the Budget*, 2009 WL 2221459 [Trial Order] [Sup Ct, New York County 2009]; *Garced v Clinton Arms Associates*, 58 AD3d 506, 511 [1st Dept 2009]; *Castro ex rel. Gonzalez v New York Hosp. Medical Center of Queens*, 52 AD3d 251, 252 [1st Dept 2008]; *Clark v Michael*

Ahem Prod. Serv., Inc., 181 AD2d 514 [1st Dept 1993]). In addition, it is settled that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed” (*Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]; *Waterways Limited v Barclays Bank, PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

Here, defendants fail to demonstrate that plaintiff’s move to Pennsylvania shortly after commencing the instant action evidences a lack of intent to retain New York County as a permanent residence sufficient to defeat New York County as a basis for venue.

First Department caselaw, which is controlling over this Court, makes clear that for the purpose of deciding whether the placement of venue is proper “the controlling date is the *date of commencement of the action*” (emphasis added) (*Roman v Brereton*, 182 AD2d 556, 557 [1st Dept 1992]). The First Department also makes clear that in the absence of evidence that a plaintiff’s residency was “contrived for the sole purpose of obtaining an advantageous venue,” it is proper to conclude that the plaintiff was a *bona fide* resident of the county wherein he or she resided at the time the action was commenced (*Lilly v Ayoub*, 260 AD2d 302, 302 [1st Dept 1999]).

The facts in *Blake v Massachusetts Mut. Life Ins. Co.*, 22 AD3d 230, 231 [1st Dept 2005]) are similar to those herein. In *Blake*, the plaintiffs took title to a house in Westchester County on July 20, 1999, while still residing in Bronx County. Then, on August 11, 1999, the plaintiffs commenced an action, basing venue on Bronx County, where they had lived for years. In affirming the Supreme Court’s denial to change venue to Westchester County, the First Department stated: “There is no dispute that plaintiffs continued to live only in the Bronx apartment while their new house was being painted, repaired and furnished, and did not move

until the end of August" (*id.*). The First Department went on to reject "defendants' argument that because plaintiffs did not intend to remain in the Bronx apartment for some length of time or with some degree of permanency at the time of the commencement of the action, Bronx County is not a proper venue" (*id.*). The Court held: "Absent evidence that plaintiffs continued to live in the Bronx apartment until after the commencement of the action for the sole purpose of obtaining an advantageous venue, no basis exists to disturb the motion court's finding, made after a hearing, that plaintiffs were *bona fide* Bronx County residents at the commencement of the action" (*id.*).

Further, the First Department points out that "a subsequent change of residence to another county does not invalidate the original designation based upon plaintiff's residence at the time of the commencement of the action" (*Kraft v Kamalian*, 290 AD2d 264, 264 [1st Dept 2002], quoting *Iassinski v Vassiliev*, 220 AD2d 372, 373-374 [1st Dept 1995]; see also *Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 573 [1st Dept 1992]). In *Iassinski*, the plaintiffs commenced a personal injury action on or about November 9, 1992, electing New York County as the venue based on their alleged residence there. Plaintiffs had moved by the time they served their Bill of Particulars on March 22, 1993, four months later. After the defendants' moved to change venue to Queens County, the plaintiffs "confirmed that their residence had since changed to Queens, but averred that at the time of the commencement of the action they resided in New York County" (*Iassinski* at 372). In reversing the trial court, the First Department held, *inter alia*, that "a subsequent change of residence to another county does not invalidate the original designation based upon plaintiffs' residence at the time of the commencement of the action" (*id.*).

at 374).¹

In *Cardona*, the plaintiffs commenced a personal injury action on May 2, 1988, designating Bronx County as the place of venue based upon their residence. In its motion to change venue, the defendant argued that because “plaintiffs no longer live in Bronx County and, since that county therefore no longer has any nexus with the action, venue should be in New York County” (*id.* at 573). The First Department rejected such reasoning, holding that “a plaintiff who has designated a county of appropriate venue is under no obligation to make any showing that the county designated is in any way preferable to the one to which the change is sought *unless and until the party seeking the change has made an adequate showing as to the convenience of material witnesses and the furtherance of justice*” (*id.* at 573) (emphasis added).

Here, plaintiff resided in New York County for two years before she commenced the instant action, and defendants make no showing that a change of venue is warranted for the convenience of material witnesses or for the furtherance of justice. Further, while it is undisputed that plaintiff moved to Pennsylvania soon after she commenced the instant action, defendants provide no evidence that plaintiff’s New York County residency was “contrived” for the sole purpose of obtaining an advantageous venue. To the contrary, plaintiff attests:

I began my full-time residence in the State of New York, County of New York (Manhattan) on September 5, 2007, when I moved into my apartment located at [the premises]. I was employed by the law firm of Landman, Corsi, Ballaine & Ford in Manhattan at the time. For over two (2) years, I lived (resided) exclusively at the [premises]. My checks from the Landman, Corsi law firm were issued to the 214 East 83rd Street address. My income tax returns were filed with this same address. My bank statements and bills were issued to the 214 East 83rd Street address. In short, during this

¹The First Department in *Jassinski* also reversed on the grounds that defendants had not met their burden of demonstrating that the witnesses would be better served by a change of venue, and that defendants’ motion was untimely.

time period I had no dwelling, residence, domicile, office or other ties to the Commonwealth of Pennsylvania, other than having family who lived there in their own homes. From September 5, 2007 until the time I left my Manhattan apartment, I never resided in Pennsylvania.
(Coughlin Affd., ¶ 8)

Plaintiff goes on to explain that she “relocated to the Philadelphia area after September 30th because I obtained a job more suited to my financial and professional needs in the Philadelphia area” (*id.* at 10).

The caselaw defendants cite is distinguishable. In *Katz v Siroty* (62 AD2d 1011 [2d Dept 1978]), the defendant appealed an order denying his motion to change the venue of the action from Kings County to Westchester County. The plaintiff had maintained a home in Westchester County for 20 years, his two children attended public school in Scarsdale, he was a registered voter in Scarsdale, and he filed income tax returns as a resident of Scarsdale. He also claimed “exclusive use” of a bedroom in his sister’s and brother-in-law’s home in Kings County. In reversing the trial court and determining that the Kings County venue did not constitute a residence, the Second Department held that the plaintiff’s “occasional use of the bedroom in his sister and brother-in-law’s home . . . does not support his contention that he has a second residence in Brooklyn” (*id.* at 1012). The Second Department went on to explain:

Although a person may have more than one residence for venue purposes (CPLR 503, subd [a]), to consider a place as such, he must stay there for some time and have the *bona fide* intent to retain the place as a residence for some length of time and with some degree of permanency. Residence requires more stability than a brief sojourn for business, social or recreational activities. The mere fact that plaintiff uses the Brooklyn home of his sister and brother-in-law as a stopover for convenience and to sleep there when in the area on business, does not establish a residence.
(*Id.*) (citations omitted)

Here, however, plaintiff’s stay in New York County was neither brief nor occasional, and

cannot be considered a mere “stopover.”

The other cases defendants cite also are unavailing. In *Jones-Ledbetter v Biltmore Auto Sales, Inc.* (229 AD2d 518, 519 [2d Dept 1996]), the plaintiff filed an action basing venue on her “residence” in Bronx County, a mere three months after moving to Bronx County from Westchester County. However, one week after the plaintiff moved to the Bronx, she registered her car in Westchester County, and “in her affidavit, the plaintiff acknowledged that she and her family were now residing in Putnam County” (*id.* at 519). After examining plaintiff’s affidavit, the Second Department determined that “the move was not made with ‘the bona fide intent to retain the place [in Bronx County] as a residence for some length of time and with some degree of permanency’” (*id.*, citing *Mandelbaum v Mandelbaum*, 151 AD2d 727, 728 [2d Dept 1989]). In *Sibrizzi v Mount Tom Day School* (155 AD2d 337, 338 [1st Dept 1989]), the First Department held that the trial court “did not abuse its discretion in granting the motion for a change of venue given its finding that plaintiffs’ occupancy of a relative’s home in the Bronx while their Westchester home was being renovated indicated a lack of intent to remain in the Bronx.” In *Morreale v 105 Page Homeowners Ass’n, Inc.* (64 AD3d 689, 690 [2d Dept 2009]), the evidence “revealed that on or about December 31, 2005, which was just over one year after the subject accident, the plaintiff moved to her son’s apartment in Brooklyn from her house in Staten Island after a ‘diabetic episode,’ that in March or April 2006, she entered into a contract to purchase a house in New Jersey, that on August 8, 2006, three days after commencing this action, she ‘took over’ her new house in New Jersey, and moved into it in November 2006.” The Second Department determined that the plaintiff was temporarily staying in a Brooklyn apartment without “the bona fide intent to retain the place as a residence for some length of time and with

some degree of permanency” when she commenced her action. Therefore, the motion to change venue from Kings County to Richmond County, where the defendants resided, should have been granted, the Court held.

Here, unlike the plaintiffs in the cases above, plaintiff had not recently moved to New York County when she filed the instant action. Instead, she had lived at the premises for two years prior (Coughlin Affd., ¶ 8). Therefore, none of these cases is on point.

Further, *Ellis v Wirshba* (18 AD3d 805, 806 [2d Dept 2005]), another case defendants cite, does not support defendants’ contention that venue should be changed to Westchester County. In *Ellis*, the defendants demonstrated that all of the parties resided in Westchester County. However, the Second Department held that the “plaintiffs’ affidavits and the annexed copies of the sublease and contract for the sale of a cooperative apartment, utility bill, stock certificate, and liability insurance sufficiently established the plaintiffs’ *bona fide* intent to retain New York County as their residence with some degree of permanency *at the time of the commencement of the action*” (*id.*) (emphasis added).

As it is clear from the evidence in the record that plaintiff was a resident of New York County at the time she commenced the instant action, and that her residence in New York County was not contrived to obtain an advantageous venue, defendants’ motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Harris Sarraf and 214 E. 83 Street Realty, LLC for an order, pursuant to CPLR §511, to change the venue of this action brought by plaintiff Jennifer Coughlin is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, March 30, 2010 at 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 17, 2010



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

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