

Rivera v Colon

2011 NY Slip Op 31577(U)

June 7, 2011

Supreme Court, New York County

Docket Number: 400012/2011

Judge: Barbara Jaffe

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

JAFFE

PART 5

Index Number : 400012/2011

RIVERA, JASMINE

VS.

COLON, ANGELO

SEQUENCE NUMBER : 001

CHANGE VENUE

CAL # 118

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to ~~for~~ *chg venue*

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 6/7/11
JUN 07 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----X
JASMINE RIVERA,

Plaintiff,

- against -

Index No. 400012/11

Motion Date: 4/5/11
Motion Seq. No.: 001

DECISION AND ORDER

ANGELO COLON,

Defendant.

-----X
BARBARA JAFFE, JSC:

FILED

JUN 10 2011

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By notice of motion dated January 4, 2011, defendant moves pursuant to CPLR 504(3), 510, and 511(b) for an order changing the venue in this action from Bronx County to New York County. Plaintiff opposes the motion.

I. BACKGROUND

On or about November 24, 2010, plaintiff filed her summons and complaint against defendant, an employee of the New York City Department of Parks and Recreation (Parks) in Supreme Court, Bronx County, alleging that while she was employed by Parks, defendant, who was her supervisor, assaulted and battered her. The complaint reflects that the action was venued in Bronx County based on defendant's Bronx residence. (Affirmation of Andre L. Lindsay, ACC, dated Jan. 4, 2011 [Lindsay Aff.], Exh. A).

Prior thereto, plaintiff had sought leave to serve a late notice on claim on the City of New

York and Parks, asserting in her notice of claim that they were negligent in hiring, training, supervising, and retaining defendant. (*Id.*, Exh. D). By decision and order dated November 23, 2010, petitioner's application was denied. (*Id.*, Exh. G).

On December 20, 2010, defendant served on plaintiff a demand for change of venue. (*Id.*, Exh. B). On December 22, 2010, plaintiff served an affirmation in opposition to the demand stating that "due to the facts of this case, [counsel maintains] that Bronx County of the State of New York be and remain the proper venue of this action." (*Id.*, Exh. C).

II. CONTENTIONS

Defendant argues that plaintiff's affirmation in opposition to the demand fails to make a *prima facie* showing that the county specified by defendant was not proper or that the county designated by plaintiff was proper as required by CPLR 511, and that venue is proper in New York County pursuant to CPLR 504(3) as plaintiff's claim is really an action against the City of New York as she alleges that the incident occurred in New York County while defendant was performing his duties as a Parks supervisor. Defendant also observes that plaintiff filed a notice of claim with City for the same incident at issue here, and argues that the instant action is an attempt to circumvent the court's denial of her petition for leave to serve a late notice of claim on City. (Lindsay Aff.).

In opposition, plaintiff contends that City is not a defendant here, that she is entitled to sue defendant individually in the county in which he resides, and that defendant failed to cite any authority for the proposition that he cannot be sued in Bronx County. (Affirmation of Jay H. Tanenbaum, Esq., dated Jan. 10, 2011).

III. ANALYSIS

Pursuant to CPLR 503(a), “except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced . . .” It is also statutorily required that trials against the City of New York or its officers be held in the county within City where the cause of action arose in order “to protect governmental entities from inconvenience.” (CPLR 504[3]; *Kennedy v CF Galleria at White Plains, LP*, 2 AD3d 222, 223 [1st Dept 2003]; *Powers v East Hudson Parkway Auth.*, 75 AD2d 776 [1st Dept 1980]).

As City is not a party to this action, and as defendant was sued individually and not in any representative capacity on behalf of City, he is not entitled to a change of venue pursuant to CPLR 504(3). (*See Cabreja v Rose*, 50 AD3d 457 [1st Dept 2008] [motion to change venue by city police officer pursuant to CPLR 504(3) denied as City not party to action and statute not intended for benefit of individual litigants]; 2 NY Prac, Com Litig in New York State Courts § 3:12 [3d ed] [CPLR 504(3) applies only to governmental officers sued in representative capacity]). Moreover, the denial of plaintiff’s application for leave to serve a late notice of claim on City on Parks prevents her only from suing City and Parks and does not foreclose her from suing defendant individually.

Pursuant to CPLR 511(b):

The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant.

Once a defendant establishes its compliance with the demand and notice of motion procedures of CPLR 511, it also has the burden of demonstrating that the plaintiff’s choice of

venue is improper. (*Baez v Marcus*, 58 AD3d 585 [2d Dept 2009]; *Hernandez v Seminatore*, 48 AD3d 260 [1st Dept 2008]).

Here, as it is undisputed that defendant resides in Bronx County, plaintiff was permitted to sue him there (CPLR 503[c]), and defendant has thus not established that plaintiff's choice of venue is improper. (*Carbajal v Bobo Robo, Inc.*, 300 AD2d 335 [2d Dept 2002] [as defendants failed to deny that one defendant resided in King County, plaintiff's decision to venue action in that county proper]).

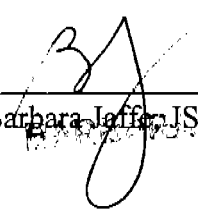
Defendant also fails to set forth in his motion papers any of the information required to support an application brought pursuant to CPLR 510. (*See Gissen v Boy Scouts of Am.*, 26 AD3d 289 [1st Dept 2006] [in order to obtain relief, movant must assert names and addresses of witnesses, substance and materiality of their testimony relative to issues in case, that witnesses have been contacted and are willing to testify for movant, and manner in which they will be inconvenienced by trial in county where action commenced]; *Figueroa v Stromfeld*, 282 AD2d 429 [2d Dept 2001] [venue improperly changed as City failed to set forth basis to change venue pursuant to CPLR 510]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to change venue is denied.

ENTER:


Barbara Jaffer, JSCAF

DATED: June 7, 2011
New York, New York
JUN 07 2011

FILED
JUN 10 2011
NEW YORK
COUNTY CLERK'S OFFICE