

West-Burrell v Burrell
2011 NY Slip Op 31811(U)
June 28, 2011
Supreme Court, New York County
Docket Number: 114960/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 114960/2010
WEST-BURRELL, HEATHER
VS.
BURRELL, MICHAEL C., SR.
SEQUENCE NUMBER : 002
CHANGE VENUE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
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

FILED

JUL 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 6/28/11


HON. JUDITH J. GISCHE 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 10

-----X
HEATHER WEST-BURRELL,

Plaintiff,

-against-

MICHAEL C. BURRELL, SR.,

Defendant.
-----X

Decision/Order
Index No.: 114960/2010
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

FILED

JUL 06 2011

Recitation, as required by the CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

NEW YORK
COUNTY CLERK'S OFFICE
Numbered

Papers	
Defs' n/m [change venue] w/ PMM affid, exhs	1

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

The court has before it defendant's motion to change venue of this action to Suffolk County. This action was commenced in New York County with the filing of the summons and verified complaint on November 10, 2010. In the complaint, plaintiff Heather West-Burrell, the ex-wife of defendant, Michael C. Burrell, Sr., asserts four causes of action, they are: causing an apprehension of imminent harmful contact, battery, the intentional infliction of emotional distress, and negligent emotional distress.

Defendant filed and served a verified answer on March 22, 2011. Defendant now seeks to change the venue of this action from New York County to Suffolk County for the convenience of the non-party material witnesses. CPLR § 510[3]. On April 8, 2011, defendant mailed the instant motion to plaintiff. Despite proof of service, plaintiff has not opposed this motion, and it will be considered on default.

The defendant contends all witnesses he intends to call at trial are police officers for the Southampton Town Police and are residents of Suffolk County. Defendant argues that having them travel to New York County to testify at trial would be an inconvenience. Specifically, defendant intends to call Sergeant Michael P. Joyce ("Sergeant Joyce"), Police Officer Thomas Schmidt ("Officer Schmidt"), and Police Officer Gaspar Montalbano ("Officer Montalbano"). Defendant states Sergeant Joyce is willing to testify regarding the events that occurred on February 26 and 27, 2010, the dates of the alleged incident in the complaint. Sergeant Joyce is expected to testify that the plaintiff did not identify any witnesses or injuries. Defendant states Officer Schmidt is willing to testify regarding the alleged events on February 26, 2010. Officer Schmidt is also familiar with other incidents regarding the plaintiff and defendant and can attest to the veracity of the plaintiff's accusations. Officer Montalbano has also indicated he is willing to testify to the veracity of the plaintiff's testimony.

Discussion

A party seeking a change of venue pursuant to CPLR § 510 [3] has the burden of demonstrating the convenience of material witnesses would be better served by such a change. Frey v. Fun Tyme Ski Shop, 163 A.D.2d 11 (1st Dept. 1980). The decision whether to grant a change of venue based on convenience of material witnesses is discretionary within the court. O'Brien v. Vassar Bros. Hosp., 207 A.D.2d 169 (1st Dept. 1995). The convenience of public officials when testifying requires careful consideration. New York Marine v. M. Rondon Construction Corp., 2010 N.Y. Slip OP 30334 U, 2010 N.Y. Misc. Lexis 1476 (February 18, 2010). The moving party has the burden of providing the names, addresses and occupations of the prospective witnesses, and

making a showing of the facts the witnesses will testify to, their willingness to testify, and an explanation of how the witnesses will be inconvenienced without a change of venue. Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 A.D.3d 299 (1st Dept. 2004); Cardona v. Aggressive Heating, Inc., 180 A.D.2d 572 (1st Dept. 1992).

Here defendant has met these requirements by providing an affirmation, which includes the names and addresses of three witnesses who are police officers for the Southampton Town Police and are residents of Suffolk County. Defendant states that each witness is willing to testify, and they will testify regarding the events that allegedly occurred on February 26 and 27, 2010 and to the veracity of the plaintiff's claims. To support the careful consideration required for public officials, defendant has also presented a letter from the Southampton Town Attorney to certify that the three witnesses are police officers who all reside in Southampton. The Town Attorney further states the inconvenience it would be for the witnesses to have to travel to New York County to testify and what an injustice it would be to the taxpayers.

Since plaintiff has not filed opposition to this motion to change venue, and accepting the facts as true, defendant has presented a justification for a change of venue pursuant to CPLR § 510 [3]. Accordingly, defendant's motion for a change of venue is granted. The court directs that the venue of this action be changed from Supreme Court, New York County to Supreme Court, Suffolk County.

Conclusion

Based upon the foregoing,

It is hereby

ORDERED that the motion by defendants for a change of venue of this is action is hereby GRANTED; and it is further

ORDERED that the Clerk of the Supreme Court, New York County shall, upon service of a copy of this Order with notice of entry, transfer all the papers in this case to the Clerk of the Supreme Court, Suffolk County; and it is further

ORDERED that upon the receipt of such papers, the Clerk of the Supreme Court of Suffolk County shall assign an index number to this case and place it on its rightful place on the calendar.

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 28, 2011

So Ordered

FILED

JUL 06 2011

NEW YORK
COUNTY CLERK'S OFFICE



HON. JUDITH J. GISCHE, J.S.C.