

Hernandez v City of New York

2011 NY Slip Op 32969(U)

November 7, 2011

Supreme Court, New York County

Docket Number: 111100/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 111100/2009

HERNANDEZ, RUSSELL

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

RENEWAL

MOTION CAL. NO. _____

CAL # 62

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1 2 3
4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-7-11

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
RUSSELL HERNANDEZ,

Index No. 111100/09

Plaintiff,

Motion Subm.: 8/16/11
Motion Seq. No.: 002

-against-

DECISION & ORDER

THE CITY OF NEW YORK, "JOHN DOE" and "JANE
DOE", the names of the last defendants being fictitious,
the true names of the defendants being unknown to the
plaintiff(s),

FILED

NOV 10 2011

Defendants.

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
BARBARA JAFFE, JSC:

For plaintiff:
Ugochukwu Uzoh, Esq.
Ugo Uzoh, P.C.
304 Livingston St., Ste. 2R
Brooklyn, NY 11217
718-874-6045

For defendants:
Frank Raimond, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0845

By notice of motion dated May 13, 2011, plaintiff moves for an order granting the request of intervenors Ebony Hernandez, an infant under the age of 18 years, by her father and natural guardian, Russell Hernandez, and Tiffany Hernandez, an infant under the age of 18 years, by her father and natural guardian, Russell Hernandez, to intervene in this action, granting him leave to file and serve an amended complaint, consolidating the instant action with one pending in Supreme Court, Bronx County, and changing the venue of this action to Bronx County. Defendant City opposes and, by notice of cross motion dated June 21, 2011, moves pursuant to CPLR 602(b) for an order consolidating the Bronx County action with this action for joint trial and discovery.

I. BACKGROUND

On May 26, 2006, defendants allegedly obtained custody of plaintiff and arrested and detained him without charges for two years until his release on May 15, 2008. (Affirmation of Ugochukwu Uzoh, Esq., dated May 13, 2011 [Uzoh Aff.], Exh. 5).

On or about August 3, 2009, plaintiff commenced the instant action by serving City with his summons and complaint in which he sets forth claims for false arrest, false imprisonment, deprivation of his civil rights, intentional infliction of emotional distress, and negligent hiring and retention. (*Id.*). Thereafter, by decision and order dated April 11, 2011, plaintiff was granted leave to serve City with a late notice of claim as to his unlawful/false arrest, unlawful/false imprisonment, and negligent hiring and retention claims. (*Id.*, Exh. 1).

On or about May 9, 2011, plaintiff commenced an action in Supreme Court, Bronx County, on his behalf and on behalf of his daughters, Ebony and Tiffany Hernandez, against defendants City, ADA Daniel Solinsky, ADA Sara Jacobson, ADA Reyes, DA Robert Johnson, Commissioner Dora Schriro, Detective Daniel Clark (Shield #505), Warden Emmanuel Bailey, Captain Torres, Correction Officer Guneys, Correction Officer MS (Shield #159A), John Doe, and Jane Doe, by serving defendants with his summons and complaint in which he advances claims for deprivation of his civil rights pursuant to 42 USC §§ 1983 and 1985 and his state constitutional rights, negligent training and violations of City's municipal policy, negligent hiring and retention, and respondeat superior, and for a declaratory judgment. He alleges that the Bronx County Supreme Court issued an order directing the New York City Department of Correction to take him into custody pursuant to an arrest warrant prepared by the Bronx District Attorney's Office, that he was detained at Rikers Island in the Bronx, and that defendants threatened to place

his daughters in foster care and blocked them from visiting him while he was incarcerated, thereby depriving them of the normal companionship, solace and society of their father and causing them injury. (*Id.*, Exh. 8).

II. MOTIONS TO CONSOLIDATE

A. Contentions

Plaintiff asserts that the two actions should be consolidated as they are identical, and that venue of the consolidated action should be in Bronx County as his claims arose there, he was incarcerated at Rikers Island, the individual defendants have offices in the Bronx, most of the witnesses and documents are located in the Bronx, and the court's calendars are less congested in the Bronx. (Mem. of Law, dated May 13, 2011).

Defendants argue that while consolidation of the two actions is appropriate, this court may not change the venue of the consolidated action to Bronx County as the relevant CPLR provision only permits the court to transfer cases from another court to this court, and that in any event, venue is proper in New York County as the first action was commenced here. (Affirmation of Frank Raimond, ACC, dated July 7, 2011).

In reply, plaintiff maintains that a motion to consolidate and change venue may be made in any county of the Supreme Court, and that venue is proper in Bronx County as his claims arose there, and observes that defendants do not claim to be prejudiced by a change of venue of the consolidated action. Plaintiff also argues that the "first action" rule does not apply given his mistake in bringing the action in New York County rather than Bronx County. (Reply Mem., dated July 22, 2011).

B. Analysis

As both parties move to consolidate the two actions, they are consolidated.

Trials against City must 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]). Here, absent any dispute that plaintiff’s claims against defendants arose in Bronx County, venue is proper there. (*See eg Garces v City of New York*, 60 AD3d 551 [1st Dept 2009] [Bronx Supreme Court justice properly granted change of venue of action from Bronx County to Queens County where plaintiff was arrested, initially incarcerated and prosecuted]; *Smith v City of New York*, 60 AD3d 540 [1st Dept 2009] [same]).

Moreover, defendants demonstrate no special or compelling circumstances that would justify a deviation from CPLR 504(3). (*See Chavez v School Constr. Consultants, Inc.*, 284 AD2d 361 [2d Dept 2001] [as CPLR 504 required venue in particular county and plaintiffs failed to show compelling circumstances, court improperly retained venue of consolidated action instead of transferring it to proper county]; *Rose v Grow-Perini*, 271 AD2d 210 [1st Dept 2000] [CPLR 504(3) governs absent compelling countervailing circumstances, and fact that action was commenced first was not such circumstance]; *see also GAM Prop. Corp. v Sorrento Lactalis, Inc.*, 41 AD3d 645 [2d Dept 2007] [although first action commenced in one county, upon consolidation venue had to be transferred to other county as CPLR 507 requires venue for real property action in county where property located]; *Davidov v Searles*, 20 Misc 3d 1107[A], 2008 NY Slip Op 51253[U] [Sup Ct, Kings County] [transferring consolidated action to Queens County even though first action commenced in Kings County as CPLR 505 required venue in

Queens County]). And I am authorized to change the venue of the consolidated action from this court to Bronx County. (*See eg Chavez*, 284 AD2d at 361 [Supreme Court should have transferred consolidated action to proper county pursuant to CPLR 504]; *B & H Interior Contracting, Inc. v Yonkers Contracting Co., Inc.*, 234 AD2d 44 [1st Dept 1996] [Bronx County Supreme Court justice properly changed venue of action to Westchester County after consolidating two actions]; *see generally Eber-NDC, LLC v Star Indus., Inc.*, 32 AD3d 1251 [4th Dept 2006] [if related Supreme Court actions are pending in different counties, court on motion to consolidate actions should also designate venue for trial, and separate motion for change of venue need not be made]).

III. MOTIONS TO INTERVENE AND AMEND

Absent any opposition to plaintiff's motion for orders permitting the proposed intervenors to intervene and amending the complaint in this action, the motion is granted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted, and the proposed intervenors are permitted to intervene in this matter; it is further

ORDERED, that plaintiff's motion to amend is granted, and the amended complaint, in the form annexed to the motion papers, shall be deemed served upon all parties who have appeared in the action upon service of a copy of this order with notice of entry upon those parties; it is further

ORDERED, that a supplemental summons and amended complaint, in the form annexed

to the moving papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that upon said service, the action shall bear the following caption:

RUSSELL HERNANDEZ, EBONY HERNANDEZ,
an infant under the age of 18 years, by her father and
natural guardian, RUSSELL HERNANDEZ, and
TIFFANY HERNANDEZ, an infant under the age of
18 years, by her father and natural guardian, RUSSELL
HERNANDEZ,

Plaintiffs,

- against -

CITY OF NEW YORK, ADA DANIEL SOLINSKY,
ADA SARA JACOBSON, ADA REYES, DA
ROBERT JOHNSON, COMMISSIONER DORA
SCHRIRO, DETECTIVE DANIEL CLARK (Shield
#505), WARDEN EMMANUEL BAILEY, CAPTAIN
TORRES, CORRECTION OFFICER GUNEYS,
CORRECTION OFFICER MS (Shield #159A),
JOHN DOE and JANE DOE,

Defendants.

It is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room

158), who are directed to mark the court's records to reflect the additional parties; it is further

ORDERED, that plaintiff's motion to consolidate is granted and the above-captioned action is consolidated in the Supreme Court, Bronx County with Russell Hernandez, *et al.* vs. City of New York, *et al.*, Index No. 350180/11 under Bronx County Index No. 350180/11, and the consolidated action shall bear the following caption:

RUSSELL HERNANDEZ, EBONY HERNANDEZ,
an infant under the age of 18 years, by her father and
natural guardian, RUSSELL HERNANDEZ, and
TIFFANY HERNANDEZ, an infant under the age of
18 years, by her father and natural guardian, RUSSELL
HERNANDEZ,

Plaintiffs,

- against -

CITY OF NEW YORK, ADA DANIEL SOLINSKY,
ADA SARA JACOBSON, ADA REYES, DA
ROBERT JOHNSON, COMMISSIONER DORA
SCHRIRO, DETECTIVE DANIEL CLARK (Shield
#505), WARDEN EMMANUEL BAILEY, CAPTAIN
TORRES, CORRECTION OFFICER GUNEYS,
CORRECTION OFFICER MS (Shield #159A),
JOHN DOE and JANE DOE,

Defendants.

It is further

ORDERED, that the Clerk of Supreme Court, New York County, shall transfer the papers

on file under Index No. 111100/09 to the Clerk of Supreme Court, Bronx County upon service of a certified copy of this order and payment of the appropriate fee, if any; it is further

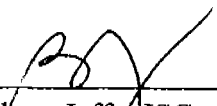
ORDERED, that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; it is further

ORDERED, that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; it is further

ORDERED, that plaintiff's motion for a change of venue is granted, and the venue of this action is changed from this Court to the Supreme Court, County of Bronx, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, 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 Bronx; and it is further

ORDERED, that defendants' cross motion to consolidate is denied as moot.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 7, 2011
New York, New York

NOV 07 2011

FILED

NOV 10 2011

NEW YORK
COUNTY CLERK'S OFFICE