

**Ken-Vil Assoc. L.P. v
New York State Div. of Human Rights**

2012 NY Slip Op 34007(U)

September 21, 2012

Court of Claims

Docket Number: Claim No. 120104

Judge: Thomas H. Scuccimarra

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This opinion is uncorrected and not selected for official publication.

Synopsis

Claimant's motion to change place of trial from New York to Buffalo District granted.

Case information

UID: 2012-030-566
Claimant(s): KEN-VIL ASSOCIATES LIMITED PARTNERSHIP
Claimant short name: KEN-VIL
Footnote (claimant name) :
Defendant(s): THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, GALEN D. KIRKLAND AND JULIAN BIRNBAUM (*sic*)
Footnote (defendant name) :
Third-party claimant(s):
Third-party defendant(s):
Claim number(s): 120104
Motion number(s): M-81788
Cross-motion number(s):
Judge: THOMAS H. SCUCCIMARRA
LIPPES MATHIAS WEXLER FRIEDMAN, LLP
Claimant's attorney: BY: KEVIN J. CROSS, ESQ.
VINCENT M. MIRANDA, ESQ.
HON. ERIC T. SCHNEIDERMAN
Defendant's attorney: ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: JYOTSNA GORTI
ASSISTANT ATTORNEY GENERAL
Third-party defendant's attorney:
Signature date: September 21, 2012
City: White Plains
Comments:
Official citation:
Appellate results:
See also
(mult-captioned case)

Decision

The following papers were read and considered on claimant's motion:

1, 2 Notice of Motion; Attorney Affirmation by Kevin J. Cross, of counsel to Lippes Mathias Wexler Friedman LLP, Attorneys for Claimant and attached exhibits

3 Defendants' Affirmation in Opposition by Jyotsna Gorti, Assistant Attorney General and attached exhibit

4 Reply Affirmation by Vincent M. Miranda, of counsel to Lippes Mathias Wexler Friedman LLP, Attorneys for Claimant

5, 6 Filed papers: Claim, Answer

This is a claim to recover money damages from defendants based upon their alleged tortious interference with a plan to develop an existing rental apartment complex, Kensington Village, located on the Buffalo/Cheektowaga border in western New York. Among other things, it is alleged that the State Division of Human Rights' "self-initiated" investigation, commenced in 2007, into the alleged impropriety of converting the existing development into a student housing residence in purported violation of provisions of the New York State Human Right's Law, and DHR's continued unfounded interference, ultimately caused entry into a restrictive Settlement Agreement rendered incapable of performance, interfered with such performance, and caused a loss of significant financing and tax credits for the project. The claim was served on July 15, 2011 and filed in the Office of the Chief Clerk of the Court of Claims on the same date. Issue was joined by service of an answer on or about August 24, 2011.

In a letter dated August 3, 2011 the Chief Clerk of the Court of Claims assigned the matter to this Court, based upon accrual of the claim in Bronx County. [*See* 22 NYCRR §206.4]. Thereafter, initial attempts to enter into a preliminary conference order were delayed based upon discussions concerning the proper location for trial of the claim. Although ultimately a preliminary conference order was entered into, and "so ordered" by the Court, additional delays followed again based upon concerns about the proper place of trial. It is unclear if any discovery has been followed since.

Claimant has made an application to remove this action from the New York District to the Buffalo District of this Court.

Civil Practice Law and Rules §510 - applicable in the Court of Claims as there are no provisions in the Court of Claims Act concerning motions for a change in venue [*see* Court of Claims Act §9(9)] - provides three instances where the court, upon motion, may change the place of trial of an action: (1) the county designated for that purpose is not the proper county; or (2) there is reason to believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change.

In this case, although the New York District provides proper venue based upon the location of the State agency involved, DHR, in Bronx County, based upon a review of the papers submitted on the motion, the Court is satisfied that venue would also be proper in the Buffalo District of this Court, based upon the claimant's location [*see generally* Civil Practice Law and Rules §503], and, more importantly, the convenience of the non-party material witnesses and the ends of justice as described in detail in claimant's papers. *See O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172 -173 (2d Dept 1995).

It is noted that the answer was prepared and served by the Buffalo office of the Attorney General, and that initially defendant's counsel had entered into and executed a stipulation to allow for such a change based upon considerations of convenience of the majority of the witnesses, and the location of the underlying property among other considerations, which was to have been "so ordered" by the Court in lieu of motion practice. [Attorney Affirmation by Kevin J. Cross, Exhibit D]. Indeed, parallel litigation initiated in Erie County Supreme Court was alluded to as being defended by the Buffalo Office. [*Ibid.*]. Such stipulation was then withdrawn, requiring the present motion practice.

Claimant provides details of the expected non-party witness testimony of five of its many witnesses, including a Director for Upstate Capital Projects for the New York State Division of Housing and Community Renewal, an attorney who resides in a Buffalo suburb, the Deputy Controller for the City of Buffalo, a vice-president of M & T Bank, and the president of Land Banking & Development Inc., all with local businesses and addresses and family and other obligations.

Claimant also notes that the Buffalo District may afford a more pragmatic venue given court congestion considerations when comparing the New York and Buffalo Districts [*see Samuels v Ramada, Inc.*, 190 AD2d 636 (1st Dept 1993); *Quick Constr. Corp. v Loribeth Theatres*, 186 AD2d 546 (2d Dept 1992)], and that the transitory nature of the action, involving as it does DHR's actions in interfering with contracts and business relations that involved property in Erie County, suggests that it "should be tried in the county in which the cause of action

arose." See Chaewsky v Siena Coll., 100 AD2d 753 (1st Dept 1984) *appeal dismissed* 62 NY2d 942 (1984). Although not a primary consideration, claimant also points out that a location of the parties' and their attorneys' principle place of business may be considered in the court's discretion. Berberich v York Scaffold Equip. Corp., 177 AD2d 451 (1st Dept 1991).⁽¹⁾

Defendant argues that some of its witnesses will be inconvenienced as well, and that three significant meetings concerning the settlement agreement took place in New York City (although at least of portion of such meetings took place over the telephone). Defendant notes that the flexibility of the bench trial afforded in the Court of Claims would allow certain witnesses to be heard in other districts if necessary (although this argument weighs equally for claimant, since it could be said that those State witnesses purportedly inconvenienced could be heard in their respective geographical areas).

The Court cannot help noting that although the agency involved has a State-wide impact, it is not one of those agencies for whom venue is prescribed in a particular location by statute [*see e.g.* Civil Practice Law and Rules §§505, 506], thus some variation of location for the place of trial may be contemplated generally. It is also noted that unlike actions commenced in State Supreme Court, where a plaintiff initially designates the venue of his lawsuit, in the Court of Claims the claimant does not have any part in selecting the place of trial.

The location of the underlying property is in Erie County, the majority of the material witnesses reside or have places of business in Erie County, and would clearly be inconvenienced, and there is related litigation in Erie County Supreme Court already defended by the Buffalo Office of the Attorney General, all providing a primary nexus with the Buffalo District as opposed to the more attenuated nexus to the New York District based primarily upon the somewhat arbitrary location of a State-wide agency.

Based on the foregoing, on balance, the Court finds that claimant has satisfied its burden on the motion, and hereby exercises its discretion to find that the place of trial of the claim should be changed from the New York to the Buffalo District of the Court of Claims. See 22 NYCRR §206.4 (b). The Clerk of the Court is directed to effectuate this change.

September 21, 2012

White Plains, New York

THOMAS H. SCUCCIMARRA

Judge of the Court of Claims

¹ "[O]ther things being equal, venue of this transitory action belonged in New York County where the cause of action arose, especially since three of the defendants maintain their principal place of business there, all the attorneys have their offices there and where, in neighboring Bronx County, plaintiff's treating physicians have their offices and the lone known eyewitness resides . . . (*citation omitted*)."