

Ross v Archdiocese of N.Y.

2013 NY Slip Op 32776(U)

October 30, 2013

Sup Ct, New York County

Docket Number: 108386/10

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

OLIVIA ROSS, an infant by her father and
natural guardian JEFFREY S. ROSS, and
JEFFREY S. ROSS individually,

Plaintiff,

Index No.: 108386/10

Motion Date: 05/03/13

Motion Seq. No.: 03

- v -

ARCHDIOCESE OF NEW YORK, CHURCH OF THE
ANNUNCIATION and THE ANNUNCIATION SCHOOL

Defendant.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Notice of Cross Motion/Answering Affidavits - Exhibits	No (s) .	2
Replying Affidavits - Exhibits	No (s) .	3

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants move to vacate the note of issue and to compel plaintiffs to serve a supplemental bill of particulars, and to provide an authorization for school records and H.I.P.A.A compliant authorizations for trial purposes within 45 days. Defendants also seek an extension of time to move for summary judgment until 120 days after resolution of this motion (Mot. Seq. No. 002).. Defendants separately move for summary judgment to dismiss defendant Archdiocese of New York (Archdiocese) from

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

this action, for an order to change the venue of this action to Westchester County, and for summary judgment to dismiss as well the remaining defendants from this action. Plaintiffs cross-move to retain venue (Mot. Seq. No. 003).

The motions are consolidated for disposition.

At oral argument of the motions, plaintiffs consented to the dismissal of defendant Archdiocese, and so that portion of Mot. Seq. No. 003 is granted on consent.

In this negligence action, plaintiff-infant Olivia Ross (infant plaintiff), a student at defendant The Annunciation School (School), claims that she suffered injuries as a result of defendants' negligence.

According to the complaint, on May 14, 2009, at approximately 4:00 p.m., the infant plaintiff and her mother were on the School grounds, when the infant plaintiff and another student were spinning on dollies in the gymnasium section of the School. Their dollies collided and Olivia Ross sustained injuries. Her father, on her behalf, commenced this action contending that defendants are liable for failing to (1) properly supervise the other student; (2) protect students from access to dangerous objects, i.e., the dollies; and (3) overall properly supervise the school property.

After plaintiffs served the complaint upon defendants, defendants moved for dismissal of Archdiocese from this action in

a pre-answer motion. The court denied the motion and defendants served their answer.

Defendants now move for a change of venue on the ground that with the dismissal of the Archdiocese of New York from this action, there is no longer any basis to litigate this case in New York County. It is not disputed that Archdiocese was the only New York resident in this action. The other parties are all Westchester County residents and the accident occurred in Westchester County. Defendants contend that all potential witnesses are residents from that county, and that venue in New York County was predicated solely upon Archdiocese's presence here.

Plaintiffs oppose the motion to change venue and cross-move to retain venue here. Their arguments are that an earlier motion for change of venue was brought and denied by the court, which defendants failed to move to reargue, and defendants are now precluded from moving based upon the doctrine of the law of the case. Moreover, plaintiffs argue that defendants have made an untimely motion, since the note of issue has already been filed. Finally, plaintiffs aver that defendants have not provided a sufficient explanation as to why this motion was not made at an earlier time.

Defendants have, in fact, made a separate motion to vacate the note of issue, based on the demand for additional discovery.

They request that the court compel plaintiffs to serve a supplemental bill of particulars specifying the statutes, ordinances, rules and regulations allegedly violated by them. Defendants also seek authorizations to obtain records from the Ursuline School, a school currently attended by Olivia Ross, and H.I.P.A.A. compliant authorizations for trial purposes.

In opposition, plaintiffs argue that all relevant discovery has been completed and the note of issue should not be stricken. They contend that the new information sought is not material to this action. As an example, plaintiffs contend that the infant-plaintiff's school records are immaterial in that there is no claim that Olivia Ross's school performance has been impaired as a result of defendants' alleged negligence. In addition, plaintiffs argue that they are not alleging any statutory violations on defendants' part.

On the question of discovery, this court agrees with plaintiffs. The authorizations and supplemental bill of particulars sought by defendants relate to information which have no bearing on the claims alleged in the complaint. Thus, the motion to vacate the note of issue shall be denied.

The remaining issues concern defendants' motion to change venue and to dismiss the complaint on summary judgment grounds. If this court decides in favor of a change of venue, it will defer the matter of summary judgment to the Westchester court.

Otherwise, the court will reach the merits of the dispositive motion.

The court finds that Westchester County is the proper county for this action. See CPLR 503 (a). The parties in this action all reside in that county.

This court is not restricted by the law of the case doctrine. Defendants raised this venue motion for the first time in the context of The Archdiocese no longer being a party to this action. The order resolving the pre-joinder motion does not preclude defendants from moving for summary judgment in favor of defendant Archdiocese. While observing that the motion for change of venue was brought after the note of issue was filed, this court finds no evidence that demonstrates that granting such a motion would be unreasonable or that plaintiffs would suffer prejudice. "[T] here is no statutory time limit for a motion to change venue upon a dismissal of a party whose residence provided the basis for venue," as long as the motion is made promptly. See Moracho v Open Door Family Med. Ctr., Inc., 79 AD3d 581 (1st Dept 2010). It is proper to move for change of venue after the dismissal of the only party having residence in the original venue. See Baulieu v Ardsley Assoc., L.P., 85 AD3d 554, 556 (1st Dept 2011). Here, defendants made the venue motion simultaneous with the dismissal motion. See Emerick v Metropolitan Transp. Auth., 272 AD2d 150 (1st Dept 2000).

Accordingly, it is

ORDERED that motion to vacate the note of issue and to compel discovery from plaintiffs (Mot. Seq. No. 002) of defendants is denied; and it is further

ORDERED that the branch of motion of the defendants seeking to dismiss defendant Archdiocese of New York (Mot. Seq. No. 003) is granted upon consent of the parties; and it is further

ORDERED that the branch of defendants' motion for change of venue (Mot. Seq. No. 003) is granted and the venue of this action is changed from this Court to the Supreme Court, County of Westchester, 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 Westchester, and it is further

ORDERED that plaintiffs' cross motion to retain venue is denied; and it is further

ORDERED that the branch of defendants' motion for summary judgment dismissing defendants Church of the Annunciation and the Annunciation School (Mot. Seq. No. 003) is denied, without prejudice.

This is the decision and order of the court.

Dated: October 30, 2013

ENTER:

M. A. James
DEBRA A. JAMES COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.

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