

Vilches v Guadagno
2014 NY Slip Op 31184(U)
May 1, 2014
Supreme Court, New York County
Docket Number: 153368/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----**CYNTHIA S. KERN**
ASHLEY VILCHES, J.S.C.

Index No. 153368/13

Plaintiff,

-against-

DECISION/ORDER

CHARLES THOMAS GUADAGNO,

Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Ashley Vilches commenced the instant action against defendant Charles Thomas Guadagno seeking to recover damages arising from an alleged assault which occurred in October 2006. Defendant now moves for an Order pursuant to CPLR § 510(3) changing the venue in this action from New York County to Albany County. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. This lawsuit arises out of an alleged incident that occurred on October 15, 2006 at the State University of New York at Albany ("SUNY Albany") located in Albany, New York. Specifically, plaintiff alleges that on that date, "defendant entered her dormitory room and attacked, criminally sexually assaulted, sexually abused, brutally assaulted, raped and sodomized plaintiff without her consent." In or around April 2013, plaintiff

commenced the instant action against defendant. Defendant interposed an answer in August 2013 and served a demand for a bill of particulars and a notice for deposition in November 2013. No discovery has yet been exchanged and depositions have not yet been held in this action.

The court may, upon motion, change the place of trial of an action where “the convenience of material witnesses and the ends of justice will be promoted by the change.” CPLR § 510(3). “[A] discretionary change of venue should be granted based on the convenience of witnesses only after there has been a detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief.” *O’Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 170 (2d Dept 1995). This evidentiary showing must include “(1) the identity of the prospective witnesses; (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced; (3)” a demonstration that the witnesses are available to testify; and “(4) the nature of the anticipated testimony and the manner in which the anticipated testimony is material to the issues raised in the case.” *Odoardi v. Abramson*, 2013 N.Y. Slip Op. 32316 (Sup. Ct. N.Y. Cty. 2013), citing *Cardona v. Aggressive Heating, Inc.*, 180 A.D.2d 572 (1st Dept 1992).

In the instant action, defendant’s motion for an Order pursuant to CPLR § 510(3) changing the venue of this action from New York County to Albany County is granted on the ground that the convenience of material witnesses and the ends of justice will be promoted by the change. As an initial matter, defendant has sufficiently identified the prospective non-party witnesses and has affirmed that they will include Edward Kercado, a SUNY Albany police officer; Wendy Knoebel, a SUNY Albany police officer; Robert Ford, a SUNY Albany football coach and Edward Baskerville, a New York State Police Investigator located in Albany.

Additionally, defendant has affirmed that he intends to call as witnesses certain personnel from St. Peter's Hospital in Albany who performed triage on plaintiff and compiled the evidence from the "rape kit"; the Custodian of Records of St. Peter's Hospital in Albany; and the Custodian of Records of SUNY Albany. Further, defendant has affirmed that these non-party witnesses would be inconvenienced as they would have to bear the expense of traveling and possibly staying in New York City overnight as well as missing time from work. While defendant has not set forth evidence that these non-party witnesses are available to testify, he states that his failure to do so is based on plaintiff's delay in providing defendant with necessary discovery, including HIPPA and SUNY Albany authorizations, which would allow defendant to consult with these witnesses. Additionally, this court notes that defendant failed to set forth the specific nature of these witnesses' anticipated testimony in his moving papers but did so only in his reply. However, this court finds that defendant's description of the prospective witnesses' jobs in his moving papers makes clear what their testimony would involve. Indeed, defendant affirms that "the three police witnesses' testimony will concern the particulars of their investigation of this incident while the St. Peter's Hospital personnel will describe plaintiff's injuries and the medical treatment afforded her after this incident."

Moreover, venue should be transferred to Albany County as some of these non-party witnesses are public officers and local government officials and as such, their "convenience is of paramount importance on a motion pursuant to CPLR 510(3), because they 'should not be kept from their duties unnecessarily.'" *Port Bay Assoc. v. Soundview Shopping Ctr.*, 197 A.D.2d 848, 849 (4th Dept 1993), citing *McComb v. Hilton Hgts. Apts.*, 43 A.D.2d 972 (2d Dept 1974). Finally, apart from the convenience of the non-party witnesses, the fact that this case has no

connection with New York County, other than that plaintiff resides here, favors a change of venue. *See Port Bay Assoc.*, 197 A.D.2d at 849 (finding that the lawsuit has no connection to the venue in which it was brought and thus, it should be transferred to the venue in which the claim arose as “all other things being equal, that is where the case should be tried.”) While it is undisputed that plaintiff had the right to commence the action in New York County as she maintains her residence in New York County located at 221 Seaman Avenue, New York, New York, it is within this court’s discretion to change venue if the proper evidentiary showing is made. CPLR § 510. As the court has found that defendant has established that New York County is not the most convenient venue as no material non-party witnesses reside in New York County and no cause of action arose from conduct which occurred in New York County, venue must be transferred.

Accordingly, as defendant has properly challenged plaintiff’s choice of venue pursuant to CPLR § 510 on the ground that the convenience of material witnesses and the ends of justice will be promoted by the change, defendant’s motion to change venue to Albany County is granted. It is hereby

ORDERED that venue of this action is changed from this Court to the Supreme Court, County of Albany, 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 Albany. This constitutes the decision and order of the court.

Dated: 5/11/14

Enter: CK
J.S.C.

GYNTHIA S. KERN
J.S.C.