

Mizhquiri v Bacares

2014 NY Slip Op 33877(U)

July 25, 2014

Supreme Court, Queens County

Docket Number: 4886/2014

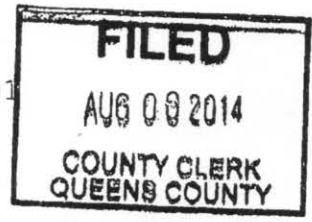
Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD IAS PART 34
Justice

----- x

MARCO MIZHQURI,

Index No.: 4886/2014

Plaintiff,

Motion Date: 07/17/2014

- against -

Motion No.: 120

FABIO BACARES,

Motion Seq.: 1

Defendant.

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ORIGINAL

The following papers numbered 1 to 16 were read on this motion by defendant, Fabio Bacares, for an order pursuant to CPLR 503(a), 510(1) and 511, changing the venue of this matter from the County of Queens to the County of Suffolk; and the cross-motion of the plaintiff for an order pursuant to CPLR 503(a) retaining venue in Queens County:

Papers
Numbered

- Notice of Motion-Affidavits-Exhibits.....1 - 4
- Plaintiff's Cross-Motion-Affidavits-Exhibits.....5 - 9
- Defendant's Affirmation in Opposition to Cross-Motion...10 - 13
- Plaintiff's Reply Affirmation in Support of Cross-Motion.14 - 16

This is a personal injury action in which Plaintiff, Marco Mizhquiri, seeks to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on March 2, 2014 at the intersection of 48th Avenue and 31st Street, Queens County, New York. At the time of the accident the plaintiff was riding a bicycle which collided with the defendant's motor vehicle.

The plaintiff commenced this action by filing a summons and complaint in Queens County on March 27, 2014. The summons asserts that venue is based upon the residence of the plaintiff at 59-37 Van Doren Street, Corona, New York, 11368.

On May 14, 2014, defendant served a Demand for Change of Place of Trial of this action from Queens County to Suffolk

County together with its verified answer. As the plaintiff did not stipulate to change venue, defendant now moves pursuant to CPLR 503(a), 510(1) and 511(a)(b) for an order changing venue to Suffolk County. Defendant contends that Queens County, the venue designated by plaintiff, is not a proper County because the police report from the date of the accident recites that the plaintiff resides in Staten Island and the defendant resides in Suffolk County. Counsel contends that as neither of the parties resided in Queens County and as defendant is a resident of Suffolk County that venue should properly be placed in Suffolk County pursuant to CPLR 503(a).

Plaintiff's counsel opposes the motion and cross-moves for an order retaining venue in Queens County. Plaintiff, age 22, asserts that although he did live in Richmond County at the time of the accident, because of the injuries he sustained in the accident, he had to give up his residence in Staten Island and move in with his mother in Corona Queens. In support of the cross-motion, the plaintiff submits a sworn affidavit dated May 20, 2014 stating that on the date of the accident, March 2, 2014, his residence was a rented room in an apartment at 339 A Van Pelt Avenue, Second Floor, Staten Island, New York 10303. However, after the accident he was taken by ambulance and admitted to Elmhurst Hospital. He states that due to his injuries sustained in the accident, which included a broken leg requiring an open reduction and insertion of hardware, he would not be able to work, continue to afford his apartment or take care of himself. He states that directly after his discharge from the hospital he returned to live with his mother and lived with her continuously through the date the lawsuit was commenced on March 27, 2014. He states that he stopped paying rent and gave up his room in Staten Island immediately after the accident. He states that at the present time he lives with his brother in Corona, Queens County.

Plaintiff's mother, Maria Cabrera, submits an affidavit dated May 22, 2014 stating that she resides at 59-37 Van Doren Street Corona, New York. She states that her son was on crutches after his discharge and moved in with her so that she could assist him during the time of his recovery. She states that he lived with her at the time the action was commenced and for several weeks thereafter. Plaintiff also submits bills from the hospital and an application for no fault benefits indicating that his address is in Queens County.

Plaintiff's counsel contends that venue should remain in Queens County because the plaintiff has demonstrated that he permanently relinquished his residence in Staten Island immediately following the accident and made Queens County his

permanent place of residence and Queens County was his permanent residence when the action was commenced (citing Kelly v. Karsenty, 117 AD3d 912 [2d Dept. 2014] quoting Samuel v Green, 276 AD2d 687 [2d Dept. 2000] [for venue purposes, a residence is where a party stays for some time with a "bona fide intent to retain the place as a residence for some length of time and with some degree of permanency]).

In opposition to the cross-motion, defendant's counsel contends that the proof submitted by the plaintiff is insufficient to demonstrate that the plaintiff had a residence in Queens County when the action was commenced. Defendant's counsel submits a "Historical Person Locator" taken from an uncertified internet search which he asserts shows that Maria Cabrera actually lives in Westchester County.

In reply Maria Cabrera submits an affidavit stating that she never lived in Westchester County and that the information contained in the defendant's internet search does not refer to her.

CPLR 503(a) indicates that the place of trial shall be in the county in which one of the parties resided when the action was commenced (see Vassell v Magno, 65 AD3d 1138 [2d Dept. 2009]; Panco Dev. Corp. v Platek, 262 AD2d 292 [2d Dept. 1999]). Where a defendant seeks to change venue based upon plaintiff's designation of an improper county, a demand to change venue must be served with or before the answer is served (CPLR 511[a]). CPLR 511(b) provides that the defendant must make a motion to change venue within 15 days after service of such written demand. If the motion is not made within the statutory period, the defendant is not entitled to change venue as of right and the motion becomes one addressed to the court's discretion (see Forbes v Rubinovich, 94 AD3d 809 [2d Dept. 2012]).

Here, this Court finds that the defendant failed to establish that Queens County, the venue chosen by plaintiff, was improper. The plaintiff submitted sufficient evidence which established, prima facie, that he resided in Queens County at the time the action was commenced. The affidavits from the plaintiff and his mother as well as the documents provided by the plaintiff are sufficient to demonstrate that the plaintiff relinquished his residence in Staten Island following the accident and moved to Queens County which is where he resided at the time of the commencement of the action. The affidavits and documents are sufficient to establish that, at the time of the commencement of the action, the plaintiff had a bona fide intent to retain an additional residence in Queens with some degree of permanency

(see Kelly v. Karsenty, supra; Ellis v Wirshba, 18 AD3d 805 [2d Dept. 2005]). Moreover, defendant has not provided any certified records or documents in admissible form which would tend to show that the plaintiff did not reside in Queens County at the time of the commencement of the action. Therefore, defendant failed to submit sufficient evidence to show that Queens County is not a proper county (see CPLR 503[a]; Cowell v Dickoff, 60 AD3d 716 [2d Dept. 2009]; Morgan v Ali, 301 AD2d 582 [2d Dept. 2003]).

Accordingly, the current venue of Queens County is proper. The defendant's motion to change venue from Queens County to Suffolk County is denied and the plaintiff's cross-motion to retain venue in Queens County is granted.

Dated: July 25, 2014
 Long Island City, N.Y.



ROBERT J. MCDONALD
 J.S.C.

FILED
 AUG 00 2014
 COUNTY CLERK
 QUEENS COUNTY