

Costello v Stop & Shop Supermarket

2015 NY Slip Op 30122(U)

January 5, 2015

Supreme Court, New York County

Docket Number: 154484/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS Justice

PART 58

ROSEMARY COSTELLO,

Plaintiff,

-v-

STOP AND SHOP SUPERMARKET, STOP AND SHOP II CORP., and AHOLD U.S.A., INC., Defendants.

INDEX No. 154484/14

MOTION DATE

MOTION SEQ. No. 001

MOTION CAL No.

The following papers, numbered 1 to were read on this motion

PAPERS NUMBERED

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

Answering Affidavits- Exhibits

Replying Affidavits

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion dismissing the complaint as against defendant, Stop and Shop II Corp., and thereafter changing the venue of this action, is decided as follows:

In this personal injury action, Plaintiff alleges that she was injured on July 10, 2013 while lawfully present in a Stop and Shop supermarket located at 154 Westchester Avenue in White Plains, New York. Plaintiff commenced this action naming Stop and Shop Supermarket, Stop and Shop II Corp. and Ahold U.S.A., Inc. ("AHOLD") as defendants. Defendants Stop and Shop Supermarket and AHOLD,

now move to dismiss the complaint and all cross-claims in their entirety as against defendant, Stop and Shop II Corp., and upon the dismissal of the complaint against said defendant, changing the venue of the instant action, from the County of New York to the correct venue of Westchester County.

Defense counsel Torino & Bernstein, P.C., initially interposed an Answer dated June 9, 2014 on behalf of all defendants. Counsel also served a Stipulation Changing Venue which proposed that venue be changed to Westchester County as that was the county in which plaintiff resided and where the incident occurred. Thereafter, defendants' counsel served an Amended Answer in which it omitted Stop and Shop II Corp. as a represented party.

Defense counsel now brings this motion to dismiss the action against Stop and Shop II Corp., and to have venue changed to Westchester County. In support of its motion, counsel for the moving defendants states that it inadvertently, initially answered for the Stop and Shop II Corp. defendant based on the similarity in the names. However, movants assert that after a search at the Department of State Division of Corporations, information for Stop and Shop II Corp. revealed that Stop and Shop II Corp. was an entirely separate entity with no connection to Stop & Shop Supermarket and AHOLD. Movants also annex a photograph of the Stop and Shop II Corp. business which is depicted in the photo as a small grocery store. Moreover, movants annex an affidavit from Mr. Bruce Astrachan, Manager of General Liability with AHOLD where he states that Stop and Shop II Corp. has no relationship with defendants Stop & Shop Supermarket and AHOLD.

CPLR § 510(1) provides for a change of venue when the county designated is

improper. A defendant seeking to challenge the chosen venue on grounds that said venue is improper must first comply with the requisites of CPLR § 511, which requires that a demand to change venue be interposed with or prior to the service of an answer. *Jason v. Dumel*, 3 Misc.3d 1101(a) (Supreme Court, Kings County 2004). Thereafter, pursuant to CPLR § 511, plaintiff must either agree to change the venue or interpose an affidavit indicating why the venue chosen is proper and why the proposed venue is improper. An action brought in the wrong county requires a venue change as a matter of right. *Id.* However, before such relief can be had, defendant is required, as mentioned above, to comply with CPLR § 511. *Id.* When a defendant makes a motion seeking to change the venue pursuant to CPLR § 510(1), the court must first determine, given the type of action, what venue provision governs and what constitutes proper venue. *Uruchima v. Burns*, 6 Misc.3d 1022(A) (Supreme Court, Kings County 2005). Thereafter, it is defendant's burden to establish that given the type of action, the venue chosen was improper. *Id.* Plaintiff must demonstrate that the venue chosen was proper. *Id.* A plaintiff forfeits the right to select the venue in an action if said plaintiff chooses an improper venue in the first instance. *Kelson v. Nedicks Stores, Inc.*, 104 A.D.2d 315, 478 N.Y.S.2d 648 (1st Dept. 1984). Furthermore, plaintiff's failure to respond to a defendant's demand to change venue, supports a transfer of the case to the venue selected by defendant. *Lynch v. Cyprus Sah & Dorr Co., Inc.*, 272 A.D.2d 260, 708 N.Y.S.2d 94 (1st Dept. 2000).

Here, plaintiff opposes the motion to dismiss the action against Stop and Shop II Corp. on the ground that movants lack standing, and that the venue of this action should not be changed until discovery is completed. Upon reviewing the evidence

submitted in support of dismissal, this Court finds that the subject action should be dismissed against defendant Stop and Shop II Corp. which was, based on the evidence presented, improperly named as a defendant herein. Moreover, since Stop and Shop II Corp. was the sole party named in this action with any contacts to New York County, this action should properly be transferred to Westchester County where the accident occurred and where plaintiff resides.

Accordingly it is

ORDERED that 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.

Dated:

1/5/15



J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.