

Oluwatayo v Dulinayan
2015 NY Slip Op 32579(U)
March 3, 2015
Supreme Court, Bronx County
Docket Number: 304570/2013
Judge: Norma Ruiz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX



VICTOR OLUWATAYO

Index No. 304570/2013

-against- Plaintiff,

Decision and Order
HON. NORMA RUIZ

MARIAH R. DULINAYAN, JONATHAN R. SHAATAL
and GRICELDA M. GUTIERREZ

NORMA RUIZ

Defendants.

The following papers numbered 1 to 13 Read on this motion CHANGE VENUE
Noticed on 9/4/14 and duly submitted as No. on the Motion Calendar of 9/29/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion		
to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1-2
	Notice of Cross Motion and Answering Affidavits	3-10
	Replying Affidavits	11-13
	Memorandum of Law	
Other:		

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Mariah Dulinayan (Dulinayan") and Jonathan Shaatal ("Shaatal") move and defendant Gricelda M. Gutierrez ("Gutierrez") cross moves for an order changing venue from Supreme Court Bronx County to Supreme Court Richmond County. The plaintiff cross moves for partial summary judgment on the issue of liability. Upon a review of the moving papers and opposition submitted thereto, the motions for a change of venue are granted and the plaintiff's cross motion is denied.

In this action, the plaintiff seeks damages for injuries he alledgley sustained in a motor vehicle accident on May 17, 2012 in Newark, New Jersey. As a result of the accident, the plaintiff alleges he sustained the following injuries: bulging disc in the cervical and lumbar spine; C5 and L5-S1 radiculopathy and; medial meniscal tear, lateral meniscal hyperintensity, patellar tendinitis and effusion of the right knee.

Defendants' Motions

Defendants move and cross move for an order changing venue from Supreme Court, Bronx County to Supreme Court Richmond county on the grounds that none of the parties lived in Bronx County at the time this action was commenced on July 24, 2013.

According to the face of the verified complaint, venue was placed in Bronx County based on the plaintiff's residence in the Bronx namely 1221 College Avenue, Bronx, N.Y. Defendants contend that when the plaintiff was deposed on June 18, 2014, it was discovered that he resided in Kings County and not Bronx County at the time this action was commenced. Thus, In support, movants submit the plaintiff's deposition testimony in which he states that his current residence is 503 East 26th Street, Brooklyn, NY and that he has resided at the Brooklyn address from May 25, 2013 continuously until the date of his deposition. Defendants.

At his deposition, the plaintiff identified his address as 1221 College Avenue, Apartment 4A, Bronx, NY and stated that he had been living at this address with his girlfriend for two years. However, he is currently living with his aunt in Brooklyn on a temporary basis. He stated that he moved with his aunt shortly after the accident. He further testified that his mail goes primarily to his Bronx address. In addition, his driver's license list the Bronx address. The plaintiff also commented that he has been living in his aunt's house in Brooklyn because he could not go up the stairs (in the Bronx residence). The manner in which the plaintiff testified in his deposition regarding his residence, it appears that he has not returned to his "Bronx home" in two years. There were no questions regarding the amount of time he spends in Brooklyn and the amount of time he spends in the Bronx.

The court considers this untimely venue motion since the plaintiff's Kings County address was first discovered during his deposition. "While a defendant who seeks a change of venue based upon an improper designation by a plaintiff must normally comply with the procedure of CPLR 511 and the time limits set forth therein, noncompliance with the statutory time requirements should not act as a bar where . . . a plaintiff's willful omissions and misleading statements regarding his residence are the cause of noncompliance and the defendant moves promptly after ascertaining the true state of affairs" (*Roman v Brereton*, 182 AD2d 556 [1st Dept 1992]; see also *Resciniti v. Fair Fax Partners*, 309 AD2d 627 [1st Dept 2003]).

In opposition, counsel argues that the plaintiff has two residences, one in the Bronx and one in Brooklyn. That he currently lives with his aunt in Brooklyn while he recovers from his

injuries since the Bronx residence has many stairs to climb. In support, he annexed an excerpt from the plaintiff's deposition testimony. There were no other documents, i.e. copy of lease agreement, driver's license, tax returns, credit card statements, or car insurance declaration sheet, to corroborate plaintiff's allegation that he continued to be a resident at the Bronx address. Nor was there any testimony from the plaintiff regarding how much time he spent in each residence. "When a defendant properly challenges plaintiff's choice of venue, the plaintiff has the burden to establish through documentary evidence that [he] actually resided in the county designated at the time the action was commenced" (*Martinez v. Semicevic*, 178 AD2d 228 [1st 1991]). Since plaintiff failed to meet its burden, he failed to raise an issue of fact, thus a hearing on the issue of residency is not required (*id.*).

Accordingly, the motion to change venue is granted. Defendants Dulinayan and Shaatal shall submit an order within 30 days from the entry of this order. This constitutes the decision of the court.

Plaintiff's Cross Motion

Plaintiff cross moves for partial summary judgment on the issue of liability. Plaintiff contends he testified that, while he was travelling southbound on McCarter Highway in Newark, NJ, he stopped for traffic. He was at a stop for about three seconds when his vehicle was hit in the rear by the vehicle operated by defendant Gutierrez.

Defendant Gutierrez testified that she was at a complete stop behind the plaintiff's vehicle when her car was hit in the rear by the motor vehicle driven by defendant Dulinayan. The impact pushed her car into the rear of the plaintiff's car.


Dulinayan contends that Gutierrez had already hit the rear of the plaintiff's vehicle when she rear-ended Gutierrez.

"It is well settled that a rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving (rear) vehicle to come forward with an adequate non-negligent explanation for the accident" (*Cabrera v. Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). In support of the motion, the plaintiff annexed the parties deposition testimony. The varying accounts of how this accident occurred, raises an issue of fact as to which defendant is

liable for this rear end collision that must be resolved by a jury. Accordingly, the plaintiff's cross motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: 3/3/15
Bronx, New York


HON. NORMA RUIZ, J.S.C.
NORMA RUIZ