

**Cesak v Kowalik**

2016 NY Slip Op 30908(U)

April 15, 2016

Supreme Court, Queens County

Docket Number: 713023/2015

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Acting Justice**

IAS PART 30

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JADWIGA CESAK,

Index No. 713023/2015

Plaintiff,

Motion  
Date: February 16, 2016

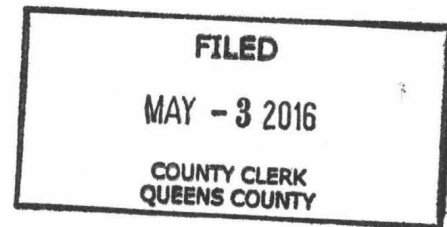
Motion Cal. No. 22

Motion Sequence No. 1

-against-

ALINA KOWALIK,

Defendant.



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The following e-filed papers numbered 4-9, 11-13 and 17 submitted and considered on this motion by defendant Alina Kowalik for an Order dismissing the verified complaint based upon venue or transferring venue of this matter to the Supreme Court, Suffolk County and pursuant to CPLR 3211 (a) (7) to dismiss the verified complaint for failure to state a cause of action.

	<u>Papers Numbered</u>
Notice of Motion -Affidavits-Exhibits.....	EF4-9
Affirmation in Opposition-Affidavits-Exhibits.....	EF11-13
Reply Affirmation-Affidavits-Exhibits.....	EF17
Affidavit of Service of Husam Al-Atrash.....	EF2

The motion is denied in its entirety. Defendant is directed to file and serve an answer within twenty (20) days of the date of this Order served with Notice of Entry.

Plaintiff, Jadwiga Cesak (hereinafter "Cesak") filed a summons and verified complaint on December 17, 2015. She alleged that on or about April 23, 2015 at a store located at 93-04 101 Avenue, Ozone Park, New York, she was assaulted by defendant Alina Kowalik (hereinafter

“Kowalik”). She alleged Kowalik owned the store where the assault occurred. Among other things, Cesak alleged that she sustained injuries as a result of the assault. She alleged “upon information and belief” that Kowalik was charged with numerous crimes and pled guilty to assault in the third degree and harrasment in the second degree. She alleged that as a result of the assault she was granted an order of protection. Her first cause of action is for civil assault and battery as a result of the incident. Her second cause of action alleged intentional infliction of emotional distress. She also made a demand in her verified complaint for punitive damages. In her verified complaint, Cesak alleged that the venue of the action was based upon her residence in Queens County.

Now, Kowalik moves to dismiss this case based upon improper venue, seeking the transfer of this matter to the Supreme Court, Suffolk County and also to dismiss the case, alleging that the copy of the summons and complaint which she was served did not have the index number on it. She also seeks to dismiss the case upon forum non conveniens grounds (CPLR 327). She alleged that Cesak’s first cause of action for assault and battery and her second cause of action for intentional infliction of emotional distress should be dismissed pursuant to CPLR 3211 (a) (7), as they fail to state a cause of action.

In support of the motion Kowalik submitted the affirmation of Darius A. Marzec, Esq.; a copy of Cesak’s summons and complaint dated December 15, 2015; Kowalik’s notice of return and rejection of summons and complaint dated February 1, 2016; her sworn affirmation in support of the motion to dismiss or change venue.

Kowalik served a notice of return and rejection of the summons and complaint on February 1, 2016 pursuant to CPLR §2101 (f). In this document, she alleged that the summons and complaint were defective because they were served without the index number; that the documents did not apprise her of “legally and procedurally mandated information”; the pleadings were drafted with errors; the pleadings are frivolous pursuant to 22 NYCRR 130-1.1, and contains libelous statements; and, that the rejection was being done within the time frame allowed by CPLR §2101.

In her affirmation, Kowalik alleged that she resides in Suffolk County, but she did not provide the address, preferring that if necessary, for the Court to conduct an in camera inspection of her drivers license. She stated that although Cesak may reside in Queens, it is inconvenient for her to travel to Queens. She stated that plaintiff’s counsel has an office in Suffolk County and is forum shopping this matter. She also stated that Cesak’s claims are not legally sufficient to warrant relief. Additionally, she claimed that she was served with a complaint which had the Index number cut off and portions of the complaint were illegible.

In opposition, Cesak submitted the affirmation of Jonathan Edward Kirchner, Esq.; copies of the parties criminal court case details from the Unified Court System; copies of temporary Orders of Protection issued against Kowalik in favor of Cesak by the Criminal Court, Queens County on May 27, 2015 and July 16, 2015. Cesak believes that Kowalik’s filing of the instant motion is frivolous and sanctionable under 22 NYCRR 130-1.1. Cesak contends that venue is clearly proper based upon the fact that she resided in Queens County at the time the action was commenced and

moreover, the incident occurred in Queens County (CPLR §§503 [a], 509). Moreover, defendant failed to serve a demand to change venue pursuant to CPLR 511(b). Additionally, Kowalik's allegation as to the inconvenience of this case being litigated in Queens is a "ruse", since she is the owner of the deli located in Queens County where the incident occurred, and, the witnesses in this matter either work or reside in Queens, thus, it would be inconvenient for them to travel to Suffolk County.

In reply, Kowalik submitted the affirmation of Darius A. Marzec, Esq. and a demand to change venue dated February 12, 2016. Kowalik alleged that the opposition should not be considered because it does not contain an affidavit of Cesak and that Kowalik did not plead guilty to any criminal charges as alleged in the complaint. Kowalik believed that the Cesak failed to state a cause of action for intentional infliction of emotional distress and therefore, the matter should be dismissed.

The Court finds denies the branches of Kowalik's motion to transfer this matter to Supreme Court, Suffolk County or dismiss or transfer the matter based upon forum non conveniens grounds. It is well settled that venue of an action is proper in the County in which one party resides (CPLR §503). Cesak has alleged that she lived in Queens County at the time of the commencement of this action. Kowalik has failed to set forth any grounds under CPLR § 510 also to demonstrate that the trial of this matter should be transferred to Supreme Court, Suffolk County, such as inconvenience to witnesses or that there is some bias which would warrant transferring the matter to another County. The Court also finds no merit to Kowalik's request to dismiss this matter based upon forum non conveniens grounds.


The branch of the motion to dismiss pursuant to CPLR 3211 (a) (7) is also denied. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true (*Leon v Martinez*, 84 NY2d 83,87 [1994]). Contrary to Kowalik's belief, the Court finds that Cesak has sufficiently pled a cause of action for assault and battery (*see generally Thaw v North Shore University Hospital*, 129 AD3d 937 [2d Dept 2015]), and intentional infliction of emotional distress (*see Howell v New York Post Co., Inc.*, 81 NY2d [1993]); *Marchionni v Drexler*, 22 AD3d 814 [2005]; *Leonard v Reinhardt*, 20 AD3d 510 [2d Dept 2005]).

As to Kowalik's allegations regarding service of the verified complaint without the index number and other alleged defects, pursuant to CPLR §2101 (f), Kowalik had a right to object to any alleged defects in the summons and complaint within fifteen (15) days of the service of the summons and complaint. In her motion, she failed to state when she was served with the summons and complaint. Based upon the affidavit of service of Cesak's process server Husam Al-Altrash dated January 12, 2016, she was personally served on January 9, 2016. Therefore, her time to object under this section of the CPLR had already elapsed at the time this motion was made, any any objections regarding the index number and other alleged defects has now been waived.

Therefore, this motion is denied in its entirety. Defendant is directed to file and serve an answer within twenty (20) days of the date of this Order served with Notice of Entry.

This constitutes the decision and Order of the Court.

Dated: April 15, 2016

  
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Hon. Chereé A. Buggs, AJSC

**FILED**  
**MAY - 3 2016**  
**COUNTY CLERK**  
**QUEENS COUNTY**