

Dae Hyun Chung v Google, Inc.
2017 NY Slip Op 30850(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 156345/16
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 2**

DAE HYUN CHUNG,

Plaintiff,

-against-

GOOGLE, INC. and ABC CORPORATION,

Nonparty(s)

-against-

IHATEDHC and RAYMOND YANG,

Defendants.

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
DEF.'S NOTICE OF MOTION AND MERCER ATTY. AFF. IN SUPP.	1-2 (Exs. A-C)
YANG AFF. IN SUPPORT OF DEF.'S MOT.	3
RJI AND ADDENDUM TO RJI	4-5
SUMMONS WITH NOTICE	6
PLAINTIFF'S AFFIRMATION IN OPP.	7 (Exs. A-N)
DEF.'S REPLY MEMO. OF LAW	8

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this defamation action, defendant Raymond Yang moves: 1) pursuant to CPLR 503, 510, and 511(a) and (b) to change the venue of this action from Kings County to New York County on the ground that Kings County is not a proper county for the venue of this action; and 2) to stay his time to answer until 30 days after service of a notice of entry on the Clerk of the Court of Kings County granting or denying the change of venue. Plaintiff submits written opposition. After oral

argument, and a review of the parties' papers and the relevant statutes and case law, the motion is **granted.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Dae Hyun Chung, a New Jersey resident (Ex. A to Mercer Aff., at par. 5), commenced this defamation action against defendant IHATEDHC in the Supreme Court, Kings County on September 2, 2014. Ex. B to Szalkiewicz Aff. Plaintiff named Google, Inc. as a nonparty and, on October 20, 2014, Google produced information which allowed plaintiff to learn defendant Yang's identity. Szalkiewicz Aff., at pars. 6-13.

An amended complaint naming IHATEDC and Yang was filed with the Supreme Court, Kings County on February 16, 2015. Kings Co. Index No. 508016/14 NYSCEF Doc. 13. Although a courtesy copy of the amended complaint was emailed to Yang's attorney on February 6, 2015 (Ex. H to Szalkiewicz Aff.), no proof of service of the amended complaint was filed with the Supreme Court, Kings County. Since plaintiff was past the 30-day period in which to amend the complaint as of right, he needed to move to do so. See CPL 3025. However, there is no indication that plaintiff moved to amend the complaint to name defendant Yang as a defendant until August 28, 2015. Kings Co. Index No. 508016/14 NYSCEF Doc. 35. The motion to amend the complaint was granted by order dated January 7, 2016. Kings Co. Index No. 508016/14 NYSCEF Doc. 120.

A second amended complaint, dated October 30, 2015 and naming IHATEDHC and Yang as defendants, was filed in Kings County on or about February 25, 2016. Kings County Index. No. 508016/14 NYSCEF Doc. No. 121. An affidavit of service filed with the Supreme Court, Kings County on April 12, 2016 reflects that the second amended complaint was served on defendant Yang by leaving the pleading with a person of suitable age and discretion on April 7, 2016 and that a

follow up mailing was made to Yang the following day. Kings County Index. No. 508016/14 NYSCEF Doc. No. 122. However, an order of the Supreme Court, Kings County dated April 4, 2016 reflects that the case was dismissed “upon default of all parties.” Kings County Index. No. 508016/14 NYSCEF Doc. No. 129). The case was restored to the trial calendar by order dated June 23, 2016. Kings County Index. No. 508016/14 NYSCEF Doc. No. 143.

In the second amended complaint, plaintiff, an immigration attorney, alleged that Yang, a resident of Kings County, defamed him on a blog called www.ihatedhc.blogspot.com (“IHATEDHC”) with intent to damage his reputation in Fort Lee, New Jersey, which was heavily populated by Koreans, and which was where plaintiff lived. Ex. A to Mercer Aff., at pars. 1-2, 7.¹

Given the dismissal of the Kings County matter prior to the initial service of the second summons and complaint on Yang, the second amended complaint was re-served on Yang on July 8, 2016, after the case was restored to the trial calendar. Kings County Index. No. 508016/14 NYSCEF Doc. No. 144; Ex. B to Mercer Aff. On July 14, 2016, Yang’s attorney served plaintiff’s counsel with a notice to change venue to New York County on the ground that such was the county in which Yang lived. Ex. C to Mercer Aff. Plaintiff’s counsel did not respond to the demand to change venue. Mercer Aff., at par. 5.

By motion filed July 29, 2016, defendant Yang moved in this Court to change the venue of the Kings County action to New York County. Defendant Yang also sought a stay of his time to answer the second amended complaint.

¹ Although the initial complaint alleged that IHATEDHC was a “resident” of Kings County (Ex. B to Szalkiewicz Aff., at par. 6), there was no claim of what type of entity this defendant was (i.e., an individual, a corporation, a partnership). Since the amendment of the complaint to name Yang as a defendant, IHATEDHC has remained in the action as a nominal defendant.

POSITIONS OF THE PARTIES:

Defendant Yang argues that this matter should not be venued in Kings County because none of the parties to the action reside there. Rather, urges defendant Yang, this matter should be venued in New York County, where he resides.

In support of his motion, defendant Yang submits an affidavit in which he states that he resides at 635 West 42nd Street, New York, New York, and has lived there since prior to the commencement of the action against IHATEDHC in September of 2014. Yang Aff. He further asserts that he first received a copy of the complaint in this action on or about July 11, 2016. Id.

In opposition to the motion, plaintiff asserts, inter alia, that, since defendant Yang failed to make a timely motion to change venue as of right, the request to change venue is solely in this Court's discretion. In making this assertion, plaintiff maintains that defendant Yang should have known from service on IHATEDHC that he was the intended defendant.

In reply, defendant Yang reiterates his contention that he has established his right to a change of venue to New York County as of right.

LEGAL CONCLUSIONS:

CPLR 511 provides, in pertinent part, as follows:

Change of place of trial

(a) Time for motion or demand. A demand under subdivision (b) for a change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.

(b) Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

(c) Stay of proceedings. No order to stay proceedings for the purpose of changing the place of trial shall be granted unless it appears from the papers that the change is sought with due diligence.

Here, the first pleading which plaintiff, a New Jersey resident, served on defendant Yang, a New York County resident, was the second amended complaint. The second amended complaint, served on defendant Yang on July 8, 2016 (Ex. B to Mercer Aff.), stated, inter alia, that defendant Yang was a resident of Kings County. Ex. A to Mercer Aff., at par. 7. In lieu of answering the second amended complaint, defendant Yang served plaintiff's counsel with a demand, dated July 14, 2016, to change the venue of the Kings County action to New York County based on his residence. Ex. C to Mercer Aff. Plaintiff did not respond to defendant Yang's demand to change venue. Then, on July 29, 2016, within fifteen days after service of the demand, defendant Yang filed the instant motion seeking to change venue to New York County. Since defendant Yang has complied with CPLR 511(a) and (b), and has established by his affidavit in support of the motion that he is a resident of New York County, and plaintiff has not introduced any evidence establishing that defendant Yang was a resident of Kings County, defendant Yang is entitled to a change of venue of this action to New York County as of right. *See* CPLR 510(1); *Lopez v K Angle K, Inc.*, 24 AD3d 422 (2d Dept 2005).

Plaintiff's argument that defendant Yang should have moved sooner to change venue is

without merit, as the initial complaint was served only on IHATEDHC. Further, the purported service of the amended complaint on defendant Yang on February 6, 2015 was improper since, as noted above, plaintiff did not seek leave to amend the complaint until August of 2015 and, in any event, an affidavit of service relating to the purported February , 2015 service not filed with the court. Although the second amended complaint was served on defendant Yang on April 7, 2016, that was three days after the dismissal of the case and thus such service at that time was a nullity. This was ostensibly the reason why plaintiff re-served defendant Yang with the second amended complaint in July of 2016. Thus, defendant Yang could not have sought a change of venue until after he was served with the second amended complaint on July 8, 2016.

Finally, that branch of defendant Yang's motion seeking to stay his time to answer is granted to the extent that defendant Yang has 30 days from service of this order with notice of entry on plaintiff's counsel and on the Clerks of the Supreme Court, New York County and Supreme Court, Kings County to answer the second amended complaint. *See Eber-NDC, LLC v Star Indus., Inc.*, 32 AD3d 1251 (4th Dept 2006); *Matter of Combs v New York State Bd. of Parole*, 19 Misc 3d 1133(A) (Sup Ct New York County 2008).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the venue of this action is changed from the Supreme Court, County of Kings to this Court and the Clerk of the Supreme Court, County of Kings is directed to transfer the papers on file in this action (Index No. 508016/14) to the Clerk of the Supreme Court, County of New York, upon service by movant of a certified copy of this order and payment of the appropriate fee, if any; and it is further,

ORDERED that the Clerk of the Supreme Court, New York County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign a New York County index number to the file transferred pursuant to this order; and it is further,

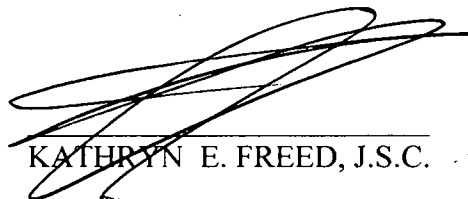
ORDERED that defendant Raymond Yang's time to answer the second amended complaint is hereby stayed and said defendant shall have 30 days from the date of the service of this order with notice of entry upon plaintiff's counsel and upon the Clerks of the Supreme Court, New York County and the Supreme Court, Kings County to serve his answer to the second amended complaint; and it is further,

ORDERED that counsel are directed to appear at a preliminary conference in this matter on July 18, 2017 at 2:30 p.m. at 80 Centre Street, Room 280; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: April 20, 2017

ENTER:



KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**