

Powers v Gervasio
2017 NY Slip Op 33161(U)
May 11, 2017
Supreme Court, Rensselaer County
Docket Number: 252626
Judge: Raymond J. Elliott, III
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At a Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York on the 11th day of May, 2017.

INDEX NUMBERS
Saratoga County Clerk

PRESENT: HON. RAYMOND J. ELLIOTT, III
Justice

SUPREME COURT
COUNTY OF RENSSELAER STATE OF NEW YORK

WILLIAM J. POWERS, III, as Administrator of the Goods, Chattels and Credits of CAITLYN C. POWERS,

Plaintiff,

-against-

DECISION AND ORDER
INDEX NO. 252626

PAUL F. GERVASIO, EDWARD GENDRON and MARC R. TETLOW,

Defendants.

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APPEARANCES: MICHAEL L. COSTELLO, ESQ.
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Attorney for Plaintiff

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LAW OFFICES OF BRIAN D. RICHARDSON
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Attorney for Defendant: Marc R. Tetlow

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KELLY & LEONARD, LLP
199 Milton Avenue
Ballston Spa, New York 12020
Attorney for Defendant: Edward P. Gendron

RAYMOND J. ELLIOTT, III J.S.C.

Defendant, Marc R. Tetlow, has moved for an Order pursuant to CPLR §503(a) and §511, changing the venue and place of trial of this action from the County of Rensselaer to the County of Saratoga on the ground that none of the parties reside in Rensselaer County, and the Estate of Caitlyn C. Powers is governed by and two Defendants reside in Saratoga County. Defendant Edward P. Gendron, through counsel, supports the motion, incorporates all arguments and requests that the motion be granted. Plaintiff has opposed the motion. Defendant Paul F. Gervasio did not file a response.

CPLR §503 addresses venue based on residence and states: “(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.”

CPLR §509 entitled Venue in County Designated provides: “Notwithstanding any provision of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511.”

CPLR §511 addresses change of place of trial and states:

“a) Time for motion or demand. A demand under subdivision (b) for 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 grounds 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.”

Defendant Tetlow’s counsel filed a Demand To Change Venue dated November 8, 2016, pursuant to CPLR §511, demanding that the place of trial of this action be changed from Rensselaer County to Saratoga County. Defendant Tetlow’s counsel states that she received no response from Plaintiff with regard to the demand.

The Amended Summons dated October 3, 2016, indicates that Plaintiff is designating Rensselaer County pursuant to CPLR §509 as the basis for venue for the trial based on the location of the motor vehicle accident.

Defendant Tetlow argues that the action is improperly venued in Rensselaer County as the Plaintiff’s Estate was issued in Saratoga County, both Defendants Gervasio and Gendron reside in Saratoga County and Defendant Tetlow previously resided in Bennington Vermont, and now resides in Florida. Defendant Tetlow states that Plaintiff failed to allege that any of the parties were residents of Rensselaer County. Defendant Tetlow further asserts that a majority of the witnesses named in the Police Report are residents of Saratoga County.

Plaintiff argues that venue in Rensselaer County was established as it was where the accident occurred resulting in the death of Caitlyn C. Powers. Plaintiff asserts that Defendant Paul F. Gervasio did not object to the venue and that upon information and belief, he currently resides in Rensselaer County. Plaintiff states that Defendant Gervasio's counsel did not respond to the pending motion. Plaintiff argues that the police report does not reflect that the majority of the witnesses named therein are residents of Saratoga County. Plaintiff asserts that Defendant Gendron's counsel has participated in discovery proceedings and conferences with the Court without objection. Plaintiff states that the Estate of Caitlyn C. Powers was filed in Saratoga County because at the time of her death Caitlyn C. Powers resided in Saratoga County. Plaintiff argues that Defendant Tetlow's motion to change venue is not supported by CPLR §510 and that Plaintiff's venue selection complied with CPLR §509. Plaintiff asserts that based on the ongoing discovery proceedings, discovery motions, scheduling orders and Court conferences before the Rensselaer County Supreme Court, a change in venue to Saratoga County at this time would not promote judicial efficiency.

Based on the paperwork before it, the Court finds that Defendant Tetlow's Demand for Change of Venue was timely as it was filed contemporaneously with his Verified Answer with Affirmative Defenses and Cross-Claim, and that his motion to change venue was timely as well.

The Court will grant Defendant Tetlow's motion to change venue. The Court finds that there is absolute no proof before the Court that any party to this action resides in Rensselaer County. Plaintiff's counsel alleges upon information and belief that Defendant Paul Gervasio currently resides in Troy, but provides no proof to support this allegation, nor has Defendant

Gervasio responded in anyway to the motion. In support of his motion, Defendant Tetlow cites the Second Amended Complaint which includes the residences of the parties. The Second Amended Complaint dated October 3, 2016, indicates at the third and fourth paragraphs that Defendant Gervasio and Defendant Gendron are residents of the County of Saratoga. Defendant Gendron supports the instant motion to change venue and incorporates all arguments made by Defendant Tetlow and asks that the motion be granted.

Plaintiff's counsel further acknowledges that Caitlyn C. Powers resided in Saratoga County at the time of her death which is the reason her Estate was filed in Saratoga County Surrogate's Court. The Court further notes that under the usual circumstances, the Plaintiff would return to Saratoga County Surrogate's Court for the disposition of any settlement or jury verdict proceeds. The Court finds that Saratoga County is a proper county based on the residences of the Defendants and the filing of the Estate of Caitlyn C. Powers in Saratoga County based on her residence at the time of her death pursuant to CPLR §503.

Accordingly, based on the foregoing, it is hereby

ORDERED, Defendant Tetlow's motion to change venue from Rensselaer County to Saratoga County is granted; and it is further

ORDERED, that the Rensselaer County Clerk's Office is directed to transfer the papers on file in this action to the Saratoga County Clerk upon service of a copy of this order with notice of entry; and it is further

ORDERED, that upon receipt of the file the Saratoga County Clerk's Office will assign this action a Saratoga County Index Number and Request for Judicial Intervention Number.

This shall constitute the Decision, Order and Judgment of the court. This Decision and

Order is being returned to the attorney for Defendant Tetlow. All other papers are delivered to the Supreme Court Clerk for transmission to the Rensselaer County Clerk. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

**SO ORDERED AND ADJUDGED
ENTER.**

Dated: May 11, 2017
Troy, New York



RAYMOND J. ELLIOTT, III
Supreme Court Justice

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Papers Considered:

1. Notice of Motion dated December 16, 2016; Affidavit of Tara K. Gutman, Esq., dated December 16, 2016, with annexed Exhibits A-C.
2. Affidavit in Support of Defendant Tetlow's Motion to Change Venue of Thomas E. Kelly, Esq., sworn to January 3, 2017.
3. Affidavit in Opposition to Motion to Change Venue of Michael L. Costello, Esq., sworn to January 17, 2017, with annexed Exhibit A.

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