

American Tr. v Flour City Bagels, LLC

2019 NY Slip Op 30589(U)

March 7, 2019

Supreme Court, New York County

Docket Number: 156167/2016

Judge: Robert D. Kalish

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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: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 156167/2016

AMERICAN TRANSIT A/S/O SHERMAN AVENUE EIGHT INC. &
KARINA NICOLAKIS,

MOTION DATE 03/04/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

FLOUR CITY BAGELS, LLC, et al.,

DECISION AND ORDER

Defendants.

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NYSCEF Doc Nos. 30-40 were read on this motion to restore.

Motion by Plaintiff to restore the action¹ is granted, there being no opposition submitted.

BACKGROUND

On March 8, 2018, this Court granted unopposed motion seq. 002 by defendants Flour City Bagels, LLC and Larry L. Ingram pursuant to CPLR 510 (3) changing the venue of this pre-note action to Bronx County. The decision indicated that the case was disposed. The parties' last appearance in this Court had been for a preliminary conference on December 12, 2017.

The Court's March 8, 2018 order provided for a change of venue

“from this Court to the Supreme Court, Bronx County, 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, Bronx County.”

(Parmar affirmation, exhibit E.)

On March 29, 2018, and again on April 10, 2018, counsel for movants in seq. 002 e-filed a copy of the Court's March 8, 2018 order with notice of entry addressed to the parties. The documents were e-filed as document type “Notice of Entry.”

On October 31, 2018, counsel for movants in seq. 002 e-filed a letter, dated October 29, 2018, which states as follows:

¹ Plaintiff's notice of motion and accompanying papers request that this Court restore the action to the “trial calendar,” but as this is a pre-note action, and based upon the papers, the Court regards the motion as one to restore the action to the Court's calendar for purposes of conferencing the case in connection with discovery.

“This case had been the subject of a motion to change venue which was granted by Your Honor pursuant to [an] Order dated March 8, 2018. We were to follow through with the New York County Clerk’s office for transfer of the file to Bronx County. However, in the interim the companion cases that had been venued [sic] in the Bronx were settled. Therefore, there is no further basis to transfer this case to the Bronx. Please advise whether or not [Y]our Honor would recall his Order or if we should nevertheless process the transfer through the New York County [C]lerk’s office.”

(Parmar affirmation, exhibit G.)

On January 18, 2019, Plaintiff filed the instant motion seq. 003 to restore the action. Plaintiff states that the movants in seq. 002 wanted the case transferred to the Bronx because Plaintiff’s subrogor had filed a related personal injury action under index number 24205/2015E in Bronx County arising out of the same May 13, 2015 motor vehicle accident that brings these parties to court in the instant subrogation action.

Plaintiff argues that the movants in seq. 002 and/or the Clerk of this Court failed to transfer this matter to Bronx County, that the case is not in Bronx County but remains in New York County, and that this mishap in the transfer did not occur due to any action or inaction by Plaintiff. Plaintiff further argues, as indicated in the October 29, 2018 letter from movants in seq. 002, that, as all Bronx County companion cases have been settled, Plaintiff should not be penalized or thwarted in its efforts to proceed with litigation of its subrogation case in this Court.

DISCUSSION

Today’s case presents the Court with the opportunity to clarify, for New York County litigants and motion courts alike, the procedure to be followed by the movant whose motion to change venue from New York County to another county is granted.

The language used by this Court in its March 8, 2018 order was similar to decretal language commonly used in similar orders. For example, motion courts commonly indicate that it is:

“ORDERED that the motion for a change of venue is granted and venue of this action is changed from this Court to the Supreme Court, County of []; and it is further

“ORDERED that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of [] and shall mark his records to reflect such transfer; and it is further

“ORDERED that, within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; and it is further

“ORDERED that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, [] County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

“ORDERED that, in an e-filed case, such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).”

Critical to starting the process of transferring a matter from New York County in an e-filed case such as this one, and not readily apparent from either the above commonly used decretal language or the cited *Protocol*, is following the proper statutory method for serving a copy of the order with notice of entry on the “Clerk of the Court,” here, the New York County Clerk, as to the change of venue. The proper method is predicated upon CPLR 8019 (c), which states that “[a] county clerk need not make an entry which is required by a court order unless proper notice is given to the clerk by a party to the action or a person legally interested therein.”

Per the New York County Clerk’s office, merely e-filing a copy of the order with “Notice of Entry” upon the parties, as was done here by the movants in seq. 002, is insufficient to effectuate the transfer. Rather, the party or person legally interested who is seeking enforcement of a motion court’s transfer order must e-file a completed form “EF-22, Notice to County Clerk – CPLR § 8019(c)”², along with a copy of the Court’s transfer order. The notice must then be e-filed on NYSCEF to the case docket under category “Non-Motion Documents>Documents not related to a motion/petition/OSC” with a “Document Type” of “Notice to County Clerk CPLR 8019(C).” Then, and only then, will the transfer order properly be filed to the New York County Clerk, who will then be properly put on notice pursuant to CPLR 8019 (c) and will take the appropriate next steps in effectuating the transfer.

According to the October 29, 2018 letter from the movants in seq. 002, the movants did not “follow through” with the transfer. It is unclear to the Court what steps, if any, movants in seq. 002 took to have the case transferred to Bronx County aside from filing two copies of the transfer order with notice of entry on March 29, 2018, and April 10, 2018. Although CPLR 8019 (c) provides that the proper notice indicated above can be given to the clerk by “a party,” the Court’s March 8, 2018 order specifically directed “movant” to serve a copy of the order with notice of entry. The order did not specify upon whom such service was to be made.

Certainly, service of a copy of the order with notice of entry was made, but this was only upon the parties, and not upon the New York County Clerk by the proper method. Per the New York County Clerk’s office, as service was not properly made on the New York County Clerk specifically, that office never received notice of the transfer order, and no action was taken to transfer the case to Bronx County.

² Available at <https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notice.to.county.clerk.pdf>.

Based upon the facts of this specific case—that movants in seq. 002 did serve a copy of the transfer order with notice of entry, albeit only on the parties, that the transfer from New York County to Bronx County was never effectuated, that the instant motion to restore the action and, in effect, vacate the transfer order is unopposed, and that the Bronx County companion case or cases are resolved—the Court finds it would be appropriate, expedient, and in the interest of justice to permit Plaintiff’s case to proceed with litigation the instant action in this Court.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff’s motion to restore the action is granted, there being no opposition submitted, to the extent that it is


ORDERED that the Court’s March 8, 2018 order transferring this matter from New York County to Bronx County is vacated; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, Plaintiff shall serve a copy of this order with notice of entry on Defendants and on the General Clerk’s Office (Room 119M), which is directed to change this action’s “Case Status” from “Disposed” to “Restored”; and it is further

ORDERED that all parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, April 9, 2019, for a compliance conference.

The foregoing constitutes the decision and order of the Court.

3/7/2019
DATE



HON. ROBERT D. KALISH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	
				REFERENCE	