

Francis v TSA Stores, Inc.

2019 NY Slip Op 30787(U)

March 22, 2019

Supreme Court, New York County

Docket Number: 158253/2015

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 158253/2015

ALEASE FRANCIS,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION AND ORDER

TSA STORES, INC. and ROLLER DERBY SKATE CORP.,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27

were read on this motion to CHANGE VENUE

Upon the foregoing documents, it is ordered that the motion and cross motion are **decided as follows.**

In this personal injury action, defendant Roller Derby Skate Corp. (“Roller Derby”) moves, pursuant to CPLR 503(a) and (c), 510(1), and 511, to change the venue of this action from New York County to Suffolk County. Plaintiff Alease Francis (“Francis”) opposes the motion, and cross-moves, pursuant to CPLR 503(c), to retain venue in New York County. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion and cross motion are **decided as follows.**

On May 9, 2015, plaintiff Francis was allegedly injured in the driveway of her home in Riverhead, Suffolk County, when the wheels on her roller skates broke. (Doc. 21 at 1–2.) Defendant Roller Derby manufactured the skates (*id.*), which were sold to plaintiff by TSA Stores, Inc. (“TSA Stores”) (*id.*).

Plaintiff subsequently commenced the instant action on August 7, 2015 by filing a summons and complaint. (Docs. 10 at 3; 13.) Evidence proffered by Roller Derby establishes that TSA Stores had filed for bankruptcy on March 2, 2016. (Doc. 11 at 4.) Plaintiff admits that TSA Stores was never served with the summons and complaint. (Doc. 21 at 3.) According to Roller Derby, this action was stayed due to TSA Stores' bankruptcy proceeding. (Doc. 10 at 2.) Roller Derby filed its answer on August 21, 2017 (Doc. 14) along with a demand to change venue (Doc. 15). Since plaintiff did not respond to the demand, Roller Derby has filed the instant motion to change venue to Suffolk County. (Doc. 10.)

In support of its motion, Roller Derby asserts that there are insufficient ties to New York County with any of the parties. In particular, Roller Derby argues that plaintiff chose New York County because her attorney's office is located in Manhattan (*id.* at 5) and because TSA Stores had a registered agent for service of process in New York County (*id.* at 2). But because TSA Stores was never served, Roller Derby argues that plaintiff's basis for commencing this action in New York County was therefore void. (*Id.* at 5.)

Plaintiff has filed a cross motion in opposition. She argues that Roller Derby's motion is untimely because, pursuant to CPLR 511(b), Roller Derby was required to file its motion to change venue within fifteen days after it served its demand to change venue. (Doc. 21 at 2.) Moreover, she maintains that New York County is a proper venue because Manhattan was the residence of TSA Stores at the time this action was commenced. (*Id.*) In response to plaintiff's assertion that its motion was untimely, Roller Derby claims that its motion was timely because "the action was stayed" due to TSA Stores' bankruptcy. (Doc. 26 at 2.)

CPLR 503(a) provides that "the place of trial shall be in the county in which one of the *parties* resided when it was commenced." (emphasis added.) Contrary to plaintiff's assertion, it

was improper to choose New York County as the place of venue, since TSA Stores was never served with the summons and complaint and thus was not a party at the time of commencement.

However, contrary to Roller Derby's claim, TSA Stores' bankruptcy proceeding is entirely inapposite to this proceeding: If TSA Stores was never a party to this action for want of service of process, then the fact that it filed for bankruptcy did not toll this action. "As a general matter, strict compliance with the time requirements set forth in CPLR 511(a) and (b) is required when defendants allege that venue was improperly placed." (*See LaMantia v N. Shore Univ. Hosp.*, 259 AD2d 294, 294 [1st Dept 1999].) "A change of venue sought as of right on the ground that the county selected is an improper one must be sought by service of a demand (CPLR 511[a]) followed by a motion, if the demand is not acceded to, within 15 days after service thereof." (*Philogene v Fuller Auto Leasing*, 167 AD2d 178, 178-79 [1st Dept 1990].) Since Roller Derby's motion fell outside the 15-day limit, it must be denied.

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

ORDERED that the motion to change venue by defendant Roller Derby Skate Corp. is denied, and plaintiffs' action shall proceed in New York County; and it is further

ORDERED that the cross motion to retain venue by plaintiff Alease Francis is granted; and it is further

ORDERED that, within 30 days of the uploading of this order to NYSCEF, defendant's counsel is directed to serve a copy of this order, with notice of entry, on all other parties and on the Clerk of the Court; and it is further

ORDERED that all counsel shall appear for a previously scheduled status conference in this matter on May 14, 2019 at 80 Centre Street, Room 280, at 2:15 PM; and it is further

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

3/22/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

CHECK IF APPROPRIATE: