

<b>Matter of Bey v Whinnery</b>
2019 NY Slip Op 31595(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 152946/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY** PART IAS MOTION 56EFM

*Justice*

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INDEX NO. 152946/2019

In the Matter of

MOTION DATE 05/30/2019

VICKY WARE BEY,

MOTION SEQ. NO. 003

Petitioner/Plaintiff,

- v -

MELANIE WHINNERY, NEW YORK CITY EMPLOYEE  
RETIREMENT SYSTEM, CYNTHIA BRANN, NEW YORK CITY  
DEPARTMENT OF CORRECTION, and CITY OF NEW YORK,

**DECISION AND ORDER**

Respondents/Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39 were read on this motion to/for CHANGE VENUE

This is a hybrid CPLR article 78 proceeding and action to recover damages for discrimination in employment on the basis of sex/gender, national origin, age, and disability, and for violations of 29 USC § 151, 42 USC § 2000d, and 42 USC §§ 2000e-2000e17. In her cause of action pursuant to CPLR article 78, the petitioner/plaintiff (hereinafter the petitioner) seeks judicial review of a determination of the respondent New York City Employee Retirement System (NYCERS) that denied her application for performance-of-duty disability retirement benefits. The respondents/defendants (hereinafter the respondents) move pursuant to CPLR 511 to transfer venue to Kings County on the ground that New York County is not a proper county. The petitioner opposes the motion. The motion is granted.

The petitioner alleges that she was injured on three different occasions in 2010, 2013, and 2014, respectively, in the course of performing her duties as an officer with the respondent New York City Department of Correction (DOC), that she made an application for performance-of-duty disability retirement benefits, and that NYCERS, based on allegedly improper influence from DOC, denied her the benefits to which she claimed entitlement. She also alleges that she

suffered harassment and discrimination at work on the basis of her race, sex, national origin, and disability. The petitioner resides in Suffolk County. NYCERS has its principal office in Kings County and made the challenged determination there. DOC has its principal office in Queens County and the petitioner apparently sustained her injuries in Bronx County while working at Riker's Island. The respondent/defendant City of New York has its principal office in New York County.

Only NYCERS and the respondent/defendant Melanie Whinney are proper parties to the cause of action seeking CPLR article 78 relief against NYCERS. The City of New York itself, in its capacity as municipal corporation, is not a proper party to that cause of action (*see Matter of Brown v Foster*, 73 AD3d 917, 918 [2d Dept 2010]). DOC and its commissioner, the respondent/defendant Cynthia Brann, did not make the challenged determination and, thus, are also not proper parties to the CPLR article 78 cause of action (*see Matter of Armacida v Reitz*, 141 AD3d 713 [2d Dept 2016]; *Matter of TAC Peek Equities, Ltd. v Town of Putnam Val. Zoning Bd. of Appeals*, 127 AD3d 1216 [2d Dept 2015]). A CPLR article 78 proceeding "shall be brought in the supreme court in the county specified in subdivision (b) of [CPLR] section 506 except as that subdivision otherwise provides." CPLR 506(b) provides that

"A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located."

NYCERS made the determination complained of in Kings County, the material events took place in Kings County and Bronx County, where the petitioner was allegedly injured, and NYCERS' principal office is in Kings County (*see Mater of Hecht v New York State Teachers Retirement System*, 138 Misc 2d 198 [Sup Ct, Suffolk County 1987] [material events "giving rise to" death benefit claim by deceased employee's spouse took place in a county within the judicial district in which the employee worked and died]). The only basis for placing venue in New York

County that is urged by the petitioner is that New York County is the seat of government of the City of New York and that NYCERS is a City agency. This is insufficient to make New York County the proper county in which to place venue.

With respect to the petitioner's causes of action seeking to recover for discrimination in employment and violations of federal law, NYCERS and DOC, "as agencies of the City are not amenable to being sued" for money damages (*Matter of Carpenter v New York City Housing Auth.*, 146 AD3d 674, 674 [1st Dept 2017] [cause of action to recover money damages does not lie against NYPD or NYC Human Resources Administration]; see *Alvarez v City of New York*, 134 AD3d 599 [1st Dept 2015] [NYPD not amenable to suit for money damages]; *Siino v Department of Educ. of City of N.Y.*, 44 AD3d 568, 568 [1st Dept 2007] [NYC Department of Investigation]; *Elisa W. v City of New York*, 2016 US Dist LEXIS 123332, 2016 WL 4750178 [SD NY 2016] [NYC Administration for Children's Services]; *Greene v Pryce*, 2015 US Dist LEXIS, 2015 WL 4069176 [ED NY 2015] [Human Resources Administration]; cf. New York City Charter, Chapter 17, § 396 ["All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law"]). Rather, only the City of New York is a proper party to such causes of action. CPLR 504(3) provides that venue in an action to recover damages against the City of New York shall be placed "in the county within the city in which the cause of action arose." The alleged discriminatory acts against the petitioner took place in Bronx County and Queens County, although the allegations concerning violations of federal law are also based on NYCERS' alleged wrongdoing as well. Hence, the causes of action to recover money damages also arose in Kings County.

In light of the foregoing, it is,

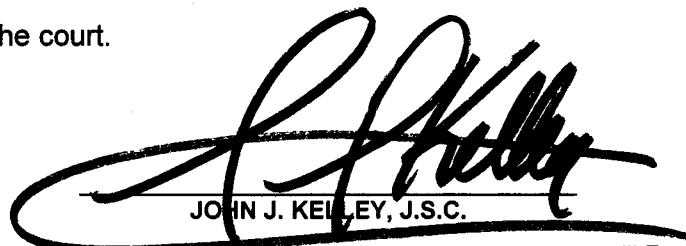
ORDERED that the respondents' motion to transfer venue is granted, and the matter is transferred to the Supreme Court, Kings County, for consideration and disposition; and it is further,

ORDERED that the respondents are directed to serve a copy of this order with notice of entry upon all other parties, the Clerk of the Supreme Court, Kings County, and the Clerk of the Supreme Court, New York County, within 30 days of the date of entry of this order; and it is further,

ORDERED that, upon the service upon it of a copy of this order with notice of entry, the Clerk of the Supreme Court, New York County, is directed to deliver to the Clerk of the Supreme Court, Kings County, all papers filed in the proceeding entitled *Matter of Ware Bey v Whinnery*, under New York County Index No. 152946/2019, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

6/7/2019  
DATE

  
JOHN J. KELLEY, J.S.C.  
**HON. JOHN J. KELLEY**  
**J.S.C.**

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: