Mason v Hayfield Barns, LLC
2020 NY Slip Op 31322(U)
April 23, 2020
Supreme Court, Kings County
Docket Number: 506733/18
Judge: Bruce M. Balter

At an IAS Term, Commercial Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23nd day of April, 2020.

P R E S E N T:

HON. BRUCE M. BALTER,

Justice.

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ELIZABETH MASON,

Plaintiff,

-against-

HAYFIELD BARNS, LLC,

Defendant.

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DECISION AND ORDER

Index No.: 506733/18

Motion Seq. Nos. 2, 3, 4

The following e-filed papers read herein:	NYSEF Nos.:
Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed	44-46, 94-95, 53-55
Affirmation (Affidavit) in Opposition and Exhibits Annexed	97
Reply Affirmation (Affidavit) and Exhibits Annexed	

Defendant, Hayfield Barns, LLC (defendant) moves, in motion sequence (mot. seq.) two for an order, pursuant to CPLR 3025 (b), granting it leave to amend its answer. Defendant also moves, in mot. seq. three for an order, pursuant to CPLR 510 (1) and 511 (a) and (b), changing venue from Kings County, New York (Kings County) to Greene County, New York (Greene County). Plaintiff, Elizabeth Mason (plaintiff) cross-moves in mot. seq. four for an order, pursuant to CPLR 3025 (b), granting it leave to amend her summons and complaint.

Background

On April 4, 2018, plaintiff commenced this personal injury action with the filing of a summons and complaint alleging she slipped and fell on September 17, 2017, while attending a wedding at 221 County Road 56, Maplecrest, New York in Greene County. She further alleges the wedding was hosted, operated, and managed by defendant. Defendant then interposed an answer with various affirmative defenses, and instituted a third-party action against third-party respondents Ms. Jessica Troy and Mr. Benjamin Miller on June 16, 2018. Motion practice ensued which resulted in, among other orders, an order granting summary judgment in favor of Ms. Troy and Mr. Miller dismissing the third-party action. Subsequently, on September 9, 2019, defendant filed a consent to change counsel, a demand to change venue, and moved to amend its answer. Having failed to persuade plaintiff to change venue, defendant thereafter moved, on September 17, 2019, for such relief. On November 11, 2019, plaintiff cross-moved to amend its summons and complaint to add an additional party.

Motions to Amend the Pleadings

As defendant's mot. seq. 2 and plaintiff's mot. seq. 4 seek amendment to pleadings, these will be addressed together before the court addresses defendant's mot. seq. 3 seeking change of venue.

The Parties' Positions

In support of its motion, defendant proffers, among other evidence, the affidavit of its member, Ms. Christiana Mavromatis, and a proposed amended pleading. She avers that due to oversights of prior counsel, mistakes, errors and omissions exist within

defendant's filed answer. She specifically asserts that the answer incorrectly admits to the allegation asserted in paragraph 3 of plaintiff's complaint, wherein plaintiff alleges defendant's principal place of business is located in Kings County. Christiana Mavromatis further attests that due to an error with the filing of the articles of organizations with the New York State Department of State, defendant mistakenly identified its headquarters in Kings County; however, subsequent to the filing of the answer, defendant remedied this error, and defendant's headquarters is currently registered and located in Greene County. Further, defendant seeks to supplement its fourth affirmative defense, sounding in comparative negligence, to include additional language that directs any monetary award be reduced by an equal amount to the percentage of fault attributed to plaintiff. Defendant also seeks to add three additional affirmative defenses sounding in improper venue, verdict being subject to Article 16 of the CPLR, and collateral offset being applied to any economic damages.

Plaintiff, in her cross motion, seeks to amend her complaint to add Anna Mavromatis (Mavromatis) as an additional defendant. Plaintiff alleges Mavromatis is the owner of the property where the alleged incident took place. Plaintiff argues that litigation will not be unduly delayed nor expenses increased as depositions have yet to occur, thus, there is no basis to deny such relief.

In opposition, defendant's arguments are restricted to procedural defects in plaintiff's cross motion. It asserts that plaintiff's cross motion is untimely and therefore must be rejected by the court. Defendant asserts that plaintiff fails to present any good

cause for her delay in submitting her cross motion. Thus, defendant argues the cross motion must denied as untimely.

Discussion

CPLR 2214 prescribes the timeline for service of motion papers. Where a notice of motion is served and provides at least sixteen (16) days before the relief being requested is heard, any opposition papers shall be served upon the movant at least seven days prior to the hearing date. In instances where an opponent fails to adhere to such a timeline and opposition is filed untimely, the burden is on the dilatory party to present good cause for its delay and demonstrate that the movant is not prejudice by the court considering such papers (*see Nakollofski v Kingsway Props., LLC*, 157 AD3d 960, 961 [2d Dept 2018]; *Mosheyeva v Distefano*, 288 AD2d 448, 449 [2d Dept 2001]; *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512, 512 [2d Dept 1999]).

Similarly, CPLR 2215 prescribes the time of service requirements for cross motions. Upon proper demand, pursuant to CPLR 2214 (b), a party cross-moving must serve a notice of cross motion at least seven days prior to the date the underlying motion is being heard. Where a party fails to adhere to such a timeframe, the cross-mover must demonstrate good cause for the delay and a lack of prejudice to the moving party (*see generally Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 987-988 [2d Dept 2005]; *First Union Auto Fin., Inc. v Donat*, 16 AD3d 372, 373 [2d Dept 2005]; *Miranda v Devlin*, 260 AD2d 451, 452 [2d Dept 1999]).

As an initial matter, plaintiff's opposition to defendant's motion is untimely and shall not be considered. CPLR 2214 provides strict and clear procedural requirements

that must be adhered to for the filing of answering papers in response to a motion. To the extent that such requirements may be adjusted, it requires a showing by the delinquent party that there is good cause for the delay and that moving party is not prejudiced by the delay. Here, even though there is no apparent prejudice to defendant, plaintiff failed to present or even reference the untimely nature of her opposition and thus the court may not consider such papers (*Nakollofski*, 157 AD3d at 961).

Addressing the timeliness of plaintiff cross motion, while CPLR 2215 provides strict guidelines as to the timeframe a cross motion must be made, plaintiff's cross motion is more appropriately viewed as an independent motion, as it is seeking affirmative relief separate and distinct from defendant's underlying motion (*see Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; *see also generally Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783 [2d Dept 2016]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept 2013]). CPLR 2001 permits the court to disregard irregularities where no substantial right of a party is prejudiced. Here, plaintiff merely denoting its motion as a cross motion falls within such an irregularity which did not prejudice defendant. Accordingly, the court shall consider plaintiff's motion to amend.

"Leave to amend pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*Katz v Castlepoint Ins. Co.*, 121 AD3d 948, 950 [2d Dept 2014], quoting *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; CPLR 3025[b]). "No evidentiary showing of merit is required under CPLR 3025(b). The court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or defense, or is patently

devoid of merit" (*Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Further, a court shall not examine the legal sufficiency or merits of the proposed amended pleading *unless such insufficiency or lack of merit is clear and free from doubt* (*see Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836 [2d Dept 2014] [internal citation and quotation marks omitted] [emphasis added]). "The party opposing the application has the burden of establishing prejudice, which requires a showing that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 664 [2d Dept 2020] [internal citations and quotation marks omitted]). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*McIntosh v Ronit Reality, LLC*, 181 AD3d 579, 579 [2d Dept 2020] [internal citation and quotation marks omitted]).

A substantial portion of defendant's proposed amended answer is neither palpably insufficient to state a defense nor patently devoid of merit. However, the court notes that defendant's proposed amended answer is substantially different in form than its filed answer. Thus, while this does not preclude defendant's relief, it requires an examination of the entire proposed amended answer as compared to the filed answer.

That being said, defendant's proposed additional affirmative defenses sounding in (a) improper venue, (b) the verdict being subject to Article 16 of the CPLR, and (c) collateral offset being applied to any economic damages are potentially meritorious and do not prejudice plaintiff (*see generally White v Royal Prudential Indus.*, 224 AD2d 682, 683 [2d Dept 1996]). Further, defendant's proposed amendment to its previously

asserted affirmative defense likewise is not improper, nor devoid of merit and does not present prejudice to plaintiff. Additionally, the proposed amendments which defendant asserts as restricted to paragraphs seven, nine, and thirteen are not devoid of merit nor present prejudice to plaintiff.[1] Accordingly, that branch of defendant's motion seeking to add the foregoing amendments is granted.

However, addressing defendant's proposed amendment to its admittance of paragraph three in the complaint, i.e. its principal place of business being in Kings County, such proposed amendment is denied. Within her affidavit, Ms. Christina Mavromatis admits, despite the alleged "error" when the corporation was formed, that at the time of answering, defendant's principal place of business was listed as Kings County (*Favia*, 119 AD3d at 836). Indeed, at the time the lawsuit was commencement, defendant's corporate filings with the New York State Department of State listed its principal place of business as Kings County. Thus, per the affidavit submitted in support of the amended answer, the proposed amendment seeking to deny that defendant's principal place of business is in Kings County wholly and clearly lacks merit. Accordingly, that branch of defendant's motion seeking to amend its answer to deny paragraph three of the complaint is denied.[2] Defendant is directed to file an amended

[1] As previously stated, defendant's amended answer is in substantially different form than its filed answer; however, to the extent that defendant specifically identifies these paragraphs, the substance of those paragraphs in the amended answer are appropriate and satisfy the requirements for CPLR 3025. Further, the proposed amended answer's format and restructuring is not improper nor does it alter the substance of its filed answer.

[2] While the court is denying defendant's proposed amendment relating to the location of its principal place of business and granting its proposed amendment asserting an affirmative defense challenging venue, such a holding is not internally inconsistent. Challenges to venue are not exclusive based on

answer consistent with the foregoing within 15 days of the entry of this decision and order.

The court now turns to the plaintiff's proposed amendment. As previously stated, leave to amend shall be freely granted absent prejudice, unjust delay, or in instances where the proposed amendments are palpably improper or devoid of merit (*see Katz*, 121 AD3d at 950; *Lucido*, 49 A.D.3d at 229). Here, plaintiff seeks to add Mavromatis as an additional defendant, whom plaintiff alleges is the owner of the premises where the alleged accident took place. Further, as the allegations of the complaint sound in negligence, the statute of limitations has not yet expired (*see* CPLR 214 [5]). As there is no prejudice to the proposed additional party nor any evidence of undue delay, and the amendment sought is neither palpably improper or devoid of merit, the burden shifts to defendant to present evidence that the amendment would hinder the preparation of her case (*see Lomeli*, 179 AD3d at 664). To this end, defendant fails to present any evidence that the proposed amendment would hinder her preparation. Accordingly, mot. seq. four is granted.

Motion to Change Venue

The Parties' Positions

In support of its motion to change venue, defendant proffers an additional affidavit from Ms. Christiana Mavromatis. Ms. Christiana Mavromatis attests that at no point in defendant's history was its principal place of business located in Kings County. She

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residency, but may be based upon a variety of legal grounds such as witness convenience or inability to have an impartial trial (*see* CPLR 510).

asserts that due to an error, defendant's corporate filings identified Kings County as its principal place of business but that during the entirety of its operating history defendant always worked out of Greene County. Ms. Christiana Mavromatis testifies that all client interactions and business transactions occurred in Greene County. Further she avers that in further support of changing venue, the situs of the accident is Greene County. She also contends that her previous attorney failed to take appropriate steps to remedy the apparent mistakes with defendant's corporate filings and failed to dispute venue, which is why there was a delay in the instant challenge.

Ms. Christiana Mavromatis asserts there is no prejudice to plaintiff as plaintiff is not a resident of New York and that there has not yet been substantial discovery in the action. Thus, defendant argues, with no substantial progress made, there is no basis to deny its motion. If denied, however, Ms. Christiana Mavromatis attests that defendant will be subject to an unfair trial in Kings County. She maintains that defendant will be significantly prejudiced as a jury composed of Kings County residents will be inclined to value the assessment of damages much higher than that of a jury composed of Greene County residents.

Discussion

As aforementioned, CPLR 2214 controls the timeframe for motion practice. Where a motion is served at least sixteen days prior to the relief being heard, any opposition papers shall be served at least seven days prior to such date (*see* CPLR 2214). Where opposition is not filed timely, the burden is on the dilatory party to present good cause for its delay and demonstrate that the movant is not prejudice by the court

considering such papers (see *Nakollofski*, 157 AD3d at 961; *Mosheyeva*, 288 AD2d at 449; *Risucci*, 258 AD2d at 512). Plaintiff's opposition to defendant's motion is untimely and shall not be considered. Here, even though there is no apparent prejudice to defendant, plaintiff failed to present or even reference the untimely nature of her opposition and thus the court may not consider such papers (*Nakollofski*, 157 AD3d at 961).

Shifting to the substance of defendant's motion, venue shall be "in the county in which one of the parties resided when [the action] was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff" (CPLR 503 [a]). A corporate entity "shall be deemed a resident of the county in which its principal office is located" (CPLR 503 [c]). A demand to change venue based on the designation of an improper county (*see* CPLR 503 [a], 510 [1]) must be "served with the answer or before the answer is served" (CPLR 503, 511[a]). Where a party's demand to change venue is untimely and it moves pursuant to CPLR 511 the matter is addressed within the court's sound discretion (*see Saint-Louis v Esposito*, 171 AD3d 824, 824-825 [2d Dept 2019]). Where a motion is made based upon the residency of a party, for the purposes of venue, residency is based upon the locale where the party resided at the time the lawsuit was commenced (*see Baez v Marcus*, 58 AD3d 585, 586 [2d Dept 2009] citing *Galan v Delacruz*, 4 AD3d 449 [2d Dept 2004]; *Bailon v Avis Rent A Car*, 270 AD2d 439 [2d Dept 2000]; *Llorca v Manzo*, 254 AD2d 396, 397 [2d Dept 1998]; *see also* CPLR 503 [a]).

Where a litigant is a corporate entity, "[t]he sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county" (*Kidd v 22-11 Realty, LLC*, 142 AD3d 488, 489 [2d Dept 2016] [internal quotation marks and citation omitted]; *see also* CPLR 503 [c]). To successfully challenge and change venue, the corporate entity must demonstrate that its certificate of incorporation either designates a different county or that such certificate was amended prior to the commencement of the action (*see generally Drayer-Arnow v Ambrosio & Co., Inc.*, 181 AD3d 651 [2d Dept 2020]; *Hamilton v Corona Ready Mix, Inc.*, 21 AD3d 448, 449 [2d Dept 2005]; *Altidort v Louis*, 287 AD2d 669, 670 [2d Dept 2001]).[3]

The instant facts are unique to the extent defendant proffers evidence that it amended its corporate filings to designate Greene County as its principal place of business subsequent to the commencement of the lawsuit. However, such amendment is irrelevant in determining proper venue, as venue is established at the time the lawsuit was commenced. Ms. Christiana Mavromatis' affidavit itself provides that at the time of commencement, though through an apparent error, the county designated as defendant's principal place of business was Kings County. As such, there is no basis to change venue based upon defendant's subsequently amended corporate filings, as holding the opposite would permit a corporate entity to forum shop by simply amending its corporate filings after a lawsuit is initiated.

[3] The Second Department in *Drayer-Arnow*, *Hamilton*, and *Altidort*, unambiguously assert that venue is determined at the time of commencement, and found that in each instance defendant failed to proffer an amended certificate of incorporation entitling it to a change in venue.

Defendant's additional challenge to venue sounding in the lack of an impartial trial is also unavailing. Defendant's argument that Kings County jurors will be inclined to award a higher award for damages if it is found liable does not present a basis to change venue. In instances that a movant asserts that venue must be moved due to the inability of an impartial trial, it has the burden of demonstrating through admissible factual evidence "a strong possibility that an impartial trial cannot be obtained" (*Behrins & Behrins, P.C. v Chan*, 40 AD3d 560, 560 [2d Dept 2007] [internal citations omitted]). A "mere belief, suspicion, or feeling [is] not [a] sufficient ground[] for the granting of the motion" to change venue (*Krupka v County of Westchester*, 160 AD2d 681, 681 [2d Dept 1990] [internal quotation marks and citations omitted]; *see also Levine v North Shore Long Is. Jewish Healthcare Sys., Inc.*, 163 AD3d 644, 645 [2d Dept 2018]). Defendant's conclusory assertions concerning a potential higher award is nothing more than mere belief, suspicion, or feeling, unsupported by any factual evidence. Further, such a concern between metropolitan communities compared to rural communities is not a basis to find that a litigant will be subject to an impartial trial (*see generally Mikul v Silverman*, 27 AD3d 625, 626 [2d Dept 2006] [internal citations omitted]). Consequently, defendant's motion, mot. seq. three, is denied.

Conclusion

Accordingly, it is

ORDERED, that the defendant's motion, in mot. seq. two, seeking to amend its answer is granted only to the extent consistent with this decision, and it is further

ORDERED, that defendant's, in mot. seq. three, seeking to change venue, is denied; and it is further

ORDERED, that the plaintiff's motion, in mot. seq. four, to amend her summons and complaint to add another named defendant is granted.

To the extent not specifically addressed herein, the parties remaining contentions were considered and found to be without merit.

The foregoing constitutes the decision and order of the court.

E N T E R

J.S.C.