

Mooney v Mizrahi

2020 NY Slip Op 34522(U)

March 6, 2020

Supreme Court, Queens County

Docket Number: Index No. 700983/2018

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30

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BUDDY MOONEY,

Index No.: 700983/2018

Plaintiff,

Motion
Date: January 8, 2020

-against-

MARIA MIZRAHI and CODY TYSON,

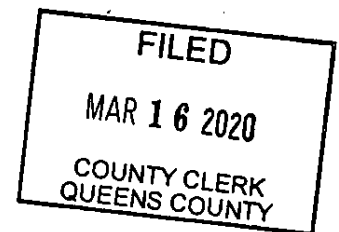
Motion Cal. No.: 42

Motion Sequence No.: 2

Defendants.

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The following e-file papers numbered 27-56 and papers numbered 1-3 submitted and considered on this motion by defendants Maria Mizrahi and Cody Tyson seeking an Order pursuant to Civil Practice Law and Rules (CPLR) for true consolidation of *Wilson Benavente and Angel Rodriguez v New York City Transit Authority*, et al., Supreme Court, Kings County Index no. 517489/2018 and *Mark Waiters v New York City Transit Authority*, et al., Supreme Court Kings County under Supreme Court, Queens County Index No. 700983/2018, where the respective plaintiffs in the above captioned action no. 2 are motor vehicle passengers involved in the same accident sharing common questions of law and facts; or in the alternative; consolidating for joint discovery and trial *Wilson Benavente and Angel Rodriguez v New York City Transit Authority*, et al., Supreme Court, Kings County Index no. 517489/2018 (Action no. 3) and *Mark Waiters v New York City Transit Authority*, et al., Supreme Court Kings County Index No. 521595/2018 (Action no. 4) with the within actions as they arise out of the same circumstances and involve common questions of law and facts.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 27-48
Affirmation in Opposition-Affidavits-Exhibits....	EF 49-54
Affirmation in Partial Opposition- Affidavits-Exhibits.....	1-3
Reply Affirmation-Affidavits-Exhibits.....	EF 55-56



This is an action commenced by plaintiff Buddy Mooney (hereinafter "Mooney") on January 22, 2018 to recover damages for serious injuries sustained in a motor vehicle accident which occurred on August 30, 2017 at or near the intersection of Stuyvesant Avenue and DeKalb Avenue, County of Kings, State of New York. A bus owned by wither New York City Transit Authority, Metropolitan Transit Authority and/or MABSTOA and operated by Mooney came into contact with a vehicle owned by defendant Maria Mizrahi and operated by defendant Cody Tyson. Defendants Maria Mizrahi and Cody Tyson make this application for an Order pursuant to CPLR for true consolidation of *Wilson Benavente and Angel Rodriguez v New York City Transit Authority*, et al., Supreme Court, Kings County Index no. 517489/2018 and *Mark Waiters v New York City Transit Authority*, et al., under Supreme Court Queens County Index No. 700983/2018, where the respective plaintiffs in the above captioned action no. 2 are motor vehicle passengers involved in the same accident sharing common questions of law and facts; or in the alternative; consolidating for joint discovery and trial *Wilson Benavente and Angel Rodriguez v New York City Transit Authority*, et al., Supreme Court, Kings County Index no. 517489/2018 (Action no. 3) and *Mark Waiters v New York City Transit Authority*, et al., Supreme Court Kings County Index No. 521595/2019 (Action no. 4) with the within actions as they arise out of the same circumstances and involve common questions of law and facts. The aforementioned matters all arise from a two-vehicle accident which occurred on August 30, 2017 at or near the intersection of Stuyvesant Avenue and DeKalb Avenue in the County of Kings, State of New York. Plaintiff in action 2, Kimberly Gourdine as well as Wison Benavente and Angel Rodriguez were all allegedly passengers on the bus while plaintiff Mark Waiters was a passenger inside moving defendants Maria Mizrahi and Cody Tyson's vehicle. On January 22, 2018, plaintiff Buddy Mooney commence action 1 under index number 700983/2018 with the filing of a summons and complaint in the Supreme Court, Queens County. Defendants joined issue with the service of a verified answer on March 27, 2018. On March 15, 2018 plaintiff Kimberly Goudine commenced action number 2 with the filing of a summons and complaint in the Supreme Court, County of Kings under index number 505234/2018. On or about April 5, 2018, co-defendants New York City Transit Authority, Metropolitan Transportation Authority and MTA Bus Company filed a verified answer with cross-claim against moving defendants, and moving defendants filed a verified answer with cross-claims on or about June 1, 2018. New York City Transit Authority, Metropolitan Transportation Authority and MTA Bus Company and Buddy Bart Mooney, Bus Operator filed an amended answer on or about June 6, 2018. Action 1 and Action 2 were consolidated under index number 700983/2018 by Order of Hon. Cheree A. Buggs dated August 15, 2018.

On August 28, 2018 the action *Wilson Benavente and Angel Rodriguez v New York City Transit*, et al., was commenced in the Supreme Court, Kings County, under Index number 517489/2018. On October 11, 2018, co-defendants joined issue with the filing of a verified answer and then served an amended verified answer on October 18, 2018. On May 20, 2019, an Order pursuant to CPLR §308 was filed. Moving defendants served a verified answer dated July 10, 2019.

On October 25, 2018, the action *Mark Waiters v New York City Transit Authority*, et al., was commenced in the Supreme Court, Kings County under Index number 521595/2018. On November 20, 2018, co-defendants filed a verified answer and moving defendants filed a verified answer on

July 10, 2019.

Movants argue that CPLR §602(a) generally permits a Court to consolidate actions involving common questions of law or fact to make such other orders concerning proceedings therein in order to avoid unnecessary costs or delay. Also, CPLR §602(b) provides that where an action is pending in the supreme court it may upon motion remove to itself another action pending in another court and consolidate it in the Supreme Court. Since plaintiff in action number 2 Kimberly Gourdine and the other plaintiffs Wilson Benavente and Angel Rodriguez were presumably passengers on the defendant bus, and Mark Waiters was a passenger inside the moving defendants' vehicle, determining liability will involve similar, if not identical questions of fact and law, and identical witnesses on the issue of liability, but not damages.

Plaintiffs in action 3, Wilson Benavente and Angel Rodriguez opposed the motion on the grounds that they both reside in the County of Kings, and that the accident occurred in the County of Kings. They do not oppose consolidation of the matters but oppose changing the venue of the action from the County of Kings to the County of Queens. Plaintiffs argued that material witnesses are either employed or reside in Kings County, and they treated with physicians located in the County of Kings. Movants failed to demonstrate that the convenience of material witnesses would be better served by changing the venue of the case (*see MI v Trinity-Pawling School*, 125 AD3d 615 [2d Dept 2015]). In the *MI* case, the Appellate Division Second Department held that a trial court may transfer the venue of a case where "the convenience of material witnesses and the ends of justice will be promoted by the change...motions to transfer venue under CPLR 510(3) are addressed to the sound discretion of the court, and absent an improvident exercise of discretion, the order will not be disturbed on appeal. The party moving for a change of venue pursuant to CPLR 510(3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change." (*Id.*) The movant must set forth the following: "the names, address and occupations of material witnesses, (2) the facts to which these witnesses will testify at trial, (3) a showing that those witnesses are willing to testify, and (4) a showing that those witnesses would be inconvenienced if the venue of the action was not changed." (*Id.*) Also, pursuant to CPLR 505(b) and General Municipal Law 50-H, the place of an action against NYCTA shall be in the county in which the cause of action arose.

New York City Transit Authority (hereinafter "NYCTA") partially opposed the motion, arguing that if these matters were joined for true consolidation for all purposes, it would be severely prejudiced. NYCTA represents itself and Buddy Bart Mooney in action no 2. Plaintiff in action no 1, Buddy Mooney is currently a Bus Operator for the NYCTA, therefore, the only relief he can recover against NYCTA is Worker's Compensation. Moreover, if the Court allowed a pure consolidation for all purposes of all four actions together, the jury would be misguided and confused, as Plaintiff Buddy Mooney would be reflected as both a Plaintiff and a Defendant in the consolidated actions. Consolidation should be denied if it would result in jury confusion. Further, although the four different actions arose from the same incident and also involves similar issues of law, however NYCTA is not named as a defendant in action 1 and it does not meet the standard of common issues of law and fact as stated under CPLR §602 as regards NYCTA. NYCTA is not a defendant in action

no. 1 and therefore has not asserted cross-claims against the defendants in that action. NYCTA does not object to the consolidation of these actions for joint trial, provided it be allowed to assert cross-claims against the defendants in Action 1 following the consolidation.

In response to the opposing papers, movants maintained that the motion should be granted. There is no opposition to the branch of the motion seeking to consolidate the matters. Wilson Benavente and Angel Rodriguez failed to cross-move for any affirmative relief to prevent the venue transfer of the action. The purpose of CPLR 510 is to promote judicial efficiency and convenience. None of the parties will be inconvenienced in venturing from the County of Kings to the County of Queens, or vice versa. The correct venue of the consolidated actions would be in the county of Queens as the first action was commenced in the County of Queens.

DISCUSSION

CPLR 602(a) states the following:

Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Pursuant to CPLR 505(b) titled “Actions involving public authorities”

The place of trial of an action against the New York City Transit Authority shall be in the county within the city of New York in which the cause of action arose, or, if it arose outside of the city, in the county of New York.

CPLR 510 titled “Grounds for change of place of trial” states the following:

The court, upon motion, may change the place of trial of an action where:

1. The county designated for that purpose is not a proper county; or
2. There is reason to believe that an impartial trial cannot be had in the proper county; or
3. The convenience of material witnesses and the ends of justice will be promoted by the change.

In conclusion, the Court finds that all cases should be joined for joint trial in the Supreme Court, County of Queens. The action involving Kimberly Gourdine and New York City Transit Authority et al has already been transferred here and given an Index number, 710779/2019, therefore, the Court finds that New York City Transit Authority is not now prejudiced by the transfer of these actions to Queens County for joint trial. Therefore, it is

ORDERED, that this action shall be consolidated with action 710779/2019 and Kings County Index numbers 517489/2018 and 521595/2018 for joint trial; and it is further

ORDERED, that the Clerk of the Supreme Court of the State of New York, County of Kings upon being served with a copy of this Order with Notice of Entry and payment of any required fees, shall transfer all papers filed under Index numbers 517489/2018 and 521595/2018 to the Clerk of the Supreme Court of the State of New York, County of Queens; and it is further

ORDERED, that separate Index Numbers, Requests for Judicial Intervention (RJI) and Notes of Issue shall be filed for each action; and it is further

ORDERED, that the captions of the actions joined for joint trial shall be as follows:

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
-----X

BUDDY MOONEY,
Plaintiff,

Action No. 1
Index No.:700983/2018

-against-

MARIAH MIZHRAHI and CODY TYSON,
Defendants.

-----X
KIMBERLY GOURDINE,
-----X

Plaintiff,

Action No. 2
Index No.: 710779/2019

-against-

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY, BUDDY BART MOONEY-BUS
OPERATOR, MARIA MIZAHAI and CODY AVIANCE TYSON
Defendants.

-----X

-----X
WILSON BENAVENTE and ANGEL RODRIGUEZ,

Action No. 3
To be assigned

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MANHATTAN and BRONX SURFACE TRANSIT
OPERATING AUTHORITY, BUDDY MOONEY,
CODY AVIANCE TYSON and MARIA MIZRAHI,

Defendants.

-----X
MARK WAITERS,

Action No. 4
To be assigned

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MANHATTAN and BRONX SURFACE TRANSIT
OPERATING AUTHORITY, BUDDY MOONEY,
MARIA MIZRAHI and CODY TYSON,

Defendants.


FILED
MAR 16 2020
COUNTY CLERK
QUEENS COUNTY

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ORDERED, that the movant shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry on all parties to the actions combined, on the Clerk of the Supreme Court of the State of New York, County of Kings, on the Clerk of the Supreme Court of the State of New York, County of Queens and at the time of filing of the Notes of Issue, upon the Clerk of the Trial Term office of the Supreme Court of the State of New York, County of Queens.

This constitutes the decision and Order of the Court.

Dated: March 6, 2020



Hon. Chereé A. Buggs, JSC