

Maerov v Long Is. Airline, LLC
2021 NY Slip Op 31142(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 153045/2020
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN

PART IAS MOTION 58EFM

Justice

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LANCE MAEROV, Individually and as Administrator
of the Estate of WILLIAM MAEROV, deceased,¹

and

CHARLOTTE MAEROV, Individually and as
Administratrix of the Estate of BONNIE B.
KRUPINSKI, deceased,

Plaintiffs,

- against -

LONG ISLAND AIRLINE, LLC, EAST HAMPTON
AIRLINES, LLC, and ROBERT WHITE as
Administrator and Executor of the Estate of BERNARD
KRUPINSKI, deceased,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26,
27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39

were read on this motion to/for

CHANGE VENUE

In this wrongful death and survival action, Defendants Long Island Airlines, LLC and Robert White, as Administrator and Executor of the Estate of Bernard Krupinski, deceased (“Defendants”), move, pursuant to CPLR 510(1) and (3) and CPLR 511, to transfer the venue of this action to Suffolk County on the ground that the designation of the venue in New York County was improper and that the convenience of material witnesses and the ends of justice will

¹ See Doc. 42 (Consolidation Order dated January 5, 2021).

be promoted by the change to Suffolk County. The motion is opposed in all respects by Plaintiff Charlotte Maerov against whom it was brought. Although Plaintiff Lance Maerov is not a party in the instant action, he is a party in the consolidated action,² which is the only active action in this case. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 2018, two aircraft, each owned and operated by Defendants, departed Newport, Rhode Island, en route to their destination of East Hampton, New York. Plaintiff Charlotte Maerov ("Ms. Maerov") and her friend were passengers in an aircraft piloted by Frank Pinter. The other aircraft (the "Subject Aircraft") crashed into the Atlantic Ocean, as it was flying from Newport State Airport in Newport, Rhode Island to East Hampton Airport in Wainscott, New York, resulting in the deaths of its commercial pilot, Jon Dollard ("Dollard"), and the three passengers, Bernard Krupinski ("Mr. Krupinski") and his wife Bonnie B. Krupinski (collectively, the "Krupinskis"), and their grandson William Maerov.

Defendant Robert White is the Administrator and Executor of the Estate of Bernard Krupinski, who, along with co-Defendants East Hampton Airlines, LLC, and Long Island Airline, LLC, owned, managed and/or operated the Subject Aircraft.

Ms. Maerov, the granddaughter of the Krupinskis, is the Administratrix of the Estate of Bonnie B. Krupinski and is bringing this action on behalf of herself individually, as well as in a representative capacity.

² This Court, in its decision dated January 5, 2021, (Doc. 42), directed that the instant action be consolidated with Index No. 153044/2020 under the latter index number.

Plaintiff Lance Maerov (“Mr. Maerov”), the father of Ms. Maerov as well as of the decedent, William Maerov, is the Administrator of the Estate of William Maerov, and is bringing this action on behalf of himself individually, as well as in a representative capacity.

In the complaint, the attorneys for Ms. Maerov allege, inter alia, that “[t]he meteorological information available from multiple sources to Dollard and [Mr. Krupinski] ... indicated the existence and presence of extreme hazardous flight conditions on the route of flight and near the destination” (Doc. 1 ¶ 24). The conditions allegedly included “extreme thunderstorm activity” (*id.* ¶ 25). Ms. Maerov further alleges that “Dollard and [Mr. Krupinski] knowingly and intentionally flew the Subject Aircraft directly into the most dangerous depicted weather, rather than diverting to a different airport or altering the flight path to the destination airport” (*id.* ¶ 41).

On July 21, 2020, Defendants served a Demand for Change of Place of Trial on Ms. Maerov seeking a change of venue from New York County to Suffolk County on the ground that none of the parties resided in New York County at the time this action was commenced, and that venue was proper in Suffolk County based on the residence of all parties.

On July 24, 2020, Ms. Maerov responded to the Demand with an Affidavit wherein she attested that, on May 21, 2020, when this action was commenced, her residence was 912 Fifth Avenue, [Apartment 1B], New York, New York (the “NYC residence”). Ms. Maerov, a college student, represented in her affidavit that she kept personal belongings in a bedroom in her father’s apartment at the NYC residence.

On August 4, 2020, Defendants filed the instant motion.

I. The Parties' Contentions

Defendants argue that the venue of this action must be changed to Suffolk County as the residence of all parties, the former residence of all four of decedents, the location of the accident and the location where the subject aircraft's wreckage is being stored, and the venue where all witnesses reside. Defendants further argue that on April 17, 2020, "only one month before [Ms. Maerov] commenced this action, she listed East Hampton as her residence when filing a Petition with the Suffolk County Surrogates Court" and that despite her contention that she lives in her father's New York apartment, she "has not submitted any documentation to establish residency, nor a change of address for her drivers' license or voter registration ... [and] has not provided any tax records³ or filings documenting that she maintains the New York City address as a residence."

Additionally, Defendants submit the following:

1. The deceased commercial pilot, Jon Dollard, and the three passengers, Bernard Krupinski, William Maerov, and Bonnie B. Krupinski were killed, all were Suffolk County residents at the time of their deaths. See Exhibit A, ¶¶ 15-19.
2. The aircraft wreckage was recovered in Suffolk County and is being stored at Sea Tow Services Eastern Long Island located at 2700 Hobart Road, Southold, New York, located in Suffolk County. Any wreckage inspection by the parties and their experts will take place at this location.
3. Plaintiff specifically identifies Pilot Frank Pinter in her Complaint as the critical witness in this case. See Exhibit A, ¶¶ 15, 18, 22. Mr. Pinter is a lifelong Suffolk County resident and is currently employed as a charter pilot in Suffolk County. Mr. Pinter has submitted an Affidavit in support of the within motion attesting that he would be extremely inconvenienced if he had to travel from Suffolk County to New York County for the proceedings.
4. Additionally, Mr. Pinter is a senior citizen and, considering the risks associated with the COVID 19 pandemic (which continues to physically restrict residents of New York State, and particularly New York City, Nassau and Suffolk Counties) he is uncomfortable and has serious reservations about travelling into New York City for any reason, let alone

³ Plaintiff disputes any tax fraud (Doc. 26 at 2). This issue is not before this Court.

a lawsuit that has absolutely nothing to do with New York City. Pinter Aff., ¶ 9, Exhibit I.

5. The Complaint includes photographs taken by "a local resident" of the thunderstorm. See Exhibit A, ¶¶31-33. This local resident of Amagansett will be identified and will be called to testify.

6. Decedent pilot, Jon Kenneth Dollard, was an employee of Long Island Airlines and, a longtime resident of Hampton Bays in Suffolk County, where his family resides.

7. As disclosed during the NTSB investigation, the Tower Controller at East Hampton Airport (HTO) attempted to contact the decedent pilot, Jon Dollard, in the aircraft several times. Several East Hampton Air Traffic Controllers will be called as witnesses regarding their communications with the pilot prior to the accident.

8. The East Hampton Police Department, the Suffolk County Police Department and the Suffolk County EMT services arrived at the scene and assisted in search and recovery efforts. These first responders, who are all employed in Suffolk County, will be called to testify as witnesses.

9. Upon information and belief, several East Hampton lifeguards located and recovered the first body from the plane. Several hours later, the U.S. Coast Guard recovered a second body from the water near the crash site off the shore of Indian Wells Beach in Amagansett. These responders will be identified in discovery and called to testify as witnesses. They are all employed in Suffolk County.

10. Autopsies of Bonnie and Ben Krupinski and the Pilot Jon Dollard were performed in the Suffolk County Medical Examiner's Office in Hauppauge, NY, by the Deputy Chief Medical Examiner, Paul Mellen, M.D.

11. Defendants have been advised that Plaintiff's decedent, Bonnie Krupinski, and her husband, Ben Krupinski, owned several businesses located in Suffolk County. The Krupinski's owned a construction company, "Krupinski Builders;" Long Island Airlines LLC, as well as three restaurants in East Hampton. Defendants expect to call many of the employees of the Krupinski's various business ventures as fact witnesses regarding Plaintiff's damages claims.

12. Decedent Ben Krupinski was the registered owner of the accident aircraft, a Piper PA-31-350, N41173, which was stored and maintained at East Hampton Airport. Defendants intend to call employees from East Hampton Airport as witnesses concerning the aircraft's airworthiness, maintenance and flight history.

13. The Estates of both Bonnie B. Krupinski and Ben Krupinski [] filed for probate in Suffolk County Surrogate's Court. As stated above, Plaintiff Charlotte Maerov was appointed Special Adminstratrix by the Suffolk County Surrogate's Court in April, 2020, and stated in her Court filings that she was a resident of East Hampton, as did her father.

(Doc. 23 at 5-7).

In opposition, Ms. Maerov argues that she maintains multiple residences; has maintained the NYC residence all her life; she stays in the NYC residence when she is away from college; she shares the NYC residence with her father who is her sole living parent; she “has a bedroom at her [NYC] residence; she keeps personal belongings at her NYC residence; her credit card statements are sent to her NYC residence; her health insurance statements are sent to the NYC residence; she receives deliveries at her NYC residence; ... and, her health care providers are located in New York City [and] ... [her] tax advisor [who is Defendant Robert White] counsel her to change her address from New York City to Suffolk County, solely for tax purposes” (Doc. 26 at 2). Ms. Maerov also indicates that her father, who, this Court notes, is a party to the consolidated action, is a New York County resident.

Ms. Maerov further argues that “[o]ther than [Mr. Pinter], the defense fails to identify any ‘material’ witness by name, address, and occupation. Nor does the defense indicate that any of the alleged ‘material’ witnesses have been contacted and agreed to testify, and there is no meaningful discussion of the witnesses’ proposed testimony or alleged inconvenience.” She additionally argues that the affidavit of Mr. Pinter carries little weight since he is a former employee of Defendant (Doc. 26 at 14, citing *Port Bay Associates v. Soundview Shopping Center*, 197 A.D. 848, 602 [4th Dep’t 1993]). She also argues that 49 CFR § 9.9(d) prevents Federal Aviation Administration employees from testifying at a trial. Moreover, she argues that Defendants failed to establish what material information would be provided by the first responders.

Moreover, Ms. Maerov contends, inter alia, that “[t]he route of the accident flight was entirely over the Atlantic Ocean [and that] the aircraft did not fly over Suffolk County [and,

further, that] ... the location of the wreckage in Suffolk County is a product of defense counsel's refusal to relocate it to a suitable aircraft storage facility where a proper post-crash inspection could be performed."

In reply and further support of their motion, Defendants argue, in effect, that New York County does not qualify as Ms. Maerov's residence and, further, that it is only a part-time residence of her father, and that it was chosen as a venue in an effort to forum shop. Defendants further argue that "the specific planning and circumstances leading up to the subject flight, the accident itself, the search and rescue efforts, the thorough post-accident investigation, as well recovery of the four decedents, and post-mortem autopsies, all occurred in Suffolk County."

LEGAL CONCLUSIONS

To prevail on a motion to change venue, the movant bears the burden of adhering to the procedures for changing venue pursuant to CPLR 511; showing that the plaintiff's choice of venue was improper pursuant to CPLR 503; and showing that their choice of venue is proper pursuant to CPLR 510.

CPLR 511 provides the procedures for changing venues. CPLR 511(a) entitled "Time for motion or demand" provides:

A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.

(CPLR 511[a]).

CPLR 511(b) entitled "Demand for change of place of trial upon ground of improper venue, where motion made" provides:

The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days, after service of the demand, unless within five days after such service

plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

(CPLR 511[b]).

CPLR 503 entitled “Venue based on residence” provides, in relevant part, that:

(a) ... Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it 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. A party resident in more than one county shall be deemed a resident of each such county.

(b) ...An ... administrator ... shall be deemed a resident of the county of his appointment as well as the county in which he actually resides.

(CPLR 503[a], [b]).

CPLR 510 entitled “Grounds for change of place of trial” provides, in relevant part, that:

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
- ...
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

(CPLR 510[1], [3]).

A. CPLR 510(1)

“Although a person may have more than one residence for venue purposes ..., to consider a place as such, he [or she] must stay there for some time and have the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency” (*Katz v Siroty*, 62 AD2d 1011, 1012 [2d Dept 1978]). “Residence requires more stability than a brief sojourn for business, social or recreational activities” (*id.* at 1012).

In moving to change the place of trial, defendant assumes the burden of disproving plaintiff's residence at the time the action was commenced (*Clarke v Michael Ahern Prod. Services, Inc.*, 181 AD2d 514, 515 [1st Dept 1992]). Once defendant meets this burden, plaintiff is then required to establish through documentary evidence that he or she intended to retain residency for some length of time and with some degree of permanency (*Buziashvili v Ryan*, 264 AD2d 797, 798 [2d Dept 1999]).

In the case at hand, Plaintiffs appear individually and as estate representatives; therefore, both 503(a) and (b) apply.

Regarding the residency of Ms. Maerov, Defendants made a showing that, on the date that this action was commenced, Ms. Maerov resided in East Hampton, New York, in Suffolk County. However, Plaintiff successfully established that, although she was not staying at the NYC residence on the date that this action was commenced, she had a second residence in New York at the NYC residence. Any perceived paucity of the documentary evidence is explained by the fact Ms. Maerov is a college student. Ms. Maerov successfully showed that she intended to retain New York as her residence for some length of time and with some degree of permanency.

Significantly, Plaintiff is a twenty-year-old college student with multiple residences. When she is "home for holidays or family gatherings," she resides at the NYC residence where she has her own bedroom and personal belongings; and at which address she receives her monthly banking statements, bills for school expenses, and deliveries (Doc. 28 [Ms. Maerov Aff.]). Also, her taxes were paid from the NYC residence until she was advised by Defendant Robert White to file taxes using her address in East Hampton, where she also maintains a residence (*id.*). In addition, her health insurance is under her father's policy and the correspondence concerning her benefits are delivered to the NYC residence (Doc. 30 at 8). Her

personal credit card is also under her father's account and statements for her card are delivered to the NYC residence (*id.* at 6).

This Court further notes that, at the date that this action was commenced, the COVID-19 exposure rate was very high in New York City and many New Yorkers with the means to do so left the city (often with the intent to return). Indeed, before a state-wide stay-at-home order was declared on March 20, 2020, Ms. Maerov stayed at the NYC residence for approximately two weeks in January of 2020; for four days from February 27 through March 2, 2020; and for three days from March 6 through 9, 2020 (*see* Doc. 30 [Mr. Maerov Aff. & supporting docs.]). In light of the aforementioned facts of this case, this Court finds that Ms. Maerov established residency in New York County for venue purposes.

Further, it is undisputed that Ms. Maerov's father resides in New York County (Doc. 23 at 19; Doc. 39 at 3). Mr. Maerov is a plaintiff in the consolidated action, which is the only active action in this case. Therefore, Defendants failed to establish that New York is not a proper county in this action.

B. CPLR 510(3)

"A change of venue based on the convenience of witnesses may only be granted after there has been a detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief" (*Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299, 299 [1st Dept 2004], citing *O'Brien v. Vassar Brothers Hospital*, 207 A.D.2d 169, 172-173 [2d Dept 1995]). "The affidavit in support of such motion must contain the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed

witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted” (*id.* at 299).

Here, Defendants fail to satisfactorily show that the convenience of nonparty witnesses would in fact be served by the granting of such relief since they fail to provide an affidavit in support of their motion containing the names, addresses, and occupations of the prospective witnesses, disclosing the facts to which the proposed witnesses will testify at the trial, and showing that the proposed witnesses are, in fact, willing to testify and would be inconvenienced in the event that a change of venue is not granted (*Jacobs*, 9 AD3d at 299 [1st Dept 2004], citing *O'Brien*, 207 A.D.2d at 172-173). The affidavit in support of the motion does not indicate that Defendants contacted the nonparty witnesses or, inter alia, identified any specific inconveniences that might be incurred by the witnesses, or even that these witnesses would testify at trial, and “such inadequacies render [D]efendants’ moving papers insufficient as a matter of law” pursuant to CPLR 510 (3) (*id.* at 300; *Harris v Havanera Tropical Mkt. Corp.*, 160 AD2d 344, 345 [1st Dept 1990]; *Pittman v Maher*, 202 AD2d 172, 177 [1st Dept 1994] [“A presumption that a witness will be inconvenienced merely because the courthouse is located in a different county is unwarranted”]).

The only witness⁴ identified by Defendants, Mr. Pinter, was an employee of Defendant Long Island Airline, LLC at the time of the subject incident, and, according to defense counsel’s email correspondence (Doc. 34), is represented by the counsel for Defendants in this action. Accordingly, his convenience carries little weight on this application (*cf. MacRobbie by MacRobbie v Olivio*, 200 AD2d 373 [1st Dept 1994]; *Coles by Coles v LaGuardia Med. Group, P.C.*, 161 AD2d 166 [1st Dept 1990]). Regarding any COVID-19 concerns, while the Court is

⁴ *Cf.* note 5.

mindful of any health concerns due to the pandemic and takes them very seriously, it is also aware of the fact that Mr. Pinter, by his own admission, is currently employed as a pilot for an air charter company with a busy flight schedule.

Although the convenience of public officers and employees and the use of public records at trial are given weighty consideration in connection with motions to change venue, (*Powers v E. Hudson Parkway Auth.*, 75 AD2d 776, 777 [1st Dept 1980]), here, Defendants fail to identify any public officers⁵ or employees, disclose facts to which these witnesses will testify at trial, and show that they are, in fact, willing to testify and would be inconvenienced in the event that a change of venue is not granted (*compare Port Bay Assoc. v Soundview Shopping Ctr.*, 197 AD2d 848, 848 [4th Dept 1993]; *Maynard v Oakes*, 144 AD2d 229 [3d Dept 1988]).

Defendants' remaining arguments are unavailing.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the Motion to Change Venue is denied in all respects; and the Clerk is directed to transfer this entire motion and this order to the consolidated action, Index No. 153044/2020, and re-file them under the consolidated action, Index No. 153044/2020; and it is further,

ORDERED that counsel for Plaintiffs shall, within 20 days from the date of this order, serve a copy of this order with notice of entry; and it is further,

⁵ Although Deputy Chief Medical Examiner, Paul Mellen, M.D., was identified in the moving papers, Defendants did not contact him, and/or did not disclose that this witness would be willing to testify or would be inconvenienced in the event that a change of venue is not granted (Doc. 23 at 17).

ORDERED that the parties are to appear for a virtual Preliminary Conference on May 17, 2021 at 12:30 PM. A Microsoft Teams link has been sent to counsel's emails.

<u>4/8/2021</u> DATE		 J.S.C. HON. DAVID B. COHEN J.S.C. DAVID BENJAMIN COHEN, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED ☐ GRANTED ☐ SETTLE ORDER ☐ INCLUDES TRANSFER/REASSIGN	☒ DENIED	☒ NON-FINAL DISPOSITION ☐ GRANTED IN PART ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT
APPLICATION:			☐ OTHER
CHECK IF APPROPRIATE:			☐ REFERENCE