

<b>Giordano v Wakefern Food Corp.</b>
2021 NY Slip Op 31321(U)
April 14, 2021
Supreme Court, Kings County
Docket Number: 510573/2020
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 14<sup>th</sup> day of April, 2021.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

-----X

MARY ANN GIORDANO

DECISION AND ORDER

Plaintiff,

Index No. 510573/2020

-against-

WAKEFERN FOOD CORPORATION d/b/a  
SHOP RITE SUPERMARKET

Defendant

-----X

The following papers numbered 1 to read herein  
Notice of Motion/Order to Show Cause/  
and Affidavits (Affirmations) Annexed  
Answers/Opposing Affidavits (Affirmations)  
Reply Affidavits (Affirmations)  
Affidavit (Affirmation)  
Other Papers

Papers Numbered

1-2, 3-4  
5, 6  
7-8

Upon the foregoing papers, defendant, Wakefern Food Corporation d/b/a Shop Rite Supermarket ("Wakefern Food") moves for an order pursuant to CPLR § 511 (a) and (b), changing the venue of the underlying action, from Kings County to Queens County (Mot. Seq 1); and pursuant to CPLR § 8501 directing that plaintiff post security for cost based on plaintiff residing outside of New York State (Mot. Seq 2). A stay is also sought until the security is posted by the plaintiff. Plaintiff opposes both motions.

**Background**

This is an action for personal injuries resulting from an incident at the Shop Rite Supermarket located at 133-11 20<sup>th</sup> Avenue, Queens County, New York, on October 7, 2018. A verified complaint was filed by Plaintiff, on June 21, 2020 in

Supreme Court, Kings County, alleging plaintiff, was caused to sustain serious personal injuries when she tripped and fell in the subject premises due to the negligence of defendant Wakefern Food. Defendant filed an answer on July 29, 2020 and contemporaneously filed this motion to change venue to Queens County.

Defendant argues that as Queens County is the location of the accident, and neither the plaintiff nor the defendant resides or is domiciled in Kings County venue should be changed, as there is no nexus with Kings County. Additionally, the defendant seeks an order directing plaintiff post security for cost, based on the plaintiff being a resident of New Jersey at the time of the filing of the action. A stay is sought pending the posting of the security.

In opposition, plaintiff contends that when the action was filed, both parties resided outside of New York State, with plaintiff and defendant residing in New Jersey: therefore, pursuant to CPLR § 503(a), plaintiff is authorized to designate the venue of the action and selected Kings County. In response to the motion seeking an order to post security, plaintiff alleges that the real purpose of the motion is not to secure costs; instead, it is to harass the plaintiff. Plaintiff's counsel offered to personally guarantee payment of cost to the defendant if it is awarded a verdict in its favor.

In reply, the defendant seeks judicial preference as to where the incident occurred for the choice of venue, also relying on CPLR § 503(a). Arguing that the venue where a substantial part of the events giving rise to the claim occurred holds precedence over the plaintiff's right to designate the venue, when both parties reside outside of the state.

### ***Discussion***

To prevail on a motion to change venue, the defendant bears the burden of demonstrating that a plaintiff's choice of venue was improper and that a defendant's choice of venue is proper. (*Lividini v. Goldstein*, 175 A.D.3d 420, 421 [1st Dept 2019]). Only after defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper (*Joseph v Kaufman*, 188 AD3d 847 [2d Dept 2020], citing *Harvey v Ogunfowora*, 179 AD3d 775, 776 [2d Dept 2020]).

CPLR § 503(a) states:

Generally. 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.

Defendant's argument that the provision of this statute upon which the plaintiff relies is no longer applicable following a 2017 amendment is without merit. "Nothing in the legislative history of the amendment suggests that the addition of the substantial-part-of-the-events-or-omissions option was meant to compel a plaintiff pursuing a claim arising from an event that occurred in New York State to place venue of an action involving no New York residents in" the county in which a substantial part of the events or omissions giving rise to the [subject] claim occurred." (*Espinal v Lightbody*, 65 Misc 3d 728, 735 [Sup. Ct. Bronx County 2019]). Therefore, the defendant has failed to establish that the plaintiff's choice of venue was improper.

The defendant argues that the court should apply a hierarchy in which the location of the accident should prevail. This reasoning would controvert the option afforded to the plaintiff by the statute in deciding the venue in which to bring the underlying action. By statute the plaintiff is granted the opportunity to decide between the venue in which substantial part of the events or omissions giving rise to the claim occurred or (emphasis added), if none of the parties then resided in the state, in any county designated by the plaintiff. "Plaintiff was permitted to designate any county as the venue for the action, because neither [party] was a resident of New York when the action was commenced (*Lobo v. Gatehouse Partners, LLC*, 169 A.D.3d 555, 556 [1st Dept 2019]).

CPLR § 8501(a) states:

Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for

costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made."

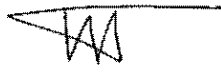
Security for costs is a 'device ordinarily used against a nonresident plaintiff to make sure that if he loses the case, he will not return home and leave the defendant with a costs judgment that can be enforced only in the plaintiff's home state." (*Clement v Durban*, 147 AD3d 39, 42 [2 Dept 2016]). Defendant's right to require the plaintiff to give security for costs does not depend at all upon likelihood or chances of the defendant obtaining judgment for costs against the plaintiff; the right rests solely upon non-residence of the plaintiff. (*Grindle v Westbury Food Market, Inc.*, 135 N.Y.S.2d 21 [Sup. Ct. Nassau Cty. 1954]). Accordingly, it is hereby

**ORDERED** that defendant's motion seeking a change of venue is denied; and it is further

**ORDERED** defendant's motion to direct plaintiff to post a security for cost is granted. Plaintiff shall post security in the amount of \$500.00 within thirty (30) days of the date of this order.

The foregoing constitutes the decision and order of this Court

ENTER,



J. S. C.

KINGS COUNTY CLERK  
FILED  
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