

<b>Mandala v NTT Data, Inc.</b>
2021 NY Slip Op 32810(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 654705-2019
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

George Mandala, individually and on behalf of all others similarly situated

INDEX NO. 654705-2019

- v -

MOT. DATE

NTT Data, Inc.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for <u>change in venue</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

In this putative class action for employment discrimination, Plaintiff George Mandala is suing his former employer, defendant NTT Data, Inc. ("NTT"). Plaintiff is African American and resides in Rochester, New York. Plaintiff worked for NTT as a Salesforce Developer and was contracted to a company based in Wellesley, Massachusetts. At all relevant times, plaintiff worked remotely from his home in Rochester.

Before he commenced his action, plaintiff filed a federal action alleging the same employment discrimination claims asserted here in the United States District Court for the Western District of New York (the "federal action"). Plaintiff's federal claims were dismissed in an order dated July 17, 2019, and the remaining state claims were dismissed for lack of supplemental jurisdiction. Plaintiff unsuccessfully appealed the district court's decision and a motion to vacate the district court's judgment and for leave to amend the complaint is currently pending before the federal court.

NTT now moves for an order changing venue of this action to Monroe County pursuant to CPLR § 510 (3). NTT maintains that venue should be changed for the convenience of material witnesses and to promote the ends of justice. Specifically, NTT contends that: 1) Mandala is a resident of Monroe County; 2) none of the events or witnesses underlying the plaintiff's claims arose or reside in New York County; 3) NTT's alleged conduct does not afford a basis for venue in New York County; 4) the appropriate venue for an action is "where the cause of action arose"; and 5) it would serve the convenience of the witnesses.

Plaintiff opposes the motion and maintains that venue in New York County should be preserved because NTT resides here, plaintiff's choice of venue should not be disturbed absent circumstances enumerated in CPLR § 510, and the defendant fails to effectively argue that a change in venue would convenience material witnesses and promote the ends of justice.

Dated: 12/06/2021

  
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HON. LYNN R. KOTLER, J.S.C.

1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

Appropriate venue is determined by CPLR § 503 which states that “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” (CPLR § 503[a]). The residence of a foreign corporation that is authorized to do business in New York is defined by the location of its office within the state that was designated in its application filed with the secretary of state (*See Collins v. Trigen Energy Corp.*, 210 AD2d 283 [2d Dept. 1994]).

In order to change venue, a moving party must demonstrate that “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” (CPLR § 510). It is well established law that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed” (*Bata v Bata*, 304 NY 51 [1952]); *Hacohen v Bolliger*, 108 AD2d 357 [1st Dept. 1985]).

When a party makes a motion to change venue pursuant to CPLR § 510(3), “there is a general consensus among appellate courts as to the existence, if not as to the absolute rigidity and inexorability, of four criteria which should be established by the movant in order to demonstrate his or her entitlement to relief” (*O’Brien v. Vassar Bros. Hosp.*, 207 AD2d 169 [2d Dept. 1995]). Those criteria are that 1) the affidavit in support of the motion must identify proposed witnesses whose convenience he claims will be affected and list their addresses and occupations; 2) the movant must specify the substance of each witness’s testimony and clarify how that testimony is necessary and material to the case; 3) the movant must indicate that prospective witnesses have been contacted and are willing to testify on his behalf; and 4) the movant must detail how these witnesses would be inconvenienced if venue is not changed (*Id.*; *Cardona v. Aggressive Heating, Inc.*, 180 AD2d 572 [1st Dept. 1992]). A moving party is not entitled to a change of venue to suit the convenience of witnesses if he has failed to demonstrate any of these elements (*see T.D.M. v Pipala*, 223 AD2d 419 [1st Dept. 1996]; *Schneider v Montalbano*, 223 AD2d 586 [2d Dept. 1996]). The moving party has the burden of proof in demonstrating these factors (*Andros v. Roderick*, 162 AD2d 813, [3d Dept. 1990]).

Movant first argues that a change of venue would promote the ends of justice because plaintiff is a resident of Monroe County, not New York County. However, venue is appropriate in the place where any party resides, not just where plaintiff resides (*see CPLR § 503[a]*). In support of its motion, NTT submitted the sworn affidavit of Sheri Bowman, the Senior Director of Employee Relations for NTT. Ms. Bowman states that NTT is incorporated in Delaware with its principal place of business in Plano, Texas. Its registered agent for service of process as filed with the New York Secretary of State is located at 28 Liberty Street, New York, New York 10005. Based upon these facts, NTT is a foreign corporation in the state of New York (*see Aybar v. Aybar*, 2021 NY Slip Op 05393 [2021][identifying a corporation that was incorporated in Delaware, and that has its principal place of business outside of New York state as a foreign corporation in the state of New York]). Therefore, its residence is located at 28 Liberty Street, New York, New York 10005. NTT was a resident of New York County at the time that the action was commenced. Thus, this argument is rejected.

NTT’s next argument is that a change of venue would promote the ends of justice because the appropriate venue for an action is where the cause of the action arose. The movant states that venue is therefore proper in Monroe County because that is where Mandala applied for the employment position. Case law does exist that states that a transitory action, all other things being equal, should be tried in the county where the cause of action arose (*Clinton v. Griffin*, 176 AD2d 501 [1st Dept. 1991]). However, this evaluation does “not authorize an inversion of the burden of proving that the convenience of witnesses will in fact be served by a discretionary change of venue” and it would be a misreading of the law to believe that this evaluation creates “a presumption that, in transitory actions, venue should be placed in the county where the plaintiff’s cause of action accrued” (*O’Brien v. Vassar Bros. Hosp.*, 207 AD2d 169 [2d Dept. 1995]). Rather, absent a demonstration of inconvenience for material witnesses, or another CPLR § 510 justification for change of venue, the controlling factor is the plaintiff’s choice of forum (*Id.*) The movant’s argument here does not assess the convenience of the material witnesses in

the case, nor does it effectively argue any other justification under CPLR § 510. Therefore, this argument is also rejected.

Relatedly, the court rejects NTT's argument that a change of venue would promote the ends of justice because none of the underlying events or relevant witnesses regarding plaintiff's claims are in New York County. These facts do not warrant a venue change.

NTT then argues that the allegations against it do not support venue in New York County. Specifically, movant argues that those similarly situated to Mandala in New York County are barred from joining this action as class members as a result of a stipulation in another action in this court entitled *NAACP New York State Conference Metropolitan Council of Branches v. Phillips Electronics N.A. Corp., et al.*, Index No. 156382/2015 (the "NAACP Action"). In the NAACP action, there is a stipulation dated May 31, 2018 whereby plaintiff NAACP New York State Conference Metropolitan Council of Branches ("NAACP") agreed to the dismissal of its complaint with prejudice as to NTT. Based on that stipulation, NTT's counsel argues that "any pre-April 2018 claims by New York County residents of Plaintiff's purported putative class are subject to the collateral estoppel and *res judicata* effect of that dismissal."

NTT's arguments based on the NAACP action are unavailing. Whether plaintiff can maintain and/or certify a class in this action has no bearing on whether venue should be maintained in New York County. Accordingly, this argument is also rejected.

NTT further argues that a change of venue would promote the ends of justice because it would serve the convenience of the witnesses. It argues that all the NTT employees involved in the Plaintiff's employment application and hiring process are located outside of New York, and therefore that they are entitled only to "subordinate consideration." NTT states that the sole witness that resides in New York state and has personal knowledge of the events surrounding this action is the plaintiff himself. The plaintiff lives in Monroe County, therefore the venue should be changed to Monroe County because this would be more convenient for him. NTT then asserts that since the plaintiff is still awaiting the decision on his application to vacate the district court's judgment and for leave to amend the complaint, it is inappropriate and not in the interests of justice to litigate identical issues at both the federal and state court levels at opposing ends of New York state.

Here, NTT does not meet its burden of demonstrating that it is entitled to a change in venue pursuant to CPLR § 510(3). In its affidavit in support of the motion and subsequent documents, NTT fails to identify any proposed witnesses whose convenience it claims will be affected. Instead, NTT only generally refers to employees who live outside of the state of New York (*see i.e. Caro Home v. 181 Westchester Ave. LLC*, 192 AD3d 503 [1st Dept 2021]). It also fails to detail how any of these witnesses would be inconvenienced if venue is not changed. (*Id.*) Therefore, this argument also fails.

Finally, NTT's assertion that it is inappropriate to litigate these issues in both the federal and state court systems at opposing ends of New York state is unavailing. It is within a plaintiff's right to commence a new action upon the same transaction or occurrence within six months after the termination of another action, so long as the first action was terminated in any manner other than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits (CPLR § 205[a]). Here, the claims that are included in this state court action were terminated at the federal level due to a lack of supplemental jurisdiction. Therefore, it was within the plaintiff's right to bring a new action on these claims in state court.


NTT has not cited any regulation or case law that demonstrates that the location of the federal case should have any bearing on the venue of the state action. Furthermore, plaintiff has made clear that he does not intend to continue litigating this state case if the federal case moves forward. Therefore, once the plaintiff's motion is decided in federal court, one of these actions will end and these issues will not be litigated in two different courts "on opposing sides of New York state."

Based on the foregoing, movant has failed to establish that the convenience of material witnesses and the ends of justice will be promoted by the change of venue.

Accordingly, it is hereby **ORDERED** that the motion is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/06/2021  
New York, New York

So Ordered:  
  
Hon. Lynn R. Kotler, J.S.C.