

**Gelwan v Hyson**

2022 NY Slip Op 34368(U)

December 21, 2022

Supreme Court, New York County

Docket Number: Index No. 656490/2022

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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LLOYD A. GELWAN,
Plaintiff,

- v -

DEPUTY SHERIFF TODD HYSON, DAVID ROSE, and
THOMAS BAGNALL

Defendants.

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INDEX NO. 656490/2022
MOTION DATE 12-21-22
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for CHANGE VENUE.

The plaintiff, an attorney who represented two non-parties in a federal civil rights action (42 U.S.C. § 1983), seeks to establish a charging lien pursuant to Judiciary Law § 475 against the defendants, three deputy sheriffs in the Office of the Columbia County Sheriff's Office, defendants in the federal action. The federal action arose from an incident that occurred in 2011 in Columbia County. It was settled in May of 2016. The plaintiff alleges that the settlement proceeds were paid out by Columbia County on behalf of the deputy sheriffs to his former clients, Georges-Lucien De Ratafia and Diane Akroyd, and/or their counsel Steve M. Warshawsky, without his knowledge and that he was not paid his fees from the proceeds.

In August of 2016, the plaintiff, pro se on behalf of himself and purportedly representing Amanda Nelson, the Executrix of the Estate of his former co-counsel Glenn Backer, commenced an action in this court against De Ratafia and Akroyd, as well as The Warshawsky Law Firm and its principal Steve M. Warshawsky and the County of Columbia, seeking to recover attorney's fees from the settlement proceeds (the prior action). The action, entitled Gelwan et al v DeRatafia et al, Index No. 654525/2016, is before another Justice of this court. The sole claim alleged against Columbia County, the 15th cause of action, was made for the first time in a second amended complaint, filed six years after the original complaint, and is for an equitable charging lien pursuant to Judiciary Law § 475. Several motions are pending, including

a motion by defendant Columbia County to change venue to that county pursuant to CPLR 504(1) or severing the claim against it and changing venue of the claim alone. Columbia County also moved to dismiss the charging lien claim on several grounds including that it was barred by a three-year Statute of Limitations (CPLR 321[b][1]) and barred by the doctrines of res judicata and collateral estoppel as the federal court found no liability on the part of the County (CPLR 3211[a][5]).

In the meantime, on August 10, 2021, the plaintiff, again proceeding *pro se*, commenced a breach of contract action against De Ratafia and Amanda Nelson (purported co-plaintiff in his prior action) seeking 40% or more of the settlement proceeds as attorney's fees. Issue has not yet been fully joined in that case, entitled *Gelwan v Tatafia and Nelson*, Index No. 654862/21, which is pending before another Justice of this court.

On May 25, 2022, the plaintiff commenced this action, *pro se*, pursuant to Judiciary Law § 475 seeking an equitable charging lien against the three deputy sheriffs from Columbia County, defendants in the federal action. In his complaint, the plaintiff does not explain why the second action would not be subject to dismissal on the ground of prior action pending (CPLR 3211[a][4]). Nor does he state when or why his representation of De Ratafia and Akroyd ceased, although only an attorney discharged without "just cause" is entitled to any charging lien under Judiciary Law § 475. See generally Klein v Eubank, 87 NY2d 459 (996); Chadbourne & Parke, LLP v AB Recur Finans, 18 AD3d 222 (1<sup>st</sup> Dept. 2005); Schneider, Keinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183 (1<sup>st</sup> Dept. 2002).<sup>1</sup>

On September 26, 2022, the defendants served the plaintiff with a Demand to Change Venue to Columbia County pursuant to CPLR 504(1). The statute provides that the place of trial in all actions against, *inter alia*, a county or any of its officers or departments shall be in that county. The plaintiff rejected the demand. The defendants then moved to change venue pursuant to CPLR 504(1), arguing that, as deputies of a county sheriff's department, they fall within the scope of the statute. The plaintiff opposes the motion, without addressing the mandate of CPLR 504(1) in his papers, and cross-moves to retain venue in New York County

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<sup>1</sup> Warshawsky represented in a 2016 affidavit filed in the prior action that De Ratafia and Akroyd retained the plaintiff and Backer in 2012, Backer withdrew from the matter in 2015, he was retained in February 2016, and the plaintiff was discharged for cause by the clients in May 2016 due to his abusive and unprofessional conduct. However, both Warshawsky and the clients were, at one time, in support of plaintiff receiving some fees but could not agree on the amount.

and consolidate this action with the prior action pursuant to CPLR 602(a), in the event it is not transferred. In that regard he argues that the two actions present common questions of law and fact, without a reasonable explanation as to why he filed a second action seeking the same relief rather than join the three deputy sheriffs in the prior action. In any event, the defendants have not moved to dismiss this complaint pursuant to CPLR 3211(a)(4) or any ground.

The defendants' motion to change venue is granted and the matter is transferred to the Supreme Court of Columbia County for further proceedings pursuant to CPLR 504(1). The defendants correctly argue that as deputies of the county sheriff's department being sued in that capacity, they fall within the scope of the statute. That argument is supported by the plain language of the statute. The statute "is couched in mandatory terms and, absent compelling countervailing circumstances, should be complied with, since its purpose is to protect public officers from inconvenience and, therefore, it is to be given 'more than ordinary consideration' (Powers v East Hudson Parkway Auth., 75 AD2d 776, 777 [1<sup>st</sup> Dept. 1980])." Rogers v U-Haul Co., 161 AD2d 214, 215 (1<sup>st</sup> Dept. 1990). Contrary to the plaintiff's contention, he has not identified any compelling circumstances here to warrant exercise of the court's discretionary powers under CPLR 510(3). See Rose v Grow-Perini, 271 AD2d 210 (1<sup>st</sup> Dept. 2000).

Since the matter is being transferred to Columbia County, the plaintiff's cross-motion to retain venue of this action in New York County and consolidate it with the prior action is moot. In any event, the plaintiff failed to establish entitlement to that relief. While, as stated, this action seeks the same relief sought in the 15<sup>th</sup> cause of action of the second amended complaint in the prior action, this alone does not warrant consolidation. There is no identity of parties between the actions save for the plaintiff; the defendants are not parties to the prior action, and the prior action has an additional plaintiff and defendants. Further, as stated, the prior action was commenced six years prior to the instant action. Being at very different procedural stages, consolidation would likely "result in undue delay in the resolution of the earlier action." Suckishvili v Visiting Nurse Service of New York, 74 AD3d 433, 433 (1<sup>st</sup> Dept. 2010).

Any relief not expressly granted herein is denied.

Accordingly, and upon the foregoing papers and after oral argument, it is

ORDERED that the defendants' motion to transfer venue of this action from this Court to the Supreme Court, County of Columbia, pursuant to CPLR 504(1) is granted; and it is further

ORDERED that the plaintiff's cross-motion is denied, and it is further


ORDERED that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Columbia, and shall mark his records to reflect such transfer; and it is further

ORDERED that, within 30 days from entry of this order, counsel for movants shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; and it is further

ORDERED that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Columbia County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the Decision and Order of the court.

<u>12/21/2022</u> DATE	 <small>NANCY M. BANNON, J.S.C.</small> <b>HON. NANCY M. BANNON</b>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/>	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/>
	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE