

John Doe J.G. v City of New York

2023 NY Slip Op 30869(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 950860/2021

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 18/CVA

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JOHN DOE J.G.,

Plaintiff,

-against-

THE CITY OF NEW YORK,
NEW YORK CITY ADMINISTRATION FOR
CHILDREN’S SERVICES, LITTLE FLOWER
CHILDREN AND FAMILY SERVICES OF NEW
YORK, (F.K.A LITTLE FLOWER CHILDREN’S
SERVICES OF NEW YORK), THE LITTLE
FLOWER UNION FREE SCHOOL DISTRICT,
THE BOARD OF EDUCATION OF LITTLE
FLOWER UNION FREE SCHOOL DISTRICT,
and BARRY J. WIGGINS,

Index No.: 950860/2021

DECISION and ORDER
Mot. Seq. No. 003

Defendants.

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ALEXANDER M. TISCH, J.

In this action, brought pursuant to the Child Victims Act (CVA), defendants The Little Flower Union Free School District (the District) and The Board of Education of Little Flower Union Free School District (the Board) (collectively, the moving defendants) move for an order: (i) pursuant to CPLR 511, 510, 504, and 502, to change the venue from New York County to Suffolk County, and (ii) pursuant to CPLR 3211 (a) (7), to dismiss the fourth, fifth, sixth and part of the second causes of action asserted in the complaint against these defendants.

Both plaintiff John Doe J.G. (plaintiff) and defendant The City of New York (the City) oppose the motion.

BACKGROUND

In a verified complaint, plaintiff alleges that, in approximately 1987, while in foster care, plaintiff was placed by defendant New York City Administration for Children’s Services (ACS) in the care of defendant Little Flower Children and Family Services of New York (the Agency), which owned a facility in Wading River, New York (the Wading River Campus) (NYSCEF Doc

No. 32, complaint, ¶¶ 28-29, 31). Plaintiff lived in a dormitory located on the Wading River Campus, where, between 1988 and 1992, plaintiff's counselor, defendant Barry J. Wiggins (Wiggins), allegedly sexually abused plaintiff, who was a minor at the time (*see id.*, ¶¶ 33-43). Some acts of sexual abuse took place off campus, such as when Wiggins took plaintiff and other children on trips (*see id.*, ¶ 47).

The Parties' Arguments

The District and the Board argue that New York County is an improper venue pursuant to CPLR 504, and that the action should be transferred to Suffolk County. According to them, Suffolk County is the proper venue, because: (i) the majority of the defendants are situated in Suffolk County; (ii) the alleged underlying conduct, giving rise to this action, took place in Suffolk County; and (iii) the District and its witnesses would suffer an undue hardship if the venue were to remain in New York County.

Plaintiff argues that New York County is, and should remain, the proper venue, because the City is a named defendant, and, pursuant to CPLR 504 (3), New York County is the proper venue. Plaintiff additionally argues that defendants' grounds for transfer under CPLR 510 (3) are insufficient, because New York County would be more accessible to a greater number of parties than Suffolk County, and the inconvenience of witnesses does not entitle defendants to a change of venue as a matter of right.

The City similarly argues that New York County is, and should remain, the proper venue pursuant to CPLR 504 (3), and there is an absence of compelling circumstances justifying a change of venue.

DISCUSSION

CPLR 510 (1) permits a court, upon motion, to change the place of trial of an action where “the county designated for that purpose is not a proper county” (CPLR 510 [1]). Pursuant to CPLR 511, a defendant, seeking to change the place of trial upon the ground of improper venue, “shall serve a written demand that the action be tried in a county he specifies as proper” (CPLR 511 [b]). The demand “shall be served with the answer or before the answer is served” (CPLR 511 [a]).

This statute further provides:

“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]).

Here, the Board and the District met the procedural requirement outlined in CPLR 511. They were served with the summons and verified complaint on August 24, 2021 (*see* NYSCEF Doc Nos. 27, 28). On August 29, 2021, before their answer was served, the moving defendants filed a demand for change of place of trial (*see* NYSCEF Doc No. 24). Within five days, on September 2, 2021, the plaintiff filed an affidavit, contending that this action was properly commenced in New York County, because: (i) the City and the ACS are named defendants; and (ii) pursuant to CPLR 504 (3), New York County is the proper venue since the cause of action arose outside of the city (*see* NYSCEF Doc No. 29).

Various CPLR provisions establish what “a proper county” is for purposes of a motion pursuant to CPLR 510 (1) to change venue. Where venue is based on residence of a party, CPLR

503 (a) provides, in relevant part, “[e]xcept 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; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred.” For actions against school districts, CPLR 504 (2) provides, in relevant parts, that the “place of trial . . . shall be . . . in the county in which such . . . school district or district corporation is situated.” Actions against the City of New York shall be “in the county within the city in which the cause of action arose, or if it arose outside the city, in the county of New York” (CPLR 504 [3]).

As a result, defendants, that qualify under CPLR 504 and timely fulfill the demand and motion procedures of CPLR 511, are entitled to a change of venue to their specified county as a matter of right (*see e.g. Llorca v Manzo*, 254 AD2d 396, 397 [2d Dept 1998]; *cf. Baez v Marcus*, 58 AD3d 585, 586 [2d Dept 2009] [“since the defendants failed to serve a timely demand for a change of venue to New York County, and failed to make a motion for that relief within the statutory 15-day period (*see* CPLR 511 [b]), they were not entitled as of right to a change of venue to New York County”]).

In instances of conflicting venue provisions, “the court, upon motion, shall order as the place of trial one proper under this article as to at least one of the parties” (CPLR 502; *see also Meyers v NY St Division of Housing & Community Renewal*, 32 AD2d 818, 818 [2d Dept 1969]). Before considering whether CPLR 502 is applicable, the Court must first determine whether the CPLR 511 demand and motion procedures have been satisfied here by the moving defendants.

On September 10, 2021, within fifteen days of filing of the aforementioned demand, the District and the Board timely filed the instant motion (*cf. Woodward v Millbrook Ventures LLC*, 148 AD3d 658, 658 [1st Dept 2017] [failure to move within 15 days of serving a demand for change of venue renders a motion untimely]). There is no evidence that any of the parties or

witnesses reside or are situated in New York County. The only reason that this action was brought in New York County is pursuant to CPLR 504 (3). The record before the Court reveals that the moving defendants are situated in Suffolk County (*see* 09/09/21 Dean aff, ¶ 3 [NYSCEF Doc No. 36]; *see also* 08/26/21 aff of service of the summons and complaint as well as other papers on the Board [NYSCEF Doc No. 27]), which renders Suffolk a proper county (*see* CPLR 504 [2]). Hence, the moving defendants are entitled, as of right, to a change of venue to Suffolk County.

The Court notes that even if the moving defendants were not entitled to the change of venue as of right and the issue was committed to the discretion of the Court, the Court would still determine that Suffolk County is the proper venue given that: (i) it is the county in which a substantial part of the events that give rise to the plaintiff's claims occurred (*see* CPLR 503 [a]; *see also* complaint, ¶¶ 28-29, 31, 33-43); and (ii) the moving defendants and the Agency are situated in Suffolk County (*see* NYS Dept of St, Division of Corporations, Entity Information for the Agency, attached to 09/10/21 Fasano affirmation as exhibit B [NYSCEF Doc No. 33]; *see also* *Brave v The City of New York*, Sup Ct, Kings County, May 9, 2022, Kaplan, J., index No. 514109/2020 [NYSCEF Doc No. 58] [in a CVA case, in which the City, the Board, the District, the Agency, and Wiggins were named defendants, the court granted the Board and the District's motion for a change of venue from Kings County to Suffolk County]). The District has also provided a statement that it would be costly and inconvenient to have its employees be absent for extended periods of time, which testifying in person in New York County would apparently entail (*see* 09/09/21 Dean aff, ¶¶ 4-12; *see e.g. Ruiz v City of NY*, 195 AD2d 327, 328 [1st Dept 1993] ["in the balancing of interests, the convenience of public officers and employees and the use of

public records at trial are given more than ordinary consideration”] [internal quotation marks and citation omitted]).

In light of this determination, the Court finds that that branch of the District and the Board’s motion to dismiss certain causes of action should be addressed by Suffolk County Supreme Court. This request is denied without prejudice, with leave to renew upon the transfer to Suffolk County.

CONCLUSION

For the foregoing reasons, it is hereby


ORDERED that the motion of the defendants The Little Flower Union Free School District and The Board of Education of Little Flower Union Free School District is granted to the following extent:

- (i) the application for a change of venue is granted and venue of this action is changed from this Court to the Supreme Court, County of Suffolk;
- (ii) the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Suffolk and shall mark his records to reflect such transfer;
- (iii) 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;

- (iv) the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Suffolk 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;
- (v) 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);

and the motion is otherwise denied without prejudice, with leave to renew upon the transfer of this action to Suffolk County.

This constitutes the decision and order of the Court.

<p style="text-align: center;"><u>3/17/2023</u> DATE</p>	 <hr/> <p>ALEXANDER M. TISCH, J.S.C.</p>	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p>
<p>APPLICATION:</p>	<p><input type="checkbox"/> SETTLE ORDER</p> <p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>
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