

**Matter of Bernstein v Tietz**

2023 NY Slip Op 31296(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 453250/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

*Justice*

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In the Matter of

RACHEL BERNSTEIN,

Petitioner,

- v -

DANIEL TIETZ, as Commissioner of the New York State  
Office of Temporary and Disability Assistance, NEW YORK  
STATE OFFICE OF TEMPORARY AND DISABILITY  
ASSISTANCE, and MASARYK TOWERS CORPORATION,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 54, 56, 57, 58, 59, 60

were read on this motion to/for

CHANGE VENUE

This is a proceeding pursuant to CPLR article 78, pursuant to which the petitioner seeks judicial review of an August 24, 2022 New York State Office of Temporary and Disability Assistance (OTDA) determination that she was ineligible to participate in the COVID-19 Emergency Rental Assistance Program (ERAP) because she was a tenant-shareholder in a residential cooperative building, and thus was not obligated to pay “rent,” as that term is defined RPAPL 702, which is incorporated by reference into the definitions provisions of the ERAP statute (see L 2021, ch 156, part BB, Subpart A, § 1[2][9]; RPAPL 702[1] [defining the term “rent”]; RPAPL 702[2] [expressly excluding proceedings between a residential cooperative housing corporation and tenant-shareholders from the applicability of RPAPL 702]). The OTDA answered the petition and submitted the administrative record in connection with MOTION SEQUENCE 001, and now moves pursuant to CPLR 506(b), 510(1), and 511(b) to transfer venue of this proceeding from New York County to Albany County. The petitioner opposes the motion. The motion is granted, and venue is transferred to Albany County.

CPLR 510(1) provides that one ground for a change of venue is that “the county designated for that purpose is not a proper county.” Pursuant to CPLR 511(b), where a defendant or respondent contends that the venue designated by the plaintiff or petitioner is improper,

“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.”

The written demand to change the place of trial on the ground of improper venue, as described in CPLR 511(b), “shall be served with the answer or before the answer is served” (CPLR 511[a]). Here, the OTDA served its written demand to change the place of trial on the ground of improper venue before it served an answer. The service of the demand was thus timely. The OTDA made the instant motion to change venue only 3 days after it served its demand to change venue, and thus within the 15 day-period required by CPLR 511(b). Hence, the motion also is timely.

The petitioner submitted her on-line application for ERAP benefits to the OTDA from her home in New York County, and the respondent cooperative corporation, Masaryk Towers Corporation, also located in New York County, submitted supporting documentation via OTDA’s on-line portal as well. Nonetheless, as OTDA’s Deputy Commissioner Barbara C. Guinn explained, the OTDA Commissioner maintains an office in Albany, all of the OTDA officials and staff responsible for implementing, administering, and overseeing the ERAP are located in Albany, and eligibility determinations and appeal determinations, such as the one at issue here, are made pursuant to the eligibility rules established by OTDA and are attributable to and finalized by OTDA’s ERAP staff in Albany.

A CPLR article 78 proceeding “shall be brought in the supreme court in the county specified in subdivision (b) of [CPLR] section 506 except as that subdivision otherwise provides” (CPLR 7804[b]). CPLR 506(b) provides that

“A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.”

The “‘material events’ leading to the subject . . . determination . . . consisted of the decision-making process leading to the determination under review” (*Matter of Rozenberg v Shea*, 200 AD3d 438, 438 [1st Dept 2021], quoting *Matter of Phillips v Dennison*, 41 AD3d 17, 23 [1st Dept 2007]). In *Phillips*, the petitioner sought judicial review of a Parole Board determination. As the Appellate Division, First Department, explained in that proceeding, “venue for a proceeding such as this is properly placed in the county where the parole hearing was held and the challenged determination made, or where the [Parole] Board’s principal office is located,” since the material events “were not the crime and sentence” (*Matter of Phillips v Dennison*, 41 AD3d at 23, quoting *Matter of Vigilante v Dennison*, 36 AD3d 620, 622 [2d Dept 2007]; see *Matter of Grochulski v Dennison*, 40 AD3d 413, 413 [1st Dept 2007]; *Matter of Ramirez v Dennison*, 39 AD3d 310 [1st Dept 2007]; cf. *Matter of Howard v New York State Bd. of Parole*, 5 AD3d 271 [1st Dept 2004] [articulating general rule, but denying motion to transfer venue because respondent failed timely to serve demand pursuant to CPLR 511]).

The term “material events” does not encompass the essentially passive characterization of the nature of the subject apartment building as a cooperative that generated the agency determination that the petitioner challenges here. Rather, the material events in the context of such a determination are limited to the office to which the administrative application was made, and the place where deliberations and determinations concerning that application were conducted and concluded (see *Matter of Levitt v Tietz*, Index No. 810366/2022 [Sup Ct, Bronx

County, Jan. 6, 2023] [applying rule to OTDA's ERAP determinations]; *Matter of Donofrio v City of New York*, 2019 Misc LEXIS 8731, \*4 [Sup Ct, N.Y. County, Nov. 27, 2019 [Kelley, J.] [applying rule to a judicial challenge to an agency determination under the Freedom of Information Law]; *Matter New York Racing Assoc. v State of N.Y. Div. of Budget*, 2009 NY Slip Op 31605[U], 2009 NY Misc LEXIS 4000 [Sup Ct, N.Y. County, Jul. 13, 2009] [same]; *see also Matter of Rozenberg v Shea*, 200 AD3d at 438 [pistol licensing determination]; *Matter of New York Republican State Comm. v New York State Comm. on Government Integrity*, 138 AD2d 884, 885 [3d Dept 1988] [proceeding to quash nonjudicial subpoena issued by a State agency]).

It is undisputed that the OTDA maintains its principal office in Albany County, and that it undertook its deliberations and made its determination in Albany County. The only connection that this dispute has with New York County is that the subject apartment building is located in New York County, and that the petitioner and Masaryk Towers transmitted applications and supporting documentation to the OTDA from New York County. Those factors do constitute "material events," as that term is employed in CPLR 506(b). Hence, Albany County is the proper county in which venue must be laid.

In light of the foregoing, it is

ORDERED that the motion of the respondent New York State Office of Temporary and Disability Assistance to transfer venue of this proceeding from New York County to Albany County is granted, and the matter is transferred to the Supreme Court, Albany County, for consideration and disposition of the petition, presently pending in this court under MOTION SEQUENCE 001; and it is further,

ORDERED that within 30 days after the entry of this order, the respondent New York State Office of Temporary and Disability Assistance shall file an EF-22 form containing the statement required by CPLR 8019(c), and shall also serve it upon the New York County Clerk, as Clerk of the Supreme Court, New York County, along with a copy of this order and notice of

entry of this order, and shall also serve a copy of this order and notice of entry of this order upon the Albany County Clerk, as Clerk of the Supreme Court, Albany County; and it is further,

ORDERED that upon service upon him of the EF-22 form containing the statement required by CPLR 8019(c), and a copy of this order with notice of entry, the New York County Clerk, as Clerk of the Supreme Court, New York County, is directed to deliver to the Albany County Clerk, as Clerk of the Supreme Court, Albany County, all papers filed in the proceeding entitled *Matter of Rachel Bernstein v Daniel Tietz, as Commissioner of the New York State Office of Temporary and Disability Assistance, et al.*, under New York County Index No. 453250/2022, and certified copies of all minutes and entries.

This constitutes the Decision and Order of the court.

4/21/2023

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: