

**Hicks v City of Syracuse**

2023 NY Slip Op 32936(U)

August 24, 2023

Supreme Court, New York County

Docket Number: Index No. 151405/2023

Judge: Lisa S. Headley

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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. LISA S. HEADLEY **PART** **28M**

*Justice*

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KENNETH HICKS,

Plaintiff,

- v -

CITY OF SYRACUSE, OFFICER M. ABRAHAM, OFFICER  
F. LAMBERTON, DETECTIVE ANDREW BARNES

Defendant.

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**INDEX NO.** 151405/2023

**MOTION DATE** 06/16/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for CHANGE VENUE.

The plaintiff, Kenneth Hicks (plaintiff’), commenced this action in New York County for malicious prosecution, false arrest, false imprisonment, negligent and intentional infliction of emotional distress, and is seeking compensation and punitive damages against the defendants, City of Syracuse (“Syracuse”), Officer M. Abraham, Officer F. Lambertson, and Detective Andrew Barnes (“Defendant-Officers”) (collectively, “Defendants”). This action arises from an alleged incident that occurred on March 24, 2022, at plaintiff’s residence located at 646 St. Nicholas Avenue, Apt. 708 in New York, New York, where plaintiff alleges that the Defendant Officers came to his apartment, woke him up at 5:00 a.m., and unlawfully arrested him and then drove plaintiff to Syracuse based on an alleged arrest warrant.

In the complaint, plaintiff alleges he was held in custody for more than twenty-four hours in Onondaga County before he was released on March 25, 2022, into freezing weather conditions, with no shelter and no ability to return home to New York County. Plaintiff alleges that while in the custody of the Defendant Officers, he was not fed, not given water, and was not allowed to take his prescribed psychiatric medications during the twenty-four-hour period. The plaintiff alleges that his attorney promptly contacted the Assistant District Attorney handling his case, and it was determined that the Defendant Officers had arrested the wrong person. Subsequently, the felony charges against the plaintiff were dismissed.

The movant-defendants filed the instant motion to change venue from New York County to Onondaga county, pursuant to *CPLR §510(1)*, on the grounds that the venue of New York County designated by Plaintiff is not the proper county pursuant to *CPLR §504(2)*. Plaintiff, Kenneth Hicks, filed opposition. Defendants filed a reply.

### **Defendants' Motion to Change Venue to Onondaga County**

In support of the motion to change venue, the defendants argue, *inter alia*, that the venue should be transferred to Onondaga County, New York pursuant to *CPLR* §504(2) because plaintiff improperly designated New York County as the place of trial based on where plaintiff resides under *CPLR* §503, and on the basis that it would be inconvenient for his mental health and his finances to travel to Onondaga County. Defendants maintain that their motion to change venue should be granted because they have complied with *CPLR* §511 by timely filing this motion, and that plaintiff forfeited his right to select venue, based on improperly designating venue under *CPLR* §§503(a) and (c). Further, defendants contend that under *CPLR* §511(b), the place of trial in this matter may be changed from New York County to Onondaga County on the ground that New York County is an improper venue.

### **Plaintiff's Opposition to the Motion**

In opposition to the motion, plaintiff submits, *inter alia*, the letter from his psychiatrist, Diane P. D'Allegro M.D., and the 50H Hearing Transcript of plaintiff, which contains testimony of plaintiff's experience from the subject incident. *See, NYSCEF Doc Nos. 26-30.*

Plaintiff argues, *inter alia*, that venue in New York County is proper pursuant to *CPLR* §504(3), because the causes of action in the complaint arose in New York County, which is also where the plaintiff resides. Plaintiff contends venue in New York County is proper because his civil rights were violated in New York County, and not in Syracuse, when he was wrongly removed from his home based on an alleged arrest warrant. Plaintiff also argues that venue should remain in New York County because the material witnesses in this case, except for the Defendant Officers, reside in New York County. Further, plaintiff contends his mental health would be at risk if venue is transferred because of the Defendants' conduct in removing him from his home in New York County to Syracuse. Plaintiff submits the letter from his psychiatrist, Dr. Diane P. D'Allegro, who opined that plaintiff should not travel to Syracuse, since it is a place that exacerbates his PTSD condition, and his other mental health issues.

Plaintiff also argues that he would have a financial hardship to travel to Syracuse if the venue is transferred because he is on a fixed income and receives social security disability for his learning disability and severe depression. Plaintiff submits that if this matter goes to trial, his psychiatrist would be a testifying witness, and it would also be a financial burden on plaintiff to pay for his witness' travel to Syracuse from New York County.

### **Defendants' Reply**

In reply, the defendants argue that plaintiff does not challenge that defendants fully complied with *CPLR* §§510(1), 511(a) and (b), and, therefore, change of venue is a mandatory and not a discretionary decision. Further, the defendants assert that plaintiff does not properly refute, that *CPLR* §504(2) requires that for all counties, outside of those within New York City, that jurisdiction is proper in the county where a municipal defendant resides. Defendants also maintain that plaintiff's appeal to factors limiting his ability to appear in Onondaga County, such as plaintiff's existing mental state, limited finances, and the potential for appearing in Onondaga County would worsen his condition should not be considered in this motion. Defendants argue that

plaintiff's opposition should not be considered because it was filed untimely, without a good faith request for an extension, or an explanation. *See, NYSCEF Doc No. 32.*

### Discussion

As it pertains to the defendants' argument that the plaintiff's opposition was untimely filed within three days of the return date on the motion, this Court, notwithstanding plaintiff's untimely opposition papers, in the interest of justice, and consistent with the policy of resolving issues on their merits, will consider plaintiff's untimely opposition papers. *See, Roell v. Org.*, 2010 N.Y. Slip Op. 30972[U] (N.Y. Sup Ct, New York County 2010). In turn, this Court will also consider the arguments presented in the plaintiff's reply papers. As such, the Court makes the determination as follows.

Pursuant to *CPLR §503*, “[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; 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. A party resident in more than one county shall be deemed a resident of each such county.” *CPLR §503(a)*.

Pursuant to *CPLR §510(1)*, one ground for a change of venue is that “the county designated for that purpose is not a proper county.” to *CPLR §510(1); Bernstein v. Tietz*, No. 453250/2022, 2023 WL 3075249, at \*1 (N.Y. Sup. Ct. Apr. 25, 2023).

Pursuant to *CPLR §504(2)*, an action brought against a city shall take place in the county where that city is situated. *CPLR §504(2); N. C. v. Ifezulumbria*, 209 A.D.3d 621, 622 (2022).

Pursuant to *CPLR § 511(a)*, a motion for change of place or trial... shall be made within a reasonable time after commencement of the action.” *Cruz v. Murphy*, No. 150512/2021, 2023 WL 3271807, at \*1 (N.Y. Sup. Ct. May 05, 2023).

Under *CPLR §511(b)*, as relevant herein, where a defendant or respondent contends that the venue designated by the plaintiff or petitioner is improper, “[t]he 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[.]” *Bernstein v. Tietz*, No. 453250/2022, 2023 WL 3075249, at \*1 (N.Y. Sup. Ct. Apr. 25, 2023).

*CPLR §504(3)* states, in relevant part, that “the place of trial for all actions against counties, cities, towns, villages, school districts and district corporations of any of their officers, boards or departments 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.” *Ruiz v. City of New York*, No. 451985/2020, 2021 WL 3863890, at \*2 (N.Y. Sup. Ct. Aug. 24, 2021).” “The purpose of *CPLR §504*, which applies not just to school districts but also to counties, cities, towns, and villages, is to protect municipal entities and their employees from the inconvenience of an alternative venue. Nevertheless, and despite the seemingly unforgiving language of the statute, venue may be changed to a non-mandated county upon a showing of special circumstances.” *See, Wager v Pelham Union Free Sch. Dist.*, 108 A.D.3d at 88, 966 N.Y.S.2d 126 (2d Dep’t 2013) citing, *Hatzipetros v. County of Chemung*, 56 A.D. 1039-1040, 868 N.Y.S.2d 793 (3d Dep’t 2008); see also *Cabreja v .Rose*, 50 A.D.3d 457, 458 (1st Dep’t 2008) [venue was transferred “in the

county...in which the cause of action arose”]. The decision of whether to grant a change of venue is committed to the providently exercised discretion of the trial court. *Dlugaski v. Port Auth. of New York and New Jersey*, 107 AD3d 536, 537 (1st Dep’t 2013); see also, *Bollman v. Port Auth. of N.Y. & N.J.*, 17 A.D.3d 182, 796 N.Y.S.2d 334 (1st Dep’t 2005).

Pursuant to *CPLR §510(3)*, “the court, upon motion, may change the place of trial of an action where...the convenience of material witnesses and the ends of justice will be promoted by the change.” Furthermore, the proponent of a change of venue must comply with *CPLR §510(3)* and provide for the following: (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case. See, *Leopold v. Goldstein*, 283 A.D.2d 319, 320 (2001).

Here, Defendants assert that they are entitled to change of venue to Onondaga County, as opposed to New York County based on *CPLR §504(2)* because the statute is “couched in mandatory terms that require venue to be in the county of a city that has an action brought against them.” *CPLR §504(2)*. However, the plaintiff argues against *CPLR § 504(2)* and cites to *CPLR §510(3)*, arguing that change of venue would be inconvenient for plaintiff and his expert witness based on the potential that travel to Onondaga County would worsen his mental health, and he has limited finances as it would be costly for him to pursue this case in Syracuse as opposed to New York County. Defendants argue that the convenience of party witnesses and their experts is not to be considered on a motion for change of venue. See, *Anastasio v. Port Auth. of New York & New Jersey*, 170 A.D.3d 589, 590 (2019).

The Court recognizes that *CPLR §504*, which provides where the place of trial shall take place against a city, is couched with mandatory terms, and absent compelling countervailing circumstances, it should be complied with, because its purpose is to protect public officers from being inconvenienced. *Powers v. E. Hudson Parkway Auth.*, 75 A.D.2d 776, 428 N.Y.S.2d 233 (1st Dep’t 1980). “Notwithstanding the mandatory language of the statute, courts nevertheless retain discretionary power to permit venue in another county upon a showing of compelling circumstances.” *Hatzipetros v. Cnty. of Chemung*, supra; see also, *Seaboard Sur. Co. v Facilities Dev. Corp.*, 100 A.D.2d 787, 788 (1st Dep’t 1984).

Here, this Court finds that plaintiff has established that the convenience of material witnesses and the ends of justice outweigh the asserted governmental inconvenience. Plaintiff produced an affirmation that he and his witness would be inconvenienced if venue was transferred to Onondaga County. Plaintiff’s affirmation states the identity of his witnesses, and they include himself and his psychiatrist, Diane P. D’Allegro M.D. Plaintiff also states the manner in which the witnesses would be inconvenienced by the transfer of venue to Onondaga County. Plaintiff, in his affidavit, demonstrates the inconvenience including that his finances would not support him or his psychiatrist to travel to Onondaga County. In addition, plaintiff demonstrates that his mental health would worsen if he were to travel to Onondaga County because it would exacerbate his PTSD. Plaintiff also demonstrates how the witnesses’ testimony would be material to the issues of the

case because the testimony would support his mental state and anguish he suffered as a result of being wrongfully detained and removed from his home in Harlem, New York to upstate New York, in Syracuse. Further, plaintiff's limited finances would hinder his ability to travel, and his ability to pay for his psychiatrist's ability to travel to Onondaga county. This Court within its discretion denies the defendants' motion to change venue as they have not shown their inability to travel to New York court. Furthermore, the defendant failed to establish that any of its trial witnesses would be inconvenienced by traveling to New York County. *Goldberg v. Bivins*, 295 A.D.2d 162, 163 (1st Dep't 2002) ["the motion was properly denied since defendant's initial papers in support thereof do not identify a single witness who would be inconvenienced by having to travel to New York county"].

The court may look to the subject matter of the lawsuit, the identity of the parties, the convenience of the witness and the interests of justice. *CPLR §510*; see also, *Town of Hempstead v City of New York*, 88 Misc. 2d 366, 368 (Sup. Ct 1976).

Accordingly, this Court finds that in the interest of justice and based upon the compelling circumstances, including the convenience of plaintiff and his witness and that the action arose in New York County, makes venue in New York County proper. Therefore, Defendants' motion to change venue is denied pursuant to *CPLR §510(3)* because plaintiff has demonstrated that his witnesses are necessary, material, and available to testify for him in New York County; and plaintiff's potential for his mental health to worsen, due to travel, and his limited finances demonstrate a compelling circumstance to override *CPLR §504*.

Accordingly, it is hereby

**ORDERED** that defendants City of Syracuse, Officer M. Abraham, Officer F. Lamberton, and Detective Andrew Barnes' motion to change venue from New York County to Onondaga County is DENIED; and it is further

**ORDERED** that, within 30 days from entry of this Order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court; and it is further

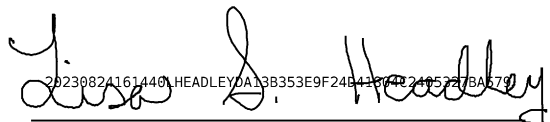
**ORDERED** that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

**ORDERED** that any relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision/Order of the Court.

8/24/2023

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE