

Silverman v Leibowitz

2023 NY Slip Op 34141(U)

November 22, 2023

Supreme Court, New York County

Docket Number: Index No. 158678/2022

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. MARY V. ROSADO</u></p> <p style="text-align: right; margin-right: 20px;"><i>Justice</i></p> <p>-----X</p> <p>JOEL SILVERMAN</p> <p style="text-align: center; margin-left: 200px;">Plaintiff,</p> <p style="text-align: center; margin-left: 150px;">- v -</p> <p>HEIDI S LEIBOWITZ,</p> <p style="text-align: center; margin-left: 200px;">Defendant.</p> <p>-----X</p>	<p>PART 33M</p> <p>INDEX NO. <u>158678/2022</u></p> <p>MOTION DATE <u>05/23/2023</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p style="text-align: center; margin-top: 20px;">DECISION + ORDER ON MOTION</p>
--	--

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for CHANGE VENUE.

Upon the foregoing documents, Defendant Heidi S. Leibowitz's ("Defendant") motion to change venue from New York County to Kings County is denied.

I. Factual Background and Procedural History

Plaintiff Joel Silverman ("Plaintiff") commenced this action on October 7, 2022, by filing a Summons and Complaint (NYSCEF Doc. 1) against his former spouse, Defendant Heidi S. Leibowitz. The Complaint asserts causes of action for malicious prosecution ("First Cause of Action") and abuse of process ("Second Cause of Action") (NYSCEF Doc. 1).

On December 15, 2022 Defendant filed a timely motion to dismiss the complaint for failure to state claims, and, in the alternative, for improper venue (NYSCEF Doc. 2). On April 25, 2023, this Court issued an Order granting the dismissal of Plaintiff's abuse of process claim, denying the dismissal as to the malicious prosecution claim, and denying dismissal on the basis of venue as premature and procedurally improper (NYSCEF Doc. 12).

With respect to Plaintiff's remaining claim for malicious prosecution, the allegations in Plaintiff's Complaint stem from allegedly false domestic incident reports filed by Defendant

against Plaintiff (NYSCEF Doc. 1) which Plaintiff claims have forestalled his NYPD career since February 2016 (NYSCEF Doc. 1 at ¶ 8).

Plaintiff further alleges that Defendant made false allegations to members of the NYPD Internal Affairs Board (“IAB”) and the Department Advocate’s Office, “causing the initiation of NYPD administrative proceedings against [him]” (NYSCEF Doc. 1 at ¶ 36). Plaintiff’s Complaint further alleges that Defendant played an active role in Plaintiff’s administrative prosecution by continuously providing and reiterating false allegations to members of the IAB and the Department Advocate’s Office (NYSCEF Doc. 1 at ¶ 37). Allegedly, Defendant’s “false statements led to the initiation of departmental charges by the Department Advocate’s Office” against him in New York County (NYSCEF Doc. 1 at ¶ 42; NYSCEF Doc. 13 at ¶ 9). Plaintiff alleges that due to Defendant’s malicious assertion of false charges against him, Plaintiff was forced to expend more than \$15,000.00 on defense attorneys’ fees (NYSCEF Doc. 1 at ¶ 61).

On May 9, 2023, Defendant sent Plaintiff a Demand to Change Venue from New York County to Kings County, alleging that New York County was an improper venue (NYSCEF Doc. 14). On May 15, 2023, Plaintiff submitted an Affidavit (NYSCEF Doc. 13) in opposition to Defendant’s demand to change venue.

On May 23, 2023, Defendant filed the instant motion for an Order, pursuant to CPLR §§ 503, 510, and 511(a) and (b), changing the venue of trial for the above-captioned action from the County of New York to the County of Kings, on the grounds that New York County is not a proper venue for this action (NYSCEF Doc. 16). In support of her motion, Defendant submitted an Affidavit (NYSCEF Doc. 20) and an Affirmation of Defendant’s counsel, Michael D. Cilento, Esq. (NYSCEF Doc. 17) on May 23, 2023. In opposition, Plaintiff filed an Affidavit (NYSCEF

Doc. 22) and a Memorandum of Law (NYSCEF Doc. 28) on June 6, 2023.¹ On June 12, 2023 Defendant filed a Reply Affirmation from Defendant's counsel, Michael D. Cilento, Esq. (NYSCEF Doc. 29).

II. Discussion

Preliminarily, “on a motion to change venue, pursuant to CPLR 510(1), ‘defendant’s burden...is limited to establishing that the designated county is improper” *IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016], quoting *Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]).

CPLR 503(a) provides for venue based on residence and states that “[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when [the action] 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 resided in the state, in any county designated by the plaintiff.”

Here, Plaintiff is a resident of Rockland County (NYSCEF Doc. 1 at ¶ 1). Defendant is a resident of Kings County (NYSCEF Doc. 20 at ¶ 2). Plaintiff commenced the instant action in New York County, alleging that “[v]enue is proper in this Court pursuant to CPLR §503(a) because a substantial part of the events giving rise to Plaintiff’s claims occurred in New York County” (NYSCEF Doc. 1 at p. 2).

In support of his position that New York County is a proper venue, Plaintiff asserts that his claim of malicious prosecution “stems from his role as a defendant in an NYPD administrative proceeding and trial, the entirety of which took place in New York County

¹ While Plaintiff’s Memorandum of Law (NYSCEF Doc. 28) in opposition is not duly executed in accordance with CPLR 2101(d), the Court, finding that no substantial right of any party is prejudiced, elects, in its discretion pursuant to CPLR 2101(f), to disregard this defect in form.

(NYSCEF Doc. 13 at ¶¶ 8-9). Further, Plaintiff's Complaint alleges that Defendant's false statements caused the initiation of departmental proceedings against Plaintiff by the Department Advocate's Office (NYSCEF Doc. 1 at ¶ 42). In his opposing Affidavit, Plaintiff asserts that the departmental proceedings took place in New York County (NYSCEF Doc. 13 at ¶ 8). Further, Plaintiff argues that Defendant, on several occasions, conveyed false information to members of the NYPD IAB, who were located in New York County, as well as Queens County (NSYCEF Doc. 13 at ¶ 7).

Defendant argues that New York County is an improper venue because "Plaintiff's single claim focuses on two domestic incident reports... filed by [Defendant] against Plaintiff. Yet, neither of those [domestic incident reports] were filed in New York County, and neither of those [domestic incident reports] were based on events that took place in New York County" (NYSCEF Doc. 17 at ¶ 15). Further, Defendant states in her Affidavit in support that she "did not testify in any administrative trial or any other hearings in New York County regarding Plaintiff" and the "[c]ommunication she had with IAB, DAO or NYPD was in Kings County" (NYSCEF Doc. 20 at ¶¶ 5-6).

Here, Defendant has failed to meet her initial burden of establishing that the venue designated by Plaintiff was improper. It is well settled that "[t]he elements of the tort of malicious prosecution include initiation or continuation of a proceeding despite the lack of probable cause, termination of that proceeding favorable to the party there sued and now aggrieved as plaintiff, and a showing of malice in the pursuit of that underlying proceeding" (*Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept 2000]).

The First Department has held that knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's

determination to investigate and prosecute, is sufficient to satisfy the element of initiation (*Morehouse v Standard, N.Y.*, 124 AD3d 1, 8 [1st Dept 2014]).

Plaintiff has alleged that Defendant provided false evidence to law enforcement which resulted in the initiation of the disciplinary proceedings against him (NYSCEF Doc. 1 at ¶ 36). Moreover, the Complaint contains allegations that Defendant did more than just provide statements to the NYPD, but also allegedly encouraged her family members to contact the NYPD and urged them to institute disciplinary proceedings (NYSCEF Doc. 1 at n.3). Plaintiff contends that Defendant and Defendant's sister, Judith Leibowitz, made false statements to the NYPD Civilian Complaint Review Board, located in New York County, as well as to the Investigating Officer, Sergeant Cunningham, who Plaintiff alleges was physically located in New York County (NYSCEF Doc. 28 at p. 6). Plaintiff also asserts that Defendant participated in an interview conducted by Sergeant Chan, while Sergeant Chan was stationed in New York County (*Id.*). Lastly, Plaintiff alleges that the allegedly malicious prosecution proceedings that Defendant caused to be brought against him took place in New York County (NYSEF Doc. 28 at p.5).

Because Plaintiff's claim for malicious prosecution is based on the allegation that Defendant maliciously caused the initiation of an administrative proceeding and trial against Plaintiff by providing false statements in New York County, or to individuals located in New York County, New York County is a venue in which a substantial part of the events giving rise to Plaintiff's malicious prosecution claim occurred. As Defendant has failed to establish that Plaintiff's designation of New York County was improper, Defendant's motion for an Order changing the place of trial from New York County to Kings County is denied.

Accordingly, it is hereby,

ORDERED that Defendant Heidi S. Leibowitz's motion to change venue from New York County to Kings County is denied; and it is further

ORDERED that within ten (10) days of entry, Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

11/22/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE