

Macaulay v Port Jervis Labs. Inc.

2024 NY Slip Op 30599(U)

February 22, 2024

Supreme Court, New York County

Docket Number: Index No. 190266/2022

Judge: Adam Silvera

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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. ADAM SILVERA PART 13

Justice

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INDEX NO. 190266/2022

TIFFANY MACAULAY, DANIEL MACAULAY

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

PORT JERVIS LABORATORIES INC. (F/K/A KOLMAR
LABORATORIES INC.),

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 78

were read on this motion to/for CHANGE VENUE.

Upon the foregoing documents, it is ordered that the instant motion for change of venue pursuant to CPLR §§503(a) and 511, is denied for the reasons set forth below.

Here, defendant Port Jervis Laboratories, Inc. f/k/a Kolmar Laboratories Inc. (“Port Jervis”) moves for a change of venue to Orange County on the grounds that venue in New York County is improper pursuant to CPLR §§503(a) and 511. Port Jervis has its principal place of business in Orange County and is incorporated in Delaware. Port Jervis argues that it was unable to determine whether venue was proper until plaintiff Tiffany Macaulay (“Macaulay”) was deposed and is now entitled to change venue pursuant to CPLR §510(1).

Macaulay filed this action on or about November 22, 2022 in New York County, New York, alleging exposure to asbestos containing products manufactured by Port Jervis. On or about December 7, 2022, Port Jervis filed its Verified Answer. On or about December 15, 2022, Macaulay served her Answers to Standard Interrogatories and Notice to Produce. In her Answers to Interrogatories, Macaulay indicated that she is a

resident of Pennsylvania. On January 6, 2023, Macaulay was deposed, and it was revealed that she has only ever resided in Pennsylvania. On January 13, 2023, Macaulay appeared for a *de benne esse* deposition, during which Macaulay revealed that she was only ever employed in Pennsylvania. That same day, Port Jervis filed a Demand for Change of Venue pursuant to §CPLR 511(b), to which Macaulay did not respond. Port Jervis argues that until Macaulay was deposed, it was unclear whether she was alleging asbestos-exposure from work she might have performed in New York County. Port Jervis further argues that there is no nexus to New York County, venue in New York County is improper, and the action should be transferred as of right to Orange County.

The determination of proper venue is governed by CPLR §503(a), which provides, in relevant part, 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 it was commenced; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred[.]” Here, neither party resides in New York County, as Macaulay is a Pennsylvania resident and Port Jervis has its principal place of business in Orange County. Macaulay argues that venue in New York County is proper because former executives testified to the existence of a Port Jervis sales office in New York City, as well as Port Jervis’ active membership in the Cosmetic, Toiletry and Fragrance Association (“CTFA”), which held meetings in New York City. Macaulay also argues that Port Jervis engineered and approved the testing methods that caused Macaulay’s asbestos exposure through its association with the CTFA. However, Port Jervis’ alleged participation in the CTFA meetings in New York County are insufficient to establish that a substantial part of the events giving rise to the claim occurred in New York City, as Macaulay only ever resided and worked

in Pennsylvania, and Macaulay testified that Pennsylvania is where the alleged exposure occurred.

Port Jervis argues that it is entitled to a change of venue as of right because Macaulay's designation of venue in New York County is improper. A demand to change venue based on the designation of an improper county as per CPLR §510(1) requires that the demand be served prior to or with its answer pursuant to CPLR §511(a). If this requirement is met, a defendant may move to transfer within 15 days of serving the demand pursuant to CPLR §511(b). Since Port Jervis served its Demand for Change of Venue after it filed its Answer, it failed to meet its initial burden under CPLR §511(a) and thus is not entitled to a change of venue as of right. *See Herrera v R. Conley Inc.*, 52 AD3d 218, 219 (1st Dept 2008). Additionally, contrary to Port Jervis' argument that the limited exception excusing untimeliness pursuant to CPLR 511(a) is applicable, Port Jervis has not shown that Macaulay misrepresented her residence, as the complaint clearly states that she resides in Pennsylvania or that the complaint had any misleading statements. *See Ohiwatayo v Dulinayan*, 142 AD3d 113, 116 (1st Dept 2016); *Philogene v Fuller Auto Leasing*, 167 AD2d 178, 179 (1st Dept 1990); *Algarin v Sackin*, 173 AD3d 465, 466 (1st Dept 2019). Thus, Port Jervis' motion seeking to change venue is discretionary.

“To obtain a discretionary change of venue under CPLR 510(3), the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue”. *Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424, 425 (1st Dept 2003) (internal quotations omitted). Here, Port Jervis failed to set forth any basis for a discretionary change in venue. Port Jervis did not identify any witnesses, let alone establish any inconvenience to any material witnesses. Nor did Port Jervis provide any

affidavits with respect to inconvenience of attending trial. The omission of affidavits or other proofs from material witnesses claiming to be inconvenienced by a trial in New York County, as well as Port Jervis' failure to identify such witnesses, is fatal to the motion. *See Sanchez v 1 Burgess Rd., LLC*, 169 AD3d 605 (1st Dept 2019); *Villalba v Brady*, 162 AD3d 533 (1st Dept 2018).

“Where, as here, the only ground sufficient to support the change of venue is that the action was not commenced in the proper county, the grant of a motion to change venue is an improvident exercise of discretion in view of the explicit statutory requirements, even assuming the inherent power of the court to exercise its discretion”. *Pittman v Maher*, 202 AD2d 172, 175-76 (1st Dept 1994). Therefore, despite New York County being an improper county for venue, this action may proceed because “there is no jurisdictional impediment to trial being conducted in [New York] County”. *Kurfis v Shore Tower Condominium*, 48 AD3d 300, 300 (1st Dept 2008). Thus, the instant motion is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant Port Jervis Laboratories, Inc. f/k/a Kolmar Laboratories Inc. to change venue is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

2/22/2024

DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE