

**State of N.Y. ex rel. Mateo v TAR Catering Corp.**

2014 NY Slip Op 30763(U)

February 7, 2014

Sup Ct, Queens County

Docket Number: 702119/2013

Judge: Sidney F. Strauss

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS  
Justice

IA PART 11

ORIGINAL

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State of New York ex rel., Manuel Mateo  
& Sonia Mateo,

Index No.: 702119/2013

Plaintiffs,

Motion Date: January 17, 2014

-against-

Seq. No.: 5

**FILED**  
FEB 10 2014  
COUNTY CLERK  
QUEENS COUNTY

TAR Catering Corp. a/k/a Russo's on the Bay,

Defendant.

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The following papers numbered 1 to 7 were read on the motion of the defendant, seeking an order pursuant to CPLR 2221, reconsidering this court's order dated August 27, 2013, and upon the granting of reargument, granting defendant's motions for venue and further, dismissing the complaint, pursuant to CPLR 3211.

**FOR A MORE FORMAL MARKING OF THE PAPERS  
READ ON THIS MOTION, CONSULT E-FILING.**

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Exhibits.....	4 - 5
Reply Affirmation - Exhibit.....	6 - 7

The defendant originally moved, seeking an order granting a change of venue, pursuant to CPLR 511(b), for the above action from New York County to Queens County, and further, upon the change of venue, granting defendant's motion dismissing plaintiffs' complaint pursuant to CPLR 3211. Defendant made a prior motion for reconsideration, but without submitting the prior motion papers, and this court, by order dated December 11, 2013, allowed said defendant to renew the motion, upon submission of the originally submitted papers. Defendant now moves, submitting the papers that should have been previously submitted.

CPLR 511(b) states, particularly, that "[d]efendant 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.” Defendant submits proof that it served a demand on May 21, 2013, and that plaintiffs did not serve a written consent or objection within five days thereof. Accordingly, defendant claims, the motion seeking to transfer venue was properly noticed.

Upon the granting of said reargument, the court now addresses the original motions seeking change of venue and further, dismissal of the complaint pursuant to CPLR 3211, and determines as follows:

As to the defendant’s motion seeking a change of venue, it is undisputed that both the individual plaintiffs, Manuel Mateo and Sonia Mateo, as well as the defendant, are residents of Queens County at the time of the commencement of the underlying action. Further, it is undisputed that the plaintiffs’ claims arose in Queens County. Defendant contends that the underlying action was commenced in New York County on August 6, 2012.

Plaintiffs submit proof of service upon the defendant on March 13, 2013, and argue that defendant’s demand for change of venue by letter dated May 21, 2013, and subsequent motion of June 7, 2013, are untimely. Further, plaintiffs contend that venue was determined based upon the applicable state office for the State of New York, which in this instance is New York County, and therefore, venue properly belongs in New York County. Defendant contends that plaintiffs’ counsel acted in bad faith by seeming to agree to stipulate to an extension of time for the instant motion to be made and then failing to do so. Thus, defendant states, plaintiffs’ argument that the demand and motion were untimely “is incorrect.” However, counsel for plaintiffs affirms that they could not agree to the extension. “If [defendant] does not so move within the fifteen days [following its demand], [it] is no longer entitled to a change of venue as of right. The change does lie in the court’s discretion, however, so [defendant] may still make the motion at any time before trial.” (Siegel, *New York Practice*, 5<sup>th</sup> Ed. §123.) Although defendant does not properly seek an extension of time to so move, the court deems the instant motion timely in the interests of addressing the issue of venue on the merits.

Defendant, for the first time in reply, addresses the issue of whether New York State could be considered a proper party plaintiff, contending that plaintiffs fail to submit proof of compliance with NY State Finance Law §190. If New York State is not a proper party plaintiff, defendant argues, then the choice of New York County is the proper venue must fall since there is no nexus to the county for either party nor did the action arise in New York County. The more appropriate venue, defendant asserts therefore, is Queens County.

The statutory provision governing *qui tam* actions mandates that such actions be initiated by the filing of the complaint *in camera* or “under seal” with the court. The *qui tam* complaint and applicable evidence must be served by personal delivery, to a person designated to receive service, on behalf of the New York State Attorney General. “The purpose of the seal is to give

the government an opportunity to investigate the allegations in the complaint so the government can determine whether it wants to intervene in the lawsuit. The seal initially lasts for sixty days,[FN3] but is typically extended for one or two years (or even longer in more complex cases) while the government investigates the merit of the allegations.[FN4] The defendant named in the qui tam complaint will not be served with the complaint until it is unsealed.[FN5] Typically, the first notice that a defendant will receive that qui tam action is pending against him is service of a subpoena from the state for requests for documents or testimony.” (NY Practice-Commentaries §85:25).

Counsel for plaintiff affirms that the complaint was drafted prior to being subsequently unsealed and served, but submits no proof as to such. Rather, counsel argues, it falls upon the defendant to cite authority as proof that the complaint must be dismissed for failing to allege conformity. The court disagrees with this argument in light of the clear language of the governing statute. New York State Finance Law §190 is quite specific that the sealing of the complaint is a condition precedent before service upon the defendant could be made. Moreover, 13 NYCRR 400.4 states:

“(a) All qui tam actions shall be served on the Attorney General by the personal delivery of the qui tam complaint and accompanying evidence to a person designated to receive service at the Managing Clerk's Office on the 24th Floor at the Office of the Attorney General at 120 Broadway, New York, NY 10271, unless otherwise authorized by the Attorney General.

(b) A local government, having been authorized by the Attorney General to supersede or intervene in a qui tam action on its own behalf pursuant to section 190(2) of the False Claims Act, shall cooperate with the Attorney General in any subsequent investigation related to the action.

(c) If the State or a local government does not intervene or supersede after the 60 day time period or any extensions obtained under section 190(2)(b) of the False Claims Act, then the qui tam plaintiff has 30 days after such time period or extensions expire to decide whether to proceed with the action.

(1) If the qui tam plaintiff elects to proceed with the action, the qui tam plaintiff shall so advise the court, the State, and applicable local governments, and *cause the complaint to be unsealed. After the complaint is unsealed, the qui tam plaintiff shall serve the complaint on any defendant pursuant to the provisions of the Civil Practice Law and Rules and other applicable law.*”

(13 NYCRR 400.4 [emphasis added].)

The court finds that plaintiffs have failed to establish that they complied with either provision governing the commencement of a qui tam action, beyond the affirmation of counsel.

Accordingly, defendant's motion seeking to change venue from New York County, Supreme Court Index No. 153456/2012, to Queens County, Supreme Court Index No. 702119/2013. Defendant shall serve and file a copy of this order, with notice of entry, upon the plaintiffs, as well as upon the Clerk of the Court, New York County, and the Clerk of the Court, Queens County, paying all applicable fees, if any, for the transfer and filing of all papers filed in connection with the action in New York County Supreme Court, Index No. 153456/2012, to be filed with the action in Queens County Supreme Court, Index No. 702119/2013, within thirty days of the date of this order.

Based upon the foregoing therefore, as to defendant's motion seeking to dismiss plaintiffs' complaint pursuant to CPLR 3211, the motion is granted. Plaintiffs have failed to provide any proof that a court order has been granted permitting them to serve the complaint upon the defendant, in compliance with New York State Finance Law §190 or as set forth in 13 NYCRR 400.4.

Dated: February 7, 2014

  
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SIDNEY F. STRAUSS, J.S.C.