SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

STUART D. FELDMAN,

Plaintiff,

-against-

COURT ORDER, INC.

Defendant.

Index No. 653682/2015

DECISION/ORDER

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This opinion consolidates motion sequences 001 and 002 for decision. In motion sequence 001, Defendant Court Order, Inc. ("Defendant") moves pursuant to CPLR 510 and 511 to change venue from New York County to Suffolk County (the "venue motion"). In motion sequence 002, Plaintiff Stuart D. Feldman ("Plaintiff") cross-moves pursuant to CPLR 2215 and 3211 to dismiss Defendant's sole counterclaim (the "cross-motion to dismiss"). Defendant's motion to change venue is granted, and Plaintiff's cross-motion to dismiss is denied without prejudice.

Background Facts

Plaintiff is an individual who claims several residences: one at 111 West 67th Street, Apt. 37E, New York, New York (the "New York Residence") and another at 19 Pine Tree Lane, Westhampton, New York (the "Suffolk Residence").[1] Plaintiff entered into a contract with Defendant, a New York corporation with its principal place of business in Suffolk County, to

[1] Plaintiff also has a Connecticut residence, which is not at issue here.

repair a tennis court at Plaintiff's Suffolk Residence. In sum and substance, Plaintiff's complaint alleges that Defendant breached the contract by failing to make the necessary repairs and, in an attempt to remedy its failure, trespassed onto the Suffolk Residence and caused further damage to the tennis court by spilling paint. In its Answer, Defendant counterclaims that Defendant's employees were falsely imprisoned on the premises as they were trying to leave when Plaintiff used his car to block the employees' vehicle's egress.

After Plaintiff filed the Complaint, and in response to Defendant's demand to change venue, Plaintiff's counsel filed an affidavit and supporting documentation opposing the demand (*NYSCEF 4-8*). Defendant's instant motion to change venue ensued (CPLR 511 [a]).

In support of its motion to change venue to Suffolk County, Defendant argues: first, that New York County bears no connection to this action, and that the summons does not list Plaintiff's address as required by CPLR 305; second, that Suffolk County is the appropriate venue because the facts underlying the Complaint and Counterclaim arose in Suffolk County; and third, that Suffolk County is the more convenient venue for Police Officer Herbert Loper ("Officer Loper"), who was called to the Suffolk Residence in response to the alleged false imprisonment.

In Plaintiff's opposition and cross-motion to dismiss, relying in part upon the affidavit of Plaintiff's counsel rejecting Defendant's demand to change venue (*NYSCEF 4*), Plaintiff argues: first, that Plaintiff's choice of venue is appropriate because he resides in New York County, and that his choice of venue is entitled to deference; second, that where a cause of action arose is relevant only in the context of witness convenience under CPLR 510(3); third, that a single instance of trespass upon the Suffolk Residence is insufficient to establish venue in Suffolk

County because the location of real property is only relevant to venue when property rights are implicated; fourth, that Defendant's motion fails to demonstrate inconvenience to Officer Loper; and fifth, that Defendant's counterclaim should be dismissed because it fails to adequately plead the requisite elements of false imprisonment, thus rendering Officer Loper's testimony (and thus the convenience to him as a witness) irrelevant.

In reply, Defendant attached, for the first time, affidavits from Edward Kaplan ("Kaplan"), Defendant's president and sole shareholder, and Officer Loper, both of which argue that venue in New York County would be inconvenient to them and, in the case of Kaplan's affidavit, to Defendant's four employees as well (*Exhs G, H*). Defendant also argues: first, that the affirmation of Plaintiff's counsel alone is insufficient to demonstrate Plaintiff's residence in opposition to the change of venue; and, second, that the contract's formation in and pertinence to Suffolk County were unaddressed by Plaintiff's opposition, and justify venue in Suffolk County. For the first time, Defendant also argues that the Court should weigh trial calendar congestion as a factor in changing venue.[2]

In a further support of the cross-motion, Plaintiff argues that counsel may submit an affidavit of the proper county on behalf of the party he represents, but attaches, for the first time, his own affidavit to supplement that of counsel (*Pl Reply, Exh A*, "*Pl Aff*").[3] As considered here,

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[2] The Court will consider defendant's new argument and affidavits raised in Defendant's reply. Though the function of reply papers is to address arguments made in opposition to the movant's position, that rule is not inflexible (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]). Courts have the discretion to consider a claim or evidence introduced in a reply where, as here, the offering party's adversary had an opportunity to respond (*id.*).

[3] The Court's consideration of documents introduced for the first time in Defendant's reply, *supra at fn 2*, merits similar consideration of Plaintiff's new submission (*see Vazquez v Beharry*, 82 AD3d 649 [1st Dept 2011]). [upholding Supreme Court's exercise of discretion in considering defendants' surreply], *accord Gastaldi v Chen*, 56 AD3d 420, 420 [2d Dept 2008] [upholding Supreme Court's exercise of discretion in considering the surreply of the plaintiffs, which was in response to argument raised in the defendants' reply papers for the first time]). Additionally,

Plaintiff argues: first, that Defendant's counterclaim must be dismissed, notwithstanding New York's liberal notice pleading standard, because the counterclaim states conclusory allegations unsupported by either sufficient facts or a recitation of the relevant elements of false imprisonment; and second, that Defendant's counterclaim must be dismissed because Defendant's employees were never actually imprisoned, *i.e.*, Plaintiff did not intend to prevent the employees from leaving his property, and the employees were not physically prevented from leaving the property.

Discussion

Defendant's motion to change venue (001)

CPLR 503(a) provides, as relevant here, 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." In turn, CPLR 511(b) provides that, after the defendant serves a demand for a change of venue and the plaintiff has timely objected *via* affidavit, the defendant may move for a change of venue. Grounds for a change of venue include, as relevant here, that the designated county is improper and that the convenience of material witnesses and the ends of justice will be promoted by the change (CPLR 510[1], [3]).

Connection to New York County (CPLR 510[1])

Upon a motion to change venue, the defendant bears the initial burden of establishing that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require

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Footnote 3, cont'd.

neither party has objected to the other's submission of evidence in reply.

that venue be changed (*Hernandez v Seminatore*, 48 AD3d 260 [1st Dept 2008]; *see, e.g., Book v Horizon Asset Mgt.*, 105 AD3d 661, 662 [1st Dept 2013] [defendants met their burden by submitting evidence showing that the plaintiff was residing in North Carolina at the time the action was commenced and had never lived in Bronx County, where the action was filed]). Generally, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431, 431 [1st Dept 2015], *quoting Gulf Oil Corp. v Gilbert*, 330 US 501, 508, 67 SCt 839, 91 L Ed 1055 [1947] [citation omitted]).

At the outset, the failure of Plaintiff's Summons to specify the basis of venue is an irregularity that can be corrected by amendment (Alexander, Practice Commentaries, CPLR 305:1 [McKinney's 2016]; *compare Archer v Astra Pharmaceutical Products, Inc.*, 1986, 133 Misc2d 804, 508 NYS2d 362 [Sup Ct NY County 1986] [complaint revealed basis for venue] *with Forte v Long Island R.R.*, 1989, 143 Misc2d 663, 541 NYS2d 729 [Sup Ct NY County 1989] [omission of the basis of venue is a mere irregularity that causes no prejudice, whether or not the complaint reveals such basis]). Here, Defendant cannot credibly claim prejudice. The Summons specifies that the basis for venue is Plaintiff's residence, the very first paragraph of the Complaint states that Plaintiff resides in New York, New York, and Plaintiff's February 5, 2016 response to Defendant's demand for change of venue specifies the exact address: 111 West 67th Street, Apt. 37E.

Further, Defendant's other evidence purports to demonstrate a lack of any connection to New York County, but is similarly unpersuasive. Although the deed to the Suffolk Residence (*Def Exh D*) demonstrates that Plaintiff had at least one other address, a party may have two

residences for venue purposes (*Farrington v Fordham Assoc., LLC*, 129 AD3d 591, 592 [1st Dept 2015], *citing* CPLR 503[a]). Evidence that Plaintiff resides in Suffolk County does not, in other words, preclude a finding that Plaintiff also maintained a New York county residence. Further, Defendant does not explain the significance of the Suffolk Residence tax bills (*Def Exh D*) sent to Plaintiff's New York County business address.

Even if Defendant had satisfied its burden, however, Plaintiff provides sufficient evidence to merit a hearing on the issue of whether he resided in New York County on the date this action was commenced. Plaintiff's recent New York residence property tax and cable bills, and his personal affidavit submitted in surreply demonstrate that Plaintiff maintains a residence in New York County, has "resided at this address for over 13 years and intend to retain this residence for the foreseeable future" (*Pl Aff* ¶¶ 3-5; *see, e.g.*, *Rivera v Jensen*, 307 AD2d 229 [1st Dept 2003] [plaintiff must demonstrate intent to reside at location with some degree of permanence]; *Martinez v Hudson Armored Car & Courier, Inc.*, 201 AD2d 359, 360 [1st Dept 1994] [granting leave to renew motion to change venue where the plaintiff provided "copies of a deed for the purchase of a Bronx condominium, and bills for real estate taxes, management services, cable television and telephone service at plaintiff's Bronx address," notwithstanding that said evidence was available during original motion]).[4]

Accordingly, Defendant's motion for a change of venue on the basis that New York County is improper (CPLR 510[1]) is denied.

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[4] It is noted that the cases cited by Plaintiff to argue that an attorney's affidavit is sufficient to establish a party's residence address the attorney's affidavit as *prima facie* evidence to establish *where a motion to change venue may be made* in accordance with CPLR 511(b), an issue not present herein (*see King v CSC Holdings, LLC*, 123 AD3d 888, 1 NYS3d 139 [2d Dept 2014]; 7 *Columbus Ave. Corp. v Town of Hempstead*, 85 AD3d 1038, 1039 [2d Dept 2011]).

Convenience to material witnesses (CPLR 510[3])

A motion to change venue to promote the convenience of material witnesses and the ends of justice requires a detailed evidentiary showing that "the convenience of nonparty witnesses would in fact be served by the granting of such relief" (*Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299, 299 [1st Dept 2004], *citing O'Brien v Vassar Brothers Hospital*, 207 AD2d 169, 622 NYS2d 284 [2d Dept 1995]; *see also* Alexander, Practice Commentaries, CPLR 510:3 [McKinney's 2016], *citing Stainbrook v Colleges of Senecas*, 237 AD2d 865, 656 NYS2d 946 [3d Dept 1997]; *Rochester Drug Co-Operative, Inc. v Marcott Pharmacy North Corp.*, 15 AD3d 899, 789 NYS2d 779 [4th Dept 2005]).

That evidentiary showing must include "the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted" (*Jacobs*, 9 AD3d at 299; *but see Soufan v Argo Pneumatic Co.*, 170 AD2d289, 566 NYS2d 17 [1st Dept 1991] [affidavits from witnesses themselves are not required, and movant may provide the necessary information through sworn averments about the witnesses]).

The "parties" whose convenience must be addressed are limited to material nonparty witnesses; thus, the convenience of parties to the litigation, their employees, persons under their control, or family members is given little if any weight (Alexander, Practice Commentaries, CPLR 510:3 [McKinney's 2016]), *citing Said v Strong Memorial Hospital*, 255 AD2d 953, 680 NYS2d 785 [4th Dept 1998]; *accord Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424, 425 [1st Dept 2003]). By contrast, public employees, such as police officers, should be given "more than

ordinary consideration," even when the convenience to only one public employee is at issue (*see, e.g., Kennedy v C.F. Galleria at White Plains, L.P.*, 2 AD3d 222, 769 NYS2d 526 [1st Dept 2003] [denial of venue change from Bronx County, where action was filed, to Westchester County, where wrongful death action arose, reversed in light of the affidavits of three Westchester County police officers with relevant testimony who would be inconvenienced by travel to Bronx County]; *accord Gentry v Finnigan*, 110 AD3d 568, 569 [1st Dept 2013] [affirming change of venue to Ulster County where New York State trooper who responded to the scene of the accident in Ulster County was willing to testify, but would be extremely inconvenienced by having to travel to New York County]).

Thus, the affidavits of Plaintiff (*Pl Reply, Exh A*) and Kaplan, Defendant's president (*Def Exh G*), the latter of which asserts that four of his employees will be inconvenienced without attaching separate affidavits from those employees, are accorded little weight compared to the affidavit of Officer Loper (*Def Exh H*). Moreover, Officer Loper's affidavit meets the requisite criteria: it lists Officer Loper's occupation, the facts to which he intends to testify, his willingness to testify, and the inconvenience to him and the Southampton Town Police Department in terms of both travel time and scheduling difficulty.

The affidavit of Officer Loper alone would be sufficient to justify transfer to Suffolk County. However, once the requisite evidentiary showing of inconvenience to material witnesses has been made, as it has here, the Court may consider whether the action is local or transitory and, if it is the latter, whether that further supports transfer (Alexander, Practice Commentaries, CPLR 510:3 [McKinney's 2016], *citing O'Brien*, 207 AD2d at 174).

Here, the necessity of transfer is further supported by the connections to Suffolk County,

including the transitory nature of the action (and thus, the "ends of justice"). While courts have treated trespass claims as local, those types of trespass claims tend to relate to a *continuous* trespass or public nuisance that continues to affect the use, possession, or enjoyment of real property, not to a one-time trespass like the one alleged in this action (*see, e.g.*, *Shulamith Sch. for Girls Inc. v Shulamith Sch. for Girls of Brooklyn*, 2012 NY Slip Op 30590[U], *6 [Sup Ct Nassau County 2012], *citing Hempstead v N.Y.*, 88 Misc 2d 366, 369 [Sup Ct Nassau County 1976]; *see also Lucas v Kensington Abstract LLC*, 20 Misc 3d 1135(A) [Sup Ct 2008] ["Because title is not affected, the action is deemed transitory"]). The false imprisonment claim is transitory for similar reasons.

Even when all factors are equal (which they are not, because Officer Loper's affidavit weighs in favor of transfer), a transitory action should be tried where the cause of action arose (*La Cara Mia Bar Lounge, Inc. v Great Locations, Inc.*, 22 Misc 3d 1107(A) [Sup Ct 2009], *citing Clark v New Rochelle Medical Center*, 170 AD2d 271 [1st Dept 1991]). Because the contract signed by the parties pertained to work to be performed on a residence in Suffolk County (*Def Exh E*) by Defendant, a company with its principal place of business in Suffolk County (*Def Exh H*), and the trespass and false imprisonment claims relate to the same property, this cause of action has strong ties to Suffolk County that merit transfer.

Finally, the relatively lighter docket in Suffolk County also justifies transfer (*see, e.g., Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 498 [1st Dept 1968] [citing annual report of judicial conference to transfer action from New York County to Onondaga County because "a much earlier trial in regular order can be had in Onondaga"); *New York State Unified Court System 2014 Annual Report* at pp. 31-37, available at <http://www.nycourts.gov/reports/

annual/pdfs/14_UCS-Annual_Report.pdf>; *Carter v Metro N. Assoc.*, 255 AD2d 251, 251 [1st Dept 1998] ["A court may only apply judicial notice to matters of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain"]); *Teamsters Nat'l Freight Indus. Negotiating Comm. et al. v. Howard's Express, Inc. (In re Howard's Express, Inc.)*, 151 Fed Appx 46, 48 [2d Cir 2005] [courts are empowered to take judicial notice of public filings, including a court's docket]; *Kucich v Leibowitz*, 68 AD2d 1002, 1002 [3d Dept 1979] [affidavit of plaintiff's attorney who was told by Judicial Conference administrator that St. Lawrence County's trial delays were substantially lower, in addition to other factors, justified transfer to that county]).

Based on the foregoing, the convenience to material witnesses and the ends of justice merit a transfer of this action to Suffolk County.

Plaintiff's cross-motion to dismiss (002)

Because a change of venue to Suffolk County is justified, it would be inappropriate to decide Plaintiff's cross-motion to dismiss Defendant's counterclaim for false imprisonment because Second Department precedent, which governs Suffolk County, may differ from that of the First Department (see McKinney's Cons. Laws of N.Y., Book 1, Statutes § 72[b]; *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014] [Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department]). Accordingly, Plaintiff's cross-motion is denied without prejudice as to his right to re-file the motion in Suffolk County.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the motion of Defendant Court Order, Inc. to change venue from New York County to Suffolk County (motion sequence 001) is **granted**; and it is further

ORDERED that the venue of this action shall be changed from this Court to the Supreme Court, County of Suffolk, and upon service by movant of a copy of this Order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Suffolk; and it is further

ORDERED that the cross-motion of Plaintiff Stuart D. Feldman to dismiss Defendant's counterclaim for false imprisonment (motion sequence 002) is hereby **denied**, without prejudice as to Plaintiff's right to re-file said motion upon transfer to Suffolk County; and it is further

ORDERED that counsel for Defendant shall serve a copy of this Order with notice of entry upon the Clerk of this Court and counsel for all parties within 20 days.

This constitutes the decision and order of the Court.

Dated: June 13, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.