

<b>Hernandez v Flores</b>
2018 NY Slip Op 30062(U)
January 9, 2018
Supreme Court, New York County
Docket Number: 153385/2017
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 43

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CRISTELA HERNANDEZ,  
Plaintiff,

-against-

Index No.: 153385/2017  
**DECISION/ORDER**  
Motion Seq. No. 001

PATRICIO FLORES, ANABEL FLORES, LUIS  
HERNANDEZ, SIXTO MANUEL CIGARRA, FAUSTO  
MENDOZA, and ENCUESTRO 103 CORP. d/b/a  
ENCUESTRO LATINO and/or ENCUESTRO  
RESTAURANT,

Defendants,

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**ROBERT R. REED, J.:**

In this action for sexual harassment, discrimination and hostile work environment, plaintiff asserts fourteen causes of action and seeks to recover lost earnings, unpaid wages, and punitive, compensatory and liquidated damages, plus reasonable attorney’s fees, interest and costs. Defendants move to dismiss the complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, and, pursuant to CPLR 3211(a)(8), for lack of jurisdiction. More specifically, defendants’ motion asserts that the court’s lack of jurisdiction is based on improper venue and/or forum *non conveniens*. Plaintiff opposes.

**Failure to State Claim**

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491; *Skillgames, LLC v Brody*, 1 AD3d 247, 250, citing *McGill v Parker*, 179 AD2d 98, 105; see also *Cron v Harago Fabrics*, 91 NY2d 362, 366). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of

the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id., citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames*, 1 AD3d at 250, *citing Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233).

Here, plaintiff has pleaded allegations which, if true, may state a legally cognizable cause of action against defendants. Accepting a liberal construction of these allegations, and affording such allegations every deference, plaintiff’s claims of sexual harassment, hostile work environment and discrimination are minimally adequate to satisfy the pleading requirements for such claims. The parties here should engage in appropriate discovery in resolution of the matter. Accordingly, the defendants’ motion to dismiss for failure to state a cause of action is denied.

#### *Forum Non Conveniens*

CPLR 327(a) codifies the doctrine of *forum non conveniens*. It states that “when the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action” (CPLR 327[a]). The movant seeking dismissal has a heavy burden of establishing “that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking” (*see Kuwaiti Eng’g Group v. Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600).

Among the factors to be considered are the burden on the New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transactions at issue in the litigation (*see Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 479, *cert. denied* 469 U.S. 1108). Other factors include the location of potential witnesses and documents and the potential applicability of foreign law (*see Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 AD3d 171, 176-177). Under New York law, the availability of an alternative forum, though a “most important factor to be considered in ruling on a motion to dismiss, is not an absolute precondition for dismissal on forum *non conveniens* grounds” (*Islamic Republic of Iran, supra*, at 481). Application of the doctrine is a matter of discretion (*Mashreqbank PSC v. Ahmad Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137; *Islamic Republic of Iran v. Pahlavi, supra*, at 478). Here, where their motion is lacking in factual detail and evidentiary support, defendants fail to satisfy any of the factors this court would consider in evaluating a dismissal based on forum *non conveniens*. Accordingly, defendants’ motion to dismiss on these grounds is denied.

#### Improper Venue

Defendants also move to dismiss based on improper venue. Venue, as codified in CPLR 503(a), states that “except 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.” (CPLR 503[a]). The appropriate remedy for improper venue would be transferring the case to a proper venue, not an outright dismissal of the complaint, as defendants have moved for here (*see, e.g., Weingarten v. Board of Educ. of City School Dist. of City of New York*, 776 NYS 2d 701). Even still, a change of venue requires compliance with CPLR 510 and 511, which defendants have not satisfied in

this case (*see, e.g., Tarpey v. Port Authority of New York and New Jersey*, 801 NYS2d 243). Accordingly, the motion to dismiss for improper venue is denied, without prejudice to any possible resubmission of a motion for change of venue, should defendants be able to establish a reasonable basis for their delay in seeking such relief.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a)(7) is DENIED; and it further

ORDERED that defendants' motion to dismiss is DENIED, without prejudice to any possible resubmission of a motion for change of venue, pursuant to CPLR 503(a), 510 and 511, should defendants be able to establish a reasonable basis for their delay in seeking such relief.

Date: January 9, 2018

Enter:



J.S.C.