

Faustino v Amin

2018 NY Slip Op 32347(U)

September 18, 2018

Supreme Court, New York County

Docket Number: 651486/2018

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X
 JASON FAUSTINO, individually and derivatively
 on behalf of EB2 LLC and EXTRA BUTTER LLC,

Index No. 651486/2018

Plaintiff,

Mot. Seq. No. 001

-against-

ANKUR AMIN, NIKUR AMIN, SHIVAM RENARTS INC.,
 RISE CHANCHAL INC., STAY ROOTED, LLC,
 THAT GOOD SAUCE INC., ABC LIMITED LIABILITY
 COMPANIES 1-10, XYZ CORPORATIONS 1-10, and
 RUSSEL FURCHAK,

Defendants.

-against-

EB2 LLC and EXTRA BUTTER LLC,

Nominal Defendants.

-----X
Masley, J.:

In motion sequence number 001, defendants Ankur Amin and Nikur Amin and nominal defendants EB2 LLC and Extra Butter LLC (collectively, Amin Defendants) move, pursuant to CPLR 510 (1) and (3), to change the venue to Nassau County from New York County. Plaintiff Jason Faustino cross-moves, pursuant to CPLR 305 (c), to allow him to amend the summons in this action. Plaintiff also cross-moves, pursuant to CPLR 510 (1) and 510(3), to retain venue of this action in New York County.

Background

This action arises from Ankur and Nikur Amin's alleged theft of assets belonging to a local boutique retailer of streetwear couture known as Extra Butter LLC, of which plaintiff Jason Faustino is a co-manager. Plaintiff is also a member of EB2 LLC and

Extra Butter LLC (Complaint, ¶1). Defendants Ankur Amin and Nikur Amin are co-managers and members of Extra Butter (*id.*).

On March 28, 2018, plaintiff filed a summons and complaint, designating the basis for venue as EB2 LLC's principal place of business at 125 Orchard Street, New York, New York 10002.¹ On April 13, 2018, the Amin Defendants made a Demand for Change of Place of Trial to Nassau County pursuant to CPLR 511. On April 17, 2018, plaintiff responded by affidavit to the Demand. Plaintiff's affidavit states that the basis for New York County as the venue is that a substantial part of the events and omissions giving rise to this action occurred at Extra Butter's flagship store located at 125 Orchard Street, New York, New York. Specifically, plaintiff describes a myriad of events that allegedly occurred at Extra Butter's Manhattan location, including the improper removal of Extra Butter's inventory, a confrontation of the Amin Defendants about the theft of store inventory, and conversations with the Amin Defendants that ultimately led to plaintiff's termination.

Discussion

Venue

The Amin Defendants argue that New York County is an improper venue because (1) EB2 LLC's actual principal place of business is Suffolk County, and not, as plaintiff claims, in New York County; and (2) venue in Nassau County would serve the convenience of material witnesses as well as "the ends of justice." The Amin Defendants insist that this action bears no nexus to New York County and should be transferred to Nassau County. In response, plaintiff contends that the basis for venue in

¹ On its Certificate of Incorporation, EB2 LLC's principal place of business is listed as 2060 Jericho Turnpike, East Northport, New York in Suffolk County.

New York County was not residence, but rather the site of events giving rise to this action.

Under CPLR 503 (a), venue is proper in either “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.”² A defendant seeking to change venue bears the burden of establishing “that the designated county is improper” (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]).

The Amin Defendants have failed to meet this burden. While the Certificates of Incorporation designate the nominal defendants Extra Butter and EB2 LLC’s principal places of business as Nassau and Suffolk County, respectively, residence, is only one path to establishing venue. In fact, the First Department has held that such a lone basis is insufficient to warrant a change of venue (*see Espinoza v Concordia Intl Forwarding Corp.*, 39 AD3d 258, 259 [1st Dept 2007] [rejecting a change of venue solely on the basis of a nominal defendant’s residence]).

Nevertheless, plaintiff’s stated basis of his venue designation is not residence, but rather, the location of the events that allegedly gave rise to this action, which is permitted by CPLR 503 (a). The factual allegations, contained in both the complaint and plaintiff’s CPLR 511 affidavit, that form the basis for this lawsuit make New York County the proper venue for adjudication of the alleged wrongdoing at Extra Butter’s flagship store in Manhattan.

² On October 23, 2017, the New York legislature amended CPLR 503 (a) to provide venue in “the county in which a substantial part of the events or omissions giving rise to the claim occurred” (2017 NY ALS 366, 2017 NY Laws 366).

The Amin Defendants also argue that plaintiff is precluded from sustaining this action in New York County because plaintiff forfeited his right by improperly designating venue in New York County in the first instance. It is true that when a plaintiff sues in an improper county, it forfeits its right to select venue if it offers no affidavit explaining the venue designation or rejecting defendants' proposed venue (*IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016]); however, no such failure exists here. Plaintiff, pursuant to CPLR 511 (b), timely served an affidavit explaining the basis for venue and arguing against a transfer to Nassau County. The fact that plaintiff improperly stated EB2 LLC's principal place of business in his complaint does not defeat the otherwise proper basis for venue under CPLR 503 (a): the site of the events forming the lawsuit. Even if venue was improperly designated based on plaintiff's incorrect understanding of EB2 LLC's principal place of business, the Amin Defendants' requested venue in Nassau County cannot be justified on the sole basis of nominal defendant Extra Butter's corporate residence.

The Amin Defendants' alternative argument that this court use its discretionary authority under CPLR 510 (3) is similarly unavailing. CPLR 510 (3) permits a party to change the place of trial where the county designated is improper or where the convenience of the material witnesses and justice will be promoted by the change. "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" (*Hernandez v Rodriguez*, 5 AD3d 269, 269-270 [1st Dept 2004] [internal quotation marks and citations

omitted)).

The Amin Defendants have failed to make this requisite showing. The Amin Defendants' principal contention is that Nassau County is the closest county to all parties, including plaintiff. However, geographic convenience, alone, is not dispositive for motions to change venue (*see Hernandez*, 5 AD3d at 270). Further, the record does not indicate that the witnesses were ever contacted about their alleged inconvenience, as required by CPLR 510 (3). Failure to establish the requisite contact with witnesses, establish their willingness to testify, or the basis for their inconvenience constitutes a fatal deficiency to the movant's burden (*Hernandez*, 5 AD3d at 270). The Amin Defendant's motion is denied.

Plaintiff's Cross Motion

Plaintiff cross-moves, pursuant to CPLR 305 (c), to allow him to amend the summons in this action. Plaintiff also moves, pursuant to CPLR 510 (1) and 510(3), to retain the venue of this action in New York County. As this court has denied the Amin Defendants' request to change venue, this second portion of plaintiff's cross motion need not be addressed, as this action will remain in New York County.

CPLR 305 (c) provides that "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced." Plaintiff seeks to amend the summons to state "[t]he basis of the venue designated is defendant EB2 LLC's principal place of business at 125 Orchard Street, New York, New York 10002 where a substantial part of the events and omissions giving rise to the verified complaint's claims occurred" (emphasis on proposed amendment).

The court will permit this amendment as defendants will not be prejudiced by the addition of this language as they were made aware of plaintiff's basis for venue in April 2018, when plaintiff filed his CPLR 511 affidavit.

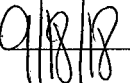
Accordingly, it is

ORDERED, that defendants motion sequence number 001 pursuant to CPLR 510 (1) and (3), to change the venue to Nassau County from New York County is denied; and it is further

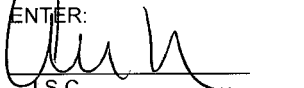
ORDERED, that plaintiff's cross-motion pursuant to CPLR 305 (c), to allow him to amend the summons in this action is denied; and it is further

ORDERED, that plaintiff's cross motion, pursuant to CPLR 510 (1) and 510(3), to retain venue of this action in New York County is denied as moot.

Dated



ENTER:



J.S.C.
HON. ANDREA MASLEY