Webb v Muller

2018 NY Slip Op 33897(U)

October 11, 2018

Supreme Court, Suffolk County

Docket Number: 605098/2016

Judge: William G. Ford

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SHORT FORM ORDER **INDEX NO.: 605098/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

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DEAN W. WEBB, as Administrator of the Estate of KYLE D. WEBB, deceased & DEAN W. WEBB & JULIE A. WEBB, Individually,

Plaintiffs,

-against-

KRISTYN N. MULLER, JOHN & JANE DOES 1 through 10,

Defendants.

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Motion Submit Date: 04/27/17
Mot Seq 006 MG

PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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Read on defendants' motion to change venue, the following papers were considered:

1. Cross-Notice of Motion & Affirmation in Support for Order to Change Venue pursuant to CPLR 510(3) dated March 22, 2017 and supporting papers;
2. Affirmation in Opposition dated April 24, 2017 and opposing papers; and upon due deliberation and full consideration; it is

ORDERED that defendants' motion to change venue from Supreme Court, Suffolk County to Supreme Court, Albany County pursuant to CPLR 510(3) is **granted** for the reasons that follow; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on counsel for plaintiffs forthwith by certified first class mail; and it is further

ORDERED that defendants file a copy of this decision and order with the Clerk of the Court for both Supreme Court, Suffolk County and Supreme Court, Albany County forthwith.

The Court assumes the parties' familiarity with the salient facts of this wrongful death negligence action filed by decedent Kyle Webb's parents. Mr. Webb was a matriculated resident student at the State University of New York at Albany, residing in on campus housing at the time of his death, which was determined to be a suicide due to illicit drug toxicity. His parents have filed suit alleging negligence on the part of SUNY and other related officials on the theory that their son

expressed threats of suicide and self-harm which were negligently handled by SUNY Residential Life official and administration. The parties have made clear that plaintiffs have filed and presently maintain a companion action venued in the Court of Claims, Albany County against the State of New York.

Previously, defendants made an application seeking the same or similar relief, discretionary change of venue, prior to assignment to this Court before the Supreme Court, Differentiated Case Management Part, Justice Hon. Paul J. Baisley, Jr., presiding. In a Short-Form Order dated August 29, 2016, served with notice of entry on August 30, 2016, Supreme Court denied defendant's motion determining in part that the application was supported solely by a party defendant, failed to specify the home addresses of anticipated witnesses, could not be based solely on inconvenience to that party defendant, and lacked sufficient evidentiary support for the requested relief.

Defendants did not take appeal or seek to renew or reargue that application at that time. Instead, the parties completed their Preliminary Conference and the matter proceeded into discovery supervised by this Court, which has conferenced this matter on several occasions. Thereafter, plaintiff moved over defendants' opposition to amend the pleadings, which was granted by this Court by Order dated October 11, 2018. This application is the sole remaining unresolved issue between the parties, as this case certified ready for trial upon issuance of a Compliance Conference Order dated October 11, 2018.

A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (***Elder v. Elder***, 21 AD3d 1055; *see* ***Matter of Allstate Ins. Co. v. Liberty Mut. Ins.***, 58 AD3d 727). It must be based upon new facts, not offered on the original application, "that would change the prior determination" (CPLR 2221[e][2]; *see* ***Matter of Korman v. Bellmore Pub. Schools***, 62 AD3d 882, 884). The new or additional facts must have either not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (*see* ***Cole–Hatchard v. Grand Union***, 270 AD2d 447). However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented (CPLR 2221 [e][3]). Thus it has been held that this requirement is a flexible one and the court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a reasonable justification for failing to submit them on the earlier motion" (***Lafferty v Eklecco, LLC***, 34 AD3d 754, 754-55, 826 NYS2d 617, 618 [2d Dept 2006]). The determination of what constitutes a "reasonable justification" is within the Supreme Court's discretion (***Heaven v. McGowan***, 40 AD3d 583, 586; ***Dervisevic v Dervisevic***, 89 AD3d 785, 786–87 [2d Dept 2011]).

The Second Department has made clear that motions for reargument are "addressed to the sound discretion of the court" and properly lie "on a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (***Vaccariello v Meineke Car Care Ctr., Inc.***, 136 AD3d 890, 892 [2d Dept 2016]). A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion' " (***Ahmed v Pannone***, 116 AD3d 802, 805 [2d Dept 2014]). The motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (***Rodriguez v Gutierrez***, 138 AD3d 964, 966 [2d Dept 2016]).

Plaintiffs oppose defendants' present application primarily arguing that it is procedurally defective. They argue that to the extent that defendants' motion may be deemed not to renew or reargue, it is untimely since the motion was not made until 7 months after entry of the court's prior determination denying the same relief. Further, plaintiffs note that it is entirely unclear whether defendants seek to reargue or renew, but further point out that defendants offer no new facts or subsequent change in law. This Court disagrees in part and on that basis **grants** the motion as explained below.

The decision of whether to grant a change of venue is committed to the providently exercised discretion of the trial court (***Adhurim Xhika v Rocky Point Union Free School Dist.***, 125 AD3d 646, 647, 2 NYS3d 601, 602 [2d Dept 2015]). This Court recognizes that the Appellate Division has under certain and limited circumstances ruled that a motion court confronted with an untimely motion for a change of venue may exercise its discretion to grant the motion (***Byron v Spektor***, 266 AD2d 253, 253, 698 NYS2d 290, 291 [2d Dept 1999]). Thus, to be successful, a movant like defendants here, bears the burden of demonstrating that the convenience of material witnesses and the ends of justice would be better served by the change (***Leake v Constellation Brands, Inc.***, 112 AD3d 792, 793, 978 NYS2d 65, 66 [2d Dept 2013). However, courts must remain mindful that the convenience of the parties, their employees, and their experts is not relevant to a determination of a change of venue under CPLR 510(3) (*25/27 Corp. v Mormile*, 43 AD3d 1154, 843 NYS2d 342, 343 [2d Dept 2007]).

Concerning the merits, movant seeking to change the venue pursuant to CPLR 510(3) must provide information about the prospective witnesses, including, but not limited to, their names and addresses, disclose the facts about which the proposed witnesses will testify at the trial, represent that the prospective witnesses are willing to testify, and state that the witnesses would be inconvenienced if the venue is not changed. Courts are instructed to not apply these criteria rigidly (***Schwartz v Walter***, 141 AD3d 641, 641-42, 37 NYS3d 272, 273 [2d Dept 2016]; *see also* ***O'Brien v Vassar Bros. Hosp.***, 207 AD2d 169, 173, 622 NYS2d 284, 286 [2d Dept 1995]).

Deeming defendants' present motion as one seeking renewal or reargument, albeit untimely, this Court in the exercise of its discretion and in the interests of justice shall consider it on the merits. Having reviewed the prior court's decision and weighed it against the present application, this Court accepts defendants' reasonable argument that certain facts have been presented newly on this motion which may not have been adduced or presented previously. By affidavit, defendants have identified non-party witnesses including the chief and deputy chief of the SUNY Albany Police Department, as well as EMTs and personnel from the Albany County Medical Examiner's Office, as well as investigators who all responded to investigate the plaintiffs' decedents suicide scene. These public servants and government officials have all identified themselves as being employed in Albany County, but have declined to disclose their residential addresses on grounds that they work for law enforcement and such public disclosure could present public safety concerns. Further, supervisory officials in SUNY Albany's police department have argued that requiring their attendance at trial and travel to Suffolk County, a distance of over 200 miles, could present operational challenges for its department, further putting public safety at risk. Plaintiffs have not opposed the application on these grounds nor have they seriously disputed these contentions.

At the outset, the Court notes that defendants'' witnesses contentions are not without merit. At least one court has determined within the context of a federal civil rights action pursuant to 42 U.S.C. § 1983 during pretrial discovery that a litigant is not entitled to disclosure of a peace officer's home address (*see e.g.* ***Collens v City of New York***, 222 FRD 249 [SDNY 2004][determining plaintiff's request for peace officer's home address information irrelevant and not reasonably calculated to lead to discoverable evidence]; *but see* ***King v. Conde,*** 121 F.R.D. 180, 190 [EDNY1988][holding that a peace officer's invocation of the official information privilege to shield disclosure of home address information during discovery requires a substantial threshold showing that disclosure would result in "specific harm to identified important interests]; ***Coggins v. Cty. of Nassau,*** 07-CV-3624(JFB)(AKT), 2014 WL 495646, at *3 [EDNY Feb. 6, 2014][standing for the proposition that at a minimum the proponent of a law-enforcement privilege must make a "threshold showing" that as to the interests that would be harmed], ***Gavrity v City of New York***, 12-CV-6004 (KAM)(VMS), 2014 WL 4678027, at *4 [EDNY Sept. 19, 2014]).

Here, the residential address information sought is pursuant to statute and for different purposes than for pretrial disclosure. That said, the Court takes the non-party peace officer and law enforcement officials' contentions and requests seriously. Moreover, plaintiffs' themselves have not indicated any strong preference for disclosure, even given the analysis warranted under CPLR 510(3). Even though disclosure may militate in favor of movant, this Court will not compel disclosure determining the request not to disclose is made in good faith. This conclusion is warranted particularly in view of good law within this State cautioning motion courts such as this Court that in consideration of applications to change venue that "[t]he convenience of public employees and the use of public records at trial should be given more than ordinary consideration" (***Kennedy v C.F. Galleria at White Plains, L.P.***, 2 AD3d 222, 223, 769 NYS2d 526, 527 [1st Dept 2003]).

Thus, this Court finds itself particularly guided by the approach taken by the First Department in the matter ***Hoogland v Transp. Expressway, Inc.***, 24 AD3d 191, 191-92, 808 NYS2d 160, 161-62 [1st Dept 2005]. There, affirming the motion court's granting a discretionary change of venue request, the Appellate Division specifically noted that the request of the governmental officials and law enforcement/public safety officers identified as likely witnesses stated that they would be inconvenienced by having to take a day off from their public service jobs to travel to New York County to testify and further to the extent that they responded to the scene and investigated, their testimony was likely relevant and material to the resolution of the matter (*see also* ***Vered v Wittenberg***, 138 AD3d 646, 646-47, 28 NYS3d 871, 872 [1st Dept 2016][ruling that motion court improvidently exercised its discretion in denying defendant's motion to change venue pursuant to CPLR 510(3) premised on a showing that nonparty material witnesses—including the police officer, detective, and paramedics who responded to the scene of the accident in Suffolk County—were willing to testify, but would be inconvenienced by having to travel to New York County]).

Here, defendants have carried their burden of identifying several non-party witnesses, likely and willing to testify, most of whom are public safety/law enforcement officials, all of whom are public servants' whose absence from their duties and being compelled to travel to Suffolk County from Albany County, could likely present administrative challenges, and possible risks to public safety. In the face of this showing, plaintiffs' having offered no real opposition on the merits. Thus, in the interests of justice and having been made aware of no

compelling reason to retain proper venue in Suffolk County beyond the residence of plaintiffs' and decadent prior to his death, this Court within its discretion **grants** defendants'' application. This is particularly the case where beyond these witnesses, the incident occurred in Albany County, records and other evidence likely resides there, and a companion action arising from the same incident, occurrence and transaction and operative facts is presently venued and pending before the Court of Claims in Albany County.

Therefore, defendants' motion to change venue pursuant to CPLR 510(3) is hereby accordingly **granted.**

The foregoing constitutes the decision and order of this Court.

Dated: October 11, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**