

<b>Murrow v Artcraft Silversmiths Inc.</b>
2019 NY Slip Op 30338(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 159077/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

*Justice*

-----X  
**INDEX NO.** 159077/2017

JESSICA MURROW,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

ARTCRAFT SILVERSMITHS INC. and ROBERT VITULLI,

Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for CHANGE VENUE

Upon the foregoing documents, it is ordered that the motion is denied in all respects.

In this action by plaintiff Jessica Murrow sounding, inter alia, in conversion and replevin, Artcraft Silversmiths Inc. ("Artcraft") and Robert Vitulli ("Vitulli") (collectively "defendants") move to change the place of trial of this action to Westchester County on the basis of improper venue pursuant to CPLR 511 or, in the alternative, to change the venue of this action to Westchester County pursuant to CPLR 510 based on the convenience of material witnesses and pursuant to CPLR 508 based on the fact that the chattels involved in the action are located in Westchester. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied in all respects.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1981, two musical instruments created by the renowned instrument maker A. Laubin, Inc. were stolen from plaintiff, a classical musician, while she rode the New York City Subway. Plaintiff subsequently learned that defendants Artcraft and Vitulli were in possession of the instruments and sought to sell the same. In May, 2017, plaintiff went to defendants' place of business in the Westchester County town of Mt. Vernon, New York in an attempt to have the instruments returned to her. The Mt. Vernon police responded to defendants' place of business and generated a police report stating, inter alia, that plaintiff resided in Massachusetts. In October 2017, after defendants refused to return the instruments, plaintiff commenced the captioned action seeking to recover them. The summons reflected that venue was based on plaintiff's residence in New York County.

Defendants joined issue by their answer, filed November 21, 2017. On the same day their answer was filed, defendants served a demand to change venue, pursuant to CPLR 511, to Westchester County on the ground that the Mt. Vernon police report reflected that plaintiff lived in Massachusetts. Alternatively, the demand sought a change of venue pursuant to CPLR 508 on the ground that the chattels sought to be recovered were located in Westchester County. Further, defendants sought to change venue to Westchester County based on CPLR 510(3) because all material witnesses were located there.

On December 5, 2017, defendants filed the instant motion seeking to change venue. In support of the motion, defendants assert that a change of venue to Westchester County must be granted due to plaintiff's failure to submit an affidavit in opposition to their demand to change venue. They further assert that venue must be changed to Westchester County because that is

where the instruments are located. Additionally, defendants maintain that the case must be venued in Westchester County because “all material witnesses” are located there.

In opposition to the motion, plaintiff argues that defendants’ motion must be denied since they failed to establish that she did not reside in New York County at the time the action was commenced, that transfer of venue to Westchester County was not required simply because the instruments were in that county, and that defendants failed to show that the case had to be venued in Westchester County for the convenience of material witnesses.

### LEGAL CONCLUSIONS

That branch of the motion seeking a change of venue pursuant to CPLR 511 is denied. As plaintiff asserts, the police accident report showing that she lived in Massachusetts was, in and of itself, insufficient to establish that she did not maintain a residence in New York County at the time the action was commenced. *See Chehab v Roitman*, 120 AD3d 736 (2d Dept 2014).

The branch of the motion seeking a change of venue based on the convenience of material witnesses is denied as well. “A change of venue based on the convenience of witnesses may only be granted after there has been a detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief. *O'Brien v Vassar Bros. Hosp.*, 207 A.D.2d 169 (2d Dept 1995); *Kraft v Kamalian*, 290 A.D.2d 264 (1<sup>st</sup> Dept 2002). The affidavit in support of such motion must contain 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 v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299, 299 (1st Dept 2004). Since

defendants have failed to submit the detailed information required above, a change of venue cannot be granted on this basis.

Moreover, defendants are not entitled to a change of venue to Westchester County merely because the instruments are located there. Although CPLR 508 provides that the “place of trial of an action to recover a chattel may be in the county in which any part of the subject of the action is situated at the time of the commencement of the action”, “that section is permissive and not mandatory” and thus “does not preclude an action in another venue.” *Tower Broadcasting, LLC v Equinox Broadcasting Corp.*, 160 AD3d 1435, 1437 (4<sup>th</sup> Dept 2018).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Artcraft Silversmiths Inc. and Robert Vitulli seeking to change the venue of this action to Supreme Court, Westchester County is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

2/11/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE