

<b>Russell v South Shore Indus. Ltd.</b>
2020 NY Slip Op 31600(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 157921/2019
Judge: Merik R. Aaron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM**

*Justice*

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INDEX NO. 157921/2019

DESTINY RUSSELL, ALBERT JOHN ALONZO LYONS, as Administrators of the Estate of LORELEI E. LYONS, a/k/a LORELEI ELIZABETH LYONS, and DESTINY NICOLE RUSSELL and ALBERT JOHN ALONZO LYONS, individually,

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

Plaintiffs,

- v -

SOUTH SHORE INDUSTRIES LTD., SOUTH SHORE FURNITURE, SOUTH SHORE USA, INC., WALMART, INC., WAL-MART STORES, INC., WAL-MART STORES EAST, L.P., WAL-MART STORES EAST, INC., WAL-MART. COM USA, LLC, WAL-MART ASSOCIATES, INC., WAL-MART TRS, LLC,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15-64, 72-74 were read on this motion to change venue.

By notice of motion, defendants move pursuant to CPLR 510(1) and 511 for an order changing the venue of trial in this action from New York County to Erie County on the ground that New York County is not a proper county for venue, or, alternatively, pursuant to CPLR 510(3) and 511 on the ground that the convenience of material witnesses and the ends of justice will be promoted by the changed venue. Plaintiffs oppose.

I. UNDISPUTED FACTS

It is undisputed that plaintiffs' daughter's tragic death occurred at their home in Buffalo, New York, located in Erie County, that the accident was investigated by the Buffalo Police

Department, that the daughter was transported to Women & Children's Hospital in Buffalo for medical treatment, and that upon her passing, she was examined by the Eric County Medical Examiner's Office. Moreover, plaintiffs were issued letters of administration by the Surrogate Court of Erie County, and currently reside in Buffalo.

It is also undisputed that:

- (1) Defendant South Shore Industries, Ltd. is a foreign corporation with a principal place of business in Saint-Croix, Quebec, Canada;
- (2) Defendant South Shore USA, Inc. is a Texas Corporation with its principal place of business in El Paso, Texas;
- (3) Defendant Walmart Inc., d/b/a Walmart and Walmart.Com f/k/a "Wal-Mart Stores, Inc.," is a foreign (Delaware) corporation with a principal place of business in Bentonville, Arkansas;
- (4) Defendant Wal-Mart Stores East, L.P., is a foreign (Delaware) limited partnership with its principal place of business in Bentonville Arkansas;
- (5) Defendant Wal-Mart Stores East, Inc. has not existed since 2011 and was converted to Wal-Mart Stores East, LLC, which is a foreign (Delaware) limited liability corporation with its principal place of business in Bentonville, Arkansas;
- (6) Defendant Wal-Mart Associates, Inc. is a foreign (California) limited liability company with its principal place of business in Bentonville, Arkansas;
- (7) Defendant Wal-Mart TRS, LLC is a foreign (Delaware) limited liability company with its principal places of business in Bentonville, Arkansas;
- (8) Defendant Walmart.Com USA, LLC is a foreign (California) limited liability company with its principal place of business in San Bruno, California.

## II. PROCEDURAL BACKGROUND

Following the filing and service of a summons and complaint, plaintiffs timely filed an amended complaint (NYSCEF 5), upon which defendants filed a notice to remove the action to federal court and filed an answer to the complaint in that court. (NYSCEF 6). After plaintiffs objected to the removal, the federal court remanded the case to this court (NYSCEF 10), which

accepted it on January 2, 2020, and filed the notice of remand (NYSCEF 9).

On January 7, 2020, defendants simultaneously served an amended answer to the amended complaint and a demand to change venue to Erie County. (NYSCEF 12, 13).

On January 22, 2020, defendants moved to change venue. (NYSCEF 15). On January 27, 2020, plaintiffs filed an affidavit of proper venue (NYSCEF 35), along with a notice of rejection of defendants' amended answer (NYSCEF 50).

Even if defendants' verified answer was untimely filed, plaintiffs retained it for 20 days and did not reject it until after defendants had filed their motion to change venue, and plaintiffs had a chance to address, in their affidavit of proper venue, the venue issues raised in defendants' amended answer. Having done so, plaintiffs are thereby deemed to have accepted the untimely answer. (*See e.g., Wittlin v Schapiro's Wine Co. Ltd.*, 178 AD2d 160 [1st Dept 1991] [plaintiff waived objection to untimely answer having accepted and retained it, raising issue of untimeliness in response to defendants' discovery demand]).

To the extent that defendants untimely filed their amended answer, as they have asked in their motion papers that the amended answer be deemed timely made, and as the amendment has merit and plaintiffs show no prejudice by the late amendment, the amended answer is deemed to have been timely filed. The demand to change venue is also thus timely filed.

In any event, even if defendants' motion to change venue is untimely, the court may still decide it based on whether the convenience of material witnesses or the ends of justice will be promoted by the change. (*Saint-Louis v Esposito*, 171 AD3d 82 [2d Dept 2019]).

### III. ANALYSIS

Pursuant to CPLR 510, the court, upon motion, may change the venue of trial of an action where: (1) the county designated for that purpose is not a proper county; or (3) the convenience

of material witnesses and the ends of justice will be promoted by the change.

In order to move to change venue under section 510, the defendant must first serve a written demand, either with the answer or before the answer is served. (CPLR 511). Thereafter, the defendant may move to change the place of trial within 15 days of service of the demand, unless within five days after such service the plaintiff serves a written consent to change venue. (CPLR 511[b]). Only the defendant may move to change venue pursuant to CPLR 510, and if the plaintiff chooses an improper venue, it forfeits the right to select the venue. (*Llorca v Manzo*, 254 AD2d 396 [2d Dept 1998]).

CPLR 503 provides, as pertinent here, that

- (a) Generally. 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. A party resident in more than one county shall be deemed a resident of each such county; and
- (c) Corporation. A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier, shall also be deemed a resident of the county where the cause of action arose.

Given the undisputed facts, defendants demonstrate that no party to this action resides in New York County, and, indeed, plaintiffs allege nothing otherwise in their amended complaint. (NYSCEF 5). Therefore, plaintiffs improperly placed venue of the action in New York County. (*See e.g., Carr v Trans Am. Express, Inc.*, 159 AD3d 458 [1st Dept 2018] [plaintiff improperly chose venue in New York County as she resided in Nassau County when action commenced, and did not allege that individual defendant resided or corporate defendant had principal office within New York County]).

Plaintiffs now contend that defendant Wal-Mart TRS, LLC is a resident of New York

County, as it designated New York County as its place of residence when it registered with the New York State Department of State. The printout of the registration provided by plaintiffs reflects that defendant selected CT Corporation System, with an address in Manhattan, as its registered agent and listed CT's address as defendant's address for service of process; nowhere on the document does defendant list a location for its principal office or place of business. (NYSCEF 64).

A corporation's "principal office" or principal place of business within the meaning of CPLR 503(c) is the address listed on its certificate of incorporation. (*Discolo v River Gas & Wash Corp.*, 41 AD3d 126 [1st Dept 2007]). A corporation's designation of an agent for service of process does not constitute an admission that its principal place of business or office is located at the agent's address. (*Lloyd v Ntl. Propane Corp.*, 271 AD2d 202 [1st Dept 2000]).

For example, in *Nadle v L.O. Realty*, one of the defendants filed an Application for Certificate of Authority, in which it indicated that its office would be located in New York County and provided a Manhattan address for service of process. It thereafter filed a Certificate of Change of Application of Authority, in which it changed its address for service of process to an address in New Jersey. The Court held that despite changing its service of process address from New York to New Jersey, the defendant's unchanged location of its office in New York County established that its proper residence was New York County, observing that "[t]he change of designation of post office address for the forwarding of process from the Secretary of State is not the same as amending a foreign corporation's designation of its principal place of business within the State of New York." (286 AD2d 130 [1st Dept 2001]).

Here, plaintiffs' evidence reflects only that defendant designated an address in New York County for the forwarding of process from the secretary of state, and there is no indication that

its principal office or place of business is in New York County. Plaintiffs otherwise submit no evidence showing that any party resides in New York County.

In any event, even if one of the defendants is a resident of New York County, it is undisputed that the accident and decedent's death occurred in Erie County, that witnesses to the investigation and treatment of the decedent, such as police and medical personnel, are based in Erie County, and that the medical examiner who examined the decedent and the surrogate overseeing the decedent's estate are located in Erie County. Defendants therefore establish that pursuant to CPLR 510(3), venue of the action should be changed to Erie County for the convenience of material witnesses and the ends of justice. (*Shedrick v Asplundh Tree Expert Co.*, 278 AD2d 49 [1st Dept 2000]).

That one defendant registered a New York County address as its address for service of process is insufficient to overcome defendants' showing. (*Id.*; see also *Neos v Crabby Joe's*, 241 AD2d 337 [1st Dept 1997] [{"(o)ther than the address of defendants' corporate attorney designated as their agent for service of process in their certificate of incorporation, the action bears no relationship to New York County, and should be tried in Nassau County, where the majority of nonparty witnesses who will be testifying as to liability either work or reside."}]).

In sum, as the accident occurred in Erie County and the preponderance of witnesses are located there, and the only asserted connection to New York County is that one of the nine defendants listed New York County as its service of process address, venue is properly placed in Erie County. (See e.g., *Taylor v Montreign Operating Co., LLC*, 161 AD3d 437 [1st Dept 2018] [venue should have been changed from New York County to Sullivan County as accident occurred in Sullivan County, and other than one defendant's registered principal place of business and one of plaintiff's physicians having office in New York County, action had no

connection with New York County]; *Wickman v Pyramid Crossgates Co.*, 127 AD3d 530 [1st Dept 2015] [even if designation of venue in New York County was proper as it was principal place of business of two corporate defendants, situs of plaintiff’s injury provided ground for discretionary change of venue to Albany County, as venue in county where action arose would better serve convenience of witnesses and promote ends of justice; “transitory action should be tried in the county where the cause of action arose.”]; *Lawrence v Volvo Cars of N. Am., Inc.*, 224 AD2d 329 [1st Dept 1996] [although plaintiff venued action in New York County for injuries caused when plaintiff’s Volvo vehicle caught fire in Rockland County solely on ground that defendant had designated New York as its principal place of business, court properly exercised discretion in changing venue to Rockland County as accident occurred there, plaintiff was treated at hospital there immediately after accident, extensive investigation and reports were undertaken there, and majority of material witnesses located there)].

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motion to change the venue of this action from New York County to Eric County is granted; and it is further

ORDERED, that the venue of this action is changed from this Court to the Supreme Court, County of Eric, and 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 Eric, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

5/28/2020

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER



APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE