

**Cruz v Murphy**

2023 NY Slip Op 31508(U)

May 5, 2023

Supreme Court, New York County

Docket Number: Index No. 150512/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. MARY V. ROSADO **PART** **33M**

*Justice*

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**INDEX NO.** 150512/2021

MYNOR ALFREDO GARCIA CRUZ,

**MOTION DATE** 11/21/2022

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

RYAN W. MURPHY, HOLLY FICHTNER MURPHY,  
AUTHENTIC WINDOW DESIGN, LLC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for

CHANGE VENUE

Upon the foregoing documents, Defendants Authentic Window Design, LLC's ("Authentic") motion to change venue is denied.

Plaintiff Mynor Alfredo Garcia Cruz ("Plaintiff") initiated this labor law action via summons and complaint on January 15, 2021 (NYSCEF Doc. 1). Venue was placed in New York County based on the principal place of business of Defendant Authentic (*id.*). Authentic filed its Answer on April 1, 2021 (NYSCEF Doc. 5). The instant motion was filed on October 31, 2022 (NYSCEF Doc. 38). Authentic concedes that venue is proper pursuant to CPLR § 503 on this basis (*see* NYSCEF Doc. 39 at ¶ 2). However, Authentic moves to have venue changed to Westchester County pursuant to CPLR § 510(3) (*id.*).

Authentic argues that the only connection this case has to New York County is Authentic's corporate filings, which indicate its principal place of business as New York County. Authentic now alleges that Authentic no longer maintains a presence in New York County (*id.* at ¶ 2). Authentic argues that because "the trial docket in New York County is backlogged" the interests

of justice favor transferring venue to Westchester County (*id.* at ¶ 8). Authentic also asserts that because the accident occurred in Westchester and the vast majority of Plaintiff's medical treatment occurred in Westchester, venue should be transferred to Westchester (*id.* at ¶ 7). Authentic argues, therefore, that pursuant to CPLR § 510(3), change of venue is proper for the convenience of material witnesses and in the interests of justice.

Plaintiff submitted opposition (NYSCEF Doc. 47). Plaintiff argues that Authentic's motion should be denied as untimely, and because it has not provided any particularized facts regarding witnesses who would be inconvenienced by having this trial heard in New York County rather than Westchester County (*id.* at ¶¶ 2-4). Plaintiff argues that pursuant to CPLR §511(a), "a motion for change of place or trial...shall be made within a reasonable time after commencement of the action." (*id.* at ¶ 10). Plaintiff asserts that although Authentic filed its Answer on April 1, 2021, it did not file the instant motion until October 31, 2022. Plaintiff argues that this delay is unreasonable and warrants denying Authentic's motion. Plaintiff argues that if this action is transferred to Westchester, it will only result in further delay. Indeed, since the motion was filed, the parties have held a preliminary conference with this Court (*see* NYSCEF Doc. 50). Further, the parties are to return for a compliance conference on July 26, 2023 (*id.*).

In reply, Authentic argues that their motion is timely since the delay was caused by Plaintiff being tardy in serving his bill of particulars, which was served approximately 17 months after the filing of the summons and complaint (NYSCEF Doc. 48 at ¶ 5).

Authentic's motion is denied. First, Authentic concedes that venue in New York County is proper based on its residence at the time the Complaint was filed. Further, Authentic has made "no showing of the identity and availability of proposed nonparty witnesses, the nature and materiality of their proposed testimony and the manner in which they would be inconvenienced by the initial

venue.” (*Argano v Scuderi*, 6 AD3d 211 [1st Dept 2004]). Without these affidavits or other proofs from material witnesses, Defendants fail to maintain their burden of showing entitlement to a discretionary change of venue (*Twaiah v McNiff*, 193 AD3d 559 [1st Dept 2021]; *10 Two Trees Lane LLC v Mahoney*, 192 AD3d 468 [1st Dept 2021]; *Manzari v Burrows*, 89 AD3d 440 [1st Dept 2011]). In particular, Authentic was required to provide an affidavit with (1) the names, addresses, and occupations of witnesses expected to be called; (2) disclose the facts upon which such witnesses are expected to testify, in order that the court may determine whether such witnesses are material and necessary; (3) demonstrate that such witnesses are willing to testify; and (4) show that the witnesses would be inconvenienced absent a change in venue (*10 Two Trees, supra* at 469). Authentic has failed to provide this information.

Moreover, simply because Authentic changed its residence from New York County, where venue was originally and properly predicated, to Westchester County, does not support a change of venue (*Ayers v Mohan*, 64 Misc.3d 470 [Sup. Ct. Bronx Co. 2019]). Also, the parties are currently on a Court supervised discovery schedule in this Part (*see* NYSCEF Doc. 50). To transfer this case to Westchester County would only result in further delay. To that end, Authentic’s argument about New York County’s “trial backlog” is disingenuous, as its own motion to transfer, if granted, would result in further delay. Finally, the delay in filing the instant motion, which is close to two years, was unreasonable.

Accordingly, it is hereby,

ORDERED that Defendant Authentic Window Design, LLC's motion to change venue to Westchester County is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties.

This constitutes the Decision and Order of the Court.

5/5/2023  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE