

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RUDOLPH E. GRECO, JR.**
Justice

IA PART 32

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Alexander Lifson,

Index No.: 717677/18
Motion Date: 7/23/20
Motion Cal. No.: 35
Motion Seq. No.: 5

Plaintiff,

FILED

-against-

**7/23/2020
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Pascarella’s Towing Service, LLC, et al.,

**COUNTY CLERK
QUEENS COUNTY**

Defendants.
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The following numbered papers read on this motion by defendants Pascarella’s Towing Service, LLC and William Haskell to change the venue of the instant action, pursuant to CPLR 510.

| PAPERS | NUMBERED |
|--|-------------|
| Notice of Motion-Affidavits-Exhibits..... | EF 83 - 94 |
| Affirmation in Opposition-Affidavits-Exhibits..... | EF 95 - 121 |

Upon the foregoing cited papers, it is ordered that this motion by defendants Pascarella’s Towing Service, LLC and William Haskell, pursuant to CPLR 510, is determined as follows:

Plaintiff, Alexander Lifson, commenced this action to recover for injuries he allegedly sustained in a trip-and-fall as a result of defective towing operations, which occurred on November 23, 2015 on Fly Road at or near its intersection with Swanka Boulevard, Incorporated Village of East Syracuse, County of Onondaga, New York. Defendants Pascarella’s Towing Service, LLC and William Haskell served their answer, coupled with a Demand for Change of Venue, upon plaintiff’s attorneys; plaintiff’s attorneys did not consent. Defendants now move for an order changing the place of venue from Queens County to Onondaga County.

Pursuant to CPLR 511(a), a defendant’s demand “for change of place of trial on the ground that the county designated for that purpose is not a proper county,” must be served prior to the answer or with the answer (CPLR 511[a]; *see also Simon v Usher*, 17 NY3d 625, 628 [2011]). CPLR 511(b) permits a defendant to “move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant” (CPLR 511[b]; *see also id.*). CPLR 2103(b)(2) provides “where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period” (CPLR 2103[b][2]; *see also id.*).

Here, on December 19, 2018 defendants, by way of mail, served their demand to change venue with their answer. Plaintiff did not provide written consent to change venue within five (5) days of such service; instead, on December 26, 2018, plaintiff timely served a rejection of such demand. Therefore, applying the five-day-extension pursuant to CPLR 2103(b)(2), defendants were required to make a motion to change venue within twenty days after service of the demand, i.e., on or before

Tuesday, January 8, 2019. Defendants motion to change venue was dated March 18, 2020 and e-filed on March 19, 2020. The Court finds that defendants failed to make a timely motion to change venue within the statutory requirements. Nevertheless, the Court finds that Queens County is a proper venue based on plaintiff's residence at the time the action was commenced.

"To prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and also that the defendant's choice of venue is proper" (*Kidd v 22-11 Realty, LLC*, 142 AD3d 488, 489 [2d Dept 2016], quoting *Deas v Ahmed*, 120 AD3d 750, 751 [2d Dept 2014]; see CPLR 511[b]; *Williams v Staten Island University Hospital*, 179 AD3d 869, 870 [2d Dept 2020]). Only if the defendant meets this initial burden, would the plaintiff be required to establish, in opposition, that the venue she selected was proper (see *Deas*, 120 AD3d at 751; *Williams*, 179 AD3d at 870).

Pursuant to CPLR 503(a), the proper venue of an action is the county in which one of the parties resides, or if none of the parties reside in New York, then in any county designated by the plaintiff; furthermore, the Legislature amended said statute to allow cases to be brought in "the county in which a substantial part of the events or omissions giving rise to the claim occurred" (CPLR 503[a]; see *Demirovic v Performance Food Group, Inc.*, 170 AD3d 656, 658 [2d Dept 2019]). For the defendant to effect change of venue based on improper choice of venue, he must demonstrate that: (i) at the time the action was commenced, none of the parties resided in the county designated by the plaintiff (see *Drayer-Arnou v Ambrosio & Company, Inc.*, 181 AD3d 651, 652 [2d Dept 2019]; *Demirovic*, 170 AD3d at 658; *Chehab v Roitman*, 120 AD3d 736, 737 [2d Dept 2014]); and (ii) a substantial part of the events giving rise to the claim did not occur in the designated county (see CPLR 503[a]).

The Court finds that the evidentiary submissions conclusively establish that plaintiff maintained a residence in Queens County at the time the action was commenced (see *Belair Care Center, Inc. v Cool Insuring Agency, Inc.*, 180 AD3d 739, 742 [2d Dept 2020]; *Drayer-Arnou*, 181 AD3d at 652; *Demirovic*, 170 AD3d at 658; *Chehab*, 120 AD3d at 737; *Johnson v Finkelstein*, 145 AD3d 863, 864 [2d Dept 2016]). Moreover, defendants failed to demonstrate the requirements to be entitled to a discretionary change of venue (see *Williams*, 179 AD3d at 870-71; see *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 171-74 [2d Dept 1995]).

Accordingly, defendants' motion to change venue is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon defendants, within 30 days of entry.

This constitutes the decision and order of this Court.

Dated: July 23, 2020


RUDOLPH E. GRECO, JR., J.S.C.

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COUNTY CLERK
QUEENS COUNTY