

December 7, 2017

VIA ELECTRONIC FILING & LAWYER SERVICE

Honorable Alberto Rivas, A.J.S.C.
Middlesex County Courthouse
56 Patterson Street
New Brunswick, New Jersey 08903-0964

Re: Yvonne Pascale v. Manahawkin Mart., et al
Docket No: MID-L-2290-16
Our File No.: 14-47

Plaintiffs' Opposition to Defendant's Third Motion to Change Venue to Ocean County

Motion Currently Returnable: December 15, 2017

Dear Judge Rivas:

Please accept the following on behalf of Plaintiffs Yvonne and Leslie Pascale in opposition to Defendants' third Motion to Change Venue to Ocean County.

I. Background

On June 2, 2014, Plaintiff Yvonne Pascale fell down when her foot got caught in one of many raised pieces of slate at a strip mall walkway. She suffered severe fractures which required open reduction and internal fixation surgery.

On April 13, 2016 this Complaint was filed in Middlesex County naming Manahawkin Mart, Manahawkin Flea & Farmers Market, Inc., Petcor LLC, Warren Petrucci, Petrucci Enterprises, LLC as well as Manuel Pereira, M. Pereira Contracting and Dan-Gar Enterprises LLC (d/b/a Dante Zeller Tuxedo).¹ On October 12, 2016 the Manahawkin Flea & Farmers Market Defendants filed a motion to Change Venue to Ocean County. On October 28, 2016 after hearing oral argument, the Honorable Travis J. Francis, A.J.S.C. denied Defendants motion to change venue because, consistent with *Rule 4:3-2(a)*, there were several defendants that did business in Middlesex County. (*Exhibit A - October 28, 2016 Order Denying Motion to Change Venue*).

¹ Manahawkin Mart, Manahawkin Flea & Farmers Market, Inc. Petcor LLC, Petrucci Enterprises, LLC ("Manahawkin Flea & Farmers Market") are all business and/or properties owned by named Defendant Warren Petrucci, who also owns properties in Middlesex County. (*Exhibit E - Deposition of Warren Petrucci at 7:22-8:5*)

Thereafter, nearly three months later, the same Defendants again filed a motion to change venue to Ocean County under the guise of a motion for partial summary judgment. This motion was heard by a different Judge, Judge Craig Corson, and once again denied because venue was originally properly laid in Middlesex County under *Rule* 4:3-2. The only relief granted was the dismissal without prejudice of parties who's dismissal Plaintiff did not oppose.² (*Exhibit B - February 3, 2017 Order Denying Motion to Change Venue*).

These same defendants now once again attempt to disrupt the progress of this litigation with this third motion to change venue to Ocean County. This motion should be denied for numerous reasons including: 1) as two separate judges ruled on two separate occasions, venue was properly laid in Middlesex; 2) this motion is long out of the 10 day time period under the Rules; 3) this matter has been properly litigated in Middlesex County for more than twenty months; 4) there is no showing a fair trial can not be had in Middlesex County and; 5) there is no showing that trial in Middlesex County instead of Ocean County would cause some kind of substantial hardship to anyone.

II. Given this Is the Third Motion to Change Venue, This is Essentially a Second Motion for Reconsideration and is well Out of Time

Defendants again move to transfer venue to Ocean County despite this motion being denied by Judge Francis on October 28, 2016 and by Judge Corson on February 3, 2017. Under *R. 4:49-2*, the party seeking to rehear, reconsider, alter or amend an order or judgment shall “state with specificity the basis on which [the motion] is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred[.]” *Ibid*. Motions for reconsideration must be filed within twenty (20) days “after service of the judgment or order upon all parties[.]” *Ibid* (emphasis added). Under the clear edicts of the Rule, Defendants had until February 23, 2017 to file their motion for reconsideration. Defendants did not do so. Under the plain language of the law they are therefore barred from doing so now, nearly nine months later. The motion should be denied.³

² Plaintiff stated in their Opposition to Defendant's second motion to change venue and for partial summary judgment, “[s]hould discovery reveal any of the above parties to be viable, Plaintiff should not be barred from bringing them back into the case. As such, while Plaintiff does not object to these Defendants which counsel represents being dismissed, it is respectfully requested they be dismissed without prejudice.” *Pb* at 3.

³ Were the motion not time barred, it should nonetheless be denied. A motion for reconsideration should be granted only if “either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence[.]” *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401-02 (Super. Ct. 1990). Motions for reconsideration should not be sought “merely because of dissatisfaction with a decision of the Court” or utilized exclusively to gain “repetitive bites at the [proverbial] apple.” *Id.* at 401. Here, the facts have not changed from the time Defendant first moved to transfer venue to Ocean County. Indeed, as discussed *infra*, named parties have ties to Middlesex which, as Judge Francis and Judge Corson found, make venue in this County proper. *See, R. 4:3-2(b)* (“a business entity shall be deemed to reside in any county in which . . . it is actually doing business.”).

Defendant's motion is also time barred because R. 4:3-3(b) mandates that motions to change venue be made "not later than 10 days after . . . the expiration of the time prescribed . . . for the service of the last permissible responsive pleading[.]" Here, moving Defendants Answered the Complaint on November 4, 2016. (*Exhibit C - ACMS and E-Filing Docket Report*). Defendants Manuel Pereira, and M. Pereira Contracting were the last served parties to file a responsive pleading and did so on January 9, 2017. *Ibid.* Accordingly, Defendants had until January 19, 2017 to move to transfer venue. Thus this motion is out of time on multiple levels and can and should be denied on this basis alone.

III. The Court Rules Favor the Plaintiffs' Selection of Venue Which Was Properly Laid in Middlesex County and There Is No Reason to Disrupt this Litigation Which Is in its End Stages

As both Judges Francis and Corson previously recognized, R. 4:3-2(a) provides venue shall be laid in the county where the cause of action arose *or* in a county in which any party to the action resides. Business entities are deemed to reside in any county in which they do business. R. 4:3-2 (b). The Court Rules favor the plaintiffs' venue selection. In fact, the venue Rule was recently *expanded* to "extend its applicability to all business entities rather than simply corporations." R. 4:3-2(b), *Official Comment, Amended Sept., 2016*. Venue was properly laid in Middlesex County because several defendants did business there. M. Periera Contracting, a construction company Warren Petrucci testified he hired to install the raised slate which caused Yvonne Pascale's fall, represents that they:

[P]rovide quality home building and house raising services to customers located in ...**Middlesex** [county]. Feel free to contact us with any further projects.

(*Exhibit D - M. Pereira Contracting Website*) (emphasis added). Of note, this company answered the Complaint on December 30, 2016 and thus is a party to this case. There can be no question this company does business in and is therefore a "resident" of Middlesex County under R. 4:3-2(b). Moreover, since these Defendants advertise they do business in Middlesex County it cannot be said this would present an undue hardship over Ocean County. The motion should be denied.

Moreover, Warren Petrucci, the sole owner and operator of Manahawkin Flea & Farmer's Market and general contractor for the slate install testified that he owns retail properties in East Brunswick located at 1177, Route 18. (*Exhibit E - Deposition of Warren Petrucci at 7:22-8:5*). The fact that Mr. Petrucci - a named Defendant and the sole owner of the premises where Ms. Pascale was injured - does business and in fact owns property in Middlesex County makes his third attempt to change venue to Ocean County claiming undue hardship, all the more incredulous.

Lastly, Dan-Gar Enterprises LLC (d/b/a Dante Zeller Tuxedos), was an initial party to this litigation and does business in the shopping plaza where Plaintiff fell. *Nielsen v. Wal-Mart Store No. 2171*, 429 N.J. Super. 251 (App. Div. 2013) (tenant in multi-tenant commercial property can be found liable for failure to maintain area abutting store). The website of this states they have stores in Metuchen and East Brunswick, Middlesex County. (*Exhibit F - Dante Zeller Tuxedo & Menswear Website*). Accordingly, since this entity did business in Middlesex when venue was placed here, venue was further proper when the complaint was filed.

While it is true Dan-Gar Enterprises LLC (d/b/a Dante Zeller Tuxedos) has since been dismissed from the litigation without prejudice, this is not reason to move the case to Ocean County

at this late juncture. Venue is determined at the time the complaint is filed and the motion to change it has to be made within 10 days of filing an answer. The fact that a defendant may later settle out or otherwise no longer be participating in the litigation is not a sound basis to disrupt the litigation under the venue rules, and for good reason. Otherwise there would be an endless hopscotching of cases among the counties as defendants come and go. Our Court Rules explicitly bar this practice:

The venue rules apply only in respect of the original parties. If venue is then properly laid in the main action, it may not thereafter be transferred on the ground that a third-party defendant is entitled to a different venue.

PRESSLER & VERNIERO, Current N.J. COURT RULES, (GANN), comment to R. 4:3-2(a) (emphasis added). The same logic barring perpetual motions to change venue rings true should an original party be dismissed without prejudice.

Additionally, as the moving party under R. 4:3-3(a)(3) Defendants bear the burden of demonstrating good cause for a change of venue. R. 4:3-3, *Official Comment; Diodato v. Camden*, 136 N.J. Super. 324 (App.Div. 1975). As recognized by the Court in *Doyley v. Schroeter*, 191 N.J. Super. 120 (Law Div. 1983):

For there are also policy considerations for the maintenance of the venue in the county where it has been laid properly by plaintiff. Indeed, the rule itself expresses a bias in favor of plaintiff's choice. There should be repose on the question of where a case is to be tried. Once the complaint is filed the administrative details of creating and maintaining a file begin. The county clerk, assignment clerk and data processing offices become involved. Often a single judge becomes familiar with the case through pretrial motions and conferences. A change of venue involves duplication of this effort and sometimes results in confusion and delay in the transfer process. Absent the likelihood of substantial inconvenience or injustice, reason dictates that a change in venue with its inevitable consequences be avoided. This thought was well expressed by the author of the note in 16 *Rut.L.Rev.*, supra, where he opined:

Uncertainty breeds litigation, litigation in turn breeds delay, and delay, particularly in personal injury actions, is likely to be quite harmful to a plaintiff's case. Even a change of venue in the absence of preliminary litigation is bound to result in some delay. Therefore, venue provisions should be construed most favorably for the plaintiff, and as long as the initial selection of a forum is not inconsistent with these rules, only the strongest showing of inconvenience to the defendant should deprive a plaintiff of his legal right to have the action tried in the county of his choice.

Id. at 124-26; *see also, Civic S. Factors Corp. v. Bonat*, 65 N.J. 329, 333 (1974) (“[A] plaintiff's choice of forum ordinarily will not be disturbed except upon a clear showing of real hardship or for some other compelling reason. The choice of forum must be demonstrably inappropriate.”). Furthermore, Middlesex County has a long tradition of opening its doors to litigants and helping resolve disputes. *See, e.g. Darrow v. Hanover Township*, 58 N.J. 410, 414 (1971) (“The court system was designed to serve the needs of the people and it would hardly be fulfilling its purpose if it excluded litigants because of inconvenience to lawyers and judges.”) Defendants’ third attempt to close its doors to Yvonne and Leslie Pascale should be rejected.

Defendants' motion, filed following the completion of fact discovery and after over a year and a half of litigating in Middlesex County is designed to take away the Plaintiff's entirely permissible choice of venue. Moreover, there is no interests of justice served by transferring this matter and would only lead to the undue delay and complexity the venue Rule was meant to avert. Indeed, Defendant makes no showing of undue hardship or that Middlesex is demonstrably inappropriate and in fact has spent the past year and a half litigating in this forum. *Diodato, supra* 136 *N.J. Super.* at 328 (venue should only be changed where there is "'a substantial doubt that a fair and impartial trial can [not] be had in the county' where the venue is laid, or for the convenience of the parties and witnesses in the interest of justice.") (*Exhibit C - ACMS and E-Filing Docket Report*). Moreover, both Defendant entities either own and operate business in Middlesex or advertise they do business in Middlesex, thus belieing any claims that this forum is "inconvenient" for them to litigate.

A defendant must do more than simply allege it is better for the parties to travel to Ocean County than Middlesex to justify a change in venue, especially at this late stage well beyond the 10 day window of *Rule* 4:3-3. Mere inconvenience, such as having to travel a distance from one end of the State does not warrant a change of venue. *Diodato, supra* 136 *N.J. Super.* at 328. It can hardly be said that requiring parties who own, operate and advertise they do business in Middlesex to appear in Court in that forum causes an undue burden. *See, e.g., Winzinger v. Brennan Brothers*, 191 *N.J. Super.* 114, 119 (Law Div. 1983) (inconvenience to parties on one side is not, ipso facto, a basis upon which venue decision should rest). Moreover, Plaintiffs are by no means inconvenienced by litigating in this forum since they filed their Complaint here.

For all these reasons, Defendants' motion to change venue should be denied. Its is respectfully submitted oral argument is not necessary.

Respectfully,

GERALD H. CLARK
For the firm

GHC:mwm
Enclosures

cc: Civil Motions Clerk (Via Electronic Filing)
Michael S. Savett, Esq. (Via Electronic Filing)

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