

12-6-08/JTN

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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KASIM AHMED,

Plaintiff,

Index No: 5939/08
Hearing Date: 10/24/08
Final Submission Date: 12/5/08

-against-

Decision After Hearing

AMERICAN STEAMSHIP COMPANY,

Defendant.

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This is an action for personal injuries allegedly sustained by plaintiff Kasim Ahmed ("plaintiff") in the course of his employment while serving as a crew member and a Jones Act Seaman on the MV Indiana Harbor, a vessel owned by American Steamship Company ("defendant"). The injury occurred while the vessel was underway on Lake Huron, between Superior, Wisconsin, and Nanticoke, Ontario. On March 6, 2008, plaintiff filed a summons and complaint in the Supreme Court, Queens County, designating Queens County as the place of venue on the basis of plaintiff's purported residence, as authorized by section 503(a) of the CPLR, which provides:

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; 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.

See, Hitchoff v. Air Brook Limousine, Inc., 26 A.D.3d 310 (2nd Dept. 2006); Greenberg v. Kruse, 23 A.D.3d 347 (2nd Dept. 2005). Defendant alleges that plaintiff is a resident of the State of Indiana, not Queens County, and contends that Erie County is a more convenient forum. Defendant further alleges that, under the Jones Act, the jurisdiction of actions arising under that Act shall be the Court of the district in which the defendant employer resides or in which his principal office is located. Based upon these allegations, defendant, moved to change venue to Erie County, the location of defendant's office and place of business, as well as its documents and materials related to MV Indiana Harbor. By order of this Court dated August 21, 2008, the motion to change venue was set down for a hearing which was held October 24, 2008, at which time plaintiff, Ali Kassim Mafflahi, plaintiff's purported landlord or his landlord's brother, and Laurie A. Montante, who is employed by defendant as a risk management analyst and assigned to handle injury and illness claims arising under the Jones Act, all testified and documentary evidence was offered into evidence. Following the hearing, the parties were granted leave to submit post hearing arguments on or before December 5, 2008.

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Where, as here, resolution of a factual issue ultimately depends on evaluating the credibility of the witnesses, a hearing should be held to resolve any inconsistencies (Cerniglia v. Combes, 157 A.D.2d 499, 549 N.Y.S.2d 689). See, Rivera v. Jensen, 307 A.D.2d 229 (1st Dept. 2003). It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor. See, Tornello v. Gemini Enterprises, Inc., 299 A.D.2d 477 (2nd Dept. 2002)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had an opportunity to see and hear the witnesses]; Cirami v. Taromina, 243 A.D.2d 437 (2nd Dept. 1997)[stating that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor]; Darmetta v. Ginsburg, 256 A.D.2d 498 (2nd Dept. 1998)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses]; Vega v. City of New York, 194 A.D.2d 537 (2nd Dept. 1993)[stating that issues of credibility are properly determined by the hearing court]. Here, the disputed factual issue is whether plaintiff's residency at the time this action was commenced was in Queens County; CPLR 503(a), in pertinent part, provides that "except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when [the action] was commenced."

"To consider a place as a residence for venue purposes, one must 'stay there for some time and have the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency' (citations omitted)." Ellis v. Wirshba, 18 A.D.3d 805 (2nd Dept. 2005); Schaefer v. Schwartz, 226 A.D.2d 619 (2nd Dept. 1996); Samuel v. Green, 276 A.D.2d 687 (2nd Dept. 2000); Buziashvili v. Ryan, 264 A.D.2d 797 (2nd Dept. 1999); Mandelbaum v. Mandelbaum, 151 A.D.2d 727 (2nd Dept. 1989). Defendant, the movant of this motion to change venue, was required to establish prima facie, through documentary evidence, that plaintiff was not a resident of Queens County at the time that the action was commenced. See, Corea v. Browne, 45 A.D.3d 623 (2nd Dept. 2007); Furth v. Elrac, Inc., 11 A.D.3d 509 (2nd Dept. 2004); Merendino v. Lloyd, 172 A.D.2d 594 (2nd Dept. 1991). That burden was met.

Plaintiff, who was born in Yemen, testified that during his twenty-year employment as a merchant seaman, he has lived in various parts of the United States, and has lived at 23-12 31st Street, Astoria, New York, with friends, including Ali Kasim, since February 2008, and pays a monthly rental of \$200.00. He further testified that his mail is sent to 22-58 31st Street, Astoria, New York, a twenty-four hour grocery store owned by his nephew, Omar, and Ali Kasim and his brother. He also testified that prior to February 2008, he had lived at the 23-12 31st Street address at different times for a period of two weeks or a month, and that he returned from Indiana to the Queens address in February 2008 for lower back surgery, and came under the care of several medical doctors, including Dr. Leon Perin, a neurosurgeon who performed surgery on plaintiff's back on May 14, 2008. Plaintiff testified that following the surgery, he went home to Yemen, where he remained for two months during the healing process. Plaintiff testified that beginning in February 2008, defendant began sending mail to him, including his paycheck, at his 22-58 31st Street mailing address, a fact that was confirmed by the testimony of Laurie Montante and documentary evidence. He concluded that he had no intention of leaving Astoria, New York.

On cross examination, plaintiff testified that he had received mail at the 22-58 31st Street mailing address for ten years. He also testified that he is not a registered voter in the State of New York, that he has no New York State driver's license or identification card of any kind that shows any residency within the State of New York, and that Angola, Indiana, was indicated as his residence in his 2007 employment application with defendant. He further testified that he has no lease agreement for the two bedroom apartment where he lives with "people working there, they come and sleep." He also testified that he stayed with his wife and children in Yemen. Plaintiff testified, in response to the question "how many places have you lived since 2007, how many states have you lived?" that he had lived in New York and Indiana.

Ali Kassim Mafflahi, plaintiff's friend, testified that plaintiff began living at his apartment at 23-12 31st Street in February 2008, and that prior to that he would "come visit and go." Linda A. Montante testified that plaintiff's employment records, including his 2007 application for employment, show his residence as being in Angola, Indiana. She further testified that she knew that plaintiff was in New York, authorized his receiving medical treatment in New York, and began sending his paycheck to the New York address in February 2008.

After hearing, this Court finds the testimony of plaintiff and his witness less than credible and thus insufficient to meet the standard to establish residence for venue purposes. As set forth above, for venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency. Ingenito v. Wantagh Racket Sports, Inc., 47 A.D.3d 887 (2nd Dept. 2008). Plaintiff alleges that when this action was commenced on March 5, 2008, he resided at 23-12 31st Street, Astoria, New York; the commencement date thus was less than a month after his purported relocation, a time period that is totally inadequate to show either any degree of permanency or "bona fide intent." See, Stern v. Epstein, 29 A.D.3d 778 (2nd Dept. 2006) ["plaintiffs' use of their medical office in Kings County to sleep over for convenience a couple of nights a week did not render them residents of Kings County for venue purposes"]; Labissiere v. Roland, 231 A.D.2d 687 (2nd Dept. 1996) ["plaintiff's receipt of two letters at the Brooklyn address will not suffice to establish residency for purposes of defeating a properly brought motion to change venue"]; Baston v. National Car Rental System, Inc., 200 A.D.2d 381 (1st Dept 1994) ["plaintiff's vague hope to return to the Bronx, where she had received mail and had available lodging, did not establish that she actually resided there at her brother's home"]; Mandelbaum v. Mandelbaum, 151 A.D.2d 727 (2nd Dept. 1989) ["mere physical presence, however, is not necessarily sufficient to establish residence for purposes of venue"]; Siegfried v. Siegfried, 92 A.D.2d 916 (2nd Dept. 1983) ["residence implies an established, as distinguished from a temporary, abode, one fixed for some substantial length of time, for business or other purposes, although there may be an intent in the future at some time or other to return to the original domicile"]; Katz v. Siroty, 62 A.D.2d 1011 (2nd Dept. 1978) ["residence requires more stability than a brief sojourn for business, social or recreational activities (citations omitted). The mere fact that plaintiff uses the Brooklyn home of his sister and brother-in-law as a stopover for convenience and to sleep there when in the area on business, does not establish a residence"]; Oelkers v. Hulseberg, 200 Misc. 352 (Sup 1951), aff'd, 279 A.D. 669 (2nd Dept 1951) ["residence is more than a mere stopover at a hotel or rooming house, or a vacation at a seashore or mountain resort"]. Plaintiff was required to establish through documentary evidence that he had intended to

retain Queens County as a residence for some length of time and with some degree of permanency. Buziashvili v. Ryan, 264 A.D.2d 797 (2nd Dept.1999). Plaintiff totally failed to present any documentary evidence that he resided in Queens County at the time of the commencement of this action with the bona fide intent of retaining Queens County as a residence for some length of time and with some degree of permanency. See, Doe v. Hall, 36 A.D.3d 651, 652 (2nd Dept. 2007). Indeed, the documentary evidence consisting of bills from Macy's all post date the commencement date, and the pre-commencement documentary evidence in the form of communications from WorldPerks Visa Card addressed to the Queens address is consistent with his use of that mailing address for ten years.

Based upon the foregoing, after hearing and consideration of the evidence, defendant's motion to change venue to Erie County on the ground that Queens County is not plaintiff's residence and thus not the appropriate venue is granted, and venue shall be changed from Queens County to Erie County, where defendant is located. Accordingly, it hereby is

ORDERED, that the motion for changing the place of trial of this matter be, and the same hereby is, granted; and it is further

ORDERED, that the place of trial in the above entitled action shall be changed from the Supreme Court, County of Queens, to the Supreme Court, County of Erie; and it is further

ORDERED, that the Clerk of this Court, upon being served with a copy of this order with notice of entry and payment of any required fees, if any, is directed to transfer all papers filed in her office in the instant action pending under Index No. 5939/08 to the Clerk of Erie County; and it is further

ORDERED, that this action shall be disposed of in the Supreme Court, Erie County, as though commenced in that Court; and it is further

ORDERED, that a copy of this Order with Notice of Entry shall be served upon all parties to this action.

Dated: January 12, 2009



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J.S.C.

Enter,