## Hout pleading

## **Tentative Ruling**

Re:

Hunt v. State of California

Superior Court Case No. 01CECG03182

Hearing Date:

January 16<sup>th</sup>, 2002 (Dept. 98A)

Motion:

Defendants' Motion for Change of Venue

## **Tentative Ruling:**

To deny the motion for change of venue, without prejudice.

## **Explanation:**

Defendants' motion for change of venue is deficient in many ways. First, the motion is premature, since defendants have not yet filed their answer to the complaint. Until the defendant answers, the court cannot ascertain the issues which may be involved at trial, and therefore cannot determine which witnesses' testimony will be necessary. Therefore, the court cannot rule on a motion to change venue based on the convenience of witnesses until the defendant files its answer. (Weil & Brown, CAL PRAC GUIDE: CIV PRO BEFORE TRIAL (The Rutter Group 1999) at § 3:567.) Likewise, Witkin states that the defendant cannot move to change venue based on inability to obtain an impartial trial until it has filed its answer, and perhaps until there has been an attempt to pick a jury. (3 Witkin, Cal. Procedure (4<sup>th</sup> ed.1996) at § 870.) Therefore, since the defendants here have not yet filed their answer, the motion for change of venue under section 397 is clearly premature.

Another problem is that defendants have failed to present any evidence that supports their contention that they will be unable to obtain an impartial trial in Fresno County. The burden is on the moving party to show the existence of actual prejudice. (Nguyen v. Superior Court, supra, 49 Cal.App.4<sup>th</sup> 1781, 1791.) The defendant must present admissible evidence in the form of affidavits or declarations to meet this burden. (Weil & Brown, at § 3:573.) Here, the only evidence presented in support of the motion is the declaration of Randy Rossi, which says nothing about the existence of any actual prejudice against defendants in this county. Also, as plaintiffs point out, there is no right to a jury trial in this case because the plaintiffs seek only equitable relief, and therefore defendants would have to show that the entire Fresno County Superior Court bench is biased against them. (Nguyen, supra, at 1791.) Again, defendants present no evidence in support of their argument.

Defendants also fail to cite any legal authority in support of their position that they would not be able to obtain an impartial trial in Fresno County. The only case that defendants cite in support of their position, *McCarthy v. Superior Court* (1987) 191 Cal.App.3d 1023 does not even relate to the code section upon which defendants rely, CCP § 397. Instead, *McCarthy* discusses CCP § 394, which does not apply here. Section 394 deals with suits by the county against the state, yet here the County of Fresno is not a party to the suit. Defendants do not even cite section 394 in their notice of motion, so they cannot rely on that section in support of their motion. Thus, the defendants' claim of prejudice fails for lack of evidentiary and legal support.

Defendants also attempt to argue that transfer is necessary for the convenience of witnesses and the ends of justice. Yet defendants cannot rely on the convenience of their own employee-witnesses, unless they can show that plaintiffs intend to call the employees as witnesses. (*Lieberman v. Superior Court* (1987) 194 Cal.App.3d 396, 400.) Again, defendants have not offered any evidence whatsoever that plaintiffs intend to call these employees as witnesses. Defendants have only offered the declaration of Rossi, which vaguely refers to the fact that the Department of Justice Firearms Division and all of its oversight staff are located in Sacramento. However, this declaration does not demonstrate that plaintiffs have called, or intend to call, defendants' employees as witnesses. Therefore, the usual rule against considering the convenience of a party's employees applies here.

In addition, defendant has failed to provide detailed declarations that would support a factual showing that the witnesses would suffer inconvenience. Normally, the moving party must submit declarations stating the names of the witnesses who will allegedly suffer inconvenience, the substance of their expected testimony, whether the witness has been deposed or has given a statement regarding the facts of the case, the reasons why it would be inconvenient for the witnesses to appear locally, and the reasons why the ends of justice would be promoted by a transfer to Sacramento. (Weil & Brown, at § 3:576.) Here, defendants have only offered the declaration of Rossi, who says nothing about any of the specific issues listed above. Therefore, defendants have failed make the necessary showing of inconvenience, or that a transfer would promote the ends of justice.

Defendants also discuss the fact that its records are located in Sacramento, and imply that a transfer is necessary because of the location of these records. Yet defendants submit no evidence showing that the records are in any way relevant to the present case. Even assuming that the records are relevant to the case, this does not necessarily mean that defendants are entitled to a change of venue. While the court may take the location of records into account in ruling on a motion under section 397 (*Minatta v. Crook* (1959) 166 Cal.App.2d at 756), defendants have not cited any authority holding that the fact that records are located in a different county is enough, by itself, to mandate transfer of the action. Since defendants have offered no competent evidence that there is a danger of bias against them in Fresno County, or that any witnesses other than their own employees will suffer inconvenience, the mere fact that defendants' records are located in another county is not enough by itself to warrant granting a change of venue. Therefore, the court's tentative ruling is to deny the motion for change of venue, without prejudice.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling	SJKANE	1/14/02	
Issued By:		on	
(Judge's Initials)		(Date)	