

Hunt  
pleading  
file

**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.

