Scan

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. JAMES P. McCORMACK
JUSTICE TRIAL/IAS PART 43

_____X

SHULAMITH SCHOOL FOR GIRLS INC. *et al*,

Plaintiffs,

-against-

Index No.: 012294/11
Motion Sequence: No. 1
Motion Submitted : 1/12/12

SHULAMITH SCHOOL FOR GIRLS
OF BROOKLYN,

Defendant.

_____X

The following papers read on this motion:

Notice of Motion/Corrected Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....

This motion by the defendant seeking an order to change the venue of the above referenced action from this court to the Supreme Court of the State of New York, County of Kings, is decided as provided herein.

This is an action by the plaintiffs, Shulamith School for Girls, Inc., a religious corporation, and Shulamith School for Girls, Inc., an education corporation, for trespass relating to the use of the Brooklyn property by Shulamith School for Girls of Brooklyn, and

for a declaratory judgement declaring "that it may exercise its rights as owner of the property to effectuate a sale of the property". The plaintiffs' Summons designates Nassau County as the venue of the action upon the basis that it involves a dispute between parties that are resident in the State of New York, the plaintiff's principal place of business is Nassau County, and the defendant's tortious conduct is affecting and injuring the plaintiffs in this County. Defendants have moved for a change of venue arguing that the action is local in nature and that the judgement demanded would "effect title to, or possession, use or enjoyment of, real property", and pursuant to CPLR § 507, it can only be properly heard in the county where the subject property is located.

Shulamith School fo Girls, Inc. was formed in 1953 to own property and operate a not-for-profit all-girls Jewish Religious Day School. In 2000 Shulamith opened a branch in Woodmere, Nassau County. By 2008 enrollment had declined at the Brooklyn location as a result of many of the families from Brooklyn moving to Nassau County. During this period enrollment at the Woodmere location steadily grew. According to the plaintiffs Shulamith was no longer able to sustain its operations in Kings County and it began to move its operations to Nassau County where it maintains its base of operations and currently has enrollment of approximately 520 students.

By agreement dated April 8, 2008, Shulamith School for Girls, a religious corporation, contracted to sell the Brooklyn property located at 1277 Est 14th Street, Brooklyn New York for twenty million dollars. Subsequently litigation was commenced by Brooklyn parents who

opposed both the move of the school to Nassau County and the sale of the property where their daughters were enrolled *(Aaron Berger v. Shulamith School for Girls, Kings County Index Number 016303/08)*. After two years of litigation a settlement agreement was negotiated and placed on the record over the course of two days before the Hon. Robert Miller, Supreme Court of the State of New York, County of Kings. Defendant provided this court with the thirty two page transcript detailing the settlement agreement. The settlement agreement specifically provided that Kings County would:

> "maintain jurisdiction to enforce any terms of the agreement, to interpret any provisions that the parties dispute, to act as it specifically stated in connection with the closing and for any purpose of a party request ." (Minutes May 17, 2010 p. 14) and "That if upon presentation to the court of an affirmation by an attorney for Mr. Guttman [the contract vendee] that there has been a refusal to vacate, the Court will exercise continued jurisdiction over the matter and issue an eviction order." (Minutes May 17, 2010 p. 14)

Under the terms of the settlement agreement, two new entities were to be created, Shulamith School for Girls of Brooklyn and Shulamith School for Girls of Long Island. In compliance with the settlement agreement, the Brooklyn court appointed a retired judge to supervise elections amongst the parent body of the religious corporation Shulamith School for Girls to approve the settlement agreement and to elect boards of directors for the Brooklyn and Long Island entities. It was agreed that the proceeds from the sale of the real property would be allocated among the two educational corporations and those monies were to be used for the purchase and renovation or rental of new facilities for each school. The

defendant, Shulamith School for Girls of Brooklyn was permitted as a licensee to operate the school on the subject property through the 2010/2011 school year, which ended on June 23, 2011. According to the plaintiff, defendant has not vacated the property despite the expiration of the license, they have no claim to occupy the property and they have not paid any money to the plaintiffs since they have remained in occupancy since June 24, 2011. According to the Defendant, the Brooklyn entity was entitled to remain in possession of the Brooklyn property until the closing, as it was understood that the Brooklyn entity would need funds from the sale of the property to acquire a new property upon which to operate their school. The defendant has also questioned why the Long Island entity has brought this action as Shulamith School for Girls, Inc., when it should in fact be calling itself Shulamith School for Girls of Long Island, pursuant to the stipulation entered in the Brooklyn matter.

The closing of the contract to sell the property never occurred and the contract vendee, Mr. Guttman, has demanded the return of his $2.5 million dollar good faith deposit. The contract deposit was utilized by plaintiffs to make a down payment on property located in Nassau County, in order to build a permanent home for Shulamith in Nassau County. As a result of the failure to close the contract for the sale of the property located at 1277 Est 14th Street, Brooklyn New York, the Long Island entity has been unable to close on the purchase of the Nassau property and the owner of the proposed Nassau property has instituted legal proceedings to keep the contract deposit that it received from plaintiffs.

Plaintiffs allege the defendant's acts of trespass are deliberate and intentional and they

seek and injunction to prevent the defendant from entering the property. They also seek actual compensatory damages, disgorgement of any sums received from occupants, the fair value of use and occupation of a premises similar to the property, special damages and nominal damages. In addition, they seek damages to the property caused by defendant and its occupants use and occupation of the property since June 24, 2011. Plaintiff claims defendant's conduct is a malicious derogation of their property rights and they believe defendant is liable for exemplary and punitive damages.

Plaintiffs state that Shulamith, religious corporation, owns the property and that they have sought to exercise their possessory rights over the property by changing the locks and posting security to protect the property from trespass. The defendants also maintain that they have a possessory right or license to remain in occupancy until the closing of the sale of the property and the distribution of the sales proceeds. Plaintiffs claim that as a result of the contract vendee's determination not to proceed with the purchase of the property it will be difficult, if not impossible to sell the property occupied by defendant. Accordingly, plaintiffs seeks a declaration that it may exercise its rights as owner of the property to effectuate a sale of the property, and to enjoin the defendant from interfering with the sale.

On November 1, 2011, the defendant served a Demand for Change of Venue, pursuant to CPLR § 511(b) upon the plaintiffs' counsel, stating that venue had been improperly placed in Nassau County and asserting that Kings County was the proper venue. The plaintiffs did not serve written consent to change the place of trial to Kings County within five (5) days

after service of the Defendant's written demand pursuant to CPLR § 511(b). Thereafter defendant made this motion to change venue on November 4, 2011, which is timely pursuant to CPLR § 511(b).

"Historically, both in New York and elsewhere, civil actions have been characterized as either "local" or "transitory" in nature. Local actions generally involved litigation in which real property is the subject matter of the plaintiff's cause of action. All other actions are said to be transitory because they involve claims that are not land specific and therefore could have arisen anywhere"(Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C501:1). The 19th Century Code of Procedure [Field Code], originally enacted in 1848, indicated actions seeking damages for injuries to real property, such as trespass, were local. (Code of Procedure, § 123; L. 1848, ch. 379; *Litchfield v. International Paper Co.*, 41 AD 446 [2nd Dept. 1899]). Most courts continue to treat all forms of trespass actions as local for venue purposes (see *Rampe v. Giuliani*, 227 AD2d 605 [2nd Dept. 2005]; *Town of Hempstead v. City of New York*, 88 Misc.2d 366 [Sup. Ct. Nassau Co. 1976]; *Geidel v. Niagra Mohawk Power Corp.*, 46 Misc.2d 990 [Sup. Ct. Nassau Co. 1965]). Moreover, in an action for a declaration as to the validity of a lease and the tenant's right to renew it, the Court found the declaration would affect the use, possession or enjoyment of the real property subject to the lease (*see Moschera & Catalano, Inc. v. Advanced Structures Corp.*, 104 AD2d 306 [1st Dept. 1984]). Conversely, a landlord tenant action relating solely to the payment terms of the lease would have no such effect (*see Port*

Bay Associates v. Soundview Shopping Center, 197 AD2d 848 [4th Dept. 1993]).

Though CPLR § 503 provides generally that a civil action may be venued in any county where a party resides, it also makes clear that this is a general rule, that may be displaced by an exception. CPLR § 503 (a) 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 it was commenced..."

CPLR § 503 is explicit in that its authorization for residence-based venue will be overcome "where otherwise prescribed by law". CPLR § 507 is a law whose venue provisions trump those found in CPLR § 503 under circumstances where the relief sought "would affect title to, or the possession, use or enjoyment of real property". Under CPLR 507:

> "The place of trial of an action in which the judgement demanded would effect title to, or possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated."

In *Regal Boy Enterprises International VII, Inc. v. MLQ Realty Management, LLC*, 22 AD3d 738 (2nd Dept. 2005), the Court held that an action seeking a permanent injunction against interference or interruption by defendant of plaintiff's construction on its leasehold premises was required to be heard in the county in which the premises was located. Though the Appellate Division acknowledged that ordinarily plaintiff would be within its rights to bring the action in the county where it resided, the court reasoned that venue was required to be maintained in the county where the property was located because the relief sought

involved the title to, or possession, use or enjoyment of property.

Similarly in *Rampe v. Giuliani*, 227 AD2d 605 (2nd Dept. 2005), the Court found a nuisance claim brought against the City of New York and its officials, by the residents of Orange County , including the County Executive, arising out of the City's operation of a men's homeless shelter in Orange County, was properly venued in Orange County because the relief they sought would affect the use or enjoyment of real property located in Orange County. That decision was made despite the fact that the City of New York argued that under CPLR § 504 suits against the City of New York must be brought in New York City. The Second Department held that while CPLR § 504 is mandatory, CPLR § 507 is also mandatory, and that the issue of venue trumps the provisions in CPLR § 504 mandating that suits against New York City be brought there when the relief sought would "effect title to, or possession, use or enjoyment of, real property" in another county.

It is without question that the relief requested: a declaratory judgement declaring, "that it may exercise its rights as owner of the property to effectuate a sale of the property" and an injunction "to prevent the defendant from entering the property" would affect the title to, or the possession, use, or enjoyment of, real property located in King's County.

In light of the foregoing, based on the residence of the parties, Kings County, not Nassau County, is the proper venue for this action.

Accordingly, it is hereby

ORDERED, that the Defendant's motion is **GRANTED**; and it is further

ORDERED, that the County Clerk of Nassau County is directed to physically transfer the file to the County Clerk, Kings County; and it is further

ORDERED, that the County Clerk, Kings County shall assign an index number to this matter upon receipt of the file.

This constitutes the decision and order of this court.

DATED: Mineola, New York
February 22, 2012

Hon. James P. McCormack, A.J.S.C.

ENTERED
MAR 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE