

Wainstein v Route 111 Hospitality Corp.

2012 NY Slip Op 33104(U)

November 9, 2012

Sup Ct, New York County

Docket Number: 115020/2010

Judge: Lucy Billings

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: _____
Justice _____

PART 46

Index Number : 115020/2010
WAINSTEIN, MICHAEL
vs.
ROUTE 111 HOSPITALITY CORP.
SEQUENCE NUMBER : 003
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion ~~to~~for non-disclosure

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court grants plaintiff's motion for a penalty due to defendants' nonproduction of documents pursuant to the accompanying decision. C.P.L.R. § 3126 (2).

FILED
JAN 07 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/9/12

L. King Dickens, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

MICHAEL WAINSTEIN,

Index No. 115020/2010

Plaintiff

- against -

ROUTE 111 HOSPITALITY CORP., RUSSELL L.
FRAGALA, AUDREY SAVIN, and JOHN
PERROTTO, individually and as officers
and shareholders of ROUTE 111
HOSPITALITY CORP.,

Defendants

-----x

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----x

AUDREY SAVIN,

Index No. 22443/2011

Plaintiff

- against -

NICHOLAS BOCCIO and MICHAEL WAINSTEIN,
individually and as officers and
shareholders of ROUTE 111 HOSPITALITY
CORP.,

Defendants

-----x

FILED
JAN 07 2013
NEW YORK
COUNTY CLERK'S OFFICE

* 3]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----x
JOHN PERROTTO,

Index No. 22145/2011

Plaintiff

- against -

NICHOLAS BOCCIO and MICHAEL WAINSTEIN,
individually and as officers and
shareholders of ROUTE 111 HOSPITALITY
CORP.,

Defendants
-----x

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. CONSOLIDATION

Michael Wainstein moves to consolidate the actions in Supreme Court, Suffolk County, under Index Numbers 22145/2011 and 22443/2011, in which Wainstein is a defendant, with his action in this court under Index Number 115020/2010. C.P.L.R. § 602(b): All three actions arise from a shareholders' agreement and management agreement among the parties to each action, governing the ownership and operation of a restaurant. Each action claims the defendants have breached their agreements and fiduciary duties regarding the parties' investments or the restaurant's profits or other personal property, converted investments or assets, or been unjustly enriched, such that an accounting among them may be necessary.

Acknowledging that New York County is a permissible venue based on Wainstein's residence, C.P.L.R. § 503(a), defendants in

the action in this court oppose consolidation only insofar as it would consolidate the three actions in this court. Defendants claim that consolidation in Suffolk County would promote the convenience of material witnesses, yet meet none of the requirements for venue on that basis. C.P.L.R. §§ 510(3), 511.

A. Defendants' Showing Regarding the Convenience of Material Witnesses

The evidentiary basis for a more convenient venue includes the identities, addresses, and occupations of expected nonparty witnesses; the detailed facts to which these witnesses will testify, to show they are necessary; and a showing that they are willing to testify, but will be inconvenienced significantly outside the requested venue. Rosen v. Uptown Gen. Contr., Inc., 72 A.D.3d 619, 620 (1st Dep't 2010); Krochta v. On Time Delivery Serv., Inc., 62 A.D.3d 579, 580-81 (1st Dep't 2009); Parker v. Ferraro, 61 A.D.3d 470 (1st Dep't 2009); Margolis v. United Parcel Serv., Inc., 57 A.D.3d 371, 372 (1st Dep't 2008). Neither the parties' convenience nor the place of the transactions at issue is a factor in determining venue. C.P.L.R. §§ 503, 510; Parker v. Ferraro, 61 A.D.3d 470; Addo v. Melnick, 61 A.D.3d 453 (1st Dep't 2009); Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Bakiriddin v. Idi Constr. Co., Inc., 45 A.D.3d 300, 301 (1st Dep't 2007).

Defendants identify only one nonparty witnesses, but do not specify his or any nonparty's anticipated testimony. Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Ford v. Chapman, 25 A.D.3d 339, 340 (1st Dep't 2006); Rodriguez-Lebron v. Sunoco,

Inc., 18 A.D.3d 275, 276 (1st Dep't 2005); Davis v. Firman, 53 A.D.3d 1101, 1103 (4th Dep't 2008). Nor do defendants show that he or any nonparty witness is willing to testify, but will be inconvenienced significantly unless venue is in Suffolk County. Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Timan v. Sayegh, 49 A.D.3d 274, 275 (1st Dep't 2008); Gissen v. Boy Scouts of Am., 26 A.D.3d 289, 291 (1st Dep't 2006); Rodriguez-Lebron v. Sunoco, Inc., 18 A.D.3d at 276.

B. Conclusion

Unless Wainstein's choice of venue was without adequate basis in the action he filed first, the court need not select an alternative venue simply based on the place of the transactions and the assumption that material witnesses will reside and work near that place and suffer hardship travelling to New York County. C.P.L.R. §§ 509, 510(1), 511(a); Rosen v. Uptown Gen. Contr., Inc., 72 A.D.3d at 620; Krochta v. On Time Delivery Serv., Inc., 62 A.D.3d at 580; Parker v. Ferraro, 61 A.D.3d 470; Addo v. Melnick, 61 A.D.3d 453. See Timan v. Sayegh, 49 A.D.3d at 275; Pittman v. Maher, 202 A.D.2d 172, 176-77 (1st Dep't 1994); Cavazzini v. Viennas, 82 A.D.3d 1343, 1345 (3d Dep't 2011). New York County, the venue chosen by Wainstein, is the undisputed residence of "one of the parties," Wainstein himself, in the action he filed first, as well as in the two later actions, where he is a defendant. C.P.L.R. § 503(a). See, e.g., Harrison v. Harrison, 16 A.D.3d 206, 207 (1st Dep't 2005); Moor v. Moor, 39 A.D.3d 507, 508 (2d Dep't 2007).

Although defendants here may bear a reduced burden in the context of a motion to consolidate, compared to a motion to change venue, they have made no showing of nonparty witnesses' inconvenience. C.P.L.R. § 510(3). Given the absence of any such showing and Wainstein's residence in New York County, C.P.L.R. §§ 503(a), 510(1), the court grants his motion to consolidate the actions in Supreme Court, Suffolk County, under Index Numbers 22145/2011 and 22443/2011, with this action in this court under Index Number 115020/2010. C.P.L.R. § 602(b).

II. DEFENDANTS' PRODUCTION OF DOCUMENTS

Wainstein also moves to compel defendants' production of documents demanded February 2, 2011, in this action. In a stipulated order dated January 26, 2012, defendants stipulated, and the court previously ordered defendants, to comply with plaintiff's demands by February 15, 2012. In another stipulated order dated June 7, 2012, defendants further stipulated, and the court ordered that, by Monday, July 9, 2012, defendants were to provide a complete response to plaintiff's February 2011 demands for documents as follows. Defendants were to (1) reproduce the documents defendants maintained they already had produced; (2) produce the documents demanded that defendants had not yet produced and that were in their possession, custody, or control; (3) provide an affidavit on personal knowledge that the remaining documents demanded were not in defendants' possession, custody, or control. C.P.L.R. § 3120(1)(i) and (2). As a final provision defendants stipulated and the court ordered that, insofar as

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defendants failed to comply with the production delineated above, the issues to which the disregarded demands pertained would be resolved in plaintiff's favor. C.P.L.R. § 3126(1).

Defendants failed to appear July 13, 2012, as further stipulated and ordered, to review their compliance. Perhaps realizing the difficulty of formulating the specific issues to which the undisclosed documents pertained, plaintiff subsequently submitted a proposed order, without opposition, alternatively precluding defendants' production at trial of the documents demanded February 2, 2011, and not produced in response. Since this relief is less dispositive than the relief to which defendants previously agreed June 7, 2012, and defendants by their further failure to appear or to oppose this alternative relief have consented to it as well, the court precludes them from producing at trial the following documents:

1. Communications concerning Route 111 Hospitality Corp. between plaintiff and any defendants and between any defendants and any nonparties other than defendants' lawyers, Aff. of Richard P. Savitt Ex. A ¶¶ 2-3;
2. Communications concerning plaintiff between any defendants, between any defendants and plaintiff, and between any defendants and nonparties other than defendants' lawyers, id. ¶¶ 4-6;
3. Communications between any defendants and any shareholders or officers of JNC, Corp., id. ¶ 7;
4. Corporate documents, records, or minutes of Route 111

- Hospitality Corp. and of JNC, Corp., id. ¶¶ 8-9;
- 5. Checks or records of payments from Route 111 Hospitality Corp. to any other defendants, to Route 111 Hospitality Corp. from any other defendants, from Route 111 Hospitality Corp. to plaintiff, and from plaintiff to Route 111 Hospitality Corp., id. ¶¶ 10-13;
- 6. Accounting records, check books, and registrars of Route 111 Hospitality Corp. and of JNC, Corp., id. ¶¶ 14-17, 25-26; and
- 7. Documents supporting any of defendants' affirmative defenses. Id. ¶¶ 20-23.

On June 7, 2012, plaintiff conceded that he had received from defendants the agreements between any defendants concerning Route 111 Hospitality Corp. or plaintiff, the agreements between any defendants and plaintiff, and the documents supporting defendants' counterclaim that he had demanded. See id. ¶¶ 18-19, 24. Although defendants then stipulated to reproduce these documents, the court denies plaintiff penalties for defendants' nonproduction of the documents if defendants in fact produced the documents. This denial is without prejudice to a future motion by plaintiff establishing that defendants in fact did not produce the agreements or documents supporting defendants' counterclaim that he demanded.

III. DEFENDANTS' DEPOSITIONS

Plaintiff's motion did not seek to compel defendants' depositions or to impose penalties due to their nonappearance for

their depositions. The stipulated order of January 26, 2012, however, did require defendants to appear for their depositions March 23, 2012. If defendants have not appeared for their depositions, plaintiff may serve new notices of their depositions, C.P.L.R. § 3107; request a further status conference to schedule their depositions; or move to compel their depositions or to impose penalties due to their nonappearance for their depositions. C.P.L.R. §§ 3124, 3126.

IV. DISPOSITION

To recapitulate, the court grants Michael Wainstein's motion to consolidate the actions in Supreme Court, Suffolk County, under Index Numbers 22145/2011 and 22443/2011, with this action in this court under Index Number 115020/2010. C.P.L.R. § 602(b).

The caption of the consolidated action shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----x

MICHAEL WAINSTEIN, Index No. 115020/2010
Plaintiff

- against -

ROUTE 111 HOSPITALITY CORP., RUSSELL L.
FRAGALA, AUDREY SAVIN, and JOHN
PERROTTO, individually and as officers
and shareholders of ROUTE 111
HOSPITALITY CORP.,
Defendants
-----x

-----x

AUDREY SAVIN,

Plaintiff

- against -

NICHOLAS BOCCIO and MICHAEL WAINSTEIN,
individually and as officers and
shareholders of ROUTE 111 HOSPITALITY
CORP.,

Defendants

-----x
-----x

JOHN PERROTTO,

Plaintiff

- against -

NICHOLAS BOCCIO and MICHAEL WAINSTEIN,
individually and as officers and
shareholders of ROUTE 111 HOSPITALITY
CORP.,

Defendants

-----x

Upon service of this order with notice of entry on the Suffolk
County Clerk, the Suffolk County Clerk shall forthwith deliver to
the New York County Clerk all documents filed and certified
copies of all minutes and entries in the actions in Supreme
Court, Suffolk County, under Index Numbers 22145/2011 and
22443/2011. The court precludes defendants in this action, two
of whom are plaintiffs in the actions now consolidated with this
action, from producing at trial in the consolidated action the
documents specified above at § II(1)-(7). C.P.L.R. § 3126(2).
This decision constitutes the court's order disposing of

plaintiff's motion for consolidation and his motion to compel defendants' production of documents or to impose a penalty due to their nonproduction of documents. C.P.L.R. §§ 602(b), 3124, 3126.

DATED: November 9, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
JAN 07 2013
NEW YORK
COUNTY CLERK'S OFFICE