| Contractors Compensation Trust v Jack of Hearts Carpet Mill Outlets, Inc. |
|--|
| 2011 NY Slip Op 33137(U) |
| December 6, 2011 |
| Sup Ct, Albany County |
| Docket Number: 4022-10 |
| Judge: Joseph C. Teresi |
| Republished from New York State Unified Court System's E-Courts Service. |
| Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CONTRACTORS COMPENSATION TRUST through its licensed Third-Party Administrator, FIRST CARDINAL, LLC, as Assignee of the Causes of action of KENNETH WHITNEY,

Plaintiff,

-against-

DECISION and ORDER INDEX NO. 4022-10 RJI NO. 01-11-104638

JACK OF HEARTS CARPET MILL OUTLETS, INC., and RICH & GARDNER CONSTRUCTION COMPANY, INC.,

Defendants.

JACK OF HEARTS CARPET MILL OUTLETS, INC.,

Third-Party Plaintiff,

-against-

JAMES A LAWSON, d/b/a J&J CARPET AND LINOLEUM

Third-Party Defendant.

RICH & GARDNER CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

SYRACUSE MERIT ELECTRIC, INC.,

Third-Party Defendant.

Supreme Court Albany County All Purpose Term, November 10, 2011 Assigned to Justice Joseph C. Teresi

APPEARANCES:

McMahon, Kublick & Smith, PC Anthony Martoccia, Esq. Attorneys for the Plaintiff 500 South Salina Street Syracuse, New York 13202

Costello, Cooney & Fearon, PLLC Kristin Walker, Esq. Attorney for Defendant/Third Party Plaintiff Jack of Hearts Carpet Mill Outlets, Inc. 5701 West Genesee Street Camillus, New York 13031

Goldberg Segalla
William Gregan, Esq.
Attorney for Defendant/Third Party Plaintiff Rich & Gardner Construction Company, Inc.
8 Southwoods Blvd.
Albany, New York 12211

Law Offices of Theresa Puleo Norah Murphy, Esq. Attorney for Third Party Defendant O'Connell Electric Company, Inc., d/b/a Syracuse Merit Electric 900 Watervliet Shaker Road Suite 210 Albany, New York 12205

Stockton, Barker & Mead, LLP
Robert Stockton, Esq.
Attorney for Third Party Defendant
James A. Lawson, d/b/a J&J Carpet and Linoleum
2 Tower Place
Albany, New York 12203

TERESI, J.:

Plaintiff commenced this personal injury action in June 2010, and now moves for a change of its venue and consolidation with an action in Onondaga County. All of the

Defendants, Third Party Plaintiffs and Third Party Defendants in this action oppose Plaintiff's consolidation motion. However, although Defendant/Third Party Plaintiff Rich & Gardner Construction Company, Inc. (hereinafter "Rich & Gardner") opposes the change of venue motion, Defendant/Third Party Plaintiff Jack of Hearts Carpet Mill Outlets, Inc., Third Party Defendant O'Connell Electric Company, Inc. and Third Party Defendant James A. Lawson all consent to this action's venue being changed to Onondoga County. On this record, because Plaintiff demonstrated its entitlement to change the venue of this action, that portion of its motion is granted. Plaintiff failed to establish, however, its entitlement to consolidation.

"A change of venue will only be granted upon a demonstration by the moving party that 'the convenience of material witnesses and the ends of justice will be promoted by the change' (CPLR 510 [3]) and, in general, must be supported with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change... Such an application... must include the names and addresses of each witness, a specific fact-based summary of the proposed testimony and how that testimony is relevant to the issues to be resolved at trial... In addition, it should include an assertion attributed to the witness that he or she is willing to testify, and describe the difficulties that will necessarily be encountered by the witness if venue is not changed." (Cavazzini v Viennas, 82 AD3d 1343, 1344 [3d Dept. 2011], quoting Manchester Tech. v Hansen, 6 AD3d 806 [3d Dept. 2004] [internal quotation marks and citations omitted]).

Here, Plaintiff duly demonstrated its entitlement to a change of this action's venue.

Plaintiff's attorney's affidavit establishes that he spoke with numerous witnesses to Mr.

Whitney's accident, upon which Plaintiff's action is premised, along with Mr. Whitney's doctors.

He "adequately identified [each] witnesses to be called, their willingness to testify, the substance, necessity and materiality of their expected testimony, and the inconvenience they would experience if venue were to remain in [Albany] County" rather than being changed to Onondoga County. (Manchester Tech. v Hansen, 6 AD3d 806, 807 [3d Dept. 2004]). Contrary to Rich & Gardner's attorney's contention, "the inconvenienced witnesses [need not] submit affidavits. A movant's burden is met if there are sworn averments that the witnesses have indicated that they would be inconvenienced." (Soufan v Argo Pneumatic Co., 170 AD2d 289, 290 [2d Dept. 1991]). As such, Plaintiff's attorney's averments sufficiently met its burden. With the burden shifted, three of the four additional parties consented to a change in venue. Rich & Gardner's attorney's only additional "forum shopping" objection is based upon no factual proof and is otherwise wholly speculative.

Accordingly, Plaintiff's motion to change the venue of this action is granted.

Turning to Plaintiff's motion to consolidate, because they failed to provide notice of this motion to the Onondonga County action's parties it must be denied. A consolidation motion "should be made on notice to all parties to all of the actions affected." (Siegel, NY Prac §128, at 230 [5th ed]). Here, Plaintiff made no showing that they noticed the Onondonga County action's parties on this motion.

Accordingly, Plaintiff's motion to consolidate is denied without prejudice.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

[* 5]

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated:

December 6, 2011 Albany, New York

Joseph C. Teresi, J.S.C

PAPERS CONSIDERED:

- 1. Notice of Motion, dated October 17, 2011; Affirmation of Anthony Martoccia, dated October 17, 2011, with attached Exhibits 1-11.
- 2. Affidavit of William Greagan, dated November 3, 2011, with attached Exhibit A.
- 3. Affidavit of Kristin Walker, dated October 27, 2011.
- 4. Letter of Robert Stockton, dated November 2, 2011.
- 5. Letter of Norah Murphy, dated October 31, 2011.