

Dichter v Installed Bldg. Prods.

2014 NY Slip Op 33016(U)

June 30, 2014

Sup Ct, Westchester County

Docket Number: 60632/2013

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X
BARRY J. DICHTER,

Plaintiff,

Index No. 60632/2013

-against-

DECISION & ORDER

INSTALLED BUILDING PRODUCTS, LLC D/B/A ALL IN
ONE & MOORE BUILDING SYSTEMS,

Defendants.
-----X

The following papers numbered 1 to 7 were read on defendant's motion to dismiss the action on the ground of forum non conveniens and plaintiff's failure to join a necessary party.

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits	1-3
Affirmation in Opposition/Exhibits/Memo of Law	4-6
Reply Affirmation	7

Factual & Procedural Background

On March 19, 2010, defendant Installed Building Products, Inc. ("IBP") entered into a contract with Heilman Building and Restoration, LLC ("Heilman") to install two fireplace systems at plaintiff's vacation home in Massachusetts. The contract was negotiated in

Massachusetts. Heilman was the general contractor hired by plaintiff to oversee the construction of plaintiff's vacation home.

On July 16, 2013, plaintiff, an attorney representing himself, commenced this action seeking damages for negligence, breach of contract, and intentional infliction of emotional distress on the ground that defendant improperly installed the fireplaces.

Defendant brings this pre-answer motion seeking to dismiss the action on the ground of forum non conveniens and due to plaintiff's failure to join Heilman, a necessary party. Defendant notes that the contract between it and Heilman was negotiated in Massachusetts and the work was performed in Massachusetts. Defendant argues that all the occurrences alleged in the complaint occurred in Massachusetts. Defendant argues that all the material witnesses are located in Massachusetts including Heilman, the local building code officials and the employees of IBP who worked on plaintiff's vacation home are in Massachusetts.

Defendant also argues that the complaint must be dismissed because Heilman is not a party to the action. Defendant argues that the contract upon which plaintiff is seeking recovery is between it and Heilman.

In opposition, plaintiff argues that it is inconvenient for him to have this action be venued in Massachusetts since he lives in New York and is disabled. Further, litigating the matter in Massachusetts would cause him to incur substantial costs including hotels stays and transportation costs. Plaintiff also claims that the action should remain in New York because he is "able to receive some very helpful free legal advice about this Action from friends in New York who are New York lawyers." Further, in support of his claim for intentional infliction of emotional distress, plaintiff plans to call his physician who lives and

practices in New York. Plaintiff claims his physician will not travel to Massachusetts to testify at trial.

With respect to the joinder of Heilman, plaintiff contends that he negotiated the contract with IBP and that contract was merely put in Heilman's name for administrative purposes. Heilman merely signed the contract at plaintiff's request. Plaintiff also submits the affidavit of Jason Heilman. Mr. Heilman states that Heilman was dissolved in January 2012 and its affairs have been wound up. Mr. Heilman also states that he entered into the contract with IBP at plaintiff's request and was not involved in the negotiation of the contract.

In reply, defendant notes that plaintiff's arguments that bringing an action in Massachusetts is inconvenient and costly are disingenuous in view of the fact that plaintiff owns a vacation home in Massachusetts. Defendant also notes that while plaintiff makes much of his immobility due to his disability, on at least one occasion plaintiff sought an adjournment of this motion because he was on a vacation in California.

Defendant also notes that there is no dispute that the contract for the installation of the fireplaces is between IBP and Heilman. Therefore, IBP owed a duty to Heilman and Heilman is the only party with standing to sue it for breach of contract. The fact that Heilman is now dissolved does not prevent from being a party to this litigation.

Discussion

On a motion to dismiss on the ground of forum non conveniens, the Supreme Court is to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system. (See CPLR 327; *Tiger Sourcing (HK) Ltd. v.*

GMAC Commercial Finance Corp.-Canada, 66 A.D.3d 1002, 887 N.Y.S.2d 652 [2nd Dept 2009]). No one factor is dispositive when ruling on a motion to dismiss on the ground of forum non conveniens. (See CPLR 327). The defendant bears the burden in a motion to dismiss on the ground of forum non conveniens to "demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-479, 478 N.Y.S.2d 597, 467 N.E.2d 245, cert. denied 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778).

Here, defendant sustained its burden of demonstrating that New York is not the appropriate forum for this litigation. Notably, all the occurrences alleged in the complaint occurred in Massachusetts. Virtually all of the witnesses are in Massachusetts. In deed, plaintiff's vacation home which is the subject of this litigation is in Massachusetts. It is also worthy to note that pursuant to the language of the contract upon which this action is based, the parties agreed to submit to the jurisdiction of the Commonwealth of Massachusetts. Moreover, in view of the fact that plaintiff's vacation home is in Massachusetts and that he is retired, plaintiff will not be significantly inconvenienced by litigating this matter in Massachusetts. Notably, the only connection this action has to the State of New York is plaintiff's residence. However, that single fact is not sufficiently persuasive to keep this action in New York.

Based on the foregoing, defendant's motion to dismiss the action on the ground of forum non conveniens is GRANTED. In light of this determination, the Court need not address defendant's other arguments.

Dated: White Plains, New York
June 30, 2014



HON. WILLIAM J. GIACOMO, J.S.C.

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