

Riverhead Motors LLC v Siegel
2015 NY Slip Op 32310(U)
November 20, 2015
Supreme Court, New York County
Docket Number: 150109/2015
Judge: Donna M. Mills
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58**

RIVERHEAD MOTORS LLC, d/b/a
RIVERHEAD BAY MOTORS,

Plaintiff,

-against-

VICTORIA FERRI SIEGEL,

Defendant.

INDEX NUMBER 150109/2015
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

In this action for fraud and conversion (the Victoria Action), defendant Victoria Ferri Siegel (Victoria) moves to change the venue of the action from New York County to Suffolk County. Plaintiff Riverhead Motors LLC, d/b/a Riverhead Bay Motors (Riverhead) opposes and cross-moves to consolidate this action with *Riverhead Motors LLC v Ronald Siegel*, Sup Ct, New York County, Index No. 653585/2013 (the Ronald Action).

FACTUAL BACKGROUND

Riverhead is an automobile dealership selling several makes of cars from showrooms in Suffolk County, New York. Its corporate headquarters are in New York County, but its articles of organization identify it as located in Suffolk County. See Trainer affirmation, exhibits C (Articles of Organization) and D (NYS Department of State, Entity Information). From 2005 through May 2012, Ronald Siegel (Ronald) was Riverhead's general manager. Victoria is Ronald's wife, a Suffolk County resident, who was never employed by Riverhead.

On October 16, 2013, Riverside commenced the Ronald Action asserting causes of action of breach of fiduciary duty, fraud, unjust enrichment, and conversion against Ronald and co-

defendant Marcy A. Scarth (Scarth). Zucker affirmation, exhibit A. Scarth was Riverhead's controller from prior to April 2005 through July 2012.

On January 6, 2015, Riverhead commenced the Victoria Action asserting causes of action of fraud, conversion, and unjust enrichment. Trainer affirmation, exhibit A.

DISCUSSION

The complaint herein alleges that Ronald provided Victoria with an automobile owned by Riverhead for her personal use without conferring any benefit on Riverhead. Additionally, Ronald allegedly provided Victoria with a credit card in Riverhead's name for her personal use without conferring any benefit on Riverhead.

CPLR 510 (3) permits the court to change the place of trial of an action where "the convenience of material witnesses and the ends of justice will be promoted by the change." However, Riverhead cross-moves here for consolidation of the Victoria Action with the older Ronald Action, and it is appropriate to resolve that application before considering the issue of venue. CPLR 602 (a) provides that

"[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

The Ronald Action alleges an intricate scheme to inflate Riverhead's automobile sales, hiding losses and creating the illusion of profits. This purportedly allowed Ronald "to generate his salary and to make unauthorized and improper payments to himself." Bragar opposition affirmation, exhibit A (Ronald Action complaint), ¶ 17. Scarth was accused of doctoring financial reports in furtherance of the scheme, thereby "never earn[ing] her salary, . . . [and receiving] unauthorized bonuses," together amounting to almost \$839,000. *Id.*, ¶ 22.

The Ronald Action commenced more than a year before the Victoria Action. According to Riverhead's counsel, Riverhead has produced 6,994 pages of documents in the Ronald Action, and both defendants there have produced documents as well. Bragar affirmation, ¶ 4. Additionally, Ronald and Scarth have been deposed in New York County, and, as of the date of Riverhead's cross motion, Ronald was scheduled for a further deposition. *Id.*

Riverhead states that discovery in the Ronald Action uncovered Victoria's use of a Riverhead car and credit card. Bragar affirmation, ¶ 5. Ronald, in turn, produced documents allegedly showing that Victoria was entitled to free use of a car. *Id.*, ¶ 6. Riverhead claims that efforts to clarify this issue have been hampered by the separation of the two actions, making document exchanges and the scheduling of depositions more difficult.

While the convenience of material witnesses is a central issue in an application to change venue, here it also illustrates the interconnectedness of the two actions. Donald Zucker, Riverhead's principal owner, avows that there are "three witnesses knowledgeable about Riverhead's agreement with Mr. Siegel, which he claims allows him to give Mrs. Siegel a Riverhead car and credit card," Albert Berkowitz, Riverhead's chief financial officer, Joseph Giamboi, Riverhead's general counsel, and Zucker himself. Zucker affirmation, ¶ 6. Zucker says that all three work at Riverhead's Manhattan offices and "would be greatly inconvenienced to have to travel to Suffolk County for a trial in this matter." *Id.* Victoria, on the other hand, contends that Ronald, a Suffolk County resident, is a material witness in the Victoria action, and that Riverhead "performs all of its operations out of its Riverhead[, Suffolk County] office." Trainer affirmation, ¶ 28.

Central to the consideration of a motion to consolidate is the presence of common

questions of law or fact between the two actions. CPLR 602 provides that

“[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Victoria argues that the allegations that she used Riverhead’s vehicle and credit card for her own purposes “have almost nothing in common with the allegations” in the Ronald Action. Chisty opposition affirmation, ¶ 11. The complaint in the Ronald Action charges Ronald with breach of his fiduciary duty, fraud, unjust enrichment, and conversion. It claims that Ronald “used Riverhead funds for reasons unrelated to Riverhead to pay his brother a total of \$27,100, his son’s accounts receivable of \$3,872, and his daughter’s car payments of \$2,485.” Ronald Action complaint, ¶ 20. Additionally, Ronald allegedly “used Riverhead’s American Express account to pay for personal items of his such as his son’s racing team in the amount of \$132,767.” *Id.*, ¶ 21. In sum the defendants in the Ronald Action were accused of “taking Riverhead funds for their own purposes.” *Id.*, ¶ 24. This comports with the allegations in the Victoria Action that Ronald provided his wife with a company vehicle and credit card for her personal use. *DLJ Mtge. Capital, Inc. v Kontogiannis*, 110 AD3d 522, 523 (1st Dept 2013) (consolidation is warranted, “[a]lthough the . . . enforcement action does not raise specific questions about the mortgage fraud scheme alleged in petitioner’s plenary action, the matters at issue all arise out of the fraudulent activities of the same defendants . . .”).

“When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right.” *Alizio v Perpignano*, 78 AD3d 1087, 1088 (2d Dept 2010). Victoria fails to demonstrate prejudice to a substantial right of hers, but opposes consolidation because of the possibility of a substantial delay in resolving the

Ronald Action, where discovery is further advanced. *See Rennert Diana & Co. v Kin Chevrolet*, 137 AD2d 589, 589 (2d Dept 1988) (“Since substantial delay would have resulted from consolidation of the actions, denial of the motion was warranted”). However, the advanced stage of the Ronald Action may hasten the resolution of the Victoria Action, since so much discovery has taken place, and a substantial record built dealing with common matters. Also, it is not Victoria’s place to lament potential delays in the Ronald Action.

Finally, New York County, where the Ronald Action originated prior to the Victoria Action, is the appropriate venue for the consolidated action. *Ali v Effron*, 106 AD3d 560, 560 (1st Dept 2013) (“The Suffolk County action was commenced prior to this one, both actions arose from the same accident and plaintiff fails to demonstrate any prejudice to the parties or inconvenience to material witnesses”). Riverhead’s cross motion for consolidation is granted.

With the consolidation of the Victoria Action and the Ronald Action, the motion to change venue of the Victoria Action is denied as moot.

Accordingly, it is

ORDERED that the cross motion by plaintiff Riverhead Motors LLC, d/b/a Riverhead Bay Motors is granted, and the above captioned action is consolidated in this Court with *Riverhead Motors LLC v Ronald Siegel*, Sup Ct, New York County, Index No. 653585/2013, under Index No. 653585/2013, and the consolidated action shall bear the following caption:

RIVERHEAD MOTORS LLC, d/b/a
RIVERHEAD BAY MOTORS,
Plaintiff,
-against-
RONALD H. SIEGEL, MARCY A. SCARTH
and VICTORIA FERRI SIEGEL,
Defendants,

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that cross movant is directed to serve a copy of this order with notice of entry on the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

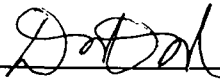
ORDERED that cross movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office, who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the motion by defendant Victoria Ferri Siegel to change the venue of the above-captioned action from New York County to Suffolk County is denied as moot; and it is further

ORDERED that counsel are directed to appear for a ^{preliminary} ~~status~~ conference in Room 574, 111 Centre Street on January 29, 2016, at 10:00 AM/PM.

DATED: Nov ~~October~~ 20, 2015

ENTER:



J.S.C.
DONNA M. MILLS, J.S.C.