SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Southern Realty & Development, LLC,
VS Walden LLC, and Thruway LLC,

Index No.
651661/2015

Plaintiffs,

DECISION and ORDER

- v -

Mot. Seq. 1

MAG Designs, LLC, Machado Architectural, P.C.,
Jamie U. Machado, and MAG Architectural Designs, PLLC,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, fraud, gross negligence and malpractice arising from a contract entered between Plaintiffs, Southern Realty & Development, LLC ("Southern Realty"), and VS Walden LLC ("VS Walden"), and Thruway LLC ("Thruway") (collectively, "Plaintiffs") and defendants, MAG Designs, LLC ("MAG Designs"), Machado Architectural, P.C. ("Machado Architectural"), Jamie U. Machado ("Machado"), and MAG Architectural Designs, PLLC ("MAG Architectural Designs") (collectively, "Defendants").

As alleged in the Complaint, plaintiffs, Southern Realty and, Thruway are domestic limited liability companies with offices and principal places of business located at 47 Southern Lane, Warwick, New York 10990. Plaintiff, VS Walden, "is a domestic limited liability company with an office and principal place of business located at 44 South Bayles Avenue, Port Washington, New York."

As alleged in the Complaint, defendant, MAG Designs is "a domestic limited liability company with an office and principal place of business located at

353 East 83rd Street, #5K, New York, New York 10028." Machado Architectural is a "professional corporation comprised of architects licensed to practice in the State of New York, with an office and principal place of business located at 1207 Route 9, Executive Part, Ste. 5, Wappingers Falls, NY 10028." Machado is "an architect licensed to practice in the State of New York" with offices located at 1073 Main Street, Fishkill, New York, and 1207 Route 9, Executive Park, Ste. 5, Wappingers Falls, NY 12490.

As alleged in the Complaint, the parties entered into an agreement dated February 9, 2011. Pursuant to the agreement, Defendants were to perform certain architectural services in connection with Plaintiffs' proposed renovation of the Thruway Shopping Center in Walden, New York ("the Project"). Defendants agreed to perform those services for a fixed fee not to exceed $38,000.00 plus certain reimbursable expenses.

The Complaint alleges, "Commencing in or around February 2011, and continuing through March 2014, defendant performed certain services under the Agreement, for which plaintiffs paid defendants the total sum of $38,000.00 . . . In or about November 2014, defendant Machado informed plaintiffs that defendants would not continue to complete their services unless plaintiff agreed to pay additional sums which Machado claimed, contrary to the terms of the Agreement, to be due for services performed under the Agreement."

Defendants move pursuant to CPLR § 503(a), to change venue from New York County to Dutchess County on the basis that New York County is not a proper county or in the alternative, that New York County is a forum non conveniens. Defendants also move to dismiss the fourth cause of action for fraud, pursuant to CPLR § 3211(a)(7).

Plaintiffs oppose the portion of Defendants' motion that seeks to change venue from New York County to Dutchess County. Plaintiffs withdraw the fourth cause of action sounding in fraud, thereby rendering the portion of Defendants' motion that seeks to dismiss the fourth cause of action to be moot.

CPLR §503(a) provides that venue is proper in the county in which one of the parties resided when the action was commenced. CPLR § 503(a).

Under CPLR §503 (c), corporations and limited liability companies are

deemed a resident of the county in which their principal offices are located. CPLR § 503(c). *See Marko v. Culinary Inst. of Am., et al.*, 245 A.D.2d 212, 666 N.Y.S.2d 608 (1997) ("The motion, insofar as it sought a change of venue as of right, was properly denied because [defendant] Conrail [Conrail Rail Corporation] is bound by its designation of New York County as its principal office in its application for authority to do business filed with the Secretary of State. This is true regardless of the location of Conrail's actual principal office in the State, and for as long as such designation remains unchanged.").

The common-law doctrine of *forum non conveniens*, now codified in CPLR § 327, permits a court to dismiss an action when, "in the interest of substantial justice the action should be heard in another forum." (CPLR § 327[a]). The doctrine, "is based upon 'justice, fairness and convenience.' . . . Among the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum." (*Grizzle v. Hertz*, 305 AD2d 311[1st Dept. 2003])(citations omitted). CPLR § 327 further provides that, "[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." (CPLR § 327[a]).

The burden rests upon the defendant challenging the forum to demonstrate "relevant private or public interest factors which militate against accepting the litigation. . . . No one factor is controlling." (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]). Unless the balance weighs strongly in favor of the defendant, a plaintiff's choice of forum should not be disturbed. (*Id.*). Additionally, the burden of demonstrating that New York is not a proper forum to litigate the action "becomes even more onerous where the plaintiff is a New York resident." (*Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 [1st Dep't 1990]).

Plaintiffs' choice of venue of New York County is based on the Articles of Organization of MAG Designs filed with the New York Secretary of State under Section 203 of the Limited Liability Company Law, on September 14, 2004. Page 1 of the Articles of Organization states:

> SECOND: The county within this state in which the office of the limited liability company is to be located is New York County.

In support of Defendants' motion to change venue, Defendants submit the affidavit of Machado, a member and owner of MAG Designs, Machado Architectural, and MAG Architectural. Machado states, "[a]t all times," Defendants "had offices in either Fishkill or Wappingers Falls, New York." Machado further states, "Both of those locations are in Dutchess County. I have never had an office in Manhattan or New York County." Machado states:

> Although I am now aware that when the original certificate of incorporation was drafted it says that there is an office in New York County, I never actually had an office in New York County after the original certificate was filed. I can assume the only reason that the office was listed in New York County was because my attorney, who created the corporation, used it as his address for service and process. For the project which is the subject of this lawsuit between myself and the Plaintiffs, I did all the work in Dutchess County or Orange County, New York. The project location was in Orange County, New York, and I made frequent visits to the Plaintiffs and the representatives of the Plaintiffs on Orange County. I never did any work for this project in New York County nor did I do any business in New York County during this time. If I had to travel to New York County for deposition and trial it would be an inconvenience on me. It takes at least two and a half (2.5) hours to get to New York City from Dutchess County, New York.

In opposition to Defendants' motion to change venue, Plaintiffs submit the attorney affirmation of Esther S. Widowski. Annexed to the attorney affirmation is a copy of MAG Designs' Articles of Organization.

Plaintiffs' choice of venue is proper based upon MAG Designs' designation of New York County as "[t]he county within this state in which the office of the limited liability company is to be located" in its Articles of Organization filed with the New York Secretary of State. Additionally, Defendants fail to meet their heavy burden of demonstrating that New York is not a convenient forum for the instant litigation. While Defendants argue that "all witnesses are expected to come from either Orange or Dutchess County," Defendants do not identify the names of these non-party witnesses of the subject matter of their knowledge. While Mr. Machado states in his affidavit that it would be "an inconvenience on me to travel to New York County for deposition and trial," this is insufficient to meet Defendants' heavy burden of demonstrating that New York is not a convenient forum for the

instant litigation.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that Defendants shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief is decided.

DATED: DECEMBER 14, 2015

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EILEEN A. RAKOWER, J.S.C.