

**Nascimento v Harrison & Burrowes Bridge
Constructors, Inc.**

2015 NY Slip Op 32486(U)

December 10, 2015

Supreme Court, New York County

Docket Number: 158258/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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ALEX NASCIMENTO,

Plaintiff,

Index No. 158258/14

- against-

HARRISON & BURROWES BRIDGE CONSTRUCTORS,
INC. and HARRISON & BURROWES LLC,

Defendants.

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HARRISON & BURROWES BRIDGE CONSTRUCTORS,
INC. and HARRISON & BURROWES LLC,

Third-Party Plaintiff,

-against-

AMSTAR OF WESTERN NEW YORK INC.,

Third-Party Defendant.

----- X

DONNA MILLS, J.:

Third-party defendant Amstar of Western New York Inc. (Amstar) moves, pursuant to CPLR §§ 510 (1) & (3), and 511, for an order changing the venue of this action to Albany County, the county of incorporation of defendant and third-party plaintiff Harrison & Burrowes Bridge Constructors, Inc. (Harrison & Burrowes).

Plaintiff Alex Nascimento (Nascimento) cross-moves, pursuant to CPLR § 510 (3), for an order retaining venue in New York County.

This is an action pursuant to Labor Law §§ 240 (1), 241 (6), 200 (1), and the common law, to recover damages for personal injuries suffered by Nascimento in a construction site accident in

Putnam County.

In support of its motion to change venue to Albany County, Amstar argues that it timely served a demand to change venue as of right, and that the convenience of material witnesses and the ends of justice will be promoted by the change.

In support of its cross motion to retain venue in New York County, Nascimento argues that the demand to change venue as of right, was untimely served, and that a discretionary change to Albany County would inconvenience Nascimento's treating physician witnesses.

CPLR 503 (a), provides that "[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff." CPLR 503 (c) provides that "[a] domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located...."

Here, neither Harrison & Burrowes nor Amstar has a principal office in New York County. Moreover, Nascimento is a resident of the State of New Jersey, and the action arose in Putnam County. Apparently, New York County's only connection to this action is that Nascimento's counsel is here.

After having been impleaded, Amstar may invoke the change of venue rules of CPLR 510 (1) and 511, that originally belonged to the defendant in the main action. CPLR 1008 has been held to confer on a third-party defendant the right to change venue if venue was improper in the main action on the date the action was commenced (*Kearns v Johnson*, 238 AD2d 121 [1st Dept 1997]). However, if the third-party defendant fails to comply in some way, with the timing prerequisites of CPLR 511's demand procedure, it forfeits the right to have venue changed to the

proper county (*Singh v Becher*, 249 AD2d 154 [1st Dept 1998]).

The venue change was timely sought by Amstar based on improper designation of venue. Inasmuch as neither of the original parties, Nascimento nor Harrison & Burrowes, had its residence in New York County, venue was not properly originally placed in New York County (*Kearns v Johnson*, 238 AD2d 121), and could be transferred, in accordance with Amstar's request, to Albany County, where Harrison & Burrowes has its corporate residence. Amstar met the filing requirements of CPLR 511, which provides for a motion for transfer of venue as of right, where it served its demand contemporaneously with its answer and moved for transfer of venue within the 15-day period imposed by CPLR 511 (b). No case law supports Nascimento's argument that an answer served, by agreement between counsel, beyond the statutory deadline for answering, waives the right to serve with the answer, a demand as of right, to change venue. By the plain language of the statute, a demand served with the answer is timely, and the cases routinely give effect to demands served with answers outside the statutory deadline for answering. For example in *Simon v Usher* (17 NY3d 625 [2011]), plaintiffs commenced their action on July 17, 2009, and defendants served their answers with their demands to change venue on August 20, 2009, beyond the statutory time for answering.

Turning to the cross motion to retain venue for the convenience of material witnesses, Nascimento argues that by transferring venue from this County to Albany County, significant hardship and inconvenience would be caused to his treating physician witnesses. Amstar, on the other hand, merely alleges in opposition that the potential witnesses are largely unknown.

"[A] plaintiff will forfeit the right to select the place of venue by choosing an improper venue in the first instance" (*Kelson v Nedicks Stores*, 104 AD2d 315, 316 [1st Dept 1984]), but is

not precluded from making an application to change venue as a matter of discretion (*Berberich v York Scaffold Equip. Corp.*, 177 AD2d 451 [1st Dept 1991]).

Nascimento's medical experts are damages witnesses. Although their convenience is a factor to be weighed, it is subordinate to the convenience of the liability witnesses (*Stonestreet v General Motors Corp.*, 201 AD2d 350 [1st Dept 1994]; *Chung v Kivell*, 57 AD2d 790 [1st Dept 1977]). However, Amstar has not offered the names of any liability witnesses whatsoever. Therefore, there is no offsetting circumstance to Nascimento's showing. This is a transitory lawsuit arising in the County of Putnam. Whether or not Albany County is either a more, or a less convenient County for liability witnesses in this case is an unknown.

Under the circumstances the only facts before the Court warrant retaining discretionary venue in New York County.

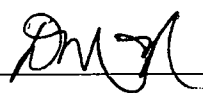
Accordingly, it is

ORDERED that the motion to change the venue of this action to Albany County, is denied, and it is further

ORDERED that the cross motion to retain venue in New York County, is granted.

Dated: 12-10-15

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.