

Goelz v Keller

2018 NY Slip Op 30934(U)

May 10, 2018

Supreme Court, New York County

Docket Number: 657172/2017

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

HAROLD GOELZ, HAREN & KELLER PAINTING
CORP., CHERRY MGMT. CORP., AND KELGO
MANAGEMENT CORP.,

Index No.: 657172/2017
DECISION/ORDER
Motion Seq. Nos. 001; 002

Plaintiffs,

-against-

STEPHEN KELLER, JEAN KELLER, LORI DOHERTY,
JOSEPH DOHERTY, WILLIAM KELLER, LILIAN
KELLER, MARIANNE CANDITO, TURNER
CONSTRUCTION COMPANY, and EISNER CPA, P.C.,

Defendants.

Recitation as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendant Eisner CPA., P.C. (Eisner), pursuant to CPLR 3016 (b) and 3211 (a) (7), for an order dismissing this action as against Eisner (motion sequence no. 001), and the motion of defendants Stephen Keller, Jean Keller, Lori Doherty, Joseph Doherty, William Keller, Lillian Keller and Mariane Candito (collectively, the individual defendants), pursuant to CPLR 510 (1), to transfer venue to the Supreme Court, Suffolk County (motion sequence no. 002).

Papers

Numbered

Motion Sequence No. 001:

Defendant’s Notice of Motion and Affirmation in Support.....	1
Plaintiff’s Memorandum of Law in Opposition.....	2
Defendant’s Reply Affirmation	3

Motion Sequence No. 002:

Defendants’ Notice of Motion and Affirmation in Support.....	1
Plaintiff’s Memorandum of Law in Opposition.....	2
Defendants’ Reply Memorandum of Law	3

Napoli Shkolnik PLLC, New York, NY (Salvatore C. Badala of counsel), for plaintiff.
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, New York, NY (Keith J. Singer of counsel), for defendant Eisner.
Zabell & Associates, P.C., Bohemia, NY (Saul D. Zabell of counsel), for the individual defendants.

Gerald Lebovits, J.

Motion sequence numbers 1 and 2 are consolidated for disposition.

Upon the foregoing papers, it is ordered that the individual defendants' motion to transfer venue to the Supreme Court, Suffolk County (motion sequence no. 002), is granted, and Eisner's motion to dismiss the complaint as against it (motion sequence no. 001) is denied without prejudice, with leave to renew in Suffolk County.

The complaint, which alleges 14 separate causes of action, involves claims by plaintiffs that defendants defrauded plaintiffs of their business interests, breached certain agreements between the parties, converted assets, and various other claims.

Plaintiff commenced this action by filing the summons and complaint with the New York County Clerk on December 1, 2017. The summons and complaint cite to the principal place of business of defendant Turner Construction Company (Turner) as the sole basis of venue for this action (see complaint, ¶ 17 ["Venue is this county is proper under CPLR 503 (a) because Turner is a resident of New York County"]; see also *id.*, ¶ 15 ["Turner is a New York corporation with its principal place of business located at 375 Hudson Street, New York, New York 10014"]).

On December 18, 2017, Eisner filed a pre-answer motion to dismiss.

On January 3, 2018, the individual defendants served on plaintiffs a demand to change the place of trial for this action from New York County to Suffolk County. Pursuant to CPLR 511 (b), plaintiffs had five days to serve a written consent to change the place of trial. This five-day period expired on January 8, 2018. To date, plaintiffs have not responded to the individual defendants' demand. Pursuant to CPLR 511 (b), the individual defendants "may move to change the place of trial within fifteen days after service of the demand." Accordingly, this motion is both procedurally proper and timely.

CPLR 503 (a), captioned "Venue based on residence," provides, in pertinent part: "Except 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." But a plaintiff's right under CPLR 509 to designate a county of his or her choosing as the situs of the lawsuit is not absolute (*Castaneda v Castaneda*, 36 Misc 3d 504, 509 [Sup Ct, NY County 2012]). CPLR 509 provides that a plaintiff's designation of a county stands "unless the place of trial is changed to another county by order upon motion." CPLR 510 provides a means by which a defendant can challenge that designation, and have venue changed from the foreign county to the home county of one, if not more, of the parties:

"The court, upon motion, may change the place of trial of an action where:

1. The county designated for that purpose is not a proper county; or
2. There is reason to believe that an impartial trial cannot be had in the proper county;

3. The convenience of material witnesses and the ends of justice will be promoted by the change”

(CPLR 510).

“[A] motion for change of venue under CPLR 510 is addressed to the sound discretion of the trial court” (*Rodriguez v Wilson*, 201 AD2d 636, 636-637 [2d Dept 1994]). “[T]o prevail on a motion pursuant to CPLR 510 (1) to change venue, a defendant must show that the plaintiff’s choice of venue is improper, and also that the defendant’s choice of venue is proper” (*Pinos v Clinton Cafe & Deli, Inc.*, 139 AD3d 034, 1035 [1st Dept 2016]); *accord Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009] [“[D]efendant’s burden on an application to change venue is limited to establishing that the designated county is improper”]. If a defendant meets this burden, “the plaintiff [is] required to establish, in opposition, that the venue selected was proper” (*Young Sun Chung v Kwah*, 122 AD3d 729, 730 [2d Dept 2014]).

The individual defendants have met their burden of demonstrating that plaintiffs’ choice of venue is improper. “[A]ll other things being equal, a transitory action should be tried in the county in which the claim arose, absent cogent reasons warranting trial elsewhere” (*Creed v United Hosp.*, 158 AD2d 654, 655 [2d Dept 1990]; *accord Wickman v Pyramid Crossgates Co.*, 127 AD3d 530, 531 [1st Dept 2015]).

Here, no legitimate reason exists why plaintiffs designated New York County as the venue for this action. Each of the four plaintiffs is either a resident of or located in Suffolk County (*see* complaint, ¶¶ 2, 3, 6, 7). All seven individual defendants, as well as defendant Eisner, are also either a resident of or located in Suffolk County (*see id.*, ¶¶ 8-15). A review of the complaint reveals that all actions underlying the alleged fraud, breach of contract, and conversion of assets took place in Suffolk County.

The only outlier of the 13 named parties is defendant Turner, and the cause of action asserted as against it. It appears that Turner was included as a named defendant to access the jurisdiction of New York County. Turner appears only once in plaintiff’s complaint, in Count XII. In that count, plaintiffs seek a declaratory judgment against Turner for sums allegedly not paid to plaintiff Haren & Keller Painting Corp. (H&K). Plaintiffs allege that, “[u]pon information and belief, Plaintiffs believe that services were provided by Plaintiff H&K to Defendant Turner” and that Turner “has not paid \$2,400 for those services” (complaint, ¶¶ 153-154). Plaintiffs seek “a declaratory judgment stating that Defendant Turner owes Plaintiff H&K \$2,400 for services provided” (*id.*, ¶ 157).

These allegations are made upon information and belief, and are thus speculative about whether services were provided to Turner to justify this cause of action. Also, plaintiffs’ sole claim against Turner is nongermane to any of the allegations set forth in the remainder of the complaint, and does not rise from any of the alleged occurrences giving rise to the remainder of the action.

The proper venue is Suffolk County, where all parties except Turner are located, where the alleged causes of action arose, and where most, if not all, the witnesses will likely be located

(see *Wickman*, 127 AD3d at 531; accord *Rodriguez*, 201 AD2d at 637; *Pickering v Westchester County Health Care Corp.*, 21 Misc 3d 1130 [A], 2006 NY Slip Op 52663 [U], *3 [Sup Ct, Westchester County 2006], *affd* 41 AD3d 454 [2d Dept 2007]).

“[M]oreover, a plaintiff’s failure to serve an affidavit in response to a defendant’s demand [to change venue], either showing that the county designated by the defendant is improper, or that the county the plaintiff designates is proper, supports a transfer of venue to the county demanded by defendant” (*Lynch v Cyprus Sash & Door Co., Inc.*, 272 AD2d 260, 261 [1st Dept 2000]; accord *IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moscovits*, 145 AD3d 464, 465 [1st Dept 2016]; *Montilla v River Park Assoc.*, 282 AD2d 389, 389 [1st Dept 2001]).

In opposition to the motion, plaintiffs do not demonstrate the existence of sufficient countervailing circumstances to justify retaining venue here. Plaintiffs do not submit an affidavit showing either that its designation was proper or that defendants’ designation was improper. Rather, in their memorandum of law in opposition, plaintiffs recite their pleadings and argue that New York is the proper county, without establishing why. Plaintiffs do not link the alleged actions of the individual defendants or defendant Eisner to the wrongdoings cited against Turner.

Accordingly, the motion of the individual defendants to transfer venue to the Supreme Court, Suffolk County, is granted.

With respect to Eisner’s motion to dismiss (motion sequence no. 001), when a determination has been made to effect a change of venue, principles of comity dictate that all remaining motions be relegated to the transferee court (see *Rosenblatt v Sait*, 34 AD2d 238, 240 [1st Dept 1970]; *Burton v Ontra, Inc.*, 167 Misc 2d 977, 979 [Sup Ct, Queens County 1996]; see e.g. *Romero v City of N.Y.*, 2018 NY Slip Op 28108, at *2, 2018 WL 1746395, at *2 [Sup Ct, Bronx County 2018] [transferring venue to Kings County, and holding that “the remaining branches of Defendants’ motion, seeking dismissal of Plaintiff’s claims against the individual defendants and dismissal of Plaintiff’s remaining timely claims . . . are denied without prejudice, with leave to renew in Kings County”]).

Accordingly, Eisner’s motion to dismiss (sequence no. 001) is denied without prejudice, with leave to renew in Suffolk County.

The court has considered the parties’ remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendants’ motion to transfer venue (motion sequence no. 002) is granted, and the venue of this action is changed from this court to the Supreme Court, County of Suffolk, and the Clerk of this Court is directed to transfer the papers on file in this action (Index No. 657172/17) to the Clerk of the Supreme Court, County of Suffolk, upon service of a copy of this order with notice of entry and payment of the appropriate fee, if any; and it is further

NYSCEF DOC. NO. 62

RECEIVED NYSCEF: 05/14/2018

ORDERED that the motion of defendant Eisner CPA, PC, to dismiss the complaint as against it (motion sequence no. 001) is denied without prejudice with leave to renew in Suffolk County.

Dated: May 10, 2018


J.S.C.
HON. GERALD LEBOWITZ
— J.S.C.