

Wallach v Greenhouses Hotel, LLC.

2018 NY Slip Op 32889(U)

November 8, 2018

Supreme Court, New York County

Docket Number: 652358/2018

Judge: Arthur F. Engoron

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM
Justice

-----X
JESSICA WALLACH & RYAN SCULLY,
Plaintiffs,
- v -

INDEX NO. 652358/2018
MOTION DATE 07/20/2018
MOTION SEQ. NO. 001

THE GREENHOUSES HOTEL, LLC. & DOUG POSEY,
Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, & 26
were read on this motion TO CHANGE VENUE

Upon the foregoing documents, the motion of THE GREENHOUSES HOTEL, LLC. & DOUG POSEY (“defendants”) is granted.

Background

This action arises out of a contract that the above-captioned parties entered into on August 21, 2017. The contract sets forth the terms for holding plaintiffs’ wedding ceremony and reception at the Greenhouses Hotel, in Ulster County, New York on May 5, 2018. Approximately two weeks prior to that date, on or about April 23, 2018, the plaintiffs allegedly were forced to select a new location because defendants failed to have the grounds ready and suitable to host a wedding due to ongoing construction on the agreed site. On May 14, 2018, plaintiffs commenced this action for (1) breach of contract; (2) negligent infliction of emotional distress; (3) intentional infliction of emotional distress; and (4) fraudulent misrepresentation.

On or about June 18, 2018, defendants moved, pursuant to CPLR 501, “Contractual Provisions Fixing Venue,” to transfer this matter from New York County to Ulster County, on the ground that the subject contract provided for venue in Ulster County of any disputes arising thereunder.

Paragraph 18 of the contract provides, as here relevant, as follows:

Jurisdiction and Choice of Law. The courts of the Town of Shawangunk, NY & Ulster County NY shall have exclusive jurisdiction to adjudicate any disputes arising under or in connection with the Agreement.

CPLR 501 provides, as here relevant, as follows:

[A] written agreement fixing [the] place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.

In opposition, plaintiffs claim that defendants’ motion is untimely and/or procedurally defective. CPLR 511 provides, as here relevant, as follows:

(a) Time for motion or demand. A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.

(b) Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand...

Plaintiffs assert that where a contract contains a forum selection clause subject to CPLR 501, but defendants fail to follow proper procedure in seeking a change of venue, it is treated as a discretionary motion to change venue, Talko Stone Prods., Inc. v Davis-Giovinzazzo Co., Inc., 2009 NY Slip Op. 06210, and, therefore, the courts should turn to CPLR 510:

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; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

Plaintiffs argue that the county selected by plaintiffs is a proper county, a fair trial can be held in said county, and far more material witnesses are located in proximity to New York County than Ulster County. Plaintiff's argue, in the alternative, that their second, third, and fourth causes of action sound in tort, and that courts have held that language like that in the subject contract is not applicable to tort claims, because the contract states that Ulster County will have jurisdiction of "any dispute arising under or in connection with this Agreement."

In their reply papers, defendants reiterate that they are moving pursuant to CPLR 501, the forum-selection provision. Defendants argue that plaintiffs mistakenly refer to CPLR 511(b), which refers to demand for change of place of trial upon ground of *improper venue*, and (a), which dictates that such motion shall be served with the answer or before the answer is served. However, defendants argue that another section of the CPLR, 511(a), applies to defendants because it states that a motion for change of place of trial *on any other ground* shall be made within a reasonable time after commencement of the action. Defendants argue that their motion to change venue was within a reasonable time given the following timeline:

5/14/2018	Summons & Complaint:
6/8/2018	Answer:
6/8/2018	Notice to Admit:
6/18/2018	Plaintiff's response to Notice to Admit [admitting their signature on the contact]
6/26/2018	Motion to change venue:

Furthermore, defendants dispute plaintiffs' alternative claim that the forum selection clause should not be upheld because this a tort action and not a breach of contract action. Defendants argue that the pleadings on the "tort" causes of action all revolve exclusively around issues that arise under the contract, and the applicability of a forum selection clause does not depend on the nature of the underlying action.

Lastly, defendants assert that CPLR 501 is a "shall be enforced" statute, and the only limitation on CPLR 501 is stated clearly in that section: "Subject to the provisions of subdivision two of section 510..." That provision governs when "there is a reason to believe that an impartial trial cannot be held in the proper county." Defendants state that plaintiffs have come forward with no claim or evidence that they cannot have an impartial trial in Ulster County and, therefore, defendants' motion must be granted.

Discussion

Defendants motion is grounded upon CPLR 501, addressing forum selection clauses in contracts made before an action is commenced, which "shall" be enforced upon a motion for change of place of trial. CPLR 511, dictates that a motion for change of place of trial shall be made within a reasonable time after commencement of the action. Defendants clearly made the instant motion within a reasonable time. As demonstrated in the timeline above, plaintiffs commenced this action on May 14, 2018, and less than a month and a half later, on or about June 26, 2018, defendants filed this motion to change venue. Plaintiffs argue that defendants had to serve a demand for change of venue with or before service of their answer, or, in the alternative, the motion had to be filed within 15 days of the service of the answer, as required by CPLR 511.

However, no such prerequisite exists for CPLR 501, which is not based upon plaintiff designated venue in an improper county, pursuant to CPLR § 503.

As defendants' motion is based upon CPLR 501, plaintiffs' other arguments are moot for purposes of this decision.

Finally, this court firmly believes that all of plaintiffs' causes of action, be they in contract or tort, arise out of the subject contract. Thus, the court is constrained to grant the instant motion.

Conclusion

Thus, for the reasons set forth herein, defendants' motion is granted, conditional on defendants serving the New York County Clerk with a copy of this Decision and Order to effect the transfer pursuant to the NY County protocol, and the clerk is hereby directed to transfer this action from this Court to Supreme Court, Ulster County.

This constitutes the decision and order of this Court.



11/8/2018

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE