

Apple Bank for Sav. v Goldberger
2019 NY Slip Op 31514(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 652128/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 37

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APPLE BANK FOR SAVINGS,

Plaintiff,

Index No. 652128/2018

Motion Sequence No. 002

– against –

RUTH GOLDBERGER,

Defendant.

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ENGORON, J:

Plaintiff Apple Bank for Savings (ABS), a New York State chartered savings bank, brings this action to recover \$28,000.00 that it allegedly deposited into the account of defendant Ruth Goldberger from the accounts of other ABS customers, without their authorization. The amended complaint asserts causes of action for breach of contract, unjust enrichment and money had and received.

Defendant now moves, pursuant to CPLR 503 and 511, to change venue to Kings County.

Apple Bank commenced the instant action on May 1, 2018 by filing a summons with notice. Defendant filed a notice of appearance and a demand for the complaint on June 1, 2018. ABS filed the complaint on June 8, 2018. On June 27, 2018, defendant filed a demand for change of venue to Kings County, on the ground that New York County is not a proper county for trial.¹ On July 2, 2018, ABS filed an affidavit in response to defendant’s demand for change

¹ On June 27, 2018, defendant also moved to dismiss the complaint (motion sequence number 001). The motion was withdrawn by stipulation after ABS filed its amended complaint on August 17, 2018. On September 21, 2018, defendant moved to dismiss the amended complaint (motion sequence number 003).

of venue, in which it refused to consent to the transfer. On July 9, 2018, defendant filed the instant motion to change venue.

Defendant contends that New York County is not a proper county pursuant to CPLR 503, because neither of the parties resides here. Defendant states that she resides in Kings County, whereas ABS resides in Nassau County. In support, she points to printouts from: ABS's website, which states that ABS's "Main Office" is located at 1395 Northern Boulevard, Manhasset, NY 11030; the Federal Deposit Insurance Corporation website, which lists the same address as ABS's "Headquarters"; and the New York State Department of Financial Services (DFS) website, which lists that address as ABS's "Main Address." Lowe affirmation, exhibit D. In addition, defendant argues that, because ABS claimed Nassau County as its principal place of business in a 2006 lawsuit (*see id.*, exhibit F), it is estopped from claiming New York County as its current principal place of business.

ABS counters that defendant fails to authenticate her submissions and that, in any event, the printouts are irrelevant to the issue of ABS's residence. It contends that non-party Apple Financial Holdings, Inc.'s (Apple Financial) principal place of business, designated in its certificate of incorporation as 122 East 42nd Street, 9th Floor, New York, New York, serves as ABS's residence. ABS argues that this is so, because Apple Financial's primary business is the operation of ABS, its wholly-owned subsidiary, and because, as a state chartered savings bank, ABS is not required to file its own certificate of incorporation with the New York Secretary of State. In support, ABS submits a printout from the New York Department of State website, containing Apple Financial's entity information and listing its address as: "c/o Apple Bank for Savings, 122 East 42nd Street, 9th Fl, New York, New York 10168." *See* Heppt aff, exhibit A. In addition, it points to a September 30, 2013 "Public Summary" filed by DFS (DFS Public

Summary), which allegedly shows that ABS is a wholly owned subsidiary of Apple Financial and lists ABS's address as 122 East 42nd Street, New York, New York. *Id.*, ¶¶ 5, 8. ABS does not submit a copy of the DFS Public Summary, but provides its web address.² Lastly, ABS directs the court to Apple Financial's "2017 Dodd-Frank Act Stress Test Disclosure," which describes Apple Financial as a "a holding company whose primary business is the operation of its wholly owned subsidiary, Apple Bank for Savings (ABS)." Again, ABS provides only the web address for this document.³

On a motion to change venue, the movant assumes the burden of establishing that the plaintiff's venue designation was improper. *See Mejia v J. Crew Operating Corp.*, 140 AD3d 505, 506 (1st Dept 2016); *see also Doyaga v Camelot Taxi Inc.*, 102 AD3d 594, 595 (1st Dept 2013). The venue of an action is proper in the county in which any of the parties reside at the time of commencement. CPLR 503 (a). A domestic corporation resides in the county where its principal office is located, as indicated in its certificate of incorporation filed with the Department of State. CPLR 503 (c); *see Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579, 580 (1st Dept 2009).

Here, defendant has met her burden of establishing that ABS improperly designated New York County as the venue. In support of her motion, she submits a printout from the DFS webpage, which lists "1395 Northern Boulevard Manhasset, NY 11030" as ABS's "Main Address." Lowe affirmation, exhibit C to exhibit D. Generally, "[t]he designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue." *Krochta*, 62 AD3d at 580 (internal

² https://www.dfs.ny.gov/reportpub/cra_reports/cr13apple.pdf

³ <https://www.applebank.com/AppleBank/media/Documents/2017-Apple-Bank-DODD-FRANK-STRESS-TEST-PUBLIC-DISCLOSURE-FINAL-FINAL.pdf>

quotation marks and citation omitted). However, as a New York State chartered savings bank, which is a corporation organized under article six on the Banking Law (Banking Law § 2 [4]), ABS was not required to file a certificate of incorporation with the Department of State. Instead, it had to submit an organization certificate to the superintendent of financial services, specifying, among other things, “where its principal office is to be located.” Banking Law § 230 [2]; *see* Banking Law § 232 (“the organization certificate . . . shall be submitted for examination to the superintendent . . .”); Banking Law § 233 (“[w]hen the superintendent shall have approved the organization certificate . . . the corporate existence of the savings bank shall begin . . .”); Banking Law § 2 (29) (“[t]he term ‘superintendent’ means the superintendent of financial services of this state”). Therefore, in submitting a printout of the DFS webpage, showing that ABS’s main address is in Nassau County, defendant has satisfied her burden of demonstrating that ABS improperly designated New York County as the venue for this action.

While defendant fails to authenticate the DFS printout in her moving papers, the court “has discretion to take judicial notice of material derived from official government Web sites . . .” *Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 (1st Dept 2011), citing *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-20 (2d Dept 2009); *see Kingsbrook Jewish Med. Ctr.*, 61 AD3d at 19-20 (stating that “[j]udicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability,” including “material derived from official government Web sites . . .”). Here, the DFS printout is readily identifiable as a printout from the DFS website. Moreover, the court has taken upon itself to confirm that the printout is identical to the contents of the DFS website. The court, therefore, takes judicial notice of the contents of the DFS printout. *See Kearney v*

Cappelli Enters., Inc., 2012 NY Slip Op 30439(U) (Sup Ct, New York County 2012) (taking judicial notice of a printout that was not readily identifiable as being from the Department of State website, after “check[ing] the Department of State website and verif[ying] that the printout submitted [was] identical to the documents as they appear[ed] on the website”); *see also Tener Consulting Servs., LLC v FSA Main Street, LLC*, 23 Misc 3d 1120(A), 2009 NY Slip Op 50857(U), *8 (Sup Ct, Westchester County 2009) (taking judicial notice of printouts from the Department of State website, which were provided without any authentication, after verifying that the “the printouts [were] identical to the documents as they appear[ed] on DOS’s website”).

Nor is the DFS printout irrelevant. ABS makes much of the fact that the DFS webpage provides ABS’s “main address” rather than its “principal place of business.” However, ABS’s own submission of a printout from the Department of State website, containing Apple Financial’s entity information, makes no mention of a “principal place of business.” *See* Heppt aff, exhibit A. Nonetheless, it is understood that that is the address listed, because that is the information a corporation must provide to the department of state in its certificate of incorporation. *See* Business Corporation Law § 402 (3). Similarly, the Banking Law requires that a savings bank provide DFS with an organization certificate, specifying the location of its “principal office.” Banking Law § 230 (2). Therefore, the Nassau County address provided on the DFS website is, not only relevant, but determinative. *Cf Krochta*, 62 AD3d at 580.

Likewise, the court is not convinced by ABS’s argument that “[t]he address reflected on the NYSDFS website printout is contradicted by a ‘Public Summary’ report issued by the NYSDFS, which lists the address for Apple Bank for Savings as ‘122 East 42nd Street, New York, NY 10168.’” ABS’s brief at 7 n 12. ABS does not provide a printout of the DFS Public Summary and the web address it provides, https://www.dfs.ny.gov/reportpub/cra_reports/

cr13apple.pdf (see Heppt aff, ¶ 5), opens to the following message on the DFS website: “The page that you are looking for is not found. Please try out Site Search.” The court was not able to locate the DFS Public Summary using the site search. Therefore, ABS has failed to come forward with evidence to rebut defendant’s showing that ABS resides in Nassau County.

Lastly, Apple Financial is not a party to this action. Accordingly, its principal place of business may not be used to establish venue. CPLR 503 (a); see *Emerick v Metropolitan Transp. Auth.*, 272 AD2d 150, 150 (1st Dept 2000) (dismissing action against MTA, as it “[was] not liable for the torts of its subsidiary” and finding that, upon such dismissal, MTA’s “headquarters [could not] serve as the basis for laying venue” and that venue should have been changed to the county of the subsidiary’s principal place of business).

For the foregoing reasons, defendant’s motion to change venue is granted.

Accordingly, it is hereby

ORDERED that the venue of this action is changed from this Court to the Supreme Court, Kings County, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, Kings County.

Dated: 5/24/19

ENTER:



J.S.C.

HON. ARTHUR F. ENGORON