

<b>Egleston v MKL Constr. Corp.</b>
2020 NY Slip Op 31931(U)
June 17, 2020
Supreme Court, New York County
Docket Number: 655534/2019
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*

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GREGORY EGLESTON,  
  
Plaintiff,

INDEX NO. 655534/2019

MOTION DATE 02/26/2020

MOTION SEQ. NO. 003

- v -

MKL CONSTRUCTION CORP. (ALSO KNOWN AS PHIL  
KOUFFMAN BUILDER, INC.), PHILLIP KOUFFMAN,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 55, 56

were read on this motion for REARGUMENT/RECONSIDERATION.

By order dated February 25, 2020, this court granted defendants MKL Construction Corp. (also known as Phil Kouffman Builder, Inc.) (MKL) and Phillip D. Kouffman’s (Kouffman) (collectively, defendants) motion to transfer this action to Suffolk County. Plaintiff Gregory M. Egleston, Trustee, GME/DBP now moves to reargue pursuant to CPLR 2221(d) and to stay the transfer of the action pursuant to CPLR 2201.

**BACKGROUND AND FACTUAL ALLEGATIONS**

In January 2018, plaintiff and defendants entered into a “Residence Construction Agreement” for construction of a house located in East Hampton, New York. On September 23, 2019, plaintiff commenced an action against defendants, grounded in breach of contract, by filing a summons and notice. “This is an action for breach of contract, failure to perform the contract, unjust enrichment, negligence, negligent misrepresentation, and consequential damages.” NYSCEF Doc. No. 6, Complaint, ¶ 1. As plaintiff “resides in New York

County,” he chose New York County as the venue for this action. *Id.*, ¶ 3. In their answer, defendants asserted a counterclaim, seeking to foreclose on the property at issue based upon the filing of a mechanic’s lien with the Suffolk County Clerk against the property.

On November 25, 2019, defendants made a demand “for change of place of trial to a proper place.” NYSCEF Doc. No. 12 at 1. Defendants stated that, pursuant to CPLR 503 (a), 507 and 510 (3), it was proper to change the venue to Suffolk County. Plaintiff answered and rejected defendants’ demand, stating, among other things, that “plaintiff had the right to choose New York County to sue, and Defendants have not met their burden of showing that the balance of convenience requires a change of venue.” NYSCEF Doc. No., Egleston Demand Response, ¶ 12.

Shortly thereafter, defendants moved for an order to change the place of trial from New York to Suffolk County. In defendants’ counsel’s affirmation, he stated that the motion was being made, pursuant to CPLR 502, to change the place of trial from New York to Suffolk County based on the conflicting venue provisions of CPLR 503 and 507 and also the underlying facts.

CPLR 503 (a) states the following:

“(a) Generally. 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; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.”

Counsel noted that, pursuant to CPLR 503 (a), plaintiff designated the place of trial in New York County on the basis of his New York residence. He continued that plaintiff is also a resident of Suffolk County under CPLR 503 (a) “having occupied the Subject Premises at the

commencement of this action . . . .” NYSCEF Doc. No. 19, affirmation of Robert Kouffman, ¶ 10.

Counsel stated that defendants asserted a counterclaim against plaintiff seeking to foreclose on the property based on the filing of a mechanics lien with the Suffolk County clerk. As a result, pursuant to CPLR 507, this action would be a local action, seeking judgment affecting title to and an interest in property located in Suffolk County. CPLR 507 provides that “[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.”

Counsel then explained, in general, how Suffolk County is the more appropriate venue for this action. He stated, in relevant part, under CPLR 503 (a), “a substantial part of the events or omissions giving rise to plaintiff’s claim actually occurred in Suffolk County. Thus making it more of a local action.” *Id.*, ¶ 15. Referencing the accompanying affidavit of Kouffman, counsel stated that “[a]rguably, under the substantial events language of CPLR § 503 (a), making Suffolk County, and not New York County, the more proper venue for the trial of this action.” *Id.*, ¶ 17. Counsel concluded that, “since the Subject Premises are situated in Suffolk County, plaintiff and defendants are all residents of Suffolk County and defendant seeks a judgment to foreclose upon these premises which will effect some realty interest in Suffolk County,” CPLR 507 trumps CPLR 503 (a). *Id.*, ¶ 18. He further requested that the court resolve the conflict in the venue provisions pursuant to CPLR 502 and direct the place to trial to be held in Suffolk County.

According to defendants, pursuant to CPLR 507, Suffolk County would be the more proper venue for this action. “[P]laintiff commenced and venued this action . .

. claiming defective house construction at the Suffolk County premises.” NYSCEF Doc. No. 22, Kouffman aff, ¶ 7. Defendants noted that the first counterclaim demands judgment to foreclose upon the subject property based on the filing of a mechanic’s lien against the property with the Suffolk County Clerk’s office.<sup>1</sup> As a result, according to defendants, the counterclaim “affects the title to, possession, use and enjoyment of plaintiff’s real property located in Suffolk County, rendering it a local action.” *Id.*, ¶ 9.

Kouffman then argued that “Defendant MKL disputes plaintiff’s claim that a substantial part of events or omissions giving rise to plaintiff’s claim occurred in New York County, but instead asserts most of the events or omissions took place in Suffolk County.” *Id.*, ¶ 11. He explained that the parties had numerous meetings at defendants’ Suffolk County office location and also at the subject property. MKL also signed the construction agreement in Suffolk County. “That because house construction was to happen in East Hampton, MKL hired Suffolk County contractors and materialmen to perform work on the subject premises as now complained of by plaintiff.” *Id.*, ¶ 16. Kouffman concluded that, “based on the foregoing it is my belief that a substantial part of the events or omissions claimed by plaintiff in its complaint occurred in Suffolk County and not in New York County.” *Id.*, ¶ 17.

In opposition, plaintiff argues that, pursuant to CPLR 503 (a), venue was proper in New York County as plaintiff resides in New York County. Further, the terms of the home were negotiated and the contract was signed in New York County. Plaintiff claims that, contrary to defendants’ assertions, the visits to MKL’s office in Suffolk County did not

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<sup>1</sup> Kouffman initially stated that the lien was filed a month prior to the complaint. In reply, Kouffman stated that this statement was “inaccurate” because he “made this statement based on my erroneous belief plaintiff’s action had officially started against defendants upon service of the actual complaint which occurred subsequent MKL’s filing of said mechanic’s lien.” NYSCEF Doc. No. 25, Kouffman aff in reply, ¶ 4.

pertain to the negotiation of the construction contract. He stated that the purpose of those visits was to discuss the architectural plans for the residence, as MKL was also hired as the architect. He maintained that, during those meetings, the parties never negotiated or finalized construction budgets and contract terms. Instead, the construction budget pricing and terms were negotiated by phone and email in his New York office.

Plaintiff continues that CPLR 507 was inapplicable. He alleges that this action is one for breach of contract and should not be moved to Suffolk County as the action does not affect the use of, or title to, the property. According to plaintiff, defendants' statement that this action involves 'defective house construction, "misconstrues Plaintiff's complaint as the complaint is for breach of contract . . . ." NYSCEF Doc. No. 24, Egleston aff in opp, ¶ 8. Plaintiff claims that defendants filed the mechanic's lien as a tactic to try and justify venue in Suffolk County. He explained that this "defense stratagem is for naught as the mechanic's lien has already been discharged by the posting of a Certificate of Deposit by Plaintiff with the Clerk of County of Suffolk." *Id.*, ¶ 2. He also alleges that defendants did not complete the work set forth in a punch list. "Therefore, Defendant Kouffman's comment that they had completed the construction [by July 2019] is incorrect. Hence, the instant action is for breach of contract." *Id.*, ¶ 38.

Further, according to plaintiff, as defendants failed to argue the merits of changing the venue pursuant to CPLR 510 (3), they are now precluded from doing so.

Defendants have replied at length, arguing that the forum nexus is in Suffolk County. In relevant part, defendants alleged that "plaintiff's actions demonstrate he maintained a strong physical presence in and substantial connection to Suffolk County during this entire time period

and not in New York County as claimed.” NYSCEF Doc. No. 25, Kouffman reply aff, ¶ 14. Plaintiff has submitted a detailed sur-reply, opposing defendants’ contentions.

On February 25, 2020, this court issued its decision and order, granting defendants’ motion to transfer the venue to Suffolk County. The order stated, in relevant part, that “defendants’ motion is granted to the extent of transferring this action to the venue of Suffolk County, which is where the subject property is located, where defendants’ principal place of business is located, and where a substantial part of the events giving rise to the claim occurred.” NYSCEF Doc. No. 41 at 1.

#### The Instant Motion

Plaintiff now moves to reargue this court’s February 25, 2020 decision and order granting defendants’ motion to transfer the action to Suffolk County. Plaintiff points to the Ordered language granting defendants’ motion and “transferring this action to the venue of Suffolk County, which is where the subject property is located, where defendants’ principal place of business is located, and where a substantial part of the events giving rise to the claim occurred.” According to plaintiff, the court “overlooked the fact that Defendants’ motion to change venue is based solely on Defendants’ lien previously filed and discharged on Plaintiff’s property pursuant to CPLR 507.” NYSCEF Doc. No. 43, Egleston affirmation in support, ¶ 5. However, this basis for transfer would be moot, because, on December 23, 2019, the mechanic’s lien was discharged.

Plaintiff also advises the court that he had submitted several documents indicating that the events leading up to the signing of the contracts took place in New York City. “Defendants have provided no evidence to this Court to refute Plaintiff’s evidence and there was no basis for

this Court to grant Defendants' motion to transfer venue." *Id.*, ¶ 8. Plaintiff reiterates that, although the property is located in Suffolk County, the dispute is about damages arising from a construction agreement.

### DISCUSSION

#### Motion to Reargue

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision." *Cuomo v Ferran*, 77 AD3d 698, 700 (2d Dept 2010) (internal quotation marks and citations omitted). *See* CPLR 2221 (d) (2).

Here, plaintiff fails to show that the court overlooked or misapprehended any matters of fact or law in determining the prior motion. According to plaintiff, in light of the language in the court's decision, the court overlooked the fact that defendants' motion to transfer the action was based solely on CPLR 507 and not on 503 (a). However, as set forth above, defendants requested that, pursuant to CPLR 502, the court resolve the conflict in the venue provisions of CPLR 503 (a) and CPLR 507 and direct that the place of trial be Suffolk County.

Defendants provided substantive arguments for why venue was proper in Suffolk County, both pursuant to CPLR 503 (a) and CPLR 507. They noted that, pursuant to CPLR 503 (a), plaintiff was entitled to venue the action in New York County on the basis of his residency.

While noting that conflict between CPLR 503 (a) and CPLR 507, defendants also provided arguments for why the court, in its discretion, should change the venue to Suffolk County based on the conflicting provisions of CPLR 503 (a). They argued that the action should be venued in Suffolk County as most of the events or omissions took place in Suffolk



County. They alleged that the parties conducted meetings related to the property in Suffolk County, that defendants signed the contract in Suffolk County at defendants' principal place of business and that they hired Suffolk County contractors to perform work because the property is located in Suffolk County. As indicated above, plaintiff opposed defendants' contentions regarding the meetings and the work performed.

“It is settled law that [w]here there are conflicting venue provisions and one or more parties seeks a change of venue, it is given to the discretion of the court to select the proper venue.” *Grumet v Pataki*, 244 AD2d 31, 35 (3d Dept 1998) (internal quotation marks and citations omitted), *affd* 93 NY2d 677 (1999); *see also* CPLR 502. Plaintiff resides in New York County but the court also found that a substantial part of the events or omissions giving rise to the claim occurred in Suffolk County. “Where, as here, there is a venue conflict, a court may make a discretionary determination to lay venue in a location appropriate to at least one of the parties or claims [pursuant to CPLR 502].” *Bennett v Bennett*, 49 AD3d 949, 950 (3d Dept 2008) (internal quotation marks and citations omitted).

The court finds that plaintiff failed to show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. After considering the conflicting venue provisions, including the conflicting provisions in CPLR 503 (a), in its discretion, the court found that Suffolk County was the proper venue for this action. A discussion on CPLR 507 was unwarranted, given that the court ultimately found defendants sufficiently demonstrated that venue in Suffolk County was appropriate, as it was the location where a substantial part of the events giving rise to the claim occurred.

Citing *Cadona v Aggressive Heating Inc.*, (180 AD2d 572 [1st Dept 1992]), plaintiff argues that defendants failed to meet their burden pursuant to CPLR 503 (a) to transfer the action

based on the convenience of the witnesses. Plaintiff’s arguments are unclear, as CPLR 510 (3), not CPLR 503 (a), provides that, upon motion, the court may change the trial of an action based upon “the convenience of material witnesses and the ends of justice will be promoted by the change.” Plaintiff’s arguments herein regarding CPLR 510 (3) are irrelevant. Although the demand to change venue mentioned CPLR 510 (3), defendants did not move for requested relief on this basis, nor was this addressed in the court’s decision and order.

Pursuant to CPLR 2201, “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Plaintiff’s request for the court to stay the transfer pending the outcome of the anticipated appeal of the February 25, 2020 decision and order, is denied.

**CONCLUSION**

Thus, the motion by plaintiff Gregory M. Egleston, Trustee, GME/DBP’s for leave to reargue the Court’s February 25, 2020 Decision and Order is denied.



<u>6/17/2020</u> DATE		<u>ARTHUR F. ENGORON, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE