

**Waste Mgt. of DE., Inc. v Metropolitan Indus.
Wrecking & Env'tl. Contrs., Inc.**

2020 NY Slip Op 32307(U)

July 7, 2020

Supreme Court, New York County

Docket Number: 159931/2016

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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WASTE MANAGEMENT OF DELAWARE, INC.,

Plaintiff,

- v -

METROPOLITAN INDUSTRIAL WRECKING &
ENVIRONMENTAL CONTRACTORS, INC.,

Defendant.

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INDEX NO. 159931/2016

MOTION DATE 10/22/2018

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

were read on this motion to CHANGE VENUE.

Upon the foregoing documents, it is ordered that the motion of defendant Metropolitan Industrial Wrecking & Environmental Contractors, Inc. (“Defendant”), to change venue from New York County to Suffolk County is denied for the reasons set forth below.

Background

Plaintiff Waste Management of Delaware, Inc. (“Plaintiff”), commenced this action by summons and complaint filed November 28, 2016 (the “Complaint”). The Complaint asserts claims for an account stated, breach of contract, and for the reasonable value of goods sold and delivered in the amount of \$60,442.21. On February 28, 2017, Defendant filed a demand to change venue pursuant to CPLR Rule 511 and filed an answer on March 6, 2017 (the “Answer”). Defendant now moves for a change of venue to Suffolk County on the grounds that Suffolk County is the proper venue pursuant to CPLR 503(a), which prescribes that “the place of trial shall be in the county in which one of the parties resided when it was commenced.” Plaintiff does not maintain its corporate residence in the State of New York and Defendant is a resident of

Suffolk County, the location of its principal place of business. In opposition, Plaintiff acknowledges the aforesaid residency circumstances but contends that Defendant waived its right to a venue change as of right because it did not timely move to change venue within 15 days of service of the demand to change venue as required by CPLR Rule 511 (b). Plaintiff argues, therefore, that the court should consider this motion under the discretionary grounds set forth in CPLR 510 (3) and should deny the motion because Defendant has not argued, let alone demonstrated, that the convenience of material witnesses would be better served by the change.

Discussion

“It is well settled that 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, Inc.*, 104 AD2d 315, 316 [1984]). Upon such forfeiture, CPLR 511 (a) prescribes a procedure whereby a defendant may seek a change of venue to the proper county “as of right.” In order to avail itself of this remedy, defendant must serve a demand for change of venue upon the plaintiff “with the answer or before the answer is served” (CPLR 511 [a]). Where the plaintiff does not consent to the change, defendant may move to change the place of venue “within fifteen days after service of the demand” (CPLR § 511 [a], [b]). Where a defendant fails to timely move for a change of venue, it forfeits the right to request a change of venue “as of right,” but the court may nonetheless consider whether to grant the motion to change venue on a discretionary basis (*Kurfis v Shore Towers Condominium*, 48 AD3d 300, 300 [1st Dept 2008]).

When a motion for a discretionary change of venue is made, “a court must, whenever possible, transfer an action under CPLR 510 to a county in which the action properly could have been commenced” (*Saxe v OB/GYN Associates, P.C.*, 86 NY2d 820, 822 [1995]). Such transfer is made “[i]n light of the express legislative preference for actions being tried in proper counties

(see, CPLR 502, 503, 510 [1]; 511[b])” (*id.*). Nevertheless, the statutory time requirement is to be strictly enforced such that a defendant’s failure to comply with the time requirement, and also offers no alternative grounds for a discretionary change of venue, the motion must be denied (*Banks v New York State and Local Employees’ Retirement System*, 271 AD2d 252, 252-253 [1st Dept 2000] [“Where, as here, the only ground sufficient to support the change of venue is that the action was not commenced in the proper county, the grant of a motion to change venue is an improvident exercise of discretion in view of the explicit statutory requirements, even assuming the inherent power of the court to exercise its discretion”] [internal citation omitted]).

Here, Defendant timely served its demand to change venue, but did not move to change venue within the fifteen-day timeframe prescribed by the statute, instead serving the motion more than nineteen months later, on October 22, 2018. Defendant has, therefore, forfeited its right to request a change of venue “as of right,” and the court can only assess this motion on a discretionary basis. Because Defendant has offered no alternative basis for a discretionary change of venue – such as factors bearing on the situs of evidence and any serious inconvenience concerns – the motion must be denied.

Accordingly, it is

ORDERED that the motion to change venue is denied; and it is further

ORDERED that a preliminary conference for this matter will be held telephonically on July 29, 2020 at 2:00 p.m.

Louis L. Nock

<u>7/7/2020</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<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