

**Saber v Tru-Facer's Kitchens**

2023 NY Slip Op 31738(U)

May 23, 2023

Supreme Court, New York County

Docket Number: Index No. 651551/2023

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

*Justice*

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NASSER SABER,

Petitioner,

- v -

TRU-FACER'S KITCHENS,

Respondent.

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INDEX NO. 651551/2023

MOTION DATE 05/16/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for TRANSFER.

The petition to transfer a case currently pending in Civil Court to this Court is denied.

**Background**

Petitioner claims he is suing respondent arising out of a contract for a home renovation project. He claims that respondent repeatedly delayed the work and caused damage so he brought a lawsuit in December 2021 in Civil Court. Petitioner argues that he sought \$50,000 in damages in that first Civil Court action. After some settlement discussions with respondent, petitioner claims that he brought a second case in Civil Court (in January 2022) and sought \$95,000 arising out of the same renovation project.

Petitioner argues that respondent failed to answer the original January 2021 case and he obtained a notice of voluntary discontinuance for that case. Petitioner maintains that respondent insisted it had answered the 2021 case and so “to speed up the process” he agreed to withdraw the 2022 case seeking \$95,000 and reinstate the first case. Petitioner argues that the County

Clerk refused to accept his motion to remove the case to Supreme Court and his motion for similar relief was also rejected in Civil Court.

In opposition, respondent offers a divergent view of the procedural history. It claims that petitioner's efforts here are simply a response to respondent's attempt to recover the balance (\$6,235.00) left on the parties' contract. Respondent emphasizes that the entire value of the contract was for \$30,000 and plaintiff paid nearly all of it. It then filed a mechanic's lien after a dispute about the remaining \$6,235.00. Respondent insists it timely answered in the December 2021 case, but that petitioner subsequently filed a second duplicative case well in excess of the Civil Court's jurisdictional limit.

Respondent insists that plaintiff improperly discontinued the first Civil Court case and obtained all manner of curious relief, including getting an inquest date for the second Civil Court case. Respondent asserts it was able, eventually, to unwind these efforts. It points to orders issued by a Civil Court judge in which plaintiff, allegedly at the Civil Court's urging, agreed to discontinue the second case and reinstate the first (NYSCEF Doc. No. 42).

Respondent insists that there is no basis to remove the only pending Civil Court case (the original matter) because petitioner did not include an amended pleading and he did not meet his burden to show that his case belongs in Supreme Court.

## **Discussion**

CPLR 325(b) provides that "Where it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion. A waiver of jury trial in the first court is inoperative after the removal."

As an initial matter, the Court has little interest in making rulings about the tortured procedural history of petitioner's two Civil Court cases and how petitioner started and obtained an inquest date on the second case when respondent had answered the first. That would require findings of fact, which is beyond the scope of this case.

This decision only concerns whether removal to Supreme Court is appropriate. "Proper procedure dictates that a motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the ad damnum clause of the complaint pursuant to CPLR 3025(b). In this case, the amount stated in the ad damnum clause was within the jurisdictional limits of the Civil Court, and the request for leave to amend was not made. In the absence of an application to increase the ad damnum clause, the Supreme Court's denial of removal was proper" (*Francilion v Epstein*, 144 AD2d 633, 633, 535 NYS2d 65 [2d Dept 1988]).


Here, the first complaint in Civil Court demanded \$50,000, which is within the jurisdictional limits of Civil Court in New York City. The instant application was not accompanied by a request for leave to amend pursuant to CPLR 3025(b). Therefore, the petition is denied. No proposed amended pleading was included nor did petitioner sufficiently justify how he came up with the increased amount he now requests (apparently, \$102,562 per paragraph 17 of the petition).

The Court also questions how a case involving an apparent dispute about a \$6,235.00 balance allegedly owed by petitioner to respondent could somehow transform into a case where petitioner initially demanded \$50,000 and now requests more than double that amount in a few short months. There is nothing here to indicate that pulling the case from civil court is appropriate or justified. To the contrary, based on the papers now before the Court, had this case

had initially been brought in Supreme Court, it would be appropriate, based on the lack of justification of plaintiff's claims, to transfer it to civil court pursuant to CPLR 325(d). This case belongs in civil court.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed and respondent is entitled to costs and disbursements as taxed by the Clerk upon presentation of a bill of costs.

<u>5/23/2023</u> <b>DATE</b>			 <b>ARLENE P. BLUTH, J.S.C.</b>
<b>CHECK ONE:</b>	<input checked="" type="checkbox"/>	<b>CASE DISPOSED</b>	<input type="checkbox"/>
	<input type="checkbox"/>	<b>GRANTED</b>	<input checked="" type="checkbox"/> <b>DENIED</b>
<b>APPLICATION:</b>	<input type="checkbox"/>	<b>SETTLE ORDER</b>	<input type="checkbox"/>
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	<b>INCLUDES TRANSFER/REASSIGN</b>	<input type="checkbox"/>
			<input type="checkbox"/> <b>NON-FINAL DISPOSITION</b>
			<input type="checkbox"/> <b>GRANTED IN PART</b>
			<input type="checkbox"/> <b>OTHER</b>
			<input type="checkbox"/> <b>SUBMIT ORDER</b>
			<input type="checkbox"/> <b>FIDUCIARY APPOINTMENT</b>
			<input type="checkbox"/> <b>REFERENCE</b>