SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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LIBERTAS FUNDING LLC,

Plaintiff,

- v -

TEMPD, INC., DIGITAL BUSINESS PROCESSES INC., TEMPD LLC, THE NEAT COMPANY, INC., RAPHAEL S SPERO, and TIFFANY M ROBERTS,

Defendants.

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INDEX NO. 155717/2023

MOTION DATE 08/22/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to CHANGE VENUE.

Faskowitz Law Firm, PLLC, Fresh Meadows, NY (Avi Faskowitz of counsel), for plaintiff.
Amos Weinberg, Esq., Great Neck, NY, for defendants.

Gerald Lebovits, J.:

This motion arises out of a business dispute between plaintiff Libertas Funding LLC and defendants Tempd, Inc., Digital Business Processes, Inc., Tempd LLC, The Neat Company, Inc., Raphael Spero, and Tiffany Roberts. Plaintiff sued defendants in Supreme Court, Erie County, for breach of two merchant-cash-advance agreements and personal guarantees contained within those agreements. (NYSCEF No. 4.) Defendants filed a timely demand for change of venue under CPLR 511 (b). (NYSCEF No. 5.) In response, plaintiff filed a timely affidavit supporting venue in Erie County. (NYSCEF No. 20.)

Defendants then purchased an index number in Supreme Court, New York County, and served a summons with notice (NYSCEF No. 1), to bring on defendants' current motion, seeking to change venue of the underlying action from Erie County to New York County (NYSCEF No. 2). In opposing this motion, plaintiff contends that given its timely service of a venue affidavit, defendants must bring their motion in Erie County, not this court. Resolving this issue requires this court to construe a pre-CPLR decision of the Appellate Division, First Department, that has not been revisited in the 60 years since its issuance. (*See Ludlow Valve Mfg. Co. v S. S. Silberblatt, Inc.*, 14 AD2d 291 [1st Dept 1961].) This court concludes that under *Ludlow Valve*, defendants' motion must be denied without prejudice because it was not filed in the proper forum.

DISCUSSION

CPLR 511 (b) provides that once the defendant has served a timely written demand for change of venue, defendant may notice a motion for change of venue "as if the action were pending in the county [defendant] specifie[s]," unless plaintiff within five days "serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by [plaintiff] is proper." It is undisputed that defendant's change-of-venue demand, and plaintiff's responsive venue affidavit, were timely. The question for this court is whether plaintiff's affidavit suffices to bar defendants from moving in this court for a change of venue from Erie County. This court concludes that the affidavit does bar defendants' motion.

Defendants argue, relying on the decision of the Appellate Division, Second Department, in *HVT, Inc. v Safeco Ins. Co. of Am.* (77 AD3d 255, 267 [2d Dept 2010]), that plaintiff's venue affidavit cannot prevent defendants from moving here for change of venue, because the affidavit does not show prima facie that venue was properly laid in Erie County. (*See* NYSCEF No. 3 at ¶ 20 [opening affirmation]; NYSCEF No. 31 at ¶¶ 1-2 [reply affirmation].) But as plaintiff points out, this court must first determine whether the Second Department's "prima facie showing" standard governs here at all.

Plaintiff relies on the First Department's 1961 decision in *Ludlow Valve* to argue that its timely service of a venue affidavit, standing alone, cut off defendants' right to bring their change-of-venue motion here, regardless whether the affidavit makes out a prima facie case for keeping venue in Erie County. (*See* NYSCEF No. 25 at ¶¶ 10-11, citing 14 AD2d at 294.) The question is close; and this court is not aware of any other later First Department cases assessing the sufficiency of a venue affidavit, or the scope of the holding in *Ludlow Valve*.[1] Ultimately, this court concludes that plaintiff's reading of the case is correct.

As an initial matter, *Ludlow Valve* construed Rule 146 of the Rules of Civil Practice, not CPLR 511. But the relevant language of CPLR 511, drafted in similar terms to Rule 146, was intended to carry forward that rule's procedure permitting a defendant to demand (and plaintiff to oppose) change of venue at the outset of the action. This court therefore court agrees with plaintiff that the decision in that case remains good law for purposes of construing CPLR 511 (b). Nor do defendants contend otherwise.

In *Ludlow Valve*, plaintiff sued in Clinton County. The answering defendant timely served a demand to change venue to New York County; to which plaintiff timely responded by serving an affidavit attesting to venue being proper in Clinton County. (*See* 14 AD2d at 292-293.) Defendant then moved in New York County for a change of venue. (*Id. at* 293.) On appeal, the First Department described the issue before it as "the efficacy of the affidavit filed by plaintiff, in response to a demand for a change of venue made under Rule 146, to foreclose defendant from making the motion for a change of venue except in the Judicial District where the

[1] The only post-*Ludlow Valve* First Department decision addressing a similar issue that this court has found, *Goldberg v Roth* (85 AD2d 555, 555 [1st Dept 1981]), involved a scenario in which the plaintiff had failed to file any affidavit at all following the defendant's timely change-of-venue demand.

action was begun." (*Id.*) The Court held that once "plaintiff has submitted an affidavit containing averments tending to support plaintiff's choice of the place of trial" (and opposing defendant's preferred venue), the "weight or sufficiency of the averments is immaterial." (*Id.* at 294.) Rather, "the mere filing of such an affidavit mandates that the motion for a change of the place of trial be made in the Judicial District in which the action was brought." (*Id.*) The Court therefore denied defendant's motion for change of venue without prejudice to renewal in Clinton County. (*Id.*)

The difficulty for present purposes is that this holding is facially ambiguous. On the one hand, the Court says that a plaintiff's affidavit should "contain[] averments tending to support plaintiff's choice of the place of trial." (*Id.*) That language suggests that *some* review of the affidavit's contents is called for. But the Court immediately goes on to say that the "*mere filing* of such an affidavit is enough"—suggesting the opposite. (*Id.* [emphasis added].)

The Second and Third Departments have given more weight to the first of these two statements. (*See e.g. Payne v Civil Serv. Empls. Assn.*, 15 AD2d 265 [3d Dept 1961]; *HVT Inc.*, 77 AD3d at 262-267.) In *Payne*, decided two months after *Ludlow Valve*, the Third Department concluded that the First Department's decision "did not turn on the mere existence of a paper designated, or in form constituting an affidavit," but instead on a refusal to test whether the "factual averments" in the affidavit, supporting plaintiff's chosen venue, would be enough to defeat a change-of-venue motion. (*Id.* at 268 [emphasis omitted].) Thus, the Third Department held, if an affidavit were "completely lacking" in any averments supporting plaintiff's preferred venue, it would be consistent with *Ludlow Valve* to deem that affidavit insufficient to cut off defendant's right to move in defendant's preferred forum. (*Id.*) In *HVT*, the Second Department expressly adopted the Third Department's construction of the Rule 146/CPLR 511 (b) affidavit requirement—and the Third Department's understanding of the holding of *Ludlow Valve*. (*HVT Inc.*, 77 AD3d at 264-265.)

There is much to recommend *HVT*'s conclusion that a venue affidavit must satisfy the threshold requirement of containing factual representations, which, taken as true, are "prima facie sufficient to support the plaintiff's choice of venue, or undermine the defendant's choice of venue." (*Id.* at 267.) Among other things, this standard strikes an administrable balance between having to give effect to "affidavits" that say nothing, on the one hand, and provoking collateral litigation about whether an affidavit says *enough*, on the other. But with due respect to the Second and Third Departments, this court cannot agree with their reading of *Ludlow Valve*.

As noted above, an ambiguity exists in the paragraph of the First Department's decision articulating the rule to be applied. But an earlier passage of the decision (which *Payne* and *HVT* do not discuss) dispels that ambiguity. The First Department explained there that a number of trial-court decisions had "examined into plaintiffs' affidavits to determine if sufficient facts have been set forth regarding residence or nonresidence" to determine which court should hear the change-of-venue motion, and that those courts had held the plaintiffs' affidavits to be "nullities for failure to state sufficient facts." (14 AD2d at 293 [collecting cases].) The Court admonished trial courts that "[w]e do not sanction such procedure." (*Id.*)

Crucially, several of those rejected trial-court decisions addressed venue affidavits that had been rejected for failing to allege *any* facts—and thus, necessarily, failed also to make out a

prima facie showing of proper venue. (*See Sterling Factors Corp. v Sad Sam's Furnitureland of Binghamton*, 21 Misc 2d 837, 838-839 [Sup Ct, Broome County 1960] [treating a venue affidavit as a "nullity" because it was "barren of any facts showing that the county defendant claims is proper is not proper or that the county designated by plaintiff is proper," and holding that the "mere service of an affidavit is not sufficient to invoke the provisions of Rule 146 in plaintiff's favor"]; *Twentieth Century-Fox Corp. v Papayanokos*, 8 Misc 2d 1079, 1079, 1080 [Sup Ct, Albany County 1957] [disregarding a venue affidavit that "set forth only" that "'New York County, designated in the summons and complaint as the place of trial, is the proper venue herein'"]; *Linder v Elmira Assn. of Commerce, Inc.*, 192 Misc 830, 832-833 [Sup Ct, Broome County 1948] [disregarding a venue affidavit because it did "not set forth a single statement of fact showing or tending to show" that plaintiff's preferred venue was proper or that defendant's preferred venue was improper, and rejecting "plaintiff's contention that the mere serving of an affidavit without regard to its contents" cuts off defendant's right to move in its preferred forum for change of venue].)

Thus, in expressly disapproving of those trial-court decisions, *Ludlow Valve* necessarily also cautioned trial courts against conducting even a minimal assessment of the representations in a plaintiff's venue affidavit. That position is not reconcilable with the Second and Third Departments' conclusion in *Payne* and *HVT* that trial courts must review venue affidavits for a prima facie showing in support of plaintiff's preferred venue. And, regardless of this court's view of what the proper interpretation of CPLR 511 (b) would be if considered on a blank slate, this court is bound by the First Department's ruling in *Ludlow Valve*.

Applying that ruling here, plaintiff's timely service of a venue affidavit means that defendants are required to bring their motion for change of venue in Supreme Court, Erie County, not this court.[2]

Accordingly, it is

[2] This court is skeptical that defendants could properly bring their motion in this court even if the *Payne/HVT* prima-facie-sufficiency standard applied. Plaintiff's venue affidavit identifies language in the underlying agreement providing that any action arising out of the agreement "shall be instituted exclusively in *any court* sitting in New York State"—such as Supreme Court, Erie County—and waiving convenience-based objections to venue. (NYSCEF No. 23 at ¶ 5, quoting NYSCEF No. 7 at 10 ¶ 45 [emphasis added.) Several trial courts have held that this forum-selection language is enforceable, notwithstanding its great breadth. (*See Royal Bus. Grp., LLC v Cloud Acct. LLC*, 2022 NY Slip Op 32704[U], at *2-*4 [Sup Ct, Monroe County 2022]; *LG Funding, LLC v Garber*, 2018 NY Slip Op 32067[U], at *4 [Sup Ct, Nassau County 2018]; *LG Funding, LLC v Four Paws Orlando LLC*, 2017 Slip Op 32391[U], *2 [Sup Ct, Nassau County 2017].) And this court's research has not found any contrary appellate authority. In these circumstances, plaintiff's venue affidavit might well be sufficient under *Payne* and *HVT* to foreclose defendants from moving to change venue in this court, rather than in Erie County. But given this court's conclusion that *Ludlow Valve*, rather than *Payne*/*HVT* controls, the court need not, and does not, definitively decide that question here.

ORDERED that defendants' motion to change venue from Supreme Court, Erie County, to Supreme Court, New York County, is denied without prejudice to its renewal in Supreme Court, Erie County.

10/25/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE