

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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DLJ MORTGAGE CAPITAL INC.,

Plaintiff,

- against -

Index No. 104675/10

THOMAS KONTOGIANNIS, GEORGIA KONTOGIANNIS,
LISA DIPINTO a/k/a LISA POLLATOS, ANNETTE
APERGIS, ELIAS APERGIS, JOHN T. MICHAEL,
JONATHAN RUBIN, MICHAEL A. GALLAN, ESQ.,
THOMAS F. CUSACK, III, ESQ., TED DOUMAZIOS, ESQ.,
STEPHEN P. BROWN, ESQ., STEPHEN A. MARTINI,
CARMINE CUOMO, COASTAL CAPITAL CORPORATION
d/b/a THE MORTGAGE SHOP d/b/a CLEARLIGHT
MORTGAGE, EDGEWATER DEVELOPMENT, INC., LORING
ESTATES LLC, GROUP KAPPA CORP., PARKVIEW
FINANCIAL CENTER, INC. d/b/a PARKVIEW FINANCIAL,
INC., CLEAR VIEW ABSTRACT, INC., TRIUMPH
ABSTRACT, LLC, BOND & WALSH CONSTRUCTION COMPANY,
INTERAMERICAN MORTGAGE CORP., HALIFAX GROUP LLC,
PLAZA REAL ESTATE, INC., WASHINGTON TITLE INSURANCE
COMPANY, INC., CHICAGO TILE INSURANCE COMPANY,
INC., UNITED GENERAL TITLE INSURANCE COMPANY,
INC., AND DOE'S 1 through 100, inclusive,

Defendants.

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Charles Edward Ramos, J.S.C.:

Motion sequence numbers 004 and 005 are consolidated for
disposition.

In motion sequence 04, defendants Edgewater Development,
Inc. (Edgewater) and Loring Estates LLC (Loring) move to change
venue from New York to Kings County on the ground that the county
designated by plaintiff DLJ Mortgage Capital (DLJ) is not proper,
pursuant to CPLR 507, 510 (1), 511 (a) and (b).

In motion sequence 05, defendant Halifax group LLC (Halifax)
moves to change venue on the same ground.

Factual Background¹

At the heart of this action is a mortgage fraud scheme purportedly orchestrated by the "Conspiracy Defendants,"² comprised of numerous members of the Kontogiannis family and headed by its patriarch, Thomas Kontogiannis. The scheme, which allegedly defrauded DLJ out of approximately \$50 million, was ultimately exposed during a grand jury investigation that led to the bribery conviction of a U.S. Congressman, Randall Duke Cunningham, who was connected to several of the Conspiracy Defendants who allegedly laundered more than a million dollars of bribes on his behalf.

In furtherance of their scheme, the Conspiracy Defendants allegedly orchestrated sham closings during which they executed fraudulent mortgage loan documents, including deeds, mortgages, notes, appraisals, title reports, and title insurance documentation in connection with the purported sale of ninety-five residential properties owned by Thomas Kontogiannis through

¹ The facts set forth herein are taken from the amended complaint and the parties' affirmations, except where noted.

² The complaint defines the Conspiracy Defendants as Thomas Kontogiannis, John T. Michael, Coastal Capital, Parkview, InterAmerican Mortgage Corporation, Edgewater, Group Kappa Corp., Loring, Bond & Walsh Construction Company, Annette Apergis, Elias Apergis, Jonathan Rubin, Lisa DiPinto, Georgia Kontogiannis, Chloe Kontogiannis, Thomas Cusack, II, Esq., Michael Gallan, Esq., Stephen Martini, Carmine Cuomo, Ted Doumazios, Esq., Clear View Abstract LLC, Stephen P. Brown, Esq., Triumph Abstract LLC, Plaza Real Estate Holdings, Inc., Halifax, and Doe defendants.

three closely held and operated companies, Group Kappa Corp., Loring, and Edgewater. Over several years, the Conspiracy Defendants periodically sold the fraudulent mortgage packages in the secondary market to DLJ, bundled with 1800 legitimate mortgage loans. DLJ believed the loan documents to be legitimate, that it was acquiring valid liens secured by first priority liens on real property, and that its lien interests were insured.

In order to cover up their scheme, the Conspiracy Defendants made over 1,000 payments on the fraudulent loans so as to create the illusion that the loans were proper and performing. Two of the moving defendants herein, Edgewater and Loring, in addition to being owned and controlled by Thomas Kontogiannis and/or members of his family, were the record owner of at least nineteen of the properties at issue in the transactions.

Edgewater and Loring resold a number of the properties to the other moving defendant, Halifax, who is also an alleged alter ego of the Kontogiannis defendants. The Conspiracy Defendants fraudulently conveyed some of the residential properties to bona fide purchasers. The proceeds of the sales were diverted to a Kontogiannis controlled entity without satisfying DLJ's mortgages.

The Conspiracy Defendants also allegedly employed the same scheme to steal at least \$50 million from other financial institutes, including Washington Mutual Bank (Wamu).

Procedural Background

In November 2008, first DLJ commenced a civil action in the Eastern District of New York (EDNY).³ In June 2009, several of the Conspiracy Defendants (Thomas Kontogiannis, John T. Michael, Elias Apergis, Stephen A. Martini, Ted Doumazios, Esq., and Jonathan Rubin) were indicted in the EDNY for various federal crimes related to the Cunningham bribery and mortgage fraud schemes; DLJ and Wamu were named among the victims. Several defendants have since pled guilty and are serving out their prison terms. Thomas Kontogiannis is currently serving a ninety-seven month prison term after pleading guilty.

In July 2010, presiding Judge Vitaliano of the EDNY dismissed without prejudice DLJ's action for lack of subject matter jurisdiction, and granted it leave to replead its state law claims. DLJ commenced this action in New York County, and moved for preliminary injunctive relief seeking an order of attachment, which was ultimately granted by this Court in November 2010 after a hearing held over several days.

³ In September 2009, the Federal Deposit Insurance Corporation (FDIC), as receiver for Wamu, also commenced a civil action against a number of the Conspiracy Defendants in the EDNY.

On December 6, 2010, the FDIC removed this action to the United States District Court for the Southern District of New York (SDNY). In mid-February 2011, presiding Judge Swain ordered the action remanded back to this Court. Immediately thereafter, several Kontogiannis defendants filed two separate notices of appeal to the Second Circuit Court of Appeals, and made motions to stay the effect of Judge Swain's order. A temporary stay was issued and ultimately vacated when the appeals were denied.

The Amended Complaint

The seventeen causes of action against the defendants include breach of contract, fraud, conversion, unjust enrichment, and fraudulent conveyance. In addition to money damages, DLJ seeks the imposition of a constructive trust and an equitable lien against certain properties conveyed to Edgewater, Loring and Halifax.

Discussion

Edgewater, Loring and Halifax (together, Moving Defendants) move to change venue on the ground that DLJ wrongly designated New York County as the venue for this action. The Moving Defendants argue that CPLR 507 mandates that where judgment is sought in an action that would affect title to, possession, use or enjoyment of real property, venue must be in the county in which the real property is located. Nineteen of the properties

at issue are located in Kings County, twenty-seven are located in Queens County, and one is located in Nassau County.

In opposition, DLJ asserts that New York County is the proper venue for this action because its principal office is located here, and the action involves predominantly transitory claims. In addition, DLJ contends that the Moving Defendants have waived improper venue by availing themselves of the benefits of this Court.

For venue purposes, civil actions have been historically characterized as either "local" or "transitory" in nature. Local actions involve litigation where the judgment demanded would affect title to real property and generally must be brought in the county where the property is located (CPLR 507; compare *Lucas v Kensington Abstract LLC*, 2009 WL 3713153 [Sup Ct, NY County 2009]).

Most other claims are transitory, in which venue is based on the residence of any one of the parties (CPLR 503 [a]). A domestic corporation is deemed a resident of the county in which its principal office is located (CPLR 503 [c]).

CPLR 510 (1), the provision under which the Moving Defendants have moved permits a court, upon motion, to change venue where the county designated by the plaintiff "is not a proper county." The procedural details for making a motion to

transfer for improper venue are set forth in CPLR 511 (a) and (b).

Here, DLJ laid venue in New York County, where its principal office is located on the basis that the majority of its seventeen claims are transitory in nature in that it seeks money damages against multiple defendants for fraud, breach of contract, and unjust enrichment for their involvement in the sale of ninety-five fraudulent mortgage packages. Under CPLR 503 (a-c), such designation is proper in an action involving transitory claims.

DLJ also seeks to impose a constructive trust and equitable liens on the proceeds of the forty-six properties that were sold to the Moving Defendants and are located in Kings, Queens and Nassau Counties. To this extent, four of the seventeen causes of action are local in that they "affect" title to real property. Thus, venue in any of the counties where the properties are located would also be proper, under CPLR 507.

Where there is a conflict of applicable venue provisions, CPLR 502 authorizes the court to determine the most appropriate venue by taking into consideration a number discretionary factors, including the convenience of witnesses and the ends of justice, set forth in CPLR 510 (2) and (3) (*Fucito v Board of Educ. of City of New York*, 190 AD2d 605, 606 [1st Dept 1993]; *Grumet v Pataki*, 244 AD2d 31, 35 [3d Dept], *motion to vacate denied* 92 NY2d 914 [1998], *affirmed* 93 NY2d 677, *certiorari*

denied 528 US 946 [1999]; *Bennett v Bennett*, 49 AD3d 949, 949 [3d Dept 2008]; Siegel, *New York Practice* § 116, at 217 n 13 [5th ed]).

In light of conflicting applicable venue provisions, the Moving Defendants may be entitled to a change of venue on discretionary grounds, under CPLR 502 (*Grumet*, 244 AD2d at 35).

Although the statutory language of CPLR 502 is silent as to favoring a particular venue provision when a conflict exists, providing only that the court shall select a county that is proper "as to at least one of the parties or claims," courts have demonstrated priorities of certain venue provisions over others.

For instance, there is authority indicating that CPLR 507, applicable to local claims, is favored over other provisions for the sake of maintaining "certainty in the title records" (see *e.g. Reichenbach v Corn Exchange Bank Trust Co.*, 249 AD 539, 540-41 [1st Dept 1937]; *Diamond v Papreka*, 7 Misc 3d 1006[A] [Sup Ct, Kings County 2005]; *Town of Hempstead v City of New York*, 88 Misc 2d 366 [Sup Ct, Nassau County 1976]).

Notwithstanding the mandatory terms set forth in CPLR 507, it is not entitled to absolute application, and courts should consider other factors in addition to the subject matter of the action in determining proper venue, including the identity of the parties, convenience of witnesses, and the interests of justice (*Town of Hempstead*, 88 Misc 2d 366).

According to DLJ, New York County is the most convenient venue in that multiple parties and witnesses reside here, while no parties reside in Kings County. In addition, DLJ is emphatic in arguing that the interests of justice also favor retaining this venue. The result of transferring this action will place it before a seventh judge in a fourth court, further delaying adjudication of its claims, which have been delayed for over two and a half years.

The Moving Defendants do not make any arguments asking the Court to exercise its discretion under CPLR 502.⁴ In any event, as an alternative to a finding of a conflict in applicable venue provisions, DLJ asserts that, even assuming that CPLR 507 mandates transfer of this action to Kings, Queens or Nassau County, the Moving Defendants have forfeited the right to obtain change of venue as of right.

A defendant may waive improper venue by not objecting within a reasonable time after the movant obtains knowledge of the facts supporting the request, or by failing to serve a demand on the plaintiff with or prior to the answer, under CPLR 511 (a)

⁴ In response to the DLJ's argument that they must set forth a discretionary basis for transferring venue in light of conflicting applicable venue provisions, the Moving Defendants state: "No useful purpose would be served by responding to those assertions in this reply brief" (Edgewater and Loring's Reply Memo., Preliminary Statement).

(*Moracho v Open Door Family Med. Ctr. Inc.*, 79 AD3d 581 [1st Dept 2010]; *Herrera v R. Conley Inc.*, 52 AD3d 218 [1st Dept 2008]; *Terezakis v Goldstein*, 168 Misc 2d 298 [Sup Ct, NY County 1996]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 507). Timeliness, with respect to a motion for proper venue, is determined as of the date of commencement of the action (Alexander, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C511:1).

DLJ points out that Halifax already answered the original complaint, and Edgewater and Loring moved to stay these proceedings prior to serving their demand to change venue and making the within motions, which, in and of itself, may result in the forfeiture of the right to request change of venue "as of right" (see *Terezakis*, 168 Misc 2d 298).

The rationale of *Terezakis* (*Id.*) as to forfeiture is applicable to this action. In addition, the Court highlights the following procedural history: DLJ commenced this action on April 9, 2010 and filed an RJI on June 23, 2010; all of the Moving Defendants were named as defendants in the original complaint, which Halifax answered. On June 18, 2010, the Moving Defendants moved for a stay pending resolution of the related federal action pending in the EDNY, which was ultimately rendered moot in late July 2010 by Judge Vitaliano's dismissal of DLJ's federal complaint.

On August 10, 2010, DLJ moved before this Court for a preliminary injunction, seeking an order of attachment, leave to file an amended complaint and for expedited discovery, which was originally signed by Judge Yates on August 16, 2010 and calendared for argument. The Moving Defendants cross-moved to vacate the notices of pendency. In their cross-motion, the Moving Defendants did not raise the issue of improper venue.

On September 7, 2010, the Court granted DLJ's motion to serve an amended complaint and for expedited discovery, and set a date for an evidentiary hearing on factual issues raised in the motion for a preliminary injunction. During oral argument before this Court, none of the Moving Defendants raised the issue of improper venue. Counsel for Halifax stated on the record: "As concerns Halifax, what he [DLJ] seeks to do in terms of amending [the complaint], and we have already answered, is to add a third property, which he alleges is also a fraudulent transfer" (9/7/2010 Tr 17: 8-11).

Counsel for Edgewater and Loring did not object to the proposed amendment to the complaint, but simply "reserve[d] a right to dismiss the claims that are in there" (9/7/2010 Tr 18: 24-26). When the Court ordered limited and expedited discovery, the Moving Defendants did not object (9/7/2010 Tr 22: 7-9, 23, 24:24-26, 29:12-15, 42:21-23), and subsequently served deposition notices on DLJ (9/20/11 Tr 12:11-18, 13:23-24).

On September 19, 2010, counsel for Edgewater and Loring filed a letter brief with the Court outlining discovery disputes; the issue of improper venue was not raised (9/27/11 Tr 17:22-24, 18:2-4, 19:20-23, 22:14-20; Exhibit 4, annexed to the 9/27/10 Amato Aff.).

The Moving Defendants finally served a demand to change of the place of trial on September 20, 2010. That same day, all parties participated in a conference call with the Court to address discovery disputes, including the scheduling of depositions, during which time the Court made rulings (9/27/10 Amato Aff., ¶¶ 13-14). On September 24, 2010, counsel for Halifax provided DLJ with dates on which his client was available to be deposed (Exhibit 12, annexed to the 9/27/10 Amato Aff.).

On September 27, 2011, in a conference with the Court transcribed on the record, counsel for Edgewater and Loring proposed a stay of depositions pending the completion of the criminal action, which was denied, and requested permission to make a formal motion to address the issue; improper venue was not raised (9/27/11 Tr 24:20-25).

On September 28, 2010, counsel for Edgewater and Loring filed a letter brief with the Court, seeking permission to make a motion for a protective order concerning discovery; the issue of improper venue was not raised. The same day that it filed this letter brief with the Court, counsel for Edgewater and Loring

initiated its motion to change venue, followed by Halifax, which initiated its motion the following day.

The original return date of Edgewater's and Loring's motion to change venue was October 6 but was later adjourned to October 12, 2010. The original return date of Halifax's motion was October 18, but was adjourned to October 25, 2010.

Two and three days after they initiated the motions to transfer venue, the Moving Defendants moved to dismiss the amended complaint for failure to state a claim and collateral estoppel, on September 30, 2010 (motion sequence numbers 06 and 07).

On October 1, 2010, counsel for Halifax filed a letter brief with the Court again requesting its intervention in settling a dispute with regard to the scheduling of a deposition. On October 5, 2010, Halifax presented an order to show cause to the Court seeking the adjournment of the deposition of its principal. On October 18, 2010, the Moving Defendants each moved to stay discovery and all proceedings, and for a protective order.

The Moving Defendants evidently have been aware as early as April 2010, when served with the original complaint, of the facts supporting their request for change of venue. In addition to Halifax's answer to the original complaint, the Moving Defendants' frequent appearances in New York County before this Court, wherein they repeatedly sought affirmative relief and

judicial intervention, made numerous motions, and set a date for an evidentiary hearing without giving any indication of a venue problem, evinces a complete disregard for judicial economy and principles of fairness (*cf Moracho*, 79 AD3d 581). Moreover, DLJ will undoubtedly suffer prejudice by transfer of venue, that will further delay adjudication of this action on the merits.

Consequently, the Moving Defendants have forfeited their right to obtain change of venue "as of right," and the motions are addressed to the Court's discretion (*Kurfis v Shore Towers Condo.*, 48 AD3d 300, 300-01 [1st Dept 2008]; *Horowicz v RSD Transp.*, 249 AD2d 511 [2d Dept 1998]).

The Court is mindful of the policy concerns underlying the historic preference for laying venue of an action affecting title to realty where the property is located. Nonetheless, inasmuch as the Moving Defendants fail to offer an alternative basis for discretionary change of venue, and the mixed nature of this action together with the interests of justice all tip in favor of retaining venue.

Contrary to the Moving Defendants' arguments, a plaintiff's service of an amended complaint does not automatically revive a defendant's right to invoke the demand procedure of CPLR 511 (b) (*see Terezakis*, 168 Misc 2d 298).

For all these reasons, the motions to change venue, addressed to the Court's discretion, are denied.

Accordingly, it is

ORDERED that motion sequence numbers 04 and 05 are denied.

Dated: May 5, 2011

ENTER:

J.S.C.