

**Delrosario v M.A. Angeliades, Inc.**

2010 NY Slip Op 32306(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 116852/09

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C. Justice

PART 5

DeLorenzo, Roberto

INDEX NO. 116852/09

MOTION DATE \_\_\_\_\_

- v -

M.A. Angelides, Inc.

MOTION SEQ. NO. 001

MOTION CAL. NO. 29

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

AUG 26 2010

NEW YORK  
CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 8-23-10

BARBARA JAFFE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ROBERT DELROSARIO and  
CONSOLACION DELROSARIO,

Plaintiffs,

-against-

Index No. 116852/09

Motion Subm.: 7/27/10  
Motion Seq. Nos.: 001,  
Calendar Nos.: 29,

**DECISION AND ORDER**

M.A. ANGELIADES, INC., KEVIN HOM &  
ANDREW GOLDMAN, ARCHITECTS P.C.,  
THE CITY OF NEW YORK and NEW YORK  
CITY DEPARTMENT OF PARKS AND  
RECREATION,

Defendants.

-----X  
M.A. ANGELIADES, INC.,

Third-Party Plaintiff,

-against-

ELLI N.Y. DESIGN CORP.,

Third-Party Defendant.

-----X  
BARBARA JAFFE, JSC:

**For plaintiffs:**  
Thomas W. Hochberg, Esq.  
Law Offices of Thomas W. Hochberg  
123 East 75<sup>th</sup> St., 4<sup>th</sup> Fl.  
New York, NY 10021  
917-622-4880

**For defendant M.A. Angeliades:**  
Edward J. White, Esq.  
Cartafalsa, Slattery *et al.*  
165 Broadway, 28<sup>th</sup> Fl.  
New York, NY 10006  
212-225-7700

By notice of motion dated December 28, 2009, defendant M.A. Angeliades, Inc. (M.A.)  
moves pursuant to CPLR 504(3), 510(3), and 511(b) for an order transferring the venue of this

**FILED**  
AUG 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

action from New York County to Richmond County. Only plaintiffs oppose. By notice of motion dated April 16, 2010, submitted on default, M.A. moves pursuant to CPLR 3215 for an order granting it a default judgment against third-party defendant Elli N.Y. Design Corp. (Elli). The motions are consolidated for decision.

### I. PERTINENT BACKGROUND

On or about November 21, 2009, plaintiffs commenced the instant action by service of a summons and complaint, designating New York County as the venue of the action based on the New York County residence of defendant Kevin Hom & Andrew Goldman, Architects P.C. (Architects). (Affirmation of Edward J. White, Esq., dated Dec. 28, 2009 [White Aff.], Exh. A). In their complaint, plaintiffs allege that on September 21, 2008, plaintiff Roberto DelRosario was injured at the Greenbelt Recreation Center in Richmond County. (*Id.*). On or about December 17, 2009, M.A. served its answer and a demand to change the venue of the action to Richmond County, and on December 30, 2009, M.A. served the instant motion. (*Id.*, Exhs. B, C).

On March 4, 2010, M.A. commenced a third-party action against Elli by service of a third-party summons and complaint on the New York Secretary of State. (Affirmation of Edward J. White, Esq., dated Apr. 16, 2010, Exhs. C, D). On April 20, 2010, it served on Elli its motion for a default judgment. Elli did not respond.

### II. M.A.'S MOTION TO CHANGE VENUE

#### A. Contentions

M.A. argues that plaintiffs improperly designated New York County as the place of venue of the action, citing CPLR 504(3) which requires that any action against the City of New York be brought in the county within City where the cause of action arose. As it undisputed that

plaintiffs' claim arose in Richmond County, it contends that the action must be brought there, and that plaintiffs will not be prejudiced by the change as discovery has not commenced.

Additionally, pursuant to CPLR 511, M.A. asserts that venue must be changed as plaintiffs have not responded to its timely demand to change venue. (White Aff.).

Plaintiffs contend that CPLR 504(3) is inapplicable as City is not the only defendant in the action, that venue is properly reposed in New York County given Architects' residence here, and that City is not prejudiced by the action being heard here as any pertinent files are likely at the principal office of defendant New York City Department of Parks and Recreation in New York County. (Affirmation of Thomas W. Hochberg, Esq., dated Feb. 23, 2010).

In reply, M.A. argues that the number of defendants is immaterial to the issue of venue under CPLR 504(3), and observes that plaintiffs cite no authority in support of their position. (Reply Affirmation, dated March 1, 2010).

#### B. Analysis

Pursuant to CPLR 503(a), "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 . . ." and pursuant to section c, a domestic corporation is deemed a resident of the county in which its principal office is located. It is also statutorily required that trials against the City of New York be held in the county within City where the cause of action arose in order "to protect governmental entities from inconvenience." (CPLR 504[3]; *Kennedy v CF Galleria at White Plains, LP*, 2 AD3d 222, 223 [1<sup>st</sup> Dept 2003]; *Powers v East Hudson Parkway Auth.*, 75 AD2d 776 [1<sup>st</sup> Dept 1980]).

Here, City has not joined in M.A.'s application. As the venue requirement of CPLR

504(3) is for the benefit of City (*see eg Swainson v Clee*, 261 AD2d 301 [1<sup>st</sup> Dept 1999] [CPLR 504 “exists for the benefit of a county or other governmental entity named as a defendant and not for the benefit of an individual litigant such as defendant”]), non-City defendants may not rely on it (*see Yasgour v City of New York*, 169 AD2d 673 [1<sup>st</sup> Dept 1991] [non-City defendants’ motion to change venue pursuant to CPLR 504(3) properly denied; only City may invoke statute]; *see also Forteau v Westchester County*, 196 AD2d 440 [1<sup>st</sup> Dept 1993] [denying motion by non-County defendant to change venue pursuant to CPLR 504(1) made on ground that County was defendant as statute was enacted for County’s benefit, not for non-County defendant]).

Pursuant to CPLR 511(b):

The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant.

Once a defendant establishes its compliance with the demand and notice of motion procedures of CPLR 511, it also has the burden of demonstrating that the plaintiff’s choice of venue is improper. (*See eg Baez v Marcus*, 58 AD3d 585 [2d Dept 2009] [defendant failed to meet initial burden of showing that plaintiff’s choice of venue was improper]; *Hernandez v Seminatore*, 48 AD3d 260 [1<sup>st</sup> Dept 2008] [defendant sustained initial burden by demonstrating that plaintiff’s choice of venue was improper]).

While M.A. moved to change venue within 15 days of service of its demand and plaintiffs did not serve a written consent to change venue, Architects’ legal residence is New York County. (*See Addo v Melnick*, 61 AD3d 453 [1<sup>st</sup> Dept 2009] [professional corporation’s residence was in county where principal office was located]; *Vecchia v Dantello*, 192 AD2d 415 [1<sup>st</sup> Dept 1993]

[same]). Thus, plaintiffs were permitted to bring their action in New York County based on Architects' residence (CPLR 503(c)), and M.A. has not established that plaintiffs' choice of venue in New York County is improper. (*Compare Argano v Scuderi*, 6 AD3d 211 [1<sup>st</sup> Dept 2004] [defendant not entitled to change of venue as it did not dispute plaintiff's allegation that co-defendant was resident of chosen county pursuant to CPLR 503(c)], *with Delia v Winter Bros., Inc.*, 183 AD2d 1006 [3d Dept 1992] [defendant established that venue based on co-defendant's residence was improper as co-defendant did not reside in chosen venue]).

M.A. has also failed to set forth in its motion papers any of the information required to support an application brought pursuant to CPLR 510(3). (*See Gissen v Boy Scouts of Am.*, 26 AD3d 289 [1<sup>st</sup> Dept 2006] ["in order to obtain relief, movant must assert names and addresses of witnesses, substance and materiality of their testimony relative to issues in case, that witnesses have been contacted and are willing to testify for movant, and manner in which they will be inconvenienced by trial in county where action commenced]).

### III. M.A.'S MOTION FOR A DEFAULT JUDGMENT

As M.A. served its third-party summons and complaint against Elli pursuant to BCL 306, which permits service on a domestic corporation by delivery of a summons and complaint to the Secretary of State, it was also required, pursuant to CPLR 3215(g)(4), to serve an additional copy of the pleadings on Elli by first class mail at least 20 days before entry of judgment and to submit an affidavit stating that it had done so. As M.A. failed to submit the affidavit, the motion is denied. (*See Balaguer v 1854 Monroe Ave. Housing Dev. Fund Corp.*, 71 AD3d 407 [1<sup>st</sup> Dept 2010] [plaintiff not entitled to default judgment as, having served defendant pursuant to BCL 306, she failed to submit proof that she complied with CPLR 3215(g)(4)]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant M.A. Angeliades, Inc.'s motion to change venue is denied;  
and it is further

ORDERED, that defendant M.A. Angeliades, Inc.'s motion for a default judgment as  
against third-party defendant Elli N.Y. Design Corp. is denied.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: August 23, 2010  
New York, New York

**FILED**  
AUG 26 2010  
NEW YORK  
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