

**Racanelli Dev. Group, LLC v Empire Devs.
Corp.**

2007 NY Slip Op 30302(U)

March 15, 2007

Supreme Court, New York County

Docket Number: 0603955

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
EILEEN A. RAKOWER Justice
J.S.C.

PART 5

Racanelli Development

INDEX NO. 603955106

- v -

MOTION DATE _____

Empire Developes

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

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

Dated: 3/15/07


EILEEN A. RAKOWER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 1]

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

-----X
RACANELLI DEVELOPMENT GROUP, LLC,

Plaintiff,

Index No. 603955/06

-against-

DECISION AND ORDER

EMPIRE DEVELOPERS CORP., COASTAL BUILDERS CORP., 334 EAST 92ND HOUSING DEVELOPMENT FUND CORP., EAST 92ND STREET SENIOR HOUSING, L.P., COMMERCE BANK CORP. a/k/a COMMERCE BANK, N.A., THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), JOHN DOE AND MARY DOE, The Last Two Defendants Being Individuals or Entities Presently Unknown to the Plaintiff or Other Interests in the Premises Sought to be Foreclosed,

Defendants.

-----X
EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for damages arising out of a contract dated November 17, 2005 for the construction of a building at 334-336 East 92nd Street New York, New York. Defendants Empire Developers Corp., Coastal Builders Corp., 334 East 92nd Housing Development Fund Corp. And East 92nd Street Senior Housing L.P. ("Moving Defendants") move for change of venue pursuant to CPLR §511(d). Plaintiff opposes the motion. Defendants Commerce Bank Corp. a/k/a Commerce Bank, N.A., the New York City Environmental Control Board, the New York City Department of Finance, the New York State Department of Taxation and Finance, The United States of America (Internal Revenue Service), John Doe and Mary Doe do not file papers in this matter.

Plaintiff entered into a construction contract with moving defendants on November 17, 2005 and duly commenced performance under the contract in

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November 2005. Thereafter, Empire assigned the contract to Coastal and on April 20, 2006, Empire and/or Coastal terminated the contract with plaintiff pursuant to a "termination by the owner for convenience" clause. The clause states, in relevant part:

“14.4.1: The owner may, at any time, terminate the contract for the Owner’s convenience and without cause.

14.4.2: Upon receipt of written notice from the Owner...

14.4.3: In case of such termination for the Owner’s convenience, the Contractor shall be entitled to receive payment for work executed, and costs incurred by reason of such termination, provided, however, that Contractor shall be allowed to recover reasonable termination expenses.”

Pursuant to the contract, moving defendants agreed to pay plaintiff \$728,634.77 of which plaintiff claims \$343,111.70 has been paid, leaving a balance of \$385,523.07 (moving defendants claim that they paid \$348,111.70, not the \$343,111.70 that plaintiff alleges). Thereafter plaintiff filed a mechanics lien on the subject premises in New York County, where the subject property is located.

Moving defendants argue that plaintiff has improperly venued this action in New York County pursuant to a clause in the contract which requires that venue for any action be in the place where the owner is located. Moving defendants submit a copy of the contract. The choice of venue clause reads as follows:

“If the controversy or claim has not been resolved pursuant to the mediation procedure within 60 days of the commencement of such procedure, the controversy or claim shall be settled by litigation proceedings in New York State Supreme Court in the County where the owner is located, which Court shall have exclusive jurisdiction.”

The address for the owner, Empire Developers Corp., is listed on the front page of the contract as: 930 Broadway Woodmere, NY 11518. Woodmere is in Nassau County.

Plaintiff argues that its choice of venue is proper because the action affects real

property located in New York County. Further, it argues that, according to the moving defendant's answer, the owner of the subject property has its principal place of business in New York County. Finally, plaintiff argues that actions against the City of New York must be tried in the county within the City in which the cause of action arose.

CPLR §501 states:

“Subject to the provisions of subdivision two of section 510, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.”

CPLR §507 states:

“The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.”

In *A.C.E. Elevator Co., Inc. V. V.J.B. Construction Corp.*, 192 Misc2d 258 (Sup.Ct. Kings Co. 2002), the court held that the proper venue was that which was designated by the contract, despite a lien on real property located in another county. Further, it found that:

“the Legislature's failure to exempt CPLR section 507 from the grasp of CPLR section 501 necessarily demonstrates that the statutory scheme does not preclude parties from contractually fixing venue in a foreclosure action. Stated otherwise, had the Legislature intended that a written agreement fixing venue could not be enforced in an action affecting real property, it would have necessarily included a reference to CPLR section 507 within the body of CPLR section 501 as it did with section 510 (2).”

Here, the parties expressly agreed to place venue in the “county where the owner is located.” At the time that the contract was signed the owner was listed as Empire Developers Corp. and its address was listed as Woodmere, NY (Nassau

County). Paragraph two of the verified complaint states “[u]pon information and belief, defendant Empire Developers Corp. (“Empire”) was at all times relevant hereto a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 930 Broadway, Woodmere, New York 11518.” Empire, in its verified answer, “[a]dmit[s] the allegations contained in paragraphs 2 and 3 of the complaint.”

The contract language is unequivocal and is not effected by the fact that the action involves real property located in New York County. Plaintiff agreed to hold trial in the county where the owner was located and is bound by the agreement.

Wherefore it is hereby

ORDERED that Moving Defendants’ motion to change venue is granted pursuant to CPLR 511, and it is further

ORDERED that the venue of this action is changed from this court to the Supreme Court, County of Nassau, and the clerk of this court is directed to transfer the papers on file in this action to the clerk of the Supreme Court, County of Nassau upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 15, 2007


EILEEN A. RAKOWER, J.S.C.

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