SHORT FORM ORDER

INDEX No. 25001-2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon MELVYN TANENBAUM
Justice

MOTION #001, 002- Mot D
R/D: 092006
S/D 120106

PLTF'S/PET'S ATTY:
PINKS ARBEIT BOYLE & NEMETH
140 Fell Court, Suite 303
Hauppauge, New York 11788

BANK OF SMITHTOWN

Plaintiff,

- against -

DEFT'S/RESP'S ATTY:
THEODORE R. BOHN
501 5th Avenue, Suite 1900
New York, New York 10017

COOK AND ASSOCIATES REALTY, INC., HARLEM CLUB, LLC, and 143-145 MADISON AVENUE, LLC

Defendants.

Upon the following papers numbered 1 to 25 read on this motion for an order pursuant to CPLR § Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-20 Answering Affidavits and supporting papers 21-22 Replying Affidavits and supporting papers 23-25 Other ; ~~and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this CPLR Article 52 petition by petitioner Bank of Smithtown ("Bank") brought on by Order to Show Cause (Pitts, J.) for an order vacating restraining notices served by respondent/judgment creditor Cook & Associates Realty, Inc ("Cook") upon petitioner "Bank" and upon respondent Harlem Club, LLC ("HC") concerning all bank accounts maintained by respondent/judgment debtor 143-145 Madison Avenue, LLC ("143-145") at petitioner "Bank"; to enforce a judgment obtained by respondent "Cook" against respondent "143-145" and the cross motion by respondent "Cook" seeking an order pursuant to CPLR 3211(a)(3) & 510 dismissing the petition or in the alternative transferring venue to New York County are determined as follows:

Respondent "143-145" owned a commercial building at 143-145 Madison Avenue, New York. Respondent Harlem Club, LLC ("HC") is a tenant in the building. Respondent "Cook" is a real estate broker. "Cook" obtained a judgment in New York Civil Court against respondent/landlord "143-145" for $23,265.00 based upon "143-145's" failure to pay "Cook's" brokerage commission for services rendered in obtaining "Harlem Club" as a tenant.

On December 5, 2003 respondent "143-145" entered into three agreements with petitioner Bank of Smithtown with respect to the premises at 143-145 Madison Avenue: 1) a mortgage for $4,418,074.64 which contained a provision for the assignment of rents and profit; 2) a leasehold modification, consolidation, spreader and extension agreement for $7.5 million which contained a provision conveying

the leasehold mortgage to the "Bank" together with an assignment of rents and profits; and 3) a separate assignment of leases and rent agreements to petitioner. Petitioner filed UCC-1 financing statements perfecting the "Bank's" security interest in the premise's rents and profits.

Petitioner "Bank" claims that respondent "143-145" defaulted in making required payments under the three "Bank"/"143-145" agreements and that the "Bank" notified each of the building's tenants to send their rental payments directly to petitioner. Petitioner "Bank" claims that a special bank account designated as "143-145 Madison Avenue, LLC" was created and used exclusively for the mortgaged premises but that respondent "143-145" had no power to withdraw funds or any ownership interest in the account.

On June 20, 2006 respondent "Cook" served restraining notices pursuant to CPLR §5222 on respondent's"143-145" and "Harlem Club" and petitioner Bank of Smithtown. "Cook" also served an enforcement subpoena on petitioner Bank of Smithtown.

This petition seeks an order vacating the restraining notice served by "Cook" claiming that the "Bank" has the right to all funds maintained in the account for rents and profits derived from the premises until the remaining $7,226,210.74 indebtedness is paid. In support, movant submits an affidavit from a bank vice president, a verified petition and an attorney's affirmation and claims the Bank is entitled to use the funds in the blocked account pursuant to the terms of the mortgage and assignment of rents. Petitioner also claims that by filing the UCC-1 financial statements the Bank has a perfected security interest in the rents and profits from the "143-145" premises and is entitled to retain possession of these funds. Petitioner claims that under these circumstances the restraining notices served by "Cook" must be withdrawn or vacated. Petitioner also claims that venue in Suffolk County is proper since this petition must be considered pursuant to CPLR §5240 for which general venue rules apply (CPLR §502). Petitioner asserts that its residence in Suffolk County is the proper predicate for venue in Suffolk County. It also asserts that there is no basis for respondents claim that the ends of justice would best be served by transfer of this proceeding to New York County since respondent has failed to submit sufficient evidentiary proof to support its contention seeking a change of venue for the convenience of material witnesses.

In opposition and in support of the cross motion respondent "Cook" submits an affidavit from a principal of the realty company, an affidavit from a principal of TPL Realty, LLC d/b/a The Harlem Club and two affirmations of counsel and claims that venue of this action should be transferred to New York County since the premises, all parties (except petitioner), the judgment and all documents relevant to the issues underlying this action are located in New York County. Respondent claims that even if the Court determines that venue in Suffolk County is proper, the action should be transferred to New York County in the interest of justice since New York is the County most associated with the parties, the judgment and the underlying transactions. Respondent also claims that petitioner lacks standing to maintain this action since the Bank is not the real party in interest for funds paid directly to respondent "143-145" which has been independently restrained. Respondent contends that significant questions of fact exist concerning: 1) whether the account has a surplus; 2) how brokerage commissions have been paid; 3) what expenses are paid from Respondent; 4) whether payments have been directly made by tenants to the respondent/judgment debtor "143-145". Respondent claims that the enforcement subpoena requires answer to these questions but that petitioner has failed to respond. Respondent also claims that the petition should be denied on

equitable grounds since "Cook" secured the tenant "Harlem Club" for the "Bank's" benefit and the "Bank" has failed to pay for "Cook's" services. "Cook" argues that it should be paid before petitioner is permitted to retain monthly lease payments from "Harlem Club".

Standing is a threshold determination resting in part on policy considerations that a person should be allowed access to the courts to adjudicate the merits of a particular dispute (SOCIETY OF PLASTICS v. COUNTY OF SUFFOLK, 79 NY2 761, 570 NYS2d 778 (1991)). An aggrieved party must sustain an injury in fact–an actual legal stake in the matter being adjudicated–and the injury asserted must fall within the zone of interest sought to be promoted or protected by the statutory provision under which the agency has acted (SOCIETY OF PLASTICS v. COUNTY OF SUFFOLK , supra; SUN BRITE v. NORTH HEMPSTEAD ZONING BOARD, 69 NY2d 406, 515 NYS2d 418 (1987)). Moreover, the plaintiff must show for standing purposes that the harm or injury suffered is in some way different from that of the public at large (SCHULTZ v. NY DEC., 186 AD2d 941, 589 NYS2d 370 (3rd Dept., 1992) appeal denied 81 NY2d 704, 595 NYS2d 398 (1993)). Petitioner Bank of Smithtown has made a sufficient threshold showing to establish that it has standing to commence this proceeding.

CPLR §5239 provides:

> Proceeding to determine adverse claims.
> Prior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt. Service of process in such a proceeding shall be made by service of a notice of petition upon the respondent, the sheriff or receiver, and such other person as the court directs, in the same manner as a notice of motion. The proceeding may be commenced in the county where the property was levied upon, or in a court or county specified in subdivision (a) of section 5221.
>
> §5240. Modification or protective order; supervision of enforcement.
> The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 31-4 is applicable to procedures under this article.

With respect to the venue issue although petitioner has denominated the petition brought pursuant to CPLR §5239, that section does not apply since it requires that property or debt be in the possession of a sheriff or receiver. CPLR §5240 is the applicable provision for the relief sought by petitioner and since jurisdiction has been established over the parties, the petition is sua sponte amended.

CPLR Section 503 (a) provides that the place of trial of an action "shall be in the county in which one of the parties resided when it was commenced".

CPLR Section 510 (3) provides that a court may change the place of trial of an action whether "the convenience of material witnesses and the ends of justice will be promoted by the change. Among the factors to be considered are the convenience of the non-party witnesses, the place where the cause of action arose and the calendar conditions of the counties". (Nolan v. Mount Vernon Hospital, 172 AD2d 368, 568 NYS2d 409 (1sr Dept., 1991); Arbel v. Turgeon Restaurants of Niagara Falls, Inc., 124 AD2d 769, 508 NYS2d 487 (2d Dept., 1987); Johnson v. Cherry Grove Island Mgt., Inc., 190 AD2d 598, 594 NYS2d 2 (1st Dept., 1993); AMI International LTD. V. Gary Pool Salon & Services, Inc., 94 AD2d 890, 463 NYS2d 553 (3rd Dept., 1983)).

Venue is proper is Suffolk County since petitioner Bank of Smithtown maintains it corporate residence in Suffolk County. Moreover respondent "Cook" has failed to make the required showing to justify transfer of this proceeding to New York County pursuant to CPLR §510(3) (O'Brien v. Vassar Brothers Hospital, 207 AD2d 169, 622 NYS2d 284 (2nd Dept., 1995)). Respondent's cross motion for an order dismissing and/or transferring this petition to New York County must therefore be denied.

Based upon submission of evidence significant issues of fact are raised concerning whether petitioner Bank of Smithtown has priority for funds deposited in the account and whether respondent "Cook" may be entitled to payment from the account. Petitioner's application for summary dispositon to vacate the restraining notices issued by respondent "Cook" must therefore be denied.

The parties are however entitled to resolve the issues underlying this proceeding in an expeditious manner. Accordingly a conference for the purpose of scheduling discovery shall be held on April 13, 2007, and it is further

ORDERED that petitioner's application to vacate the restraining notices issues by respondent "Cook" is granted solely to the extent that "Cook" is enjoined from enforcing the collection of its judgment against the accounts maintained by respondent "143-145 Madison Avenue LLC" at petitioner "Bank" pending further Court order.

Dated: March 21, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION