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

PRESENT: **HON. CAROL EDMEAD** PART 35

Justice

JOSE MUNOZ

- v -

TRUMP ORGANIZATION LLC et al

INDEX NO. 118546-06

MOTION DATE 4/17/07

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Defendants for an order pursuant to CPLR 3212 dismissing the Trump Organization LLC, Trump Plaza LLC, and Capelli Enterprises, Inc. is granted; and it is further

ORDERED that the cross-motion by Plaintiff for an order adding the Trump Corporation, Donald J. Trump, and New Roc Parcell 1A LLC as defendants is denied as to the Trump Corporation and Donald J. Trump, and is granted as to New Roc Parcell 1A LLC; and it is further

ORDERED that Plaintiff shall serve and file, pursuant to the CPLR, an Amended Complaint to replace the name of the defendants Trump Organization LLC, Trump Plaza LLC, and Capelli Enterprises, Inc. with New Roc Parcell 1A LLC; and it is further

ORDERED that the motion by Defendants for an order pursuant to CPLR 510 to change the venue of the trial from New York County to Westchester County, New York is granted; and it is further

ORDERED that the cross-motion by Plaintiff for an order retaining venue in New York County is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 5/18/07

HON. CAROL EDMEAD *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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

----------x

JOSE MUNOZ,

Plaintiff,

-against-

TRUMP ORGANIZATION LLC, TRUMP PLAZA LLC, CAPELLI ENTERPRISES, INC., and GEORGE A. FULLER CONSTRUCTION MANAGEMENT, INC.,

Defendants.

----------x

Index No.: 118546-2006

Sequence 001
DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Jose Munoz (the "Plaintiff") commenced this action against the Trump Organization LLC, Trump Plaza LLC, (together, the "Trump Entities"), Capelli Enterprises, Inc. ("Cappelli"), and George A. Fuller Construction Management, Inc. ("Fuller") (together, the "Defendants") for negligence and violation of New York State Labor Law §§ 200, 240(1), and 241(6) as well as applicable provisions of the New York State Building Code and Industrial Code Rule 23 of the State of New York.

Before the Court is Defendants' motion for an order (1) pursuant to CPLR 3212 dismissing the instant action against the Trump Entities and Capelli as improper parties to this action and (2) pursuant to CPLR 510 changing venue from New York County to Westchester County.

Also before the Court is Plaintiff's cross-motion for an order (1) permitting Plaintiff to amend his Summons and Verified Complaint to correct the designation of certain defendants to this action and (2) retaining venue in New York County based upon the residence of certain

defendants to the action.

FACTUAL BACKGROUND

According to the Verified Complaint, the instant matter is an action to recover for personal injuries due to an alleged construction accident on September 20, 2006 at 175 Huguenot Street, New Rochelle, New York.

Defendants' Contentions

Based on the affidavit of Sonja Talsnik, Director of Property Administration and the Assistant General Counsel for The Trump Organization, Defendants contend that the Trump Entities are not proper parties to the instant matter. The Trump Entities did not own, control, manage, or maintain the land, building, or construction project at the worksite where Plaintiff's accident allegedly occurred. Further, the Trump Entities had neither a physical presence at the worksite nor a supervisory or contractual nexus to the worksite. The only tangential connection between a Trump entity and the subject property is a licensing agreement (the "Licensing Agreement") whereby Donald J. Trump ("Mr. Trump") personally agreed to license the mark, "Trump Plaza," to the owners of the subject property for use as a name of the complex. Defendants further contend that, based on the plain language of the Licensing Agreement, Mr. Trump did not acquire any ownership or control over any parcel of land, any building, or any construction relating to the subject premises. Moreover, the Licensing Agreement did not delegate any responsibility to Mr. Trump or the Trump Entities concerning the construction, management, or maintenance of the subject premises. Accordingly, the Trump Entities are legally blameless, rendering them improper parties.

Based on the affidavit of Louis R. Cappelli, Chairman and Chief Executive Officer of

Cappelli Enterprises, Inc., Defendants also contend that Cappelli is not a proper party. Although Cappelli is the parent company of Fuller, the construction manager for the construction project, Cappelli is a separate and distinct corporation that was not involved with the management or performance of the construction project. Furthermore, Cappelli is not a party to any contracts or agreements concerning the subject premises. Rather, Fuller hired all subcontractors and maintained all records, contracts, agreements, and correspondence regarding the management of the construction project. Since Cappelli had no connection with the subject premises it is legally blameless, rendering it an improper party.

Lastly, Defendants contend that the instant matter should be transferred to Westchester County because the improper designation of the Trump Entities as defendants serves as the only basis for venue to be found in New York County. Further, Plaintiff resides in Westchester County and Fuller maintains its principal place of business in same.

Plaintiff's Cross-Motion

Plaintiff contends that an order amending the Summons and Verified Complaint is warranted to reflect the correct designation of certain defendants who were simply misnamed. It is Plaintiff's contention that section 3(a) of the Licensing Agreement establishes that New Roc Parcell 1A LLC ("New Roc") agreed to enter into a "Management Agreement" with non-party "the Trump Corporation" in which the latter agreed to be the management company for the project. Further, sections 3(b) and (c) of the Licensing Agreement provide that New Roc maintain operating standards that are consistent with those followed by Mr. Trump's "Signature Properties" and that the failure to do so may result in Mr. Trump either curing the breach or terminating the Licensing Agreement at his discretion. Section 3(d) provides that Mr. Trump

shall have access to the property upon twenty-four (24) hours notice. Plaintiff also maintains that section 3(e) of the Licensing Agreement establishes that the plans and specifications of the building must be approved by Mr. Trump and that he required that "any change of products or materials must be equal in quality and appearance to those found at the 'Signature Properties' or at Trump Tower at City Center."

Accordingly, the Licensing Agreement demonstrates that "the Trump Corporation" and Mr. Trump are proper parties to this action and that the Summons and Verified Complaint should be amended to substitute them for the Trump Entities as defendants herein.

Further, Plaintiff is not opposed to the dismissal of the claim against Cappelli as such claim should have been properly brought against New Roc. Therefore, Plaintiff requests that New Roc be substituted for Cappelli as a defendant herein.

On the issue of venue, Plaintiff maintains that New York County is the proper place for this action to be adjudicated based on the fact that the Trump Corporation and Mr. Trump are both located at 725 Fifth Avenue, New York, New York. Further, Defendants motion to change venue should also be denied because Defendants failed to comply with CPLR § 511(b), which requires that a motion to change the place of a trial on the grounds of improper venue be made within fifteen (15) days after service of the demand to change venue. The demand to change venue is dated February 6, 2007, but the motion to change venue is dated March 23, 2007.

DISCUSSION

I. Summary Judgment

As a general rule, to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its

favor (CPLR § 3212[b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [movant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the

motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Here, Defendants present, through the affidavit of Sonja Talsnik, Director of Property Administration and the Assistant General Counsel for The Trump Organization, and Louis R. Cappelli, Chairman and Chief Executive Officer of Cappelli Enterprises, Inc., that both the Trump Entities and Cappelli are improper parties to this action. Their affidavits establish that the respective entities had no connection to the construction project sufficient to warrant a finding that they are improper defendants.

Plaintiff has presented no opposition to either Ms. Talsnik's or Mr. Cappelli's affidavits. In fact, he expressly states that he is not opposed to the dismissal of the claims against Cappelli, but makes no such statement concerning the Trump Entities. Rather, Plaintiff has cross-moved to substitute different Trump defendants for the Trump Entities and New Roc for Cappelli. In seeking to make this substitution by way of his cross-motion, Plaintiff effectively acknowledges that the Trump Entities and Cappelli should not be parties to this lawsuit.

Accordingly, Defendants' motion for summary judgment dismissing the instant action against the Trump Entities and Cappelli is granted.

II. Substitution of Defendants

Although not specifically cited by Plaintiff in his cross-motion, it appears that the relief he requests rests on the distinction between an order permitting Plaintiff to amend the pleadings so as to change the designation of existing defendants (CPLR 305[c]) and an order permitting Plaintiff to add a new defendant to the pending action (CPLR 305[a]; 1003).

CPLR 305(c) authorizes the court, in its discretion, to "allow any summons or proof of summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced" (CPLR 305[c]). Accordingly, where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that: (1) the intended but misnamed defendant was fairly apprised that he was the party the action was intended to affect, and (2) the intended but misnamed defendant would not be prejudiced (*see National Refund and Utility Services, Inc. v. Plummer Realty Corp.*, 22 AD3d 430, 430, 803 NYS2d 63, 64 [1st Dept 2005]; *Fink v. Regent Intern Hotels, Ltd*, 234 AD2d 39, 41, 650 NYS2d 216, 218 [1st Dept 1996]; *Ober v.Rye Town Hilton*, 159 AD2d 16, 21, 557 NYS2d 937, 939 [2d Dept 1990]; CPLR 305[c]). However, the amendment of a summons and complaint pursuant to CPLR 305(c) should be allowed only in order to correct the terminology by which a plaintiff have described an existing defendant; such an amendment may not serve as the mechanism by which a new defendant is added (*see Ober v.Rye Town Hilton*, 159 AD2d 16, 21,557 NYS2d 937, 941 [2d Dept 1990]).

In this case, Plaintiff's service upon the Trump Entities and Cappelli does not constitute service upon the Trump Corporation, Mr. Trump, and New Roc. This is not a case where a party

is misnamed (*see Medina v. City of New York*, 167 AD2d 268, 561 NYS2d 768 [1st Dept 1990]; *Ober v. Rye Town Hilton*, 159 AD2d 16, 557 NYS2d 937 [2d Dept 1990]); rather it is a case where Plaintiff seeks to add or substitute a party defendant (*see Reid v. Niagara Mach. & Tool Co.*, 170 AD2d 662, 567 NYS2d 83 [2d Dept 1991]; *Creative Cabinet Corp. of Am. v. Future Visions Computer Store*, 140 AD2d 483, 528 NYS2d 596 [2d Dept 1988]). Although the Licensing Agreement indicates that Mr. Trump and the Trump Entities share the same corporate address, Plaintiff presents no evidence that the Trump Entities are designated agents for service of process upon Mr. Trump or the Trump Corporation, an entity whose corporate address is unknown to the court (*see Perez v. Paramount Communications, Inc.*, 247 AD2d 264 [1st Dept 1998], *appeal granted, reargument denied*, 249 AD2d 246 [1st Dept 1998] *and aff'd on other grounds*, 92 NY2d 749 [1999]; *Donley v. Gateway 2000, Inc.*, 266 AD2d 184, 184 [2d Dept 1999]; *Pappas & Marshall v. A.J. Ross Logistics, Inc.*, 222 AD2d 424 [2d Dept 1995]; *Feszczyszyn v. General Motors Corp.* 248 AD2d 939, 940-41 [4th Dept 1998]). Similarly, the Licensing Agreement indicates that New Roc and Cappelli share the same corporate address and that Louis R. Cappelli, who is the president of Cappelli, is also the managing member of New Roc. Again, Plaintiff presents no evidence that Cappelli is a designated agent for service of process upon New Roc (*Id.*). Since Plaintiff seeks to substitute the parties themselves, rather than just correct the names of the parties, the instant matter is more properly governed by CPLR 305[a] and 1003.

CPLR 1003 provides that parties may be added at any stage of the action by leave of court, by stipulation of all parties who have appeared, or once without leave of court within certain time frames. CPLR 305(a) provides that a supplemental summons must be filed and

served when a new party--one who was not named in the original summons--is added to a pending action.

In seeking to substitute the Trump Corporation and Mr. Trump for the Trump Entities and New Roc for Cappelli, Plaintiff argues that the Licensing Agreement is evidence that the proposed new defendants are the proper parties.

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept. 1989]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one

meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]). Further, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

Contrary to Plaintiff's contention, section 3(a)[1] merely states that New Roc "will enter" into a "Management Agreement" with the Trump Corporation. A plain reading of section 3(a) leads to the conclusion that this is an agreement to enter into future agreement. Although the term "Management Agreement" is not defined, section 3(a) does not reference any construction related activity. Further, when read in context with the entire Licensing Agreement it is clear that the term addresses a matter other than construction related management. The indicia for this conclusion is found in the second whereas clause, which states that New Roc is in the process of constructing a luxury condominium building on land that it owns, as well as the third whereas clause, which states that New Roc intends to design, develop, construct, operate, and maintain the building. Further evidence is found in the fact that the remainder of the contract lacks any express reference to the Trump Corporation or Mr. Trump engaging in construction of the building. Accordingly, the court concludes that section 3(a) does not expressly or impliedly state

[1] Section 3(a) states that the Licensee covenants and agrees that the: "Licensee will enter into a Management Agreement (the "Management Agreement") with The Trump Corporation in the same form as the Management Agreement with respect to Trump Tower at City Center dated as of December 2004 between LC White Plains Residential II, LLC and the Trump Corporation."

that either the Trump Corporation or Mr. Trump are contractually obligated to play a role in the construction project.

Further, section 3(b)[2] applies to New Roc's obligation to ensure that residential and retail occupants maintain the standards, in connection with ownership, operation, and maintenance, followed by the Signature Properties. Section 3(c)[3] provides Mr. Trump with the authority to demand that New Roc cure any breach and to terminate the Licensing Agreement if New Roc

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[2] Section 3(b) states that the Licensee covenants and agrees: "At all times, to maintain, and ensure that all occupants referenced in Section 1(b) hereof, maintain, standards in connection with the ownership, operation and maintenance of the Property, that are at least equal to those standards of ownership, operation and maintenance followed by the Signature Properties, as of the date hereof, except as otherwise consistent with any modifications agreed to by Licensor at Trump Tower at City Center (such standards of ownership, operation and maintenance, as of the date hereof, collectively the "Operating Standards").

Section 1(b) states that: "Licensor hereby grants to Licensee, during the term of this Agreement, the right to permit residential and retail occupants of the Building to use the Trump Mark solely for the purpose of identifying the address of such occupants' location at the Building. However, such right shall not permit the residential and retail occupants of the Building to use the Trump Mark as part of the name or identification of such occupant. For example, trade names such as "Trump Plaza Restaurant" or "The Restaurant at Trump Plaza" are not permitted or authorized. The rights and restrictions governing such occupants' use of the Trump Mark shall be set forth in the condominium offering plan filed with respect to all or a portion of the Building ("Plan") and in any lease agreement between Licensee and such retail occupant, which Plan and lease terms governing such use, to the extent they relate to the use of the Trump Mark, shall be subject to Licensor's prior written approval. Licensee agrees to cooperate fully with, and furnish assistance to Licensor in any action required, to ensure that any use of the Trump Mark by such occupants complies with the terms and conditions of this Agreement.

[3] Section 3(c) states that the Licensee covenants and agrees: "If the Operating Standards are not being maintained or Licensee has breached any other provision of this Agreement, including, without limitation, Paragraph 3(d) hereof (collectively, a "Breach") Licensor may notify Licensee thereof in writing (the "Default Notice") and if Licensee shall fail to fully correct any condition or cure any other Breach identified in the Default Notice, within thirty (30) days of the date of such Default Notice, Licensor may immediately terminate this Agreement and all rights licensed hereunder by notifying Licensee in writing of such termination; provided however, that so long as the Breach cannot be cured solely by the payment of money and Licensee shall have commenced the curing of such Breach within such thirty (30) day period and shall diligently prosecute the curing thereof to completion, then Licensee shall have such reasonable additional period of time as shall be reasonably necessary to cure such Breach, but in no event more than (90) days. Licensor shall not be required to send a Default Notice on more than three (3) occasions in any twenty-four (24) consecutive month period, Licensor may immediately terminate this Agreement and all rights licensed hereunder by notifying Licensee in writing of such termination. In the event, however, that Licensee disputes any alleged non-monetary Breach at anytime prior to the sale of the last condominium unit, such dispute shall be submitted to arbitration in accordance with the procedure hereinafter set forth. In the event that Licensee timely commences such arbitration, the time to cure any non-monetary Breach shall be tolled during the pendency of such arbitration. After the sale of the last condominium unit, Licensor shall, using his commercially reasonable judgment, be the sole judge of whether Licensee is maintaining the Operating Standards.

fails to do so. Section 3(d)[4] provides that Mr. Trump shall have the right to inspect the property to confirm New Roc's compliance with the provisions of the Licensing Agreement. Section 3(e)[5] provides that the construction should be done substantially in accordance with the plans and specifications of New Roc's architects and engineers, that the building's quality should be comparable to that of Trump Tower at City Center, that New Roc shall submit copies of the plans and specifications to Mr. Trump, and that New Roc may make changes to the plans and specifications provided that those changes do not alter the quality of the construction.

Contrary to Plaintiff's contentions, the foregoing does not demonstrate that the Trump Corporation or Mr. Trump are proper parties. None of cited clauses make reference to the Trump Corporation or Mr. Trump having any construction related obligations. Sections 3(c), and (d) provide Mr. Trump with certain rights and authority to take certain action. Section 3(b) and (e) detail New Roc's obligations. Nothing in these sections indicate that the Trump Corporation or Mr. Trump were required to approve the plans and specifications of the construction or that they played any role in the construction of the building itself. Mr. Trumps role was limited to licensing the mark "Trump Plaza" for the building.

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[4] Section 3(d) states that the Licensee covenants and agrees that: "Licensor or his representatives shall at all times have access to, and the right to inspect, the Property, interior and exterior, during normal business hours, upon twenty-four (24) hours notice, but without unreasonably interfering with the operation of the Property, to confirm Licensee's compliance with the provisions of this Agreement."

[5] Section 3(e) states that the Licensee covenants and agrees that: "The building shall be constructed pursuant to a design/build construction contract substantially in accordance with the Plans and Specifications to be prepared by Licensee's architects and engineers (the "Plans and Specifications"). The quality of the Building and its interior finishes will be comparable to the quality of Trump Tower at City Center. Upon completion of the Plans and Specifications, Licensee will submit copies of same to Licensor. After submission of the Plans and Specifications to Licensor, Licensee shall have the right to make additional changes to the Plans and Specifications with respect to products and materials, provided that any change of products or materials shall be equal in performance, function, appearance and quality to those set forth on the Plans and Specifications or those found at the Signature Properties or at Trump Tower at City Center."

With regard to New Roc, the Licensing Agreement specifies that New Roc is in the process of constructing the building on land that it owns. It further identifies New Roc as the designer, developer, operator, and the party charged with maintaining the building. Lastly, New Roc is a party to the Licensing Agreement. Therefore, the court concludes that New Roc is a proper party to this action.

Accordingly, Plaintiff's cross-motion to amend the summons and complaint to correct the designation of certain defendants should be denied as to the Trump Corporation and Mr. Trump, and granted as to New Roc.

III. Venue

Pursuant to CPLR 503, venue based on residence is proscribed as follows: "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...." CPLR 503(c) mandates that a domestic corporation shall be deemed to be a resident of "the county in which its principal office is located." CPLR 510(1) provides that the "court, upon motion, may change the place of trial of an action where: the county designated for that purpose is not a proper county...." Furthermore, CPLR 511(b) states as follows:

> (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.* Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.
> (Emphasis added).

It is uncontested that Plaintiff did not serve a written consent to change the place of trial

to Westchester County, and that Defendants did not serve its motion within the proscribed 15-day period after the demand was served. Thus, Defendants' request is untimely. However, it is also uncontested that venue was based upon the Trump Entities being located in New York County. With those parties now dismissed from the instant case, and no new Trump defendants having been added, New York County is no longer the proper situs for this action. It has been held that where venue is placed on the basis of naming an improper party, a motion to change venue should be granted upon the dismissal of the party (*Crew v St. Joseph's Medical Center*, 19 AD3d 205 [1st Dept 2005]; *Chow v. Long Island R.R.*, 202 AD2d 154, 155 [1st Dept 1994]).

Therefore, venue in the instant matter is proper in Westchester County.

Accordingly, it is hereby

ORDERED that the motion by Defendants for an order pursuant to CPLR 3212 dismissing the Trump Organization LLC, Trump Plaza LLC, and Capelli Enterprises, Inc. is granted; and it is further

ORDERED that the cross-motion by Plaintiff for an order adding the Trump Corporation, Donald J. Trump, and New Roc Parcell 1A LLC as defendants is denied as to the Trump Corporation and Donald J. Trump, and is granted as to New Roc Parcell 1A LLC; and it is further

ORDERED that Plaintiff shall serve and file, pursuant to the CPLR, an Amended Complaint to replace the name of the defendants Trump Organization LLC, Trump Plaza LLC, and Capelli Enterprises, Inc. with New Roc Parcell 1A LLC; and it is further

ORDERED that the motion by Defendants for an order pursuant to CPLR 510 to change the venue of the trial from New York County to Westchester County, New York is granted; and it

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ORDERED that the cross-motion by Plaintiff for an order retaining venue in New York County is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: May 17, 2007

Hon. Carol Robinson Edmead, J.S.C.