

Otero v East Northport, LLC

2007 NY Slip Op 32190(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0100284/2007

Judge: Jane S. Solomon

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

PRESENT: SOLOMON
Index Number : 100284/2007

PART 55

OTERO, CARLO

vs

EAST NORTHPORT, LLC

Sequence Number : 001

CHANGE VENUE

INDEX NO. 100284/2007

MOTION DATE 5-23-07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for change venue/summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in

accordance with the annexed memorandum decision and order.

FILED

JUL 20 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/17/07

[Signature]
EANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
CARLO OTERO,

Plaintiff,

INDEX NO. 100284/2007

-against-

EAST NORTHPORT, LLC and KING KULLEN
GROCERY CO., INC.,

DECISION and ORDER

Defendants
-----X
JANE S. SOLOMON, J.

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendants East Northport, LLC ("East Northport") and King Kullen Grocery Co., Inc. ("King Kullen") (collectively, "Defendants") move to change venue to Nassau County and to dismiss the claims against East Northport as a matter of law. For the reasons described herein, the motion is granted in its entirety.

Background

Plaintiff Carlo Otero ("Plaintiff") is a resident of Connecticut. This action arises out of an accident which allegedly occurred on January 22, 2004, at the King Kullen supermarket located in East Northport, Suffolk County, New York (the "Premises"). Plaintiff claims that he was injured when he slipped and fell on ice, frozen rain and/or snow that accumulated and remained on the steps that provide ingress and egress at the Premises' loading dock.

King Kullen occupies and operates the Premises pursuant to a lease agreement with East Northport dated September 9, 1958 (the "Lease"). Under the terms of the Lease, King Kullen is solely responsible for keeping the Premises in good order, condition and repair. The Lease further states that East Northport shall not be liable for any claims arising out of ice, rain or snow on the Premises.

In August 2005, Plaintiff commenced an action against King Kullen in the Superior Court of the State of Connecticut, Judicial District of Hartford. King Kullen's motion to dismiss for lack of jurisdiction was granted by that court on April 11, 2006. Plaintiff then commenced this action in New York County against both Defendants in January 2007.

The Complaint alleges that King Kullen maintains its principal place of business in Bethpage, Nassau County, and that East Northport maintains its principal place of business at the offices of "J.P. Morgan Chase Bank, N.A., 345 Park Avenue, 4th Floor, New York, New York 10154 and JP Morgan Chase Bank, 1 Chase Manhattan Plaza, 20th Floor, New York, New York 10081." According to the records of the New York State Department of State, however, East Northport is a domestic limited liability company with its principal office located in Suffolk County, and J.P. Morgan Chase Bank, N.A. is its agent for service of process.

[* 4]

Based on the records of the New York Department of State and pursuant to CPLR § 510, Defendants served a demand on Plaintiff to change venue to Nassau County together with their answer. Plaintiff did not respond to this request. Defendants now move under CPLR § 510 to transfer this action from New York County to Nassau County, and under CPLR § 3212 to dismiss the Complaint against East Northport as a matter of law.

Discussion

Change of Venue

Under CPLR § 503(a) the proper venue for an action is the county in which any of the parties reside when the action is commenced. A corporation is considered to be a resident of the county where it maintains its principal place of business. CPLR § 503(c). The county of a corporation's principal office shown in a certificate of incorporation is controlling for venue purposes. See Velasquez v. Delaware River Valley Lease Corp., 18 A.D.3d 359, 360 (1st Dep't 2005). This is so notwithstanding that the corporation may have moved its principal office out of that county years earlier. Conway v. Gateway Assoc., 166 A.D.2d 388, 388 (1st Dep't 1990).

In this case, Plaintiff's assertion that venue is proper in New York County based on the principal place of business of East Northport is belied by the records of the New York Department of

State. Although Defendants' original answer admitted Plaintiff's allegation that East Northport maintained its principal place of business at JP Morgan Chase Bank's New York County address, they later denied the allegation in their amended answer.

Plaintiff contends that the address listed for service of process forms a proper predicate for jurisdiction against a corporation in a personal injury action. However, Plaintiff's reliance on Altidort v. Louis, 287 A.D.2d 669 (2nd Dep't 2001) is misplaced. In that case, the defendant's certificate of incorporation identified Kings County as the location of both its principal place of business and its address for service of process. The defendant sought a change of venue based upon the fact that it had changed its principal place of business to Queens County. In opposition (and in the complaint), the plaintiff argued that the address for service of process provided an adequate basis for venue in Kings County. Although the Second Department agreed that Kings County was indeed the proper venue, it confirmed that the county designated as the location of the defendant corporation's principal place of business determines residence for the purposes of venue.

Here, East Northport's address for service of process is not located in the same county as its principal place of business. Thus, East Northport's residence for venue purposes is Suffolk County, and New York County is not the county of residence for any

party in this action. Accordingly, Defendant's motion to change venue to Nassau County, the residence of King Kullen, is granted.

Dismissal of Claim Against East Northport

Although Plaintiff acknowledges that an out-of-possession landlord is generally not liable for injuries that occur on its premises (Zaglas v. Girona, 266 A.D.2d 282 [2nd Dep't 1999]), he argues that East Northport has subjected itself to liability by retaining a right to reenter the Premises to make repairs (see Bonifacio v. 910-930 Southern Boulevard LLC, 295 A.D.2d 86 [1st Dep't 2002]).

Although a landlord's retention of the right to reenter premises and make repairs can furnish a basis for liability, this is only true in the case of a design defect that constitutes a statutory violation. Henderson v. Hickory Pit Restaurant, 221 A.D.2d 161 (1st Dep't 1995). Absent a statutory duty, a landlord's mere reservation of the right to enter leased premises to inspect and repair is insufficient to give rise to liability for a subsequently arising condition. Madtes v. 809A 8th Ave. Restaurant, Inc., 184 A.D.2d 326 (1st Dep't 1992).

It is undisputed that East Northport was an out-of-possession landlord that had no contractual duty to maintain the Premises. There is no allegation of a structural design or defect; Plaintiff alleges that he was injured when he sipped on ice. Thus, despite the fact that it retained the right to reenter the Premises

to make repairs, East Northport cannot be held liable in this matter, and Defendants' motion for summary judgment dismissing claims against East Northport is granted.

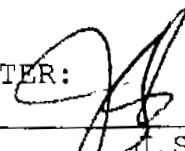
Accordingly, it hereby is

ORDERED that Defendants' motion is granted in its entirety; and it further is

ORDERED that the claim against East Northport is severed and dismissed and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed; and it further is

ORDERED that the venue of the remainder of this proceeding 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.

Dated: July 17 2007

ENTER: 

J.S.C.
JANE S. SOLOMON

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE