

**Board of Directors of the Maidstone Landing Home
Owners Association, Inc. v Maidstone Landing, LLC**

2008 NY Slip Op 32062(U)

July 18, 2008

Supreme Court, New York County

Docket Number: 0600438/2007

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 600438/2007
THE BRD OF DIRECTORS OF THE
VS.
MAIDSTONE LANDING LLC.
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. 600438/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____
this motion to/for _____

PAPERS NUMBERED	
1, 2	
3	
4	
5	
6	

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A+B

Answering Affidavits — Exhibits 1-6

Replying Affidavits - Exhs. C+D

Notice of Cross-Motion - Affidavits - exh. A
Answering Aff to cross-motion + exh. 1-4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached decision
and order.

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

FILED
JUL 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 18 2008

MARTIN SHULMAN J.S.C.
~~J.S.C.~~

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 1

----- X
THE BOARD OF DIRECTORS OF THE MAIDSTONE
LANDING HOME OWNERS ASSOCIATION, INC., suing
on behalf of its members, THE BOARD OF MANAGERS
OF THE MAIDSTONE LANDING CONDOMINIUM I,
suing on behalf of its unit owners, and THE BOARD OF
MANAGERS OF THE MAIDSTONE LANDING
CONDOMINIUM II, suing on behalf of its unit owners,

Index No. 600438/07

Plaintiffs,

-against-

MAIDSTONE LANDING, LLC, WILBER FRIED, DAVID
FRIED, JUDITH FRIED, EXETER BUILDING CORP.,
DOUGLAS R. SHARP and BLOODGOOD, SHARP,
BUSTER ARCHITECTS AND PLANNERS, INC.,

Defendants.

FILED
JUL 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

----- X
MARTIN SHULMAN, J.:

Defendants Maidstone Landing, LLC (the "sponsor"), David Fried, Wilber Fried ("Fried"), Judith Fried (collectively, the "Fried defendants"), and Exeter Building Corp. ("Exeter") move pursuant to CPLR §510 to change the place of trial of this action from New York County to Suffolk County. Defendants Douglas R. Sharp ("Sharp") and Bloodgood, Sharp, Buster Architects and Planners, Inc. ("Bloodgood") (collectively, "the architects") cross-move for the same relief.

Maidstone Landing is an 82-unit condominium complex, comprised of two condominium buildings and recreational facilities, located in the town of Riverhead in Suffolk County. Plaintiffs are the board of directors of the complex's homeowners association, which owns the recreational facilities, and the board of managers of each of the two condominium buildings, all acting on behalf of their respective members and

constituents. Defendants are the complex's sponsor, the sponsor's owners (Exeter and Fried, who is also Exeter's sole shareholder), the three individuals who comprised the initial condominium boards (the Fried defendants, plaintiffs' predecessors), and the complex's architects.

Plaintiffs premised the venue in New York County based on the sponsor's 'residence,' 10 East 78th Street in Manhattan, which also houses Exeter and the Fried defendants, all of whom, arguing that their residence is the only nexus to this county, now move pursuant to CPLR §510(3) to change the venue to Suffolk County on the grounds Maidstone Landing is located in Suffolk, all the causes of action asserted in the complaint arose in Suffolk, and "the convenience of material witnesses and the ends of justice will be promoted by the change" to Suffolk.

The architects, who are Iowa residents, join in the request to change venue to Suffolk County, arguing that "the majority of the witnesses, contractors and professionals involved, all of the current residents, the project itself and potential expert witnesses ... most of all the depositions in the case and the discovery and inspection of any claimed defects will all be in Suffolk County" (Fitch supporting affirmation, ¶ 4).

The gravamen of this 14-count, multi-million dollar suit is that there are substantial defects in the design, planning and construction of Maidstone Landing which defendants have refused to correct despite plaintiffs' repeated demands, and as a result the individual units and common elements of the complex are far inferior to what was promised the unit owners in their respective purchase agreements, the offering plan and various other related documents.

It is inexplicable to this court why plaintiffs, the governing bodies of real property located in Suffolk County, would choose to litigate about that real property in New York County. The proper venue for this action is clearly Suffolk County, since "the judgment demanded [herein] would affect the title to, or the possession, use or enjoyment of, real property" in that county (CPLR §507). However, defendants did not object to New York County as a venue prior to joinder of issue, nor did they raise the matter in their answers. A motion to change venue "on the ground that the designated county is improper (CPLR 510[1]) ... must be served with the answer or before the answer is served (CPLR 511[a])" (Gousgounis v. Bravor Plumbing Heating Co. Inc., 155 AD2d 269, 270 [1st Dept 1989], amended in part 157 AD2d 550 [1st Dept 1990]).

Having through apparent laxity lost the right to move pursuant to a clear-cut mandatory ground (CPLR §507), defendants now move under the less evident, discretionary ground of convenience of witnesses and ends of justice (CPLR §510[3]). A change of venue motion addressed to the discretion of the court is not subject to the same time frame as one challenging the venue's propriety. Rather, a discretionary motion must be "made within a reasonable time after commencement of the action (CPLR 511[a]), prior to discovery, and [with] no prejudice to plaintiff" (Gissen v. Boy Scouts of America, 26 AD3d 289, 290 [1st Dept 2006]). Hence, contrary to plaintiffs' contentions, the instant motions are timely.

"Upon a motion made pursuant to CPLR §510(3), the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change.... This showing must include (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in

which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case" (Cardona v. Aggressive Heating Inc., 180 AD2d 572 [1st Dept 1992], citations omitted). All of these elements must be established by "a detailed evidentiary showing" (Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 AD3d 299 [1st Dept 2004]; O'Brien v. Vassar Brothers Hospital, 207 AD2d 169, 170 [2d Dept 1995]).

To satisfy the first component of the test (identity of witnesses), a change of venue motion must be supported by an affidavit specifying the names, addresses and occupations of the prospective witnesses (see Job v. Subaru Leasing Corp., 30 AD3d 159 [1st Dept 2006], Shindler v. Warf, 24 AD3d 429 [2d Dept 2005], Montero v. Elrac, Inc., 300 AD2d 9 [1st Dept 2002]). The instant motion is supported only by the affirmation of counsel, Cally Schickler ("Schickler"), and Fried's affidavit. Fried does not identify a single witness. Counsel identifies -- or, more aptly, alludes to -- several witnesses, but none adequately.

The first potential witness named by Schickler is Robert L. Schwartzberg, P.E. ("Schwartzberg"), identified as plaintiffs' consulting engineer with a principal place of business at an address in Commack, Suffolk County (Schickler affirmation, ¶ 12[a]). The only other potential witness named is Joseph Schmitt Consulting Engineers ("Schmitt"), identified only as having its principal place of business at an address in Stony Brook, Suffolk County (Schickler affirmation, ¶ 12[b]). The other witnesses anticipated by Schickler are the unnamed "unit owners who reside at Maidstone Landing" (Schickler affirmation, ¶ 12[c]) and the members of plaintiffs, also unnamed

(id., ¶ 12[d]). These unnamed individuals are also the only witnesses mentioned by Fried, who argues venue should be changed to Suffolk County because "the beneficial members of the plaintiff association and the unit owners at the premises all reside in Suffolk County" (Fried affidavit, ¶ 4).

"The party moving for a change of venue under CPLR 510(3) has the burden of proof and is required to supply the names, addresses and occupations of the witnesses whose convenience he claims will be affected" (Andros v. Roderick, 162 AD2d 813, 814 [3d Dept 1990]; Schoen v. Chase Manhattan Automotive Finance Corp., 274 AD2d 345 [1st Dept 2000]). Clearly, under this standard "plaintiffs' members" are not adequately identified (compare, Walsh v. Mystic Tank Lines Corp., 51 AD3d 908 [2d Dept 2008]: "defendants identified seven potential nonparty witnesses, [and e]ach witness submitted an affidavit which contained his or her name, address, occupation, and county of employment" [citations omitted]), so the motion appears to rest on the convenience of Schwartzberg and Schmitt.

With respect to the inconvenience element, Schickler states that "[u]pon information and belief, all of the aforesaid witnesses are either employed or residing in the County of Suffolk for whom [sic] it will be a great hardship to be compelled to travel to the County of New York" (Schickler affirmation, ¶ 13). Again, movants' submission falls short. "Mere general statements as to witness inconvenience are not enough" (Timan v. Sayegh, 49 AD3d 274, 275 [1st Dept 2008]). Counsel's "vague and conclusory allegations" are "insufficient to warrant a change of venue.... [Movants'] submissions failed to identify a single non-party witness who has expressed any inconvenience in having to testify in New York County" (Schoen v. Chase Manhattan

Automotive Finance Corp., *supra*, 274 AD2d 345), much less how the witnesses would be inconvenienced (see Heinemann v. Grunfeld, 224 AD2d 204 [1st Dept 1996]). In fact, movants' suppositions are explicitly dispelled by one of their two identified witnesses. Schwartzberg has submitted an affidavit (on plaintiffs' behalf) stating that he would **not** be at all inconvenienced to testify in New York either at trial or a deposition (exhibit 6 to Raines opposing affirmation, ¶¶ 2, 4).

Both Schickler and Fried are silent as to each prospective witness' availability and willingness to testify at trial, and the only witness interviews mentioned are those cited as "[t]he sources of [counsel's] information and the grounds of [her] belief" (Schickler affirmation, ¶ 17). In their reply, movants explain that "[a]ny contact with Mr. Schwartzberg to discuss his willingness to testify in Suffolk County would have been futile since Mr. Schwartzberg is the expert retained by plaintiffs and who has prepared a report for plaintiffs" (Schickler reply affirmation, ¶ 11). It would indeed have been futile, since as plaintiffs' expert Schwartzberg's convenience "is not relevant to a determination of a change of venue under CPLR 510(3)" (Mei Ying Wu v. Waldbaum, Inc., 284 AD2d 434, 435 [2d Dept 2001]; see also Metzger v. Esseks, 168 AD2d 287 [1st Dept 1990]). No explanation is proffered for the failure to contact Schmitt, a major omission since "the witness names and description of anticipated testimony [are] insufficient ... [when] there is no indication that the witnesses were ever contacted" (Goldberg v. Bivins, 295 AD2d 162, 163 [1st Dept 2002]). Prospective witnesses' failure to profess a willingness to testify warrants denial of the motion (see Colon v. Sears Roebuck and Co., Inc., 220 AD2d 280 [1st Dept 1995]).

Neither does the prediction that plaintiffs' members and constituents will testify aid movants, who "are required to do more than assert the mere existence of these unnamed witnesses in the desired county. They must establish that the witnesses have been contacted and are available to testify" (Walsh v. Mystic Tank Lines Corp., *supra*, 51 AD3d 908). Here, movants "did not even indicate that they had contacted the nonparty witnesses, much less identify the specific inconveniences which might be incurred by the witnesses, and such inadequacies render defendants' moving papers insufficient as a matter of law.... Any assertion that any particular witness would be inconvenienced could only be based on speculation" (Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, *supra*, 9 AD3d at 300, citations omitted). Most significantly, movants' "papers failed to demonstrate that the nonparty witness[es] for whose convenience the change of venue was sought w[ere] willing to testify on the defendants' behalf" (Franke v. Stavsky, 40 AD3d 918, 919 [2d Dept 2007]).

As to the substance of the witnesses' anticipated testimony, Schickler states that Schwartzberg "will testify with respect to a consultation report it prepared regarding the Maidstone Landing ... building construction" (Schickler affirmation, ¶ 12[a]), and Schmitt "will testify with respect to the inspection which took place on March 15, 2006" (*id.*, ¶ 12[b]). The unit owners are "expected" to "testify as to the damages complained of and the warranty claim forms that a few of the unit owners prepared" (*id.*, ¶ 12[c]). The testimony of plaintiffs' members is even less clearly anticipated: "they will testify with respect to circumstances leading to the above entitled action" (*id.*, ¶ 12[d]). This is not an adequate "showing of the asserted inconvenience, or the nature and relevance of their anticipated testimony" (Morrison v. Lawler, 290 AD2d 370 [1st Dept 2002], citations omitted; Moye v. H.L. Green, Inc., 159 AD2d 242, 243 [1st Dept 1990]).

As to materiality, counsel states only that the occurrence of all events in Suffolk County is "a material consideration in the determination of this motion" (Schickler affirmation, ¶ 16) and that "[e]ach of the witnesses below is material and necessary to these proceedings" (id., ¶ 11). This does not satisfy movants' burden, which is to indicate the substance of each witness' proposed testimony in sufficient detail to "indicat[e] how such testimony would be material to the resolution of this dispute" (Supplement of Pompano Realty Corp. v. Tops Markets, Inc., 246 AD2d 342 [1st Dept 1998]; Gissen v. Boy Scouts of America, *supra*, 26 AD3d at 290).

Based on the foregoing, the court finds that movants have not met their burden on this motion to change venue for the convenience of non-party witnesses. "The affidavit in support of such motion must contain the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted" (Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, *supra*, 9 AD3d 299; Marko v. Culinary Institute of America, 245 AD2d 212 [1st Dept 1997]). Movants' supporting affidavits do not accomplish this.

It is true that blind adherence to technicalities at the expense of substance is inappropriate (Tricarico v. Cerasuolo, 199 AD2d 142, 143 [1st Dept 1993]), and a change of venue pursuant to CPLR §510(3) may be proper where "[d]espite technical defects in the defendants' motion papers, they demonstrate that the convenience of the witnesses will be promoted by changing the place of trial" (Wolff v. Friedman, 148 AD2d

448, 448-449 [2d Dept 1989]). However, such a demonstration must still be made (Molloy v. W.F. McCoy Petroleum Products, Inc., 161 AD2d 245, 245-246 [1st Dept 1990]). Here, movants "did not submit affidavits from the witnesses themselves, and from the information in the record it is impossible to determine the substance of their testimony, or to evaluate its relevance. Further, there was no indication that defendant had even contacted the witnesses to determine whether they were willing and available to testify, or that they would be inconvenienced by a trial in New York County.... Accordingly, while the facts of the case might appear to support a change of venue, defendant[s'] failure to meet the requirements set forth in Cardona, *supra* require that the action remain in New York County" (Rodriguez-Lebron v. Sunoco, Inc., 18 AD3d 275, 276 [1st Dept 2005], citations omitted; Bollman v. Port Authority of New York and New Jersey, 17 AD3d 182, 183 [1st Dept 2005]; Dores v. New York Medical Group, P.C., 259 AD2d 297 [1st Dept 1999]).

In short, movants have failed to identify "a single witness who would be inconvenienced by having to travel to New York County" (Goldberg v. Bivins, *supra*, 295 AD2d at 163; Barbot v. Nagabushana, 235 AD2d 289 [1st Dept 1997]). Movants' secondary argument that because they "will request that the Court travel to the subject premises for an inspection" (Schickler affirmation, ¶ 15) venue in Suffolk County would be "much more convenient" for the court (Fried affidavit, ¶ 4), is unpersuasive.

The cross-motion fares no better. The architects, all of whom are out-of-state residents, support their cross-motion with their counsel's affirmation. The closest counsel comes to identifying a witness is to say that although the architects "have not yet retained an expert, [he] fully expect[s] that the witness will be from Suffolk County

since the property in question is there and any issues of local codes, rules and regulations are better dealt with by a local expert" (Fitch affirmation, ¶ 6). As discussed above, "[t]he convenience of the parties, or that of their agents, employees and others under their control, carries little if any weight on a motion pursuant to CPLR 510(3)" (Port Bay Associates v. Soundview Shopping Center, 197 AD2d 848 [4th Dept 1993]; Mei Ying Wu v. Waldbaum, Inc., *supra*, 284 AD2d at 435).

Accordingly, it is hereby

ORDERED that the motion and the cross-motion are denied in their entirety.

Counsel for the parties are directed to appear for a preliminary conference on August 19, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for the parties.

Dated: July 18, 2008



Hon. Martin Shulman, J.S.C.

FILED
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