

**Boyd v Downs Fin., Inc.**

2008 NY Slip Op 32206(U)

August 5, 2008

Supreme Court, New York County

Docket Number: 0601912/2007

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: \_\_\_\_\_

PART 55

*Justice*

Index Number : 601912/2007

BOYD, PETER

vs

DOWNS FINANCIAL

Sequence Number : ~~002001~~

CHANGE VENUE

INDEX NO. \_\_\_\_\_

MOTION DATE 7/18/08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

... is motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-5

6-7

8-10

Cross-Motion:     Yes     No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the entered memorandum decision and order.*

**FILED**

AUG 06 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/5/08

JANE S. SOLOMON <sup>J.S.C.</sup>

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : 1AS PART 55

-----x

PETER BOYD and CYNTHIA BOYD,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 601912/07

DOWNS FINANCIAL, INC., SUFFOLK COUNTY  
NATIONAL BANK, O'SHEA, MARCINCUK &  
BRUYN, LLP, BRIDGEWATER FINANCIAL  
FUNDING, LLC and LAWRENCE POWELL,

Defendants.

**FILED**  
AUG 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x

SOLOMON, JANE J.:

Defendant Bridgewater Funding, LLC (Bridgewater) moves to change the venue of this action to Suffolk County. The motion is joined by the other appearing defendants, Suffolk County National Bank (SCNB) and O'Shea, Marcincuk & Bruyn, LLP (OMB). Plaintiffs oppose the motion, which is granted for the following reasons.

Plaintiffs reside in Shirley, New York, in Suffolk County. They allege that they sold their residence property in Suffolk County to non-party Heath Wade (Wade) at a closing on November 30, 2006, and expected to receive proceeds from the sale in the amount of \$29,283.99. They did not receive the proceeds, and have sued to recover it. They allege that defendant Downs Financial, Inc. (Downs) was Wade's mortgage lender; that Bridgewater was Wade's mortgage broker; that defendant Lawrence

Powell (Powell) worked for Bridgewater as a broker; that OMB was a law firm representing the interests of Downs in the transaction; and that SCNB maintained an account for OMB that received the sale proceeds. Plaintiffs allege that the sale proceeds were wrongfully forwarded to an unknown party. The complaint alleges five causes of action sounding in conversion, fraud and breach of fiduciary duty.

Like plaintiffs, all appearing defendants are located in Suffolk County (Down and Powell have not answered). The sole basis for venue in New York County is plaintiffs' contention in the complaint that Downs, a Colorado corporation with its principal place of business in Colorado, has an office in Manhattan. Plaintiffs rely upon Downs's registration with the New York State Secretary of State, which provides the name and address of a registered agent (National Registered Agents, Inc.) with a Manhattan address.

When Bridgewater served its answer in November 2007, it simultaneously served a demand to change venue to Suffolk County pursuant to CPLR 511(b), stating that the Manhattan address for Downs is not a proper basis for venue. Plaintiffs did not respond. This motion was filed approximately five months later.

Under CPLR 511(b), where a party served a demand to change venue on the ground that plaintiff chose an improper venue, it may move to change venue within fifteen days after

serving the demand. Plaintiffs contend that Bridgewater lost its right to move to change venue because it waited more than fifteen days to make the motion. Plaintiffs misunderstand the result of Bridgewater's failure to move within fifteen days - had it done so, the motion would have been granted as of right (see, Siegel, New York Practice, § 123). The motion must be made within a reasonable time after commencement of the action (CPLR 511[a]), and granting the motion is in the court's discretion.

Bridgewater's motion was made within a reasonable time after commencement of the action, and plaintiffs have failed to show that venue is properly in New York County. No party is located here, and the ends of justice will be promoted by changing venue to Suffolk County. In short, this action has no connection to this county, and plaintiffs have not demonstrated that this action may properly be venued in this court (CPLR 503). Accordingly, it hereby is

ORDERED that the motion to change venue to Supreme Court, Suffolk County is granted; and it further is

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

Dated: August 5, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C

**JANE S. SOLOMON**

**FILED**  
AUG 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK