

People v Greenberg

2008 NY Slip Op 32974(U)

October 24, 2008

Supreme Court, New York County

Docket Number: 401720/05

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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THE PEOPLE OF THE STATE OF NEW YORK, by
ANDREW CUOMO, Attorney General of the
State of New York,

Plaintiffs,

-against-

MAURICE R. GREENBERG and HOWARD I. SMITH,
Defendants.

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NEW YORK

Charles Edward Ramos, J.S.C.:

Plaintiffs The People of the State of New York, by Attorney General Andrew Cuomo (the AG) moves to transfer venue in an Article 78 proceeding, entitled *In the Matter of the Application of Howard I. Smith v The New York State Office of the Attorney General* (the Article 78 Proceeding), pursuant to CPLR 510.

Background

This action for common law fraud and for violations of the Martin Act was commenced following an investigation by the AG into several sham insurance transactions implemented by former defendant, the American International Group, Inc. (AIG), in 2000 and 2001. The AG alleges that during their tenures as CEO and CFO of AIG, defendants Greenberg and Smith (Defendants) improperly assisted AIG to implement the transactions in order to bolster AIG's reported loss reserves.

In February of 2006, AIG entered into a settlement with the AG and is no longer a named defendant (see *People v Greenberg*, 50 AD3d 195 [1st Dept], lv dismissed 10 NY3d 894 [2008]).

In the course of discovery in this action, Defendants sought

the production of certain documents and information from the AG, including public statements made to the press, and other communications made between the Office of the AG (OAG) and the press, concerning the allegations in this action. Defendants additionally sought the names of media contacts with whom the OAG had discussed the action. The OAG objected to the discovery demands, and Defendants moved to compel, which was denied by this Court (July 31, 2007 Transcript, 33:14).

Thereafter, Smith submitted a request to the OAG for documents pursuant to the provisions of the Freedom of Information Law (FOIL). The OAG partially denied the request on the ground that the materials sought were exempt from production, pursuant to Public Officers' Law § 87 (2) (e), but agreed to provide a limited numbers of documents (Exhibit 15, annexed to the Aff. of Peter Dean, Esq.). Smith appealed the denial of his FOIL request, which appeal was denied by the OAG in January 2008 (Exhibit 17, annexed to the Aff. of Peter Dean, Esq.).

On May 6, 2008, Smith commenced the Article 78 Proceeding in the Supreme Court of Albany County, seeking to set aside the denial of his FOIL request by the OAG.

Discussion

The AG moves to transfer venue of the Article 78 Proceeding here due to its interrelatedness with the instant action.

CPLR 510 designates three grounds by which a court may change a place of trial of an action, on motion:

- (1) the county designated for that purpose is not a proper county; or

(2) there is reason to believe that an impartial trial cannot be had in the proper county; or

(3) the convenience of material witnesses and the ends of justice will be promoted by the change.

Although the AG did not specify which of the three grounds set forth in CPLR 510 that it is moving on, it appears from its arguments that it is moving pursuant to CPLR 510 (3), that permits the Court to transfer venue in its discretion.

This Court arguably lacks jurisdiction to even entertain transferring venue of the Article 78 Proceeding. Unless change of venue is demanded as of right due to the plaintiff's selection of an improper county under CPLR §§ 510 (1) and 511 (b), motions for change of venue based upon the discretionary grounds set forth in CPLR 511 (2) and (3) must be made in the county where the plaintiff in the first instance placed venue (*see e.g. Baker v Julius Pollack & Sons*, 277 AD 11, 12 [1st Dept 1950]; *Wachunas v Demas*, 43 AD2d 979, 979 [2d Dept 1974]; *Fountainhead Caterers, Inc. v Peck*, 42 Misc 2d 330, 331 [County Ct, Westchester County 1964]; *see also* CPLR 2212 [a]). Consequently, the AG should have made this motion in Albany County, where the Article 78 Proceeding was commenced.

In any event, Smith's selection of Albany County as the venue for the Article 78 Proceeding was proper. CPLR 506 (b) expressly provides that a special proceeding against a body or officer shall be commenced in "any county within the judicial district where the respondent made the determination complained of ... or where the materials events otherwise took place, or

where the principle office of the respondent is located."

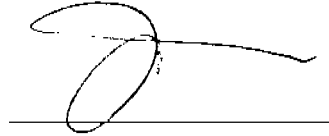
Indisputably, the AG maintains an office in Albany. Further, it directs that all FOIL requests be submitted to that Albany office (Office of the Attorney General <<http://www.oag.state.ny.us/bureaus/foil/pdfs/FOILrequestform.pdf> > [last accessed October 24, 2008]). Thus, Smith's selection of Albany County as the place of trial for the Article 78 Proceeding was proper. Therefore, there is no basis for this Court to transfer venue of the Article 78 Proceeding to New York County. This. Of course, without prejudice to any action the Court in Albany County may deem appropriate.

Accordingly, it is

ORDERED that plaintiffs' motion to transfer venue is denied.

Dated: October 24, 2008

ENTER:



J.S.C.

CHARLES E. RAMOS

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