Druckman v Sinel
2008 NY Slip Op 33394(U)
December 10, 2008
Supreme Court, Nassau County
Docket Number: 018295/08
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

STUART DRUCKMAN,

Plaintiff,

INDEX No. 018295/08

MOTION DATE: Nov. 19, 2008
Motion Sequence # 001, 002, 003

-against-

ELLIOT SINEL,

Defendant.

The following papers read on this motion:

Order to show Cause.................................. X
Notice of Motion... XX
Affirmation/Affidavit in Opposition......... XX
Reply Affidavit/Affirmation..................... XXXX
Memorandum of Law.................................. XXXXXX
Reply Memorandum of Law..................... XX

Motion (seq. No. 1) by the attorneys for Stuart Druckman for temporary and preliminary injunctive relief; motion (seq. No. 2) by the attorneys for Stuart Druckman for an order changing the place of venue of *Sinel v Druckman*, New York County Index No. 602694/08 to Nassau County and to consolidate that action with this action; and (seq. No. 3) by the attorneys for Elliot Sinel for an order pursuant to CPLR 3211(a)(4) and CPLR 3211(a)(7) dismissing the complaint, are determined as hereinafter set forth.

This is an action for the dissolution and accounting of a two-person law firm partnership known as Druckman & Sinel, LLP (the partnership). The partnership was

formed in 2001. Druckman and Sinel have been partners, sharing the profits and liabilities equally. The partnership has offices in Westbury and New York City. Druckman and Sinel are also the sole and equal members of an entity known as Drexel Realty Management LLC (Drexel). Drexel owns a building located at 242 Drexel Avenue, Westbury, N.Y. where the partnership maintains its Nassau office. Druckman & Sinel also formed Lebral, Inc. (Lebral) as equal co-shareholders. Lebral is the tenant on the lease for the Manhattan office the partnership occupies at 7 Penn Plaza, New York City. Druckman and Sinel share the mortgage payments that Drexel pays on the real estate where the Nassau office is located. Druckman and Sinel also share equally the rent paid by the partnership for the Manhattan law office leased by Lebral.

On September 17, 2008, Sinel filed a summons and complaint in New York County Supreme Court for an accounting and dissolution of the partnership (***Sinel v Druckman***, New York County index no. 602694/08).

On October 3, 2008, Druckman filed the within action in Nassau County against Sinel for dissolution of the partnership and Drexel; conversion; breach of fiduciary duty; diversion of assets; misappropriation of assets; and an accounting.

Simultaneously with the filing and service of the within Nassau County action, Druckman brought an order to show cause for temporary and preliminary injunctive relief. The order to show caused signed on October 3, 2008 contained a temporary restraining order with four (4) decretal paragraphs. On October 3, 2008, Druckman also served a Demand for Change of Place of Trial pursuant to CPLR § 511 requesting that Sinel move the First Action from New York County to Nassau County. This demand was served by first class mail. Adding the five days that CPLR 2103(2) provides for service by first class mail to the five-day period under CPLR § 511 to respond to a demand for change of place of trial, Sinel's response was due 10 days later or by October 13. Since Monday, October 13, 2008 fell on Columbus Day, service may be made the next business day immediately following the legal holiday (N.Y. Gen. Constr. Law § 20). Sinel timely served his change of venue opposition affidavit on October 14, 2008.

Sinel argues that CPLR § 511(b) required Druckman to file a motion for change of venue in New York County within 15 days after the service of his Demand for Change of Place of Trial, i.e., by October 18, 2008. The papers submitted by Druckman to the Special Term Justice on October 3, 2008 for a temporary restraining order and preliminary injunction made absolutely no mention of the pending New York County action, or that Druckman served a Demand for Change of Place of Trial on Sinel pursuant

to CPLR § 511 requesting Sinel move the New York County action to Nassau County. Notwithstanding CPLR § 511(b), on or about October 17, 2008 Druckman served the within notice of motion (seq. No. 2) to consolidate the New York County action with the within Nassau County action and to change the venue of the New York County action to Nassau County. Druckman wrongly concluded that Sinel was late in responding to Druckman's Demand to Change Venue served on October 3, 2008.

On or about October 23, 2008 Sinel served a Motion (seq. No. 3) To Dismiss the within action pursuant to CPLR 3211(a)(4) due to the existence of the prior action pending between the parties in New York County and also pursuant to CPLR 3211(a)(7).

CPLR § 511(b) provides:

> Demand for change of place of trial, upon ground of improper venue, where motion made. 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).

The Demand for change of Place of Trial served by Druckman states "that the place of trial in the above entitled action be changed from the County of New York, in which it has been improperly placed, to the County of Nassau where venue would be proper, as provided in CPLR § 503(a)." Sinel's affidavit in response to the Demand for Change of Place of Trial states ". . . venue is proper in New York County pursuant to CPLR § 503(a) and (c) because plaintiff Lebral is a corporation with its principal office located at 370 South Avenue in the County of New York." On October 14, 2008, Sinel served an amended complaint, adding Lebral, Inc. as a party plaintiff in the New York County action.

Sinel and Druckman, each accusing the other of forum shopping, is comparable to the "pot calling the kettle black." Moreover, Sinel and Druckman are admonished that the judiciary of Nassau County and New York County are independent and impartial, and their integrity is unquestioned. Druckman argues that when Sinel commenced the New York county action, New York County was not the proper venue since both he and Druckman resided in Nassau County and the partnership law office was in Westbury. In support of this position he points to the fact that Sinel served an amended complaint naming Lebral, Inc., a New York County corporation, as a party plaintiff for the sole purpose of establishing venue in New York County. Druckman contends adding a party for purposes of venue was too late and Sinel missed his opportunity to venue the action in New York County. Sinel argues that Druckman should have moved in New York County pursuant to CPLR § 511(b) in the first instance for a change of venue of the New York action from New York County to Nassau County and that by failing to do so, he loses the right to have their dispute litigated in Nassau County.

Sinel relies on ***Ludlow Value Manufacturing Co. v S.S. Silberblatt, Inc***., (14 AD2d 291, 293, 1st Dept., 1961) for the argument that any objection Druckman had to the sufficiency of the affidavit that venue be changed should have been determined by the New York Court. In that opinion the court stated:

> Where, as in the instant case, plaintiff has submitted an affidavit containing averments tending to support plaintiff's choice of the place of trial and opposing the demanded chance of venue, we hold that, for the purpose of determining jurisdiction to entertain a motion for change of venue, the weight or sufficiency of the averments is immaterial. At that juncture, the mere filing of such an affidavit mandates that the motion for a change of the place of trial be made in the judicial district in which the action was brought.
>
> In holding that the affidavit submitted by plaintiff herein precluded defendant from making its motion in New York County, we in no way pass on the adequacy of its averments to withstand a motion for change of venue made in the proper county. We conclude only that under the language and spirit of rule 146 [Civil Practice Act], defendant could not, in effect, pass upon the sufficiency of the plaintiff's affidavit and, by treating the affidavit as a nullity, make its motion in New York County.

The court noted the statement in the Judicial Council Report recommending former rule 146 that:

> In order to avoid confusion and to protect the courts against being swamped with collateral motions, no opportunity is afforded the defendant, under the proposal, for testing the sufficiency of any affidavit served pursuant thereto. The mere service of the affidavit will be sufficient to preclude the defendant from making his motion in what he claims is the proper county. 7 N.Y. Jud. Council Rep. 293.

Druckman relies on the Third Department's ***Payne v Civil Service Employees Ass'n.***, (15 AD2d 265, 3d Dept., 1961) wherein the plaintiff commenced the action in New York County; the defendant demanded a change to Albany County where it had its place of business, and plaintiff's affidavit stated that plaintiff resided in Bronx County. The court held that the mere service of the affidavit did not preclude the defendant from making his motion in Albany County. It noted that the affidavit "set forth no facts showing either that [Albany] county . . . is not the proper one or that [New York] county . . . is the proper one. (Rule 146)," and concluded that the "affidavit served was, in our view, 'equivalent to no affidavit at all' and, indeed, to give it any effect would be to nullify the salutary rule." (***Payne v Civil Serv. Employees Ass'n.***, ***supra*** at 267-268 quoting ***Linder v Elmira Ass'n of Commerce, Inc.***, 192 Misc 830, 832-833).

The court in ***Payne, supra*** stated:

> We do not consider that our determination is necessarily in conflict with the recent decision of the Appellate Division, First Department, in ***Ludlow Valve Mfg. Co. v Silberblatt, Inc.***, 14 AD2d 291, 294, holding that under Rule 146, 'defendant could not, in effect, pass upon the sufficiency of the plaintiff's affidavit and, by treating the affidavit as a nullity, make its motion in New York County.' In context, however, it is clear that the decision did not turn on the mere existence of a paper designated, or in form constituting an affidavit, but that the 'sufficiency' referred to, and as to which examination was inhibited, was the sufficiency of the *factual averments* set forth in the affidavit made pursuant to Rule 146; as plaintiff had, in fact, 'submitted an affidavit containing averments tending to support plaintiff's choice of the place of trial,' and the court held 'that, for the purposes of determining jurisdiction to entertain a

> motion for a change of venue, *the weight or sufficiency of the averments is immaterial.*' (p. 294.) (Emphasis supplied). In the case before us, averments of residence are required but such averments 'tending to support plaintiff's choice,' or purporting to do so, are completely lacking and hence there are no averments to weigh. The rule allows defendant to move 'in the county which he claims is the proper one, provided there is no dispute between the parties as to whether such county is the proper one' and '*it is assumed that there is no dispute*' if plaintiff shall fail to serve an affidavit 'which shall set forth facts showing either that the county named by the defendant is not the proper one or that the county previously designated by the plaintiff as the place of trial is the proper one.' (Seventh Annual Report of N.Y. Judicial Council, 1941, p. 296; emphasis supplied.) ***Payne, supra*** at 268-269.

Assuming, *arguendo*, that Druckman's assertion is correct that the New York action was in the wrong venue when commenced, he may have moved to change venue at the same time he brought the order to show cause on October 3, 2003, in Nassau County (*Payne, supra*) or in New York County (***Ludlow Valve Manufacturing, supra*** and CPLR § 511[b]). The plaintiff did neither. In the meantime, Sinel amended his complaint in New York County naming Lebral, Inc. as a party plaintiff. Sinel's affidavit setting forth the allegations that the first filed New York County action between Druckman and Sinel, two attorneys operating a law partnership with offices in Nassau County and New York County, and jointly owning a corporation with its principal place of business in New York County to have the venue issue decided in New York County Supreme Court was sufficient on its face in the first instance (see CPLR 503[d]). Druckman's motion (seq. No. 1) for temporary and injunctive relief is **denied**. To do otherwise would condone the actions of Druckman for failing to include in his October 3, 2008 order to show cause brought in Nassau County where he sought and obtained a temporary restraining order, any reference to the prior New York Supreme Court action, and excuse his failure to follow the time frame set forth in CPLR § 511(b). Moreover, in light of the conflicting averments in the submissions now before this Court there is no reason at this time to enjoin the conduct of one partner and not the other. The temporary restraining order dated October 3, 2008 is **vacated**.

For the reasons set forth in ***Ludlow Valve Manufacturing (supra)***, Druckman's motion (seq. No. 2) for an order pursuant to CPLR 510 and 511 changing the place of trial of the action captioned ***Elliot Sinel v Stuart Druckman***, Index No. 602694/08, pending in the Supreme Court of the State of New York, County of New York, to Nassau

County and pursuant to CPLR § 602, upon transfer, consolidating the New York County action with the above-captioned Nassau County action is **denied** without prejudice to renewal in New York County, provided he does so within 20 days of the date of this order. *(See also,* ***Kuzmin v Nevsky***, 51 AD3d 639; ***Meyers v New York State division of Housing and Community Renewal***, 32 AD2d 818.

Sinel's motion (seq. No. 3) for an order dismissing the complaint in Nassau County pursuant to CPLR 3211(a)(7) for failing to state a cause of action is **denied** without prejudice. At the very least all parties agree there is a viable cause of action for an accounting and dissolution of the partnership. On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." (***Sokoloff v Harriman Estates Development Corp***., 96 NY2d 409, 414; *see* ***Polonetsky v Better Homes Depot***, 97 NY2d 46, 54; ***Leon v Martinez***, 84 NY2d 83, 87-88).

CPLR § 3211(a)(4) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

> there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires;

This Court will not dismiss the within Nassau County action on the grounds that there is another action pending in New York County. Rather, the Nassau County action shall be held in abeyance pending the determination of Druckman's motion to renew in New York County, his application to change venue and for consolidation. (For calendar control purposes, pending the outcome of the New York County proceeding, the within action shall be scheduled for a Preliminary Conference as set forth below). The Court notes that there is no motion now before this or any court by Sinel to transfer the Nassau County action to New York County. The Court is authorized to change venue only upon motion and may not do so on its own initiative. (CPLR 510; ***Kelson v Nedicks Store, Inc***., 104 AD2d 315). That part of Sinel's motion to dismiss the complaint pursuant to CPLR 3211(a)(4) on the grounds of the prior New York action is also **denied** without prejudice.

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A Preliminary Conference has been scheduled for February 20, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This constitutes the decision and order of the Court.

Dated DEC 10 2008

J.S.C.

ENTERED

DEC 11 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE