

Simon v Evans

2009 NY Slip Op 31149(U)

May 21, 2009

Supreme Court, New York County

Docket Number: 601947/08

Judge: Walter B. Tolub

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

WALTER B. TOLUB

PRESENT: _____

PART _____

Index Number : 601947/2008

SIMON, LAWRENCE

VS.

EVANS, IAN

SEQUENCE NUMBER : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/21/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 15

-----x
LAWRENCE SIMON and BETTY SIMON

Plaintiffs,

-against-

IAN EVANS and BRENDAN O'BRIEN,
Defendants.

Index No. 601947/08

Mtn Seq. 001

FILED

MAY 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

-----x
WALTER B. TOLUB, J.:

This is Defendants motion to change venue from New York
County to Suffolk County pursuant to CPLR § 510[3].

Facts

The underlying action was commenced by the Plaintiffs for breach of contract. Plaintiffs claims that on or about October 2007, they requested that Defendants assist them in a construction project in their home located at 357 Dune Road, Westhampton Beach, Suffolk County, New York. Negotiations, meetings and conversations relating to the construction occurred in Suffolk County.

Plaintiff claims that in April of 2008, Defendants abandoned the Plaintiffs and refused to complete the work they were obligated to complete under the contract.

Defendants brings this motion to change the venue of this action from New York County to Suffolk County for the convenience of the non-party witnesses. Defendants argue that other than Plaintiffs owning a separate home in New York County, there is no

[* 3]

basis for venue in New York County. Additionally, the parties and the transactions at issue have a close nexus to Suffolk County and that four of six nonparty witnesses which have been designated by the Plaintiffs are located in Suffolk County and five additional nonparty witnesses reside in Suffolk County.

Discussion

CPLR 503(a) provides, in relevant part, that except where otherwise prescribed by law, the place of trial shall be the county in which one of the parties resided when the action was commenced. Here, venue is proper because Plaintiff owns a New York County residence.

The Court may order a change in venue if the plaintiff's designation is technically proper, but another venue would be more appropriate (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §8:330). A motion to transfer to a more appropriate venue must be made within a reasonable time after the action is commenced (CPLR 511[a]). Although the courts hold that the motion may be brought at any time before trial, what constitutes a reasonable time depends on the facts of each case (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §8:331 citing Toro v. Gracin, 148 AD2d 364 [1st Dept 1989]). Here, Defendants motion is timely as it was made prior to trial and the demand was made in conjunction with the answering papers

[* 4]
(Defendants' Ex. B).

The court may, upon motion, change the place of trial of an action where the convenience of material witnesses and the ends of justice will be promoted by the change (CPLR 510[3]). The movant bears the burden of establishing the need for a change of venue on the grounds of witness inconvenience (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §8:342 citing Rosenthal v. Bologna, 211 AD2d 436 [1st Dept 1995]).

The Appellate Division has established a rigorous set of requirements for a motion to change venue pursuant to CPLR 510(3) (McKinney's Consolidated Laws of New York (Annotated) [2006], *Practice Commentaries*, Vincent C. Alexander, C510:3). The movant must establish four criteria: (1) the affidavit in support of the application must contain the names, addresses and occupation of prospective witnesses. The parties themselves are not witnesses for the purpose of deciding a motion pursuant to CPLR 510(3); (2) the movant must disclose the facts to which the proposed witnesses will testify; (3) the movant must demonstrate that the witnesses for whose convenience a change of venue is sought are in fact willing to testify; and (4) the movant must demonstrate how the witnesses in question would be in fact inconvenienced (Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan, LLP, 9 AD3d 299 [1st Dept 2004]). However, a motion for a change of

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venue for the convenience of witnesses is in the sound discretion of the trial court, and absent a clear showing that such discretion has been abused, the decision will not be disturbed (Stavredes v. United States of America, 87 AD2d 502 [1st Dept 1982]).

Although the addresses of the non-party witnesses have not been listed, Defendants nonetheless have met the criteria for a change of venue. In his affidavit, Mr. Evans states that on or about January 20, 2009, he contacted witnesses to ascertain if they were available and willing to testify at the trial of this action. "All of the witnesses asserted that they would be inconvenienced in the event that the Court denied defendants' motion to change venue to the County of Suffolk." (Evan's Aff. Para. 5). Mr. Evans affidavit and Plaintiffs' response to Defendants' combined demands (Defendant's Ex. D) lists the names and professions of the non-party witnesses. Each of the witnesses worked on Plaintiffs' home and have material information related to the underlying action. Moreover, aside from all of the non-party witnesses that would be inconvenienced, Plaintiffs' property, the work performed and meetings and negotiations took place in Suffolk County.


Accordingly, it is

ORDERED that Defendants motion for a change of venue is granted; and it is further

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.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/21/09



HON. WALTER B. TOLUB, J.S.C.

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK