

Lee Odell Real Estate, Inc. v Lefkowitz

2009 NY Slip Op 32253(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 108939/07

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 108939/2007
LEE ODELL REAL ESTATE, INC.
 vs.
LEFKOWITZ, JACK
 SEQUENCE NUMBER : 003
 CHANGE VENUE

INDEX NO. _____

MOTION DATE 9/4/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

OCT 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to change venue of this action is granted; and it is further

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

ORDERED that defendants serve a copy of this order with notice of entry upon all the Clerk of this Court and all parties.

This constitutes the decision and order of the Court.

Dated: 9/30/09

HON. CAROL EDMEAD

J.S.C.

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: PART 35

-----X
LEE ODELL REAL ESTATE, INC.,

Plaintiff,

-against-

JACK LEFKOWITZ, BLUMA LEFKOWITZ and
MASKIL EL-DAL INC.,

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 108939/07

DECISION/ORDER

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff Lee Odell Real Estate, Inc. ("plaintiff"), a judgment creditor of defendant Jack Lefkowitz ("Jack"), commenced this action against defendants Jack and Bluma Lefkowitz ("Bluma") and Maskil El-Dal ("Maskil") (collectively, the "defendants") alleging fraud (first cause of action) and fraudulent conveyances in violation of Debtor and Creditor Law §§273 and 273-a (second, third, fourth, fifth, seventh, and eighth causes of action), and seeking a judgment directing that the land and improvements thereon owned by Bluma be sold in order to satisfy plaintiff's judgment (sixth cause of action). Defendants now move for an order under CPLR §510(1) to transfer the venue of this action from New York County to Kings County.

Defendants' Motion

Defendants argue that CPLR 507 mandates that the place of trial of an action that would affect real property should be held in the county in which the property is located. Since the plaintiffs are seeking to set aside a conveyance of a property located at 1526 52nd Street, Brooklyn, New York ("the property") and request that the property be sold to satisfy a judgment in favor of plaintiff against Jack, the proper venue for this action is in Kings County. On June

30, 2009, defendants served a Demand for Change of Venue. Plaintiff responded by asserting that New York County is the proper venue because that is where plaintiff maintains his principal office, certain acts of the complained conduct took place in New York County and the underlying judgment was entered in New York County. However, defendants argue, the mandate of CPLR 507 takes precedence over plaintiff's claims. Furthermore, although the instant motion was served eight days after the 15-day period prescribed under CPLR 511, the Court has discretionary power to change venue.

Plaintiff's Opposition

Plaintiff argues that the court should deny defendants' motion as untimely. The court should not exercise its discretion to relieve a party of the filing requirement and transfer the case to Kings County. Plaintiff argues that the First Department has held it an error to grant a motion to transfer venue of a case based solely upon it allegedly being brought in an improper county when the motion was not made within the time set forth in the CPLR. Plaintiff also argues that the court has statewide jurisdiction to decide issues affecting title to property in another county. Thus, there is no imperative to having this action heard in Kings County.

Defendants' Reply

Defendants argue that this Court unquestionably has the power to grant the requested relief. The fact that the motion was served only eight days after the time frame prescribed by CPLR 511 does not deny defendants the right to seek a change of venue in the Court's discretion. Defendants note that instead of serving an affidavit in response to defendants' Demand to Change of Venue, plaintiff served an attorney affirmation, which is insufficient pursuant to

[* 4]

CPLR 511(b).¹ Additionally, this Court has the power pursuant to CPLR 2004 to extend the time for service of a motion under CPLR 511. There would be no prejudice to the plaintiff by the granting of requested relief because plaintiff has yet to comply with defendants' outstanding discovery demands and, other than the motions addressed to the sufficiency of the pleadings, there has been no motion practice or significant proceedings in this action. Plaintiff has taken no action in this matter other than service of a Complaint and Amended Complaint. The Court also has "inherent power" to transfer venue, *sua sponte*, where, as here, the action is related to title to real property.

Discussion

Change of Venue

For the Supreme Court of the State of New York, the prescribed venue of an action is codified at and statutorily authorized by Article 5 of the CPLR. The statutory scheme provides that "notwithstanding the provisions of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order of the court upon motion or by consent . . ." (CPLR 509). As such, unless the parties have by prior written agreement fixed the venue of an action, CPLR Article 5 permits the plaintiff the right to make the initial selection of an appropriate venue (*see* CPLR 501, 503, 509; *Medicorp v Avis Corp.*, 122 Misc 2d 813 [1984]).

Likewise, it is settled that upon a motion by defendant to change said venue, defendant

¹ The Court notes that plaintiff's service of an affirmation *in lieu* of an affidavit is not necessarily unwarranted or dispositive (*State v Whitney*, 66 AD2d 1029, 411 NYS2d 723 [4th Dept 1978] [stating that once plaintiff files an affidavit *or* affirmation, the motion to change venue may only be noticed to be heard in the judicial district where the action is triable or in a county adjoining the proper county] [emphasis added]).

bears the burden to establish that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v Pahlavi*, 62 NY2d 474, 479, 478 NYS2d 597, *cert. denied* 469 US 1108, 105 SCt 783 [1984]; *Clark v Michael Ahem Prod. Serv., Inc.*, 181 AD2d 514, 580 NYS2d 360 [1st Dept.1993]; *Bradley v Plaisted*, 277 AD 620, 102 NYS2d 295 [3d Dept 1951], *leave denied*, 278 AD 727, 103 NYS2d 661 [1951]). In addition, it is settled that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*see Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]; *Waterways Limited v Barclays Bank, PLC*, 174 AD2d 324 327, 571 NYS2d 208 [1st Dept 1991]; *Temple v Temple*, 97 AD2d 757, 468 NYS2d 388 [2d Dept 1983]).

CPLR 507 directs that the place of trial of an action "in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated" (CPLR 507). Eight of the nine causes of action in plaintiff's complaint affect the disposition of defendants' property located in King's County. Since plaintiff's relief seeks the sale of the property, this action clearly affects the defendants' use, possession or enjoyment of their property.

Plaintiff cites to *A.C.E. Elevator Co., Inc. v V.J.B. Const. Corp.* (192 Misc2d 258, 746 NYS2d 361 [Sup Ct New York County 2002]) to argue that CPLR 507 is not mandatory, and that courts routinely hear matters affecting title to real property in other counties. However, *A.C.E. Elevator Co.* is easily distinguishable because the court determined that CPLR 507 is trumped by a written agreement fixing venue as authorized by CPLR 501 (written agreement fixing place of trial shall be enforced) and thus, the forum selection clause in the underlying contract governed. Here there is no allegation that any of plaintiff's causes of action involve a contract containing a

forum selection clause.

Untimely Filing

A demand to change venue based on the designation of an improper county (CPLR 510[1]) "shall be served with the answer or before the answer is served" (CPLR 511[a]) and, in the event the plaintiff refuses to consent to the change, a motion must be made "within fifteen days after service of the demand" (CPLR 511[b]). It is undisputed that defendants filed their motion 23 days after the service of the demand, eight days after the 15-day prescribed period. (*Affirmation*, ¶13) New York State courts have found filing of even one day to be considered untimely (*see Callanan Indus. v Sovereign Constr. Co., Ltd.*, 44 AD2d 292, 295, 354 NYS2d 486 [3d Dept 1974]). Also, defendants provide no explanation for their delay in filing the instant motion. Based upon the untimeliness of the motion, defendants are not entitled to a change of venue as of right and the Court is limited to considering only the grounds for a discretionary change of venue (*see* CPLR 510[3]; *Kurfis v Shore Towers Condominium*, 48 AD3d 300, 852 NYS2d 76 [1st Dept 2008]; *Banks v New York State and Local Employees' Retirement Sys.*, 271 AD2d 252, 707 NYS2d 46 [1st Dept 2000]; *Pitmann v Maher*, 202 AD2d 172, 175, 608 NYS2d 199 [1st Dept 1994]).

Discretion of the Court

Where a defendant fails to comply with CPLR 511 and makes no showing of a basis for change of venue under CPLR 510 (2) (an improper trial cannot be had in the proper county) or CPLR 510 (3) (for the convenience of material witnesses and to promote the ends of justice), the application is committed to the court's discretion (*Pitmann v Maher*, 202 AD2d 172, 175, 608 NYS2d 199 [1st Dept 1994] *citing*, *Callanan Indus. v Sovereign Constr. Co., Ltd.*, 44AD2d 292,

295, 354 NYS 2d 486 [3d Dept 1974]). However, the discretion bestowed is appropriately exercised only in certain limited situations (*see Callanan* [granting an untimely motion to change venue pursuant to CPLR 501 where a contract provision set forth venue]; *Reichenbach v Corn Exchange Bank Trust Co.*, 249 AD 539, 292 NYS 732 [1st Dept 1937] [granting a late motion to change venue because judicial policy dictated that a foreclosure case be heard only in the county where the real property was situated]).

Since CPLR 507 mandates that an action affecting real property “shall” be held in the county the property is located, and because defendant’s late filing has not been shown to prejudice plaintiffs in any way, defendant’s motion to change venue is granted (*see Reichenbach; Diamond v Papreka*, 7 Misc 3d 1006, 801 NYS2d 232 [Sup Ct Kings County 2005] [noting that “where venue in one county is proper pursuant to CPLR 507 and proper in a different county because of another venue provision, the court should, as a rule, select as the place of trial the county where the real property is situated”]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to change venue of this action is granted; and it is further


ORDERED that the venue of this action is changed from this Court to the Supreme Court, Kings County, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, Kings County upon service of a copy of this order with

notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all the Clerk of this Court and all parties.

This constitutes the decision and order of the Court.

Dated: September 30, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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