

**Matter of Bowne Mgt. Sys., Inc. v New York City  
Dept. of Transp.**

2009 NY Slip Op 32433(U)

October 2, 2009

Supreme Court, Nassau County

Docket Number: 011897-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**In the Matter of**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**BOWNE MANAGEMENT SYSTEMS, INC.,**

**Index No: 011897-09  
Motion Seq. Nos: 1, 2 and 3  
Submission Date: 9/25/09**

**Petitioner,**

**-against-**

**NEW YORK CITY DEPARTMENT OF  
TRANSPORTATION; VINCENT PULLO,  
AGENCY CHIEF CONTRACTING OFFICER  
OF NEW YORK CITY DEPARTMENT OF  
TRANSPORTATION; JANETTE SADIK-KHAN,  
COMMISSIONER OF NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION,**

**Respondents.**

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**The following papers having been read on Motion Sequence # 3:**

- Notice of Cross Motion, Moving Affirmation and Exhibits.....x**
- Respondents' Memorandum of Law in Support.....x**
- Affirmation in Response and Exhibits.....x**
- Petitioner's Memorandum of Law in Opposition.....x**

This matter is before the Court for decision on motion sequence numbers 1, 2 and 3. Motion Sequence number 3 is the cross motion filed by Respondents (hereinafter "the City") to change the venue of this proceeding from Nassau County to New York County. The Court conducted oral argument as to all the submitted motions on September 25, 2009. **For the reasons set forth below, the Court grants that application (Motion Sequence # 3) and**

**directs that the venue of this proceeding is transferred from Nassau County to New York County. In light of this Order, the Court refers Motion Sequence numbers 1 and 2 to the New York County judge who is assigned to this matter after the transfer, and directs the Clerk of Nassau County to transfer the entire file, including all motion papers regarding all motions that have been filed in Nassau County, to the Clerk of New York County forthwith.**

**A. Relief Sought**

The City moves for an Order 1) pursuant to CPLR §§ 510(1), 510(3) and 511(a), changing the venue of the above-captioned proceeding from Nassau County to New York County on the grounds that Nassau County is not a proper county under either CPLR § 506(b) or § 504(3), and the ends of justice will be promoted by the change; 2) pursuant to CPLR § 511(c) staying this proceeding pending a change of venue; or 3) pursuant to CPLR § 2004, extending Respondents' time to respond to the petition.

Petitioner Bowne Management Systems, Inc. ("Bowne" or "Petitioner") opposes Respondents' application.

**B. The Parties' History**

This matter concerns the termination for cause of an information technology services contract ("Contract") between the City, through its Department of Transportation ("DOT"), and Bowne. The Contract required Bowne to design and implement a Sign Information Management System for traffic control devices in New York City, and to train DOT employees in New York County to use the system. DOT terminated the Contract based on its position that Bowne failed to perform the required work and was unable to meet the requirements of the Contract. DOT advised Bowne by letter dated June 11, 2009 of its decision to cancel the Contract and listed the reasons for the cancellation which included 1) unacceptable and incomplete deliverables, and 2) unsatisfactory/incomplete project plan and project schedule.

Bowne filed a Verified Petition ("Petition") dated June 18, 2009 in the Supreme Court of Nassau County, pursuant to Article 78 of the CPLR, in which it challenged DOT's termination of the Contract. The Petition contains six (6) causes of action against the DOT. The first seeks injunctive relief. Causes of action 2-6 are based on breach of contract, DOT's allegedly arbitrary and capricious determination, *quantum meruit*, account stated and a request for legal fees and

costs. The Petition also contains a request for a Declaratory Judgment, *inter alia*, directing DOT to remove Bowne's termination from its records. The City now moves to transfer venue of this matter from Nassau County to New York County.

### C. The Parties' Positions

The City submits that Petitioner's choice of venue in Nassau County is improper under either 1) the CPLR § 506(b) criteria applicable to Petitioner's Article 78 claim, or 2) the CPLR § 504(3) criteria applicable to Petitioner's plenary action claims. The City argues, further, that transferring venue to New York County will promote the convenience of material witnesses and the ends of justice.

Bowne opposes the City's application, arguing that Nassau County is the appropriate forum, *inter alia*, because 1) the overwhelming majority of the work related to the Contract was performed in Nassau County; 2) the critical witnesses to the facts underlying the action reside in Nassau County; 3) Bowne has a principal place of business in Nassau County and established a secondary office in Nassau County devoted to the project in question; and 4) a senior partner of Bowne, who is an essential fact witness, resides in Nassau County and has a medical condition that makes travel to New York County more burdensome.

## RULING OF THE COURT

### A. Relevant Statutes

CPLR §§ 510(1) - (3) provide that the Court, upon motion, may change the place of trial of an action where:

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.

CPLR § 7804(b) provides that a proceeding brought under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

CPLR § 506(b) provides, in pertinent part, that a 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 refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

B. This Case Belongs in New York County

The Court is persuaded that New York County is the appropriate venue for this matter. Among the cases supporting the Court's view is *Vigilante v. Dennison*, 36 A.D.3d 620 (2d Dept. 2007). There, the petitioner, an inmate, filed an Article 78 proceeding to challenge a decision of the New York State Division of Parole which affirmed the New York State Board of Parole's determination to deny petitioner's application to be released on parole. Petitioner was incarcerated in a facility in Sullivan County, and was challenging the parole agency's determination which the Parole Board made in Sullivan County and which the Executive Department of the Division of Parole affirmed in Albany County. *Id.* at 621. The petitioner brought the proceeding in Kings County, where he committed one of the crimes that led to his incarceration, and where he was sentenced based on his conviction for that crime and for convictions for unrelated crimes. *Id.*

After the petitioner in *Vigilante* refused to consent to a change of venue to either Albany or Sullivan County, the Parole Board cross moved to change the venue of the proceeding. 36 A.D.3d at 621. The Court reversed the trial court's denial of the cross motion for a change of venue, rejecting petitioner's contention that Kings County was a proper venue because petitioner's Kings County crime and sentence were "material events," pursuant to CPLR § 506(b), leading to the parole determination. *Id.* at 622. In reversing the trial court, which accepted the petitioner's argument, the Court held "[t]o the contrary, the relevant material event was the decision-making process leading to the determination under review." *Id.*

*Vigilante* echoes the principles enunciated in *Franklin Nat. Bank v. Superintendent of Banks*, 40 Misc. 2d 315 (Sup Ct. Nassau Cty. 1963). There, the petitioner brought an action in Nassau County that challenged the Superintendent of Banks' decision to allow a rival bank to open a branch in Nassau. The court granted the respondent's motion to transfer venue to New York County, and wrote as follows:

It may well be that conditions existing in Nassau County might be utilized by

either of the parties hereto as evidentiary material which would or could be produced before the court in this proceeding, but I do not consider that the mere location of such material or applicability of such evidence coming out of Nassau County would be sufficient to establish Nassau County as the proper jurisdiction for the venue of this proceeding. To go a step further, even if this were so, the statute clearly gives this court the right to exercise its discretion, after considering all of the facets involved in this type of a proceeding, to transfer the venue to the county where the principal office of the respondents is located.

*Id.* at 319.

Here, the essence of Petitioner’s claims is that DOT acted improperly in terminating the Contract. Applying the reasoning of *Vigilante* and *Franklin National*, the Court concludes that the relevant material event, pursuant to CPLR § 506(b), was DOT’s decision, in New York County, to terminate the Contract. Accordingly, the Court determines that the appropriate county for this Article 78 proceeding is New York County, as that is the County in which the agency that issued the challenged decision is located.

In light of the foregoing, it is hereby

**ORDERED**, that Respondents’ Cross Motion to transfer venue of this matter to New York County (Motion Sequence # 3) is hereby granted and this matter is transferred in its entirety to New York County; and it is further

**ORDERED**, that Motion Sequence numbers 1 and 2 are referred to the New York County judge who is assigned to this matter after the transfer; and it is further

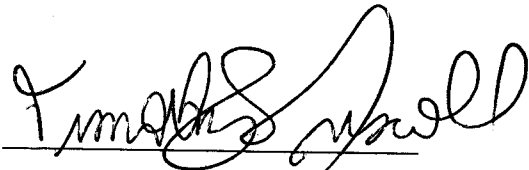
**ORDERED**, that this proceeding is stayed pending further court order; and it is further

**ORDERED**, that the Clerk of Nassau County is directed to transfer forthwith the entire file, including all motion papers regarding all motions that have been filed in Nassau County, to the Clerk of New York County forthwith.

All matters not decided herein are hereby denied.  
This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
October 2, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
OCT 08 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE