

Durst v S.B.E. Co. Inc.

2009 NY Slip Op 32469(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 110991/08

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 2

Index Number : 110991/2008
DURST, DOUGLAS
vs.
S.B.E. COMPANY
SEQUENCE NUMBER : 002
DISMISS

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 *to change venue to Westchester Co. granted pursuant to attached Deen*

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/15/09

MARILYN SHAFER
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: PART 8

-----X
DOUGLAS DURST and SUSANNE DURST,

Plaintiffs,

-against-

Index № 110991/08

S.B.E. COMPANY INCORPORATED, CASCADE
CONSTRUCTION, INC., DRI-TEC WATERPROOFING
SOLUTIONS, LLC a/k/a DRI-TEC WATERPROOFING
a/k/a DRI-TECH WATERPROOFING, THE DISALVO
ERICSON GROUP STRUCTURAL ENGINEERS, INC.,
and BREWSTER TRANSIT MIX CORP.,

Defendants.

-----X
MARILYN SHAFER, J.:

This is a motion by defendant Dri-Tec Waterproofing Solutions, LLC a/k/a Dri-Tec Waterproofing, a/k/a Dri-Tech Waterproofing (Dri-Tech) for an order dismissing the complaint pursuant to CPLR 3211 and/or CPLR 3212, or in the alternative, for an order changing venue of the entire action to Westchester County. Plaintiffs Douglas Durst and Susanne Durst oppose the motion and cross-move to amend their complaint.

Plaintiffs commenced this action, sounding in breach of construction contract and negligence, by filing of a summons and complaint with the County Clerk, New York County, on or about August 12, 2008. The action arises out of the construction of a concrete terrace (the project) at the rear of a newly built house owned by plaintiffs and located in northern Westchester County at 182 North Salem Road, Katonah, New York. The complaint consists of five causes of action and charges S.B.E. Company Incorporated (SBE) and The DiSalvo Ericson Group Structural Engineers, Inc. (DiSalvo) with breach of contract (first and third cause of action, respectively); SBE with breach of implied warranty of fitness (second cause of action); all

defendants with negligence (fourth causes of action); and attorneys' fees is sought from SBE (fifth cause of action). Issue was joined by service of SBE's answer on or about September 22, 2008. However, along with the answer, counsel for SBE included a letter demanding a CPLR 511 change of venue by consent, to Westchester County, as Westchester County is the undisputed location of plaintiffs' house and terrace project (SBE Aff., Exhibit B). By letter dated September 25, 2008, counsel for plaintiff objected to the change of venue and annexed the sworn affidavit of Douglas Durst stating, in relevant part:

1. I am a plaintiff in this action. I make this affidavit in response to the demand of [SBE] to change the place of venue from New York County to Westchester County.
2. New York County . . . is the proper County because, at the time this action was commenced on or about August 12, 2008, I was a resident of New York County.

On or about December 29, 2008, Dri-Tec served its answer containing general denials, defenses including lack of jurisdiction and improper venue, and a cross claim against other named defendants. On or about December 29, 2008, Dri-Tec served a formal demand for change of venue and various demands for a bill of particulars and other forms of discovery.

On or about January 21, 2008, DiSalvo moved, under motion sequence 001, for a summary judgment dismissal of the claims against it based on, among other things, the statute of limitations. Plaintiffs opposed the motion and cross-moved to amend their complaint. By decision and order, dated June 17, 2009, this court denied both motions with leave to renew upon completion of discovery.

As part of its motion (under motion sequence 002), Dri-Tec re-states its prior demand for a change of venue to Westchester County. SBE submits an affirmation supporting this aspect of Dri-Tec's motion. Plaintiffs oppose all aspects of Dri-Tec's motion and seek to add a third-party

beneficiary claim against Dri-Tec.

Based on the following, the motion to change venue is granted.

As set forth above, both SBE and Dri-Tec's requests for a change of venue by consent were denied by plaintiffs. Douglas Durst's affidavit averring to a New York County residency at the time the action was commenced, tracks the language of CPLR 503 (a), which provides that:

the place of trial shall be in the county in which one of the parties resided when it was commenced. . . . A party resident in more than one county shall be deemed a resident of each such county.

Therefore, while plaintiffs acknowledge that Westchester is not necessarily an improper venue for this action, they continue to argue that, based on Douglas Durst's statement of residency, they are entitled to designate venue in New York County.

Dri-Tec supports its motion with evidence that both Douglas and Susanne Durst were residents of Westchester County at the time the action was commenced. They submit on-line DMV records which list "182 North Salem Road, Katonah, New York 10536" as the address for Douglas and Susanne Durst's respective driver's licenses, and the same address for the vehicle registrations in each of their names (three registrations under the name of Douglas Durst and four under the name of Susanne Durst). The motion papers also contain on-line public information regarding each plaintiff's political contributions, noteworthy for the fact that each contribution lists Katonah, New York, as the Durst donor's place of residence. Finally, movant submits a transcript of a 2007 Douglas Durst interview in which he names Katonah as his place of residence.

Dri-Tec also argues that, with respect to the convenience of all witnesses who might be called to testify in this matter, including the plaintiffs, Westchester is the proper venue for this

action because all defendants and/or their project employees reside in or about Westchester County, Putnam County or Connecticut.

In opposition, plaintiffs submit only an attorney's affirmation and another sworn statement from Douglas Durst, in which he avers:

I have resided in a residential Manhattan building for years and intend on doing so for years to come. In fact, I have been paying New York City taxes because I am a resident of New York County. For privacy concerns, I do not want to disclose my Manhattan address in this affidavit. However, if necessary, I will present my address and proof thereof to the Court in camera.

Plaintiffs have not submitted even one piece of documentary evidence to support Douglas Durst's self-serving, conclusory claims that he was a resident of New York County at the time the action was commenced (*see Key-Kenuteh v Kenia*, 288 AD2d 16 [1st Dept 2001]). Where, as here, "the movant satisfies its burden of proof on improper selection of venue, [plaintiffs'] total lack of documentary evidence to substantiate a conclusory allegation of residence warrants changing venue" (*Rivera v Jensen*, 307 AD2d 229 [1st Dept 2003]). Moreover, even if the affidavit had been accompanied by competent evidence sufficient to demonstrate a bona fide residence in New York County with some degree of permanency (*id.* at 229 - 230; *Buziashvili v Ryan*, 264 AD3d 797, 798 [2nd Dept 1999]; *Martinez v Semicevic*, 178 AD2d 228 [1st Dept 1991]), or by evidence sufficient to require a hearing as to his residency (*Cerniglia v Combes*, 157 AD2d 499 [1990]), his reliance on CPLR 503 (a) to place venue in New York County is misplaced and improper.

Section 503 (a) provides for venue based on plaintiffs' residence "[e]xcept where otherwise prescribed by law," and CPLR 507 clearly provides otherwise. Regarding actions involving real property, CPLR 507 states that "[t]he 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."

This lawsuit involves allegations of inadequate "construction of a terrace at the first floor, west side of the New House" located at 182 North Salem Road, Katonah, New York (see Complaint, ¶¶ 6 - 8). Accordingly, it was improper for venue to have been placed in New York County, not only because of the inadequacy of plaintiff's evidence, but because the real property at the center of the dispute was and is situated in Westchester County.

Accordingly, it is

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Westchester, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester 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 the balance of the motion and cross motion are denied without prejudice to renew in Supreme Court, Westchester County.

Dated:

10/13/09

ENTER:

MARILYN SHAFER
J.S.C.

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK