

Brusca v Elmont Estates Inc.

2010 NY Slip Op 30823(U)

April 8, 2010

Supreme Court, NY County

Docket Number: 109921/09

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

SALVATORE BRUSCA and EMANUELA BRUSCA,

Plaintiffs,

-against-

INDEX NO. 109921/09

MOTION SEQ. NO. 001

ELMONT ESTATES INC., 601 OLD COUNTRY ROAD CORPORATION d/b/a JOHN'S FARMS, JOHN'S FARMS MEAT CORP., CAPTAIN JOE'S FISH CORP. and BUSINESS NETWORK CONNECTIONS COMPANY,

Defendants.

FILED

APR 12 2010

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 - 8 were considered on this motion to ~~change venue~~ change venue

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>7, 8</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>5, 6</u>

Upon the foregoing papers, it is ordered that this motion and cross motion are decided to the extent set forth below.

Defendants 601 Old Country Road Corporation d/b/a John's Farms, John's Farms Meat Corp., Captain Joe's Fish Corp. and Business Network Connections Company (collectively, "Moving Defendants") move to change the venue of this action from New York County to Nassau County, pursuant to CPLR 503. Defendant Elmont Estates Inc. cross-moves for the same relief.

Plaintiffs commenced this action on or about July 13, 2009 for personal injuries which allegedly occurred following a slip and fall accident on December 26, 2006, at John's Farms located at 601 Old Country Road, Plainview, New York. Plaintiffs designated New York County as the place of trial based on the fact that at least one of Moving Defendants allegedly resides in New York County, given that its

principal place of business is in New York County. Defendants served a written demand on plaintiffs, as set forth in CPLR 511, to change venue, stating that the venue listed in the complaint is improper. Plaintiffs did not consent to change venue and defendants subsequently made the within motion and cross motion to change the venue of this action to Nassau County.

CPLR 510 provides that a court has discretion to change venue when: (1) the county designated is not proper; (2) an impartial trial is unlikely in the designated county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change. Venue is proper in any county where one of the parties resided when the action was commenced, and for a corporation, residency is defined as the place where the corporation's principal office is located. CPLR § 503(a), (c).

In seeking to change the venue of this action to Nassau County, Moving Defendants maintain that none of the defendants has a principal place of business or corporate office in New York County. Moving Defendants submit an affidavit by Gregg Catalano, who is the President of Business Network Connections Company (which he asserts does business as John's Farms Meat Corp.) and 601 Old Country Road Corporation d/b/a John's Farms, who states that such corporations do not, nor have they ever, maintained a principal place of business in New York County. *See* Gregg Catalano Aff at ¶¶ 3, 6 (attached to Caroline Papadatos Affirmation, Exh D). Also attached is an affidavit from Joseph Catalano, the President of Captain Joe's Fish Corporation, wherein he states that the corporation's principal place of business is in Nassau County and has never been in New York County. *See* Joseph Catalano Aff at ¶¶ 2-3 (attached to Caroline Papadatos Affirmation, Exh E). Moving Defendants also submit a print-out from the New York State Department of State, with regard to co-defendant Elmont Estates Inc., to show that its principal place of business is also in Nassau County. *See* Caroline Papadatos Affirmation, Exh F.

Elmont Estates Inc. cross-moves for similar relief, seeking that the action be transferred to

Nassau County because none of the parties reside in New York County. Elmont Estates Inc. argues that “[t]he designation of County of New York as a place for Trial is improper, serves no purpose, and would result in inconvenience to the witnesses herein.” Jodi M. Nyear Affirmation ¶ 8.

Plaintiffs oppose the motion on the ground that defendant Business Network Connections Company’s certificate of incorporation filed with the New York State Secretary of State designated New York County as the county in which its principal place of business would be located.

The location of a foreign corporation’s principal place of business is determined by the designation of the county in its application for authority to do business. *See Marko v Culinary Inst. of Amer.*, 245 AD2d 212, 212 (1st Dep’t 1997); *see also Nadle v L.O. Realty Corp.*, 286 AD2d 130, 132 (1st Dep’t 2001). Although a corporation’s actual place of business may be located in another county, a corporation is bound by its designation in papers filed with the Secretary of State as long as such designation remains unchanged. *See Marko*, 245 AD2d at 212.

Here, defendants fail to demonstrate that plaintiffs erred in commencing this action in New York County. Defendants have not shown that Business Network Connections Company’s certificate of incorporation or its initial application for authority to do business designate a county other than New York County as the place where its principal office would be located. In fact, the Court notes that none of the parties has submitted Business Network Connections Company’s application for authority. As Moving Defendants are seeking the relief of changing venue, their submissions should have included such document, as it is controlling in terms of determining where venue is proper.

Although Moving Defendants submit affidavits by the presidents of the corporations that indicate they never had principal places of business in New York County (*see Papadatos Affirmation*, Exhs D and E), such denials are insufficient to warrant a change in venue, in light of the conflicting evidence that shows Business Network Connections Company designated New York County in its filing with the

Secretary of State (*see* Stefano A. Filippazzo Affirmation in Opp, Exh 1) and there is no evidence that such designation was ever amended by statutory method, as provided in Business Corporation Law § 1309. Moreover, although the print-out from the New York State Department of State lists 601 Old Country Road, Plainview, New York, in Nassau County, as the address for the chief executive officer, Gregg Catalano, and the principal executive office, as well as the mailing address for service of process by the Department of State, such print-out nonetheless lists New York as the county for the entity, in the general information section. *See id.*

Based on the above, Moving Defendants’ motion to change venue is denied and the cross motion by Elmont Estates Inc. for the same relief is likewise denied. Further, in its cross motion and Demand to Change Venue, Elmont Estates Inc. also references the convenience of witnesses in its argument for a change of venue. *See* Jodi M. Nyear Affirmation ¶ 8, Exh B at 9. However, a party moving to change venue based on the convenience of witnesses must provide an affidavit indicating: (1) the names, addresses and occupations of the witnesses; (2) the facts to which the witnesses would testify; (3) the witnesses’ willingness to testify; and (4) how the witnesses would be inconvenienced. *See Job v Subaru Leasing Corp.*, 30 AD3d 159, 159 (1st Dep’t 2006); *O’Brien v. Vassar Bros. Hosp.*, 207 AD2d 169, 172–73 (2d Dep’t 1995). Defendant Elmont Estates Inc. has not provided the required affidavit, as the affirmation submitted by its attorney simply states, without any factual support, that “[t]he designation of County of New York as a place for Trial . . . would result in inconvenience to the witnesses herein.” Nyear Affirmation ¶ 8.

Accordingly, it is

ORDERED that the motion and cross motion to change venue are denied; and it is further

ORDERED that **counsel shall appear for a preliminary conference on May 7, 2010 at 9:30 AM in Room 428, 60 Centre Street, New York, New York, at which time an expedited discovery**

schedule will be set; and it is further

ORDERED that within 20 days, counsel shall exchange documentary demands (responses, if already served); and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy of this order, with notice of entry, on all defendants.

Dated: 4/8/10


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

JAVENUE CHANGEABrusca, change venue of foreign corp - denied.wpd

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