

Casavecchia v Mizrahi

2010 NY Slip Op 32234(U)

August 11, 2010

Supreme Court, Nassau County

Docket Number: 011406-08

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
JOSEPH CASAVECCHIA, SR.,

Plaintiff,

-against-

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 011406-08
Motion Seq. No: 2
Submission Date: 6/18/10**

**WILLIAM W. MIZRAHI, BLOOMINGDALE
GREENS, INC., and CHARLESTON SQUARE, INC.,**

Defendants.

-----x

The following papers having been read on this motion:

- Notice of Cross Motion, Affirmation in Support and Exhibits.....x**
- Affidavits in Opposition (2) and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendants William W. Mizrahi ("Mizrahi"), Bloomingdale Greens, Inc. ("Bloomingdale Greens") and Charleston Square, Inc. ("Charleston Square") (collectively "Defendants") on May 19, 2010 and submitted on June 18, 2010. For the reasons set forth below, the Court denies Defendants' motion in its entirety.

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 510(1) and 510(3), and Business Corporation Law ("BCL") § 1112, 1) dismissing this action; or, alternatively, 2) transferring this matter to the Supreme Court of Richmond County, New York. Plaintiff Joseph Casavecchia, Sr. ("Plaintiff") opposes Defendants' motion.

B. The Parties' History

In her Affirmation in Support, counsel for Defendants affirms as follows:

Plaintiff filed this action, via Order to Show Cause, seeking to preliminarily enjoin Defendants from using any funds or assets of Defendants Bloomingdale Greens and Charleston Square ("Businesses"). Bloomingdale Greens is a New York Domestic Business Corporation formed on April 17, 1987 with its principal place of business at 9 Borman Avenue, Staten Island (Richmond County), New York. Charleston Square is a New York Domestic Business Corporation formed on April 30, 1985 whose principal place of business is also located in Richmond County. In support, Defendants provide a copy of documentation from the New York State Department of State, Division of Corporations website (Exs. A and B to Aff. in Supp.). That documentation also reflects that 1) Mizrahi is the Chairman or Chief Executive Officer of Bloomingdale Greens; and 2) Plaintiff is the Chairman or Chief Executive Officer of Charleston Square. Mizrahi and Plaintiff are the only owners of the Businesses.

The Certificates of Incorporation of the Businesses (Exs. A and B to Aff. in Supp.) reflect that 1) the principal office of Bloomingdale Greens is located in Richmond County, New York; and 2) the office of Charleston Square is located in Richmond County, New York. The Charleston Square Certificate of Incorporation states that the purpose of Charleston Square is to carry on and conduct a general construction business. Defendants' counsel affirms that Charleston Square involves a tract of land located in Charleston, Staten Island, New York which, depending on the type of unit constructed, would result in approximately fourteen (14) buildable units. All transactions concerning the Businesses occurred in Richmond County, and potential witnesses reside in Richmond County. The real property owned by Charleston Square is located in Richmond County.

In his Affidavit in Opposition, counsel for Plaintiff affirms as follows:

Plaintiff commenced this action in June of 2008 and filed the Verified Complaint ("Complaint") (Ex. A to Miller Aff. in Opp.) on or about June 20, 2008. The Complaint asserts four (4) causes of action. The first challenges the validity of a loan made from Charleston Square to Bloomingdale Greens. The second alleges that Mizrahi breached his fiduciary duty to Plaintiff by, *inter alia*, refusing to distribute certain Bloomingdale Greens profits to its shareholders. The third seeks declaratory relief regarding a dispute between Mizrahi and

Plaintiff concerning Bloomingdale Greens' assets. The fourth seeks to hold Mizrahi liable for wasting Bloomingdale Greens' assets by making unauthorized loans.

As a result of disagreements in their business relationship, several lawsuits ("Lawsuits") were filed regarding the Businesses. The first Lawsuit was *Casavecchia v. Mizrahi et al.*, Nassau County Supreme Court Index Number 006679-05, and involved an entity called Casa Mason Corp. ("CMC"). The initial complaint in the CMC matter alleged that Mizrahi obtained majority control of CMC and tried to remove Plaintiff from his responsibilities in CMC. The complaint in the CMC matter was recently amended to add claims alleging other breaches of agreements and breaches of fiduciary duty by Mizrahi. On May 25, 2010, the Honorable Ira B. Warshawsky granted a temporary restraining order (Ex. B to Miller Aff.) that, pending the hearing and determination of the motion at issue, directed that 1) defendants shall not cause nor allow CMC to make any repayment of loans or interest on loans purportedly due to Mizrahi or a Mizrahi entity, nor enter into a new loan from Mizrahi or a Mizrahi Entity, nor incur any debt obligation or make any expenditure without advance notice to Plaintiff and without Plaintiff's written consent; 2) defendants shall not cause or allow the 2009 federal and/or state tax returns of CMC to be finalized or filed; and 3) defendants were to immediately provide to Plaintiff all CMC ledgers, financial statements and loan documents for the years 2008-2010.¹

The second Lawsuit was *Casavecchia v. Mizrahi*, Nassau County Supreme Court Index Number 8635/05, which involved an entity called Hills of Heartland LLC ("Hills"). The allegations in the second Lawsuit were that 1) in February of 2005, Mizrahi wrongfully diverted a payment in the sum of \$100,000, due to Plaintiff, to CMC without Plaintiff's consent; and 2) Mizrahi failed to distribute Hills' profits to Plaintiff and other Hill members. After conducting hearings on the matter, Judge Warshawsky entered two (2) judgments, dated October 5 and November 13, 2007 (Exs. F and G to Miller Aff.), in favor of Plaintiff. Judge Warshawsky subsequently issued Orders dated September 11 and October 2, 2007 (Exs. H and I to Miller Aff.) holding that Mizrahi was in contempt for transferring certain funds in violation of court orders, ordering Mizrahi to pay Plaintiff certain monies and directing that Mizrahi was to be incarcerated if he failed to make the required payment. Defendants' appeals of the judgments

¹ As outlined in a footnote in the Miller Affidavit in Support, the First Lawsuit has been restored to the active calendar and the complaint has been amended.

and Orders issued by Judge Warshawsky were denied (*See* Exs. J, K, L, and M to Miller Aff.)

The third Lawsuit filed was *Casavecchia v. Mizrahi*, Nassau County Supreme Court Index Number 18485/05, which involved an entity called GMC Construction Corp. (“GMC”). In this Lawsuit, Plaintiff alleged that Mizrahi refused to distribute GMC’s profits to Mizrahi. This Lawsuit was settled.

Plaintiff’s counsel submits that these Lawsuits establish that 1) Mizrahi has repeatedly and improperly transferred monies between entities, to fund certain real estate projects to which Plaintiff does not consent; and 2) Mizrahi has attempted to use his control over the finances of these entities to pressure Plaintiff into consenting to these transferrals. Plaintiff’s counsel also contends that the parties in the matter at bar disagree as to whether there exists an arrangement between Plaintiff and Mizrahi that permits these transferrals; Plaintiff denies that such an arrangement exists.

In his Affidavit in Opposition, Plaintiff reaffirms the truth of the affirmations of his counsel regarding Mizrahi’s allegedly improper conduct, and the absence of any cross-financing arrangement between Mizrahi and Plaintiff that authorized the disputed transfers. Plaintiff also affirms that he has been a resident of Nassau County since 1960 and that his son, who is also a potential trial witness, resides in Nassau County. Plaintiff also avers that he is unaware of any potential trial witness who resides in Richmond County, or would be unable to travel to Nassau County to testify.

C. The Parties’ Positions

Defendants submit that Plaintiff is attempting to dissolve the Businesses without filing the appropriate petitions for dissolution. Thus, in light of the venue provisions of BCL § 1112, Plaintiff has filed this action in an improper venue because the proper venue is Richmond County, where the Businesses’ offices are located. Defendants also contend that, pursuant to CPLR §§ 510(1) and (3), venue is proper in Richmond County because 1) the relevant transactions occurred in Richmond County; 2) the Businesses’ real property and assets are located in Richmond County; and 3) venue in Richmond County would benefit material witnesses and serve the interests of justice.

Plaintiff disputes Defendants’ claim that this matter is, in effect, a dissolution proceeding. Thus, the Court should apply CPLR § 503(a), not BCL § 1112, in determining the appropriate

venue of this matter.

Plaintiff contends, further, that Defendants have failed to provide specific information in support of their application to transfer venue, and notes that Casavecchia lives in Nassau County and Mizrahi has been litigating the Lawsuits in Nassau County for several years, undermining Defendants' claim that the convenience of the parties warrants a change of venue. Moreover, Mizrahi has actively participated in the Lawsuits without objecting to venue in Nassau County. Plaintiff also maintains that Defendants' application is untimely.

RULING OF THE COURT

A. Relevant Statutes

CPLR § 503(a) provides as follows:

Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

Business Corporation Law § 1112 provides as follows:

An action or special proceeding under this article [for dissolution] shall be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding.

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.

B. Venue is Proper in Nassau County

Preliminarily, the Court rejects Defendants' argument that this action is, in effect, an application for dissolution of the Businesses. The Complaint does not seek that relief, and the

Orders issued in the related Lawsuits do not discuss dissolution. Moreover, even assuming, *arguendo*, that the Court were to conclude that the relief that Plaintiff seeks includes dissolution, the Court is guided by the reasoning in *Tashenberg v. Breslin*, 89 A.D.2d 812 (4th Dept. 1982) in which the Appellate Division affirmed the trial court's denial of respondent's motion for a change of venue. In affirming the trial court's decision, the Appellate Division held:

If this were simply a special proceeding for a judicial dissolution, venue would lie in the judicial district in which the office of the corporation is located, that location being the one designated in the certificate of incorporation [citations omitted]. Here, however, inasmuch as the petitioner essentially seeks various other types of relief on his own behalf as a stockholder, director and officer, his county of residence is proper for purposes of venue [citing, *inter alia*, CPLR § 503(a)]. Accordingly, since this matter involves a joinder of claims with conflicting venue provisions, [the trial court] exercised its discretion and designated petitioner's county of residence as the place of trial (CPLR [§] 502).

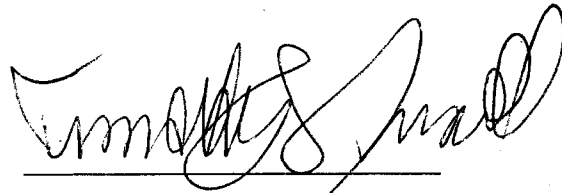
The Court concludes that it is not bound by the venue provisions of BCL § 1112 because Plaintiff is not seeking dissolution of the Businesses. Even if the Court were to construe the Complaint as seeking that relief, the Complaint clearly seeks other non-dissolution relief, and the Court may properly apply the venue provisions of the CPLR rather than the BCL.

In light of the facts that 1) Plaintiff resides in Nassau County; 2) Plaintiff's son, a potential witness, resides in Nassau County; 3) Defendants have been litigating the Lawsuits in Nassau County without objection; and 4) Defendants have failed to provide specific facts in support of their claim that factors, including the convenience of witnesses, support venue in Richmond County, the Court concludes that venue in Nassau County is appropriate, and that dismissal of this action is not warranted. Accordingly, the Court denies Defendants' motion in its entirety.

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

ENTER

DATED: Mineola, NY
August 11, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE