

Powers v Cannon Corp.
2010 NY Slip Op 33882(U)
October 21, 2010
Supreme Court, New York County
Docket Number: 106420/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Justice

Index Number : 106420/2009

POWERS, MEREDITH

VS.

CANNON CORPORATION

SEQUENCE NUMBER : 003

CONSOLIDATION/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2

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

FILED

OCT. 25 2010

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 10/21/10

HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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 15

-----X
MEREDITH POWERS,

Index No.
106420/09

Plaintiff,

Action #1

- against -

THE CANNON CORPORATION and CANNON DESIGN,
INC.,

**DECISION
and ORDER**

Defendants.

Mot. Seq.
002&003

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

-----X
MEREDITH POWERS,

Index No.
1985/10

Plaintiff,

Action #2

- against -

SARKISIAN BROTHERS, INC., ABDO TILE COMPANY
and CARPETS WHOLESALE, INC.,

FILED

OCT. 25 2010

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER

Plaintiff moves to consolidate the two above actions, and for a transfer of the consolidated action to Sullivan County, the county in which she resides, and where, according to her affidavit, several witnesses to her accident reside. The motion to consolidate is unopposed by any of the parties of either action. However, defendants Cannon Corporation and Cannon Design, Inc. ("Cannon defendants"), as well as defendant Sarkisian Brothers, Inc. ("Sarkisian") oppose the motion for a transfer of venue to Sullivan County. Sarkisian argues that venue should be transferred to

Oswego County, where Plaintiff's trip and fall accident occurred, as "it is anticipated numerous witnesses from Oswego County and the surrounding counties will ultimately testify in this matter." The Cannon defendants state that Erie County (where the Cannon defendants maintain their principal office) is the proper venue for this action since Plaintiff has forfeited her right to designate the venue due to her improperly commencing this action in New York County. Nevertheless, the Cannon defendants state that, "in the interest of fairness to all parties and, in an attempt to accommodate potential witnesses, Cannon would agree to a change of venue to Supreme Court, Oswego County, the site of the accident." The Cannon defendants cite Oswego as a proper venue due to the fact that potential non-party witnesses such as personnel of the university where Plaintiff was injured and emergency responders are likely situated in or near Oswego County.

The Court finds that consolidation is warranted, as the two actions clearly contain common questions of law and fact (*see* CPLR §602(a)). As for Plaintiff's motion to change the venue of the consolidated action to Sullivan County, the Court finds that Erie County is the proper venue for the instant action. First, since Plaintiff selected an improper venue in the first instance, she has forfeited the right to select the place of venue (*see Roman v. Brereton*, 182 A.D.2d 556 [1st Dept. 1992])¹. Moreover, while the Cannon defendants and Sarkisian agree that Oswego County would likely be convenient for potential witnesses, a motion pursuant to CPLR §510(3) must contain an affidavit specifying, *inter alia*, the names and addresses of the proposed witnesses, and the essence of their expected testimony (*see DiPalma v. Long Island R.R.Co.*, 189 A.D.2d 593 [1st Dept. 1993]). Since no such showing has been made, Erie County is the proper venue for this action (*see* CPLR §503(c)).

Wherefore it is hereby

ORDERED that Plaintiff's motion is granted to the extent that above-captioned action is consolidated in this Court with *Meredith Powers v. Sarkisian Brothers, Inc.*, *Abdo Tile Company and Carpets Wholesale, Inc.*, Index No.1985/10, under Index No. 106420/09, and the consolidated action shall bear the following caption:

¹The record indicates that Cannon defendants timely demanded, and subsequently moved for an order changing venue pursuant to CPLR §511. This application was denied without prejudice to renew by the Hon. Walter B. Tolub in light of the fact that Plaintiff had anticipated bringing additional parties into the action.

MEREDITH POWERS,

Plaintiff,

-against-

THE CANNON CORPORATION, CANNON
DESIGN, INC., SARKISIAN BROTHERS, INC.,
ABDO TILE COMPANY and CARPETS
WHOLESALE, INC.,

Defendants,

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the Court's records to reflect the consolidation; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Erie, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, 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 Erie.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 21, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 25 2010
NEW YORK
COUNTY CLERK'S OFFICE