Soil Solutions, Inc. v Preferred Bldrs., Inc.
2011 NY Slip Op 30719(U)
March 28, 2011
Sup Ct, Albany County
Docket Number: 1206-11
Judge: Joseph C. Teresi
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[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SOIL SOLUTIONS, INC.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1206-11
RJI NO. 01-11-102967

PREFERRED BUILDERS, INC., COLONIAL SURETY COMPANY, THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, PERI FORMWORK SYSTEMS, INC., IVERAGH CONSTRUCTION CORP., CLEAN EARTH OF NEW CASTLE, HOFFMAN INTERNATIONAL, INC., JEG INC., KAMCO SUPPLY CORP., T MINA SUPPLY INC., NEW YORK STATE DEPARTMENT OF LABOR, RECON CONSTRUCTION CORP., EAGLE 1 MECHANICAL, INC., D. MAGNAN & CO., INC. JOHN DOES 1-100,

Defendants.

Supreme Court Albany County All Purpose Term, March 18, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Joseph A. Fazio, Esq.
Attorney for Plaintiff
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Mineola, New York 11596

Couch White, LLP
Jennifer Harvey, Esq.
Attorneys for Defendant The Dormitory Authority of the State of New York
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PO Box 22222
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TERESI, J.:

Plaintiff commenced this action, in Nassau County, to recover the damages it allegedly sustained from Preferred Builders, Inc.'s breach of its subcontract, on a Dormitory Authority of the State of New York (hereinafter "Dormitory Authority") project.

The Dormitory Authority now moves, pursuant to CPLR §§510(1) and 511(b), to change the venue of this action from Nassau County to Albany County. Plaintiff opposes the motion. Because this Court has no jurisdiction to consider the Dormitory Authority's motion, it is denied.

CPLR §511(b) dictates a specific procedure for a motion to change venue when a Defendant claims Plaintiff's choice of venue was improper pursuant to CPLR §510(1). It states, in full, that: "[t]he defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper."

Here, the Dormitory Authority has chosen to "notice [its] motion to be heard as if the action were pending in the county [it] specified." As Plaintiff's objection to the Dormitory Authority's choice to notice its motion in Albany County directly implicates the Court's jurisdiction to hear this motion, this threshold issue is considered first. (United Jewish Appeal-Federation of Jewish Philanthropies of New York, Inc. v. Young Men's and Young Women's Hebrew Ass'n, Inc., 30 AD3d 504 [2d Dept. 2006]; Podolsky by Podolsky v. Nevele Winter Sports Inc., 233 AD2d 605 [3d Dept. 1996]; Vacant Lots, Inc. v. Town Bd. of Town of Liberty, 116 AD2d 865 [3d Dept. 1986]).

On this record it is uncontested that Plaintiff timely[1] served a CPLR §511(b) affidavit objecting to the Dormitory Authority's CPLR §511(b) demand to change venue. The Dormitory Authority further correctly recognized that Plaintiff's CPLR §511(b) affidavit alleged that: "Nassau County... is a proper venue pursuant to CPLR §503 as it is the residence of Plaintiff." As Plaintiff's CPLR §511(b) affidavit specifically alleged "that the county designated by [it] is proper" with a fact substantiating such allegation, i.e. venue pursuant to CPLR §503(a)'s residence provision, the Dormitory Authority had no authority to "notice [this] motion to be heard as if the action were pending in [Albany] county." Correspondingly, this Court has no jurisdiction over this motion.

Contrary to the Dormitory Authority's contention, the sufficiency of Plaintiff's CPLR §511(b) affidavit is irrelevant. "[S]uch affidavits must be examined not to evaluate the sufficiency of the factual averments therein, but to determine that the averments do indeed show[] either that the county specified by the defendant is not proper or that the county designated by [the Plaintiff] is proper." (HVT, Inc. v. Safeco Ins. Co. of America, 77 AD3d 255, 267 [2d Dept. 2010], quoting CPLR §511[b][emphasis added and internal quotation marks omitted]; see also Ludlow Valve Mfg. Co. v S. S. Silberblatt, Inc., 14 AD2d 291 [1st Dept. 1961]; Payne v Civil Serv. Empls. Assn., 15 AD2d 265 [3d Dept. 1961]). Because Plaintiff's CPLR §511(b) affidavit set forth a sufficient fact to establish that "that the county [it] designated... is proper" pursuant to CPLR §503, it was unnecessary for Plaintiff to set forth any additional facts

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[1] As the Dormitory Authority's CPLR §511(b) demand was served by mail, the five days Plaintiff was afforded to serve its CPLR §511(b) affidavit was extended an additional five days. (CPLR §2103[b][2]). Plaintiff complied by serving its CPLR §511(b) affidavit seven days after the Dormitory Authority served its CPLR §511(b) demand.

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to demonstrate that the "county specified by the defendant is not proper." The use of the word "or" separating the two statutory factors plainly provides for a disjunctive reading, requiring factual averments for one factor not both. (Daimler Chrysler Corporation v. Spitzer, 26 AD3d 88 [3d Dept. 2005]; McKinney's Cons. Laws of N.Y. Book 1, Statutes §235 [comment stating "[u]se of the conjunction 'or' in a statute usually indicates that the language is to be construed in an alternative sense"]). As such, the Dormitory Authority was required to make this motion in Nassau County and had no authority to make it in Albany County, the county it specified. (HVT, Inc. v. Safeco Ins. Co. of America, supra at 267).

"Irrespective of the issue as to how this conflict is ultimately to be resolved, the mere service of the [CPLR §511(b)] affidavit by [Plaintiff] (which clearly tended to support [its] choice of venue) was sufficient to preclude [the Dormitory Authority] from moving in [Albany] County; and the motion herein should properly have been made returnable in [Nassau] County." (HVT, Inc. v. Safeco Ins. Co. of America, supra at 267, quoting Meyers v New York State Div. of Hous. & Community Renewal, 32 AD2d 818 [2d Dept. 1969]).

As this Court has no jurisdiction to hear the Dormitory Authority's motion, it is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

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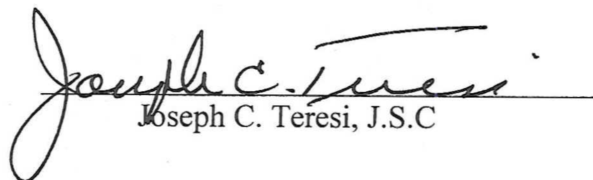
entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 28, 2011
Albany, New York



Joseph C. Teresi, J.S.C

PAPERS CONSIDERED:

1. Order to Show Cause, dated February 22, 2011; Affidavit of Kay Edwards, dated February 18, 2011, with attached Exhibit A; Affidavit of John Pasicznyk, dated February 18, 2011; Affirmation of Jennifer Harvey, dated February 18, 2011, with attached Exhibits A-F.
2. Affidavit of Joseph Fazio, dated March 11, 2011, with attached Exhibits A-D.
3. Affirmation of Jennifer Harvey, dated March 18, 2011, with attached Exhibits A-D.