

Alpert v Alpert

2011 NY Slip Op 31304(U)

May 3, 2011

Supreme Court, Nassau County

Docket Number: 026735-2009

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
CHARLES ALPERT and JOSEPH ALPERT,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 026735-2009
Motion Seq. No: 1
Submission Date: 3/9/11**

**SARAH ALPERT, FAYA COHEN, LOIS KATZ,
BETTE GROSSMAN and SUSAN WEILAND,**

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, Affirmation and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Supplemental Memorandum of Law in Support.....x**
- Affidavit in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Reply Memorandum of Law.....x**

This matter is before the Court for decision on the motion filed by Defendants Sarah Alpert ("Sarah"), Faya Cohen ("Faya"), Lois Katz ("Lois"), Bette Grossman ("Bette") and Susan Weiland ("Susan") (collectively "Defendants") on July 1, 2010 and submitted on March 9, 2011. For the reasons set forth below, the Court 1) grants the branch of Defendants' motion seeking to transfer venue of this matter to New York County and directs that the above-captioned action, including all motions, is transferred in its entirety to New York County; 2) refers the remaining branches of Defendants' motion to the New York County judge who is assigned to this matter after the transfer; 3) directs that the above-captioned action is stayed pending further court order; and 4) **directs the Clerk of Nassau County to transfer forthwith the entire file, including all**

motion papers regarding any motions that have been filed in Nassau County, to the Clerk of New York County.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR §§ 507, 510 and 511, transferring venue from Nassau County to New York County for all purposes, including determination of Defendants' motion to dismiss; or, in the alternative, 2) pursuant to CPLR §§ 3211(a)(5) and (7), dismissing the Complaint.

Plaintiffs Charles Alpert ("Charles") and Joseph Alpert ("Joseph") (collectively "Plaintiffs") oppose the motion.

B. The Parties' History

The Amended Complaint ("Complaint") (Ex. N to Pahmer Aff. in Supp.) alleges as follows:

Charles is a resident of Nassau County and Joseph is a resident of New Jersey. Sarah, Lois, Bette and Susan are residents of New York County and Faya is a resident of Queens County.

In or about the late 1930s, William Alpert ("William"), the father of Charles and Joseph, began to make investments. William hired his brothers Abraham Alpert ("Abe") and Jack Alpert ("Jack") to work in his business. William also allowed Abe and Jack to hold an equity interest in some of the entities that William had formed, on the condition that Abe and Jack agreed that these holdings would not be transferred, and would be subject to a buyout upon their death. By the late 1950s, Charles and Joseph participated in William's investments. William, Abe, Jack, Charles and Joseph referred to themselves as "the Office" (Compl. at ¶ 10).

Beginning in the mid 1950s, William, Abe, Jack, Charles and Joseph entered into several agreements, all of which contained restrictions on transfers of certain Office interests during their lifetimes and provided for a right of the survivors among them to buy out a deceased Office member's interests, at a set price. In 1961, William, Abe, Jack, Charles and Joseph entered into a "global agreement" (Compl. at ¶ 12) covering all of the Office interests. This agreement reiterated the restrictions on lifetime transfers and provided for the right of their survivors to buy out a deceased Office member's interests at the "book value" (*id.*) of each such interest as

defined in the agreement. In 1964, William, Abe, Jack, Charles and Joseph restated this agreement, with virtually identical restrictions on lifetime transfers and buy-out provisions. The 1964 Agreement, as later supplemented, remains in effect.

During his lifetime, Abe transferred interests in some of his Office holdings to the names of Sarah, his wife, Faya, Lois, Bette and Susan, his daughters, and to various trusts. These transfers were allegedly made “without payment of any real consideration” (Compl. at ¶ 15). Abe repeatedly confirmed that a) these transfers were not intended to, and did not, change the agreements entered into by the members of the Office; and 2) the transferees of his Office interests were “mere nominees, with actual beneficial interest remaining with Abe and subject to the terms of the Agreement” (Compl. at ¶ 18). Defendants allegedly also acknowledged that any Office interests in their name did not actually belong to them.

Abe passed away in 2002. At that time, William was deceased and Jack subsequently passed away, leaving Charles and Joseph as the surviving members of the Office. Plaintiffs allege that, pursuant to the terms of the Agreement, the personal representatives of Abe’s estate were required to offer to sell his interests in Office holdings to the surviving members of the Office, at book value. Those surviving members would then have the option of electing to purchase any of those interests. Despite their alleged status as nominees, or successors and assigns, who held Abe’s Office interests subject to the terms of the Agreement, Defendants have refused to offer for sale the Office interests they received.

Abe also held, first directly and subsequently via nominees including Sarah and Faya, interests in a cooperative located at 130 West 16th Street, New York, New York (“Co-Op interests”). Up to the time of his death, Abe, directly and/or through a nominee, received more than \$5 million in proceeds relating to sales of the Co-Op interests. Following Abe’s death, Defendants failed to offer the Co-Op interests for sale, as required by the Agreement. Moreover, sales of the individual Co-Op interests continued, resulting in more than \$3 million proceeds.

On October 3, 2008, Plaintiffs served an arbitration (“Arbitration”) demand on Defendants, as well as against Abe’s estate. This action is being commenced following an appellate court determination (“Appellate Decision”) on December 22, 2009 that Defendants are not required, in their individual capacities, to arbitrate their dispute with Plaintiffs.

The Complaint contains nine (9) causes of action: 1) a request for a declaration that

Defendants must offer to sell to Plaintiffs all of the Office interests they are holding; 2) a request for a constructive trust on all Office interests held in the name of Defendants, 3) unjust enrichment for Defendants' retention of the Office interests, 4) breach of fiduciary duty, 5) a request for a declaration that Sarah is bound by an agreement reached in 1971 ("1971 Agreement") which provided that assets in the name of Abe's wife, children and trusts belonged exclusively to Office members, 6) breach of the contract by Sarah with respect to the 1971 Agreement, 7) breach of contract as to the Agreement and a 1960 agreement "relating to the ownership of" (Compl. at ¶ 56) the building at 130 West 16th Street, New York, New York, 8) request for a constructive trust, and 9) unjust enrichment with respect to proceeds from the sale of the Co-Op interests.

Counsel for Defendants affirms that on June 17, 2010, Defendants served on Plaintiffs a demand, pursuant to CPLR § 511, based on improper venue ("Demand") (Ex. A to Pahmer Aff. in Supp.). The Demand asserts that venue is improper in Nassau County, pursuant to CPLR § 507, because the relief sought by this action ("Instant Action") would affect title to and possession of real property, and none of the real property is located in Nassau County. Defendants requested, in the Demand, that venue be changed to New York County. In response, Plaintiffs provided an affidavit of Charles (*id.* at Ex. B), in which he affirmed that he is a resident of Nassau County and, therefore, pursuant to CPLR § 503(a), venue is proper in Nassau County.

Counsel for Defendants provides the procedural history of the Arbitration, including the applications to stay the Arbitration. The Honorable Charles E. Ramos of New York County ("Justice Ramos") conducted oral argument and issued two decisions ("Prior Decision") related to the Instant Action, one on May 18, 2009 (Ex. I to Pahmer Aff. in Supp.) and the second on July 20, 2009 (*id.* at Ex. L). Defendants' counsel also provides a copy of the Appellate Decision (Ex. M.) in which the Appellate Division, First Department affirmed the Order of Justice Ramos which granted the petition by Lois and Faya, as Trustees of the 1996 A. Alpert Trust ("Trust") to stay Arbitration.¹

In his Affidavit in Opposition, Charles affirms the truth of the allegations in the

¹ Plaintiffs filed an initial Statement of Claim in connection with the Arbitration, and subsequently amended that Statement of Claim by removing Defendants as respondents and adding the Trust as respondents.

Complaint regarding the agreements entered into by Abe, Jack, Joseph and Charles. Charles provides copies of shareholders agreements with respect to 16 Operating, Inc. (Charles Aff. in Opp. at Ex. A), Astoria 34 Inc. and Astoria 35 Inc. (*id.* at Exs. B and C), and East 53rd Inc. (*id.* at Ex. D). The assets held by these entities are among those at issue in the Instant Action. Charles also provides a copy of the 1964 Agreement (*id.* at Ex. E).

Charles affirms that the “fundamental policy” of the Office (Charles Aff. in Opp. at ¶ 16) was that all Office property must stay in the Office, and provides documentation in support of that assertion, including 1) a May 11, 1965 memorandum drafted and signed by Abe (Ex. F to Charles Aff. in Opp.), 2) a May 5, 1971 memorandum from Abe (*id.* at Ex. G), 3) correspondence from Lois and Bette (*id.* at Ex. I), and filings in prior litigation among the parties. Charles submits that Defendants’ motion to transfer venue should be denied on the grounds that the assets that are in dispute in the Instant Action are primarily held in corporations or partnerships. Therefore, the ownership of the real property is not directly in dispute, and title to the real property at issue would not be affected. Another asset at issue consists of interests in a cooperative building. Only one of the interests at issue is directly in real property, specifically the building located on West 12th Street in New York County.

C. The Parties’ Positions

Defendants submit that 1) as a judgment in the Instant Action would affect the title to, or possession, use or enjoyment of, real property located in New York County, venue is proper in New York County; 2) Plaintiffs’ reliance on Charles’ county of residence is misplaced in the Instant Action; 3) assuming, *arguendo*, that transfer to New York County is not mandated by CPLR §§ 507 and 511, transfer is nonetheless appropriate in light of the fact that a) Justice Ramos has considered the terms of the Agreement in issuing certain rulings; b) Plaintiffs would not be inconvenienced by the proposed transfer; c) the Office, which is controlled by Charles, is located in New York County; and d) all of the attorneys involved in this matter are located in New York County; 4) if the Court denies the motion to transfer venue, the Court should dismiss the Complaint in light of the fact that the Defendants were not parties to the Agreement that Plaintiffs seek to enforce; 5) any claim that Plaintiffs have is more properly asserted against Abe, or his estate, not the Defendants; 6) the obligation that Plaintiffs seek to enforce, which purports to create an interest in real property, violates the Statute of Frauds; 7) there is no basis for

holding Defendants, the purported nominees of the interests, responsible for the contractual obligations of Abe; and 8) any claim is time barred, as Plaintiffs failed to commence their action within six (6) years of the transfer(s) to which they object.

Plaintiffs submit, *inter alia*, that venue in Nassau County is proper in light of the fact that 1) Charles is a resident of Nassau County; 2) with the exception of the West 12th Street Property, the Office interests at issue consist of interests in partnerships and corporations that hold title to the underlying real property and, therefore, this is not an action in which a judgment would affect the title, possession, use or enjoyment of real property; 3) a discretionary change of venue is also inappropriate because there is no showing that material non-party witnesses will be inconvenienced if the Instant Action proceeds in Nassau County; and 4) the Prior Decisions related to whether the Instant Action should be the subject of Arbitration and, therefore, Justice Ramos' prior consideration of relevant issues is not a basis for transferring venue to New York County.

Plaintiffs submit, further, that as Defendants' motion addresses only the legal sufficiency of the first cause of action, Defendants have conceded that the remaining causes of action were properly pled. Plaintiff also argue that 1) the Agreement is enforceable against Defendants as the nominees, or alter egos, of Abe; 2) even if Defendants are not nominees or alter egos of Abe, they are nonetheless bound by the Agreement in light of the fact that a) the transfers to them were without consideration and, therefore, Defendants were not *bona fide* purchasers; b) as assignees of Abe's interests in the Office properties, Defendants stand in Abe's shoes, subject to the restrictions in the Agreement, including the obligation to offer the interests to Plaintiff's upon Abe's death; c) the UCC prohibits Defendants' acquisition of any greater rights than those possessed by Abe, who was contractually prohibited from transferring ownership of his Office interests; and d) the evidence submitted supports the inference that Abe did not intend to vest in Defendants his beneficial interests in Office assets.

Plaintiffs also argue that 1) even if there is no contract claim based on the Agreement, Defendants hold the Office interests under a constructive trust; 2) Defendants are estopped from taking a different position in this litigation than they took in prior litigations; 3) the Agreement complies with the Statute of Frauds; and 4) Plaintiffs' action is not time-barred as their claim could not have arisen until Abe's death in October of 2002.

RULING OF THE COURT

CPLR § 507, titled “Real property actions,” provides as follows:

The 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.

Defendants cite *Regal Boy Enters. Int’l VII, Inc. v. MLQ Realty Mgmt., LLC*, 22 A.D.3d 738 (2d Dept. 2005) in support of their claim that CLPR § 507’s specific venue provision “trumps” the general venue provision of CPLR § 503 (Ds’ Reply Memorandum of Law at p. 4). In *Regal Boy, supra*, plaintiff-builder sued to enjoin defendant from interfering with or interrupting plaintiff’s construction of its leasehold premises pursuant to a commercial lease. *Id.* at 739. The plaintiff had filed suit in Rockland County, where he was a resident, rather than Dutchess County, where the property was located. *Id.* The Second Department reversed the trial court’s order denying defendant’s cross motion to change venue to Dutchess County. In so ruling, the Second Department held that, while venue would otherwise have been proper in Rockland County, as the relief sought would affect the title to, or possession, use or enjoyment of, the real property at issue, venue was proper only in Dutchess County, where the property was located. *Id.*

In the Instant Action, the West 12th Street Property is among the Office interests at issue. In addition, the seventh cause of action in the Complaint alleges breach of contract as to the Agreement and a 1960 agreement “related to the ownership of” the building at West 16th Street. None of the real property interests at issue is located in Nassau County.

The Court notes, further, that in his Affidavit in Opposition to Petition to Stay Arbitration dated December 3, 2008, (Ex. F to Pahmer Aff. in Opp.), filed in the New York County action that was the subject of the Prior Decisions, Charles affirmed as follows:

As fully set forth herein, while interests in real property may have been placed in the names of some or all of the Petitioners herein, they are in fact mere nominees for their late husband and father, Abraham Alpert (“Abe”); and none of the Petitioners has any beneficial interest in any of these properties. The Arbitration seeks a determination of Abe’s real property interests and a direction that all of those interests - including interests Abe placed in the names of Petitioners - must be offered for sale pursuant to our agreement with Abe.

Id. at ¶ 3.

In connection with that Affidavit in Opposition, Charles annexed a copy of the Agreement (Ex. A to Charles Aff. in Opp. to Pet. To Stay Arb.). The first full paragraph of the Agreement provides as follows:

The Parties hereto wish to maintain ownership and control of the real property owned individually or as co-owners, or as co-venturees or in corporate form as co-stockholders, among themselves, for the purpose of insuring the continuing of management among themselves and their survivors and to provide for restrictions upon the transfer of any of the real property or stock holdings of the Corporations in aid thereof and to provide for the orderly liquidation of their realty holdings and stock holdings in the Corporations during their lifetime and in the event of death or any of the Parties.

The Agreement addresses “Real Property Owned by Individuals” (Agreement at p. 4) and “Real Property Owned by a Corporation” (*id.* at p. 5).

The Court concludes, in light of the foregoing, that the Instant Action is an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property located in New York County and, therefore, pursuant to CPLR § 507, venue should be transferred to New York County, where the real property at issue is located. Accordingly, it is hereby:

ORDERED, that the branch of Defendants’ motion seeking to transfer venue of this matter to New York County is hereby granted and this matter is transferred in its entirety to New York County; and it is further

ORDERED, that the remaining branches of Defendants’ motion are referred to the New York County judge who is assigned to this matter after the transfer; and it is further

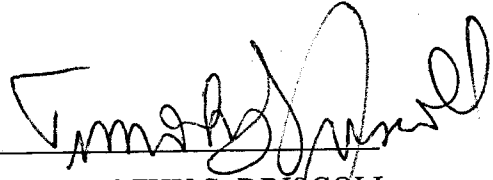
ORDERED, that this proceeding is stayed pending further court order; and it is further

ORDERED, that the Clerk of Nassau County is directed to transfer forthwith the entire file, including all motion papers regarding any motions that have been filed in Nassau County, to the Clerk of New York County.

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

ENTER

DATED: Mineola, NY
May 3, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAY 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE