

Tsuruda v 6810 Equities Inc.

2011 NY Slip Op 31541(U)

May 18, 2011

Sup Ct, Nassau County

Docket Number: 21185/10

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

RONALD M. TSURUDA,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 11

Index No.: 21185/10

**Motion Seq. No.: 01, 02, 03, 04
05 & 06**

6810 EQUITIES INC., KALED MANAGEMENT,
BARON & BARON, ESQS., and "JOHN or JANE DOE"
being the fictitious names for the party who may have bid
successfully for the plaintiff's co-op shares,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Plaintiff's Order to Show Cause	01
Defendant Linsker's Affidavit in Opposition	xx
Defendants 6810 Equities, Inc. and Kaled Management's Affidavit in Opposition	xx
Defendant Linsker's Memorandum of Law	xx
Defendant Linsker's Notice of Motion	02
Defendants 6810 Equities, Inc. and Kaled Management's Affirmation in Reply	xx
Defendant Linsker's Affirmation in Support	xx
Defendants 6810 Equities, Inc. and Kaled Management's Notice of Motion	03
Defendants 6810 Equities, Inc. and Kaled Management's Affidavit in Support	xx
Plaintiff's Order to Show Cause	04
Defendants 6810 Equities, Inc. and Kaled Management's Affirmation in Opposition	xx
Plaintiff's Notice of Cross-Motion	05
Plaintiff's Affidavit in Opposition	xx
Defendants 6810 Equities, Inc. and Kaled Management's Affirmation in Reply	xx
Plaintiff's Memorandum of Law	xx
Plaintiff's Affirmation in Opposition	xx
Defendants 6810 Equities, Inc. and Kaled Management's Affirmation in Opposition	xx
Plaintiff's Reply Affirmation	xx
Defendant Linsker's Memorandum of Law	xx

Plaintiff's Notice of Motion	06
Plaintiff's Memorandum of Law	xx
Defendant Linsker's Memorandum of Law	xx

In motion sequence number one, the plaintiff Ronald M. Tsuruda, hereinafter referred to as "Tusurda") moves for an order pursuant to CPLR §6311 (1) enjoining the defendants from transferring his shares of stock in defendant 6810 Equities Inc. and all his right, title and interest in and to his Proprietary Lease of apartment 5-G in the building located at 68-10 108th Street, Forest Hills, New York, 11375; (2) granting him a right of redemption period of ten days in which to pay \$7,299.32, plus reasonable costs; (3) precluding the defendant 6810 Equities Inc. from dealing with any other parties with respect to his shares in 6810 Equities Inc. and his Proprietary Lease for apartment 5-G at 68-10 108th Street in Forest Hills, New York; and (4) directing defendant Baron & Baron, Esqs. or any agent retained by them to return any funds deposited by any third party in an attempt to gain ownership of his shares and proprietary lease to apartment 5-G at 68-10 108th Street in Forest Hills, New York, is determined as provided herein.

In motion sequence number two, the defendant Leonard Linsker moves for an order pursuant to CPLR §3211 dismissing the complaint.

In motion sequence number three defendants 6810 Equities Inc. and Kaled Management cross-move for an order pursuant to CPLR §211(a)(7) dismissing the complaint against Kaled Management and an order pursuant to CPLR §510 changing the venue of this action to Queens County.

In motion sequence number four, the plaintiff Tsuruda moves for an order pursuant to CPLR §6311 staying the action entitled *6810 Equities Inc. v Ronald M. Tsuruda, et al.* (Civil Court of the City of New York: Housing Part Queens County) and an order pursuant to CPLR §602(a) consolidating that

action or joining it for trial with this action.

In motion sequence numbers five and six, the plaintiff cross-moves for an order pursuant to CPR §3212 declaring that he has a right to redeem his shares in 6810 Equities Inc.; that 6810 Equities Inc. and Kaled Management must account to him for outstanding maintenance costs and make application for all other expenses alleged to be owed by him; directing 6810 Equities Inc. to return defendant Linsker's deposit being held by the defendant Baron & Baron, Esqs. in their escrow account; and, declaring that defendant Linsker does not have any further rights to his shares or his Propriety Lease of apartment 5-G at 68-10 108th Street in Forest Hills, New York.

In this action, the plaintiff seeks to reacquire his 214 shares in 6810 Equities Inc. as well as his rights under his Propriety Lease to unit 5-G at 68-10 108th Street in Forest Hills. 6810 Equities Inc. sold those shares and the attendant lease rights to the defendant Lenny Linsker for \$44,500 pursuant to Article 9 of the Uniform Commercial Code ("UCC") at auction on October 27, 2010. In his complaint, Tsuruda alleges that the defendants breached their duty of good faith, fair dealings and their fiduciary relationship to him; that the defendants failed to properly give him notice of the auction thereby entitling him to an injunction permanently staying the defendants' sale of his shares and Propriety lease; that the defendants' foreclosure of his interest was unjustified; that the purchaser defendant Lenny Linsker will be unjustly enriched if his purchase of the shares and acquisition of the lease is not permanently stayed; that the sale price of his stock and lease was "shockingly low;" that the Board Members of 6810 Equities breached their fiduciary duties by engaging in insider dealing with respect to his shares and lease; and, that the defendants' sale of his stock and lease was not commercially reasonable.

"When assessing the adequacy of a complaint in light of a CPLR §3211(a)(7) motion to dismiss,

the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . ‘the benefit of every possible favorable inference.’ ” *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 (2005), quoting *Leon v Martinez*, 84 NY2d 83, 87 (1994), citing *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 324, 326 (2002). “Whether a . . . plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). “Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence.” *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, *supra*, at p. 582, quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 (1976).

Defendant Kaled Management (“Kaled”) is the management agent hired by the Board of Directors of 6810 Equities. It’s executive office is in Nassau County but it has an office at 143-08 Roosevelt Avenue, Flushing. Through his testimony Kaled has established that at most, its involvement here was as an agent of the corporate defendant 6810 Equities. Kaled played no role in the activities challenged by the plaintiff here, *i.e.*, the non-judicial foreclosure of his interest in 6810 Equities Inc. and the attendant lease. The plaintiff has failed to state a claim against Kaled Management. The complaint against Kaled Management is accordingly *dismissed*.

The only party to this action with any affiliation with this County is/was Kaled Management.

“A ‘party moving for a change of venue pursuant to CPLR §510(3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change.’ ” *McMannon v York Hill Housing, Inc.*, 73 AD3d 1137, 1138 (2d Dept 2010), quoting *Rochester Drug Co-operative, Inc. v Marcott Pharmacy North Corp.*, 15 AD3d 899, 900 (4th Dept 2005). “

'In doing so, the moving party must set forth (1) the names, addresses and occupations of numerous prospective witnesses, (2) the facts to which the witnesses will testify at trial, so that the court may judge whether the proposed evidence of the witnesses is necessary and material, (3) a statement that the witnesses are willing to testify, and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed' ” *McMannon v York Hill Housing, Inc.*, *supra*, at p. 1138, quoting *Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908 (2d Dept 2008), citing *Lafferty v Eklecco, LLC*, 34 AD3d 754, 755, (2d Dept 2006); *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169 (2d Dept 1995); *see also, Kurfis v Shore Towers Condominium*, *supra*, at p. 30. “The convenience of ‘defendants themselves, or their employees, . . . is not a factor in considering a change of venue based on CPLR §510(3).’ ” *McMannon v York Hill Housing, Inc.*, *supra*, at p. 1138, quoting *Cilmi v Greenberg, Trager, Toplitz v Herbst*, 273 AD2d 266, 267 (2d Dept 2000); *Curry v Tysens Park Apartments, LLC*, 289 AD2d 191 (2d Dept 2001); *Flynn v Niagra University*, 198 AD2d 262 (2d Dept 1993); *Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424 (1st Dept 2003). And, the moving party must establish how the potential witnesses would be greatly inconvenienced if venue were not changed. *McMannon v York Hill Housing, Inc.*, *supra*, at p. 1138, citing *Fernandes v Lawrence*, 290 AD2d 412 (2d Dept 2002); *Blumberg v Salem Truck Leasing, Inc.*, 276 AD2d 5767 (2d Dept 2000).

6810 Equities Inc. has not established that there is a reason to believe that an impartial trial could not be had here and has met its burden of establishing that the convenience of material witness requires a change in venue.

While a demand to change venue was served pursuant to CPLR §511(a), a motion to change venue on the grounds that Nassau County was not a proper venue was not made within the

time required by CPLR §511(b). Therefore, the court is limited to considering only grounds for a discretionary change of venue under CPLR §510: *i.e.*, (1) that Nassau is not a proper County; (2) that there is reason to believe that an impartial trial cannot be obtained here; or, (3) that the convenience of material witnesses and the ends of justice will be promoted by the change. *Kurfis v Shore Towers Condominium*, 48 AD3d 300 (1st Dept 2008). While ordinarily a motion to change venue pursuant to CPLR §510(1) is precluded in light of CPLR §511, “where a defendant fails to comply with [CPLR §511] and makes no showing of a basis for change of venue under CPLR §510(2) or (3), the application is committed to the court’s discretion.” *Pittman v Mahr*, 202 AD2d 172, 175 (1st Dept 1994), citing *Callanan Industires, Inc. v Sovereign Const. Co., Ltd.*, 44 AD2d 292, 295 (3rd Dept 1974); *see also Byron v Spector*, 266 AD2d 253 (2d Dept 1999); *Newman v Physician’s Reciprocal Insurers*, 204 AD2d 210 (1st Dept 1994). While this discretion “is appropriately exercised only in certain limited situations” (*Pittman v Maher, supra*, at p. 175), here, the venue was proper until the complaint as against Kaled Management was dismissed. These circumstances warrant this court’s exercise of its discretion.

In light of the dismissal of the complaint against the only party with an office or residence in Nassau, 6810 Equities Inc. has established that Nassau County is not a proper venue for this action. None of the parties to this action reside in or are situated in Nassau County. The plaintiff resides in Suffolk County and the remaining parties are in Queens County. The cooperative unit at stake is also situated in Queens. Additionally, summary proceeding seeking plaintiff’s eviction and 6810 Equities, Inc.’s repossession has been brought in Queens County. *See, Bergman v Feil*, 12 AD3d 337 (2d Dept 2004); *Harley v Miller*, 295 AD2d 401 (2d Dept 2002); *Senzon v Uveges*, 265 AD2d 476 (2d Dept 1999); *Rodriguez v Kim*, 2003 WL 21638262 (Supreme Court Bronx

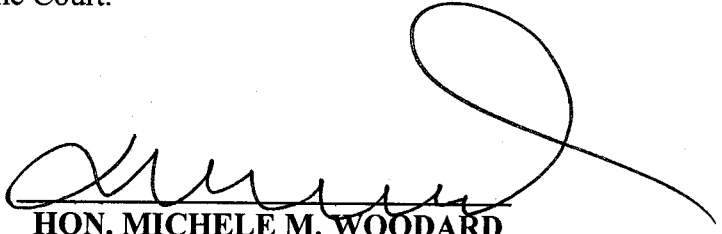
County 2003). It is hereby

ORDERED, that this action is transferred to the Supreme Court Queens County. The Clerk of the Court is directed to transfer the file of this case to the Supreme Court Queens County. Motion sequence nos. 1, 2, 4, 5 and 6 are accordingly referred to that court for resolution. The stays issued by this court in this action in the Orders to Show Cause dated November 12, 2010 and February 28, 2011 are continued pending further order of the Supreme Court Queens County.

This constitutes the Decision and Order of the Court.

DATED: May 18, 2011
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

FADECISION - CHANGE OF VENUE Tsuruda v 6810 Equities Inc. et al MLP.wpd

ENTERED
JUN 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE