

Leidel v Annicelli

2011 NY Slip Op 31654(U)

June 16, 2011

Supreme Court, New York County

Docket Number: 102456/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 102456/2010

LEIDEL, PETER A.

vs

ANNICELLI, JOHN P.

Sequence Number : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross motion are decided in accordance with the accompanying memorandum decision.

FILED

JUN 21 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/16/11

Saliann Scarpulla
SALIANN SCARPULLA S.C.

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: CIVIL TERM: PART 19

----- X
PETER A. LEIDEL and PAMELA LEIDEL,

Plaintiffs,

Index No. 102456/10
Submission Date: 3/2/2011

-against-

DECISION AND ORDER

JOHN P. ANNICELLI, d/b/a OLD STONE HILL
ROAD ASSOCIATES; NEW YORK SMSA
LIMITED PARTNERSHIP; and OLD STONE HILL
ROAD ASSOCIATES,

Defendants.

----- X

For Plaintiff:
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For Defendants John P. Annicelli and Stone Hill Road Associates:
Michael F.X. Ryan, Esq.
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For Defendant New York SMSA Limited Partnership:
Snyder & Snyder
94 White Plains Road
Tarrytown, New York 10591

Papers considered in review of this motion for change of venue:

Notice of Motion.....	1
Notice of Cross Motion.....	2
Opp of Motion.....	3
Opp of Cross Motion.....	4
Reply Affirm.....	5

FILED

JUN 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action plaintiffs seek to recover damages for rents, proceeds, fees and profits received or derived by the defendants in the rental and operation of an equipment building ("Cell Tower Facility") constructed by New York SMSA Limited Partnership ("Verizon") on land rented from Old Stone Hill Road Associates and John P. Annicelli

(the "Old Stone Defendants"). Verizon and the Old Stone Defendants move and cross-move, respectively, for a change in venue from New York County to Westchester County.

Plaintiffs Peter and Pamela Leidel (the "Leidels") own land adjacent to the Old Stone Defendants' land in Pound Ridge, New York. In November 1998, the Old Stone Defendants leased their land to Verizon for the erection and use of a wireless communication center. At the time there was a restrictive covenant which prevented the property from being used for anything except residential purposes. The Leidels commenced an action in March 2000 to enforce the restrictive covenant. Verizon constructed the Cell Tower Facility despite knowing that the Leidels filed suit. In November 2001, the Supreme Court of New York granted partial summary judgment and ordered the Cell Tower Facility to be taken down. Verizon and the Old Stone Defendants appealed and in February 2004 the Court of Appeals affirmed the Supreme Court's decision.

Verizon continued to operate the facility until July 2007, at which point it was removed. The Old Stone Defendants continued to lease and collect rent from Verizon until that date. The Leidels allege that the rent received by the Old Stone Defendants from Verizon was far greater than the rent that the Old Stone Defendants could receive from legal use of the property. This action seeks to collect the rents, proceeds, fees, and profits received by the Old Stone Defendants during the period they were violating the Leidels' rights and maintaining the Cell Tower Facility.

In support of its motion to change venue, Verizon contends that it does not reside in New York County and as such New York County is an improper venue. Verizon submits the affidavit of Karen Shipman, an Associate Director of Verizon's partner Cellco Partnership. Shipman states that the principal office of Verizon is in Basking Ridge, New Jersey. As CPLR 503(d) states that a partnership is a resident of the county where its principal office is located, Verizon is not a resident of New York County but rather of a county in New Jersey. Verizon, however, admits that it has an office in New York County.

Verizon and the Old Stone Defendants also argue for the venue change under CPLR 507 on the ground that the relief sought affects the title, possession, use or enjoyment of real property in Westchester County and thus is a local action which must be litigated there. Verizon also argues that the Leidels are asserting a trespass claim and that trespass claims must be litigated in the county where the action occurred.

In opposition, the Leidels argue that New York County is a proper venue because Verizon resides here, as evidenced by its New York State Department of State (NYSDOS) filing. The Leidels argue that under New York Partnership Law §91 a limited partnership, such as Verizon, must file its certificate in the county in which its principal office is located.

In further opposition, the Leidels contend that the remedy they seek does not affect the title, possession, use or enjoyment of real property in Westchester County. The Leidel's state that their action is for monetary relief only.¹

Discussion

A movant seeking a transfer of venue under CPLR 511 must show that the plaintiff's choice of venue was improper and identify a proper venue to which the action may be legally transferred.

With respect to whether New York County is a proper venue, CPLR 503(d) states that a business's residence is where its principal office is located. Under New York Partnership Law §91 a limited partnership must file its business certificate in the county in which its principal office is located. New York courts have held that a limited partnership resides in the county listed on its certificate. *Mid Valley Discount Mall Associates v. Credit Alliance Corporation*, 139 Misc.2d 271, 272 (1988). A business maintains residence in the county where its certificate is filed even if its principal office is not actually located in that county. *Kochany v. Chrysler Corp.*, 67 A.D.2d 637, 637 (1979); *General Precision, Inc. v. Ametek, Inc.*, 24 A.D.2d 757, 758 (1965). Thus, when determining the residency of a limited partnership, the county where the business certificate is filed is instrumental.

¹ The Old Stone Defendants' cross-motion was opposed by the Leidels on different grounds. More specifically, the Leidels argue that the Old Stone Defendants improperly styled their motion as a cross-motion, as their motion was not made against the moving party. The Leidels also argue that even if the Old Stone Defendants had properly cross-moved, the Old Stone Defendants did not meet the statutory time requirements in CPLR 2214(b) and 2103(b)(2).

Here, the information obtained from the NYSDOS shows that Verizon filed its certificate in New York County and thus is a resident here. Therefore, New York County is a proper venue.

Verizon also argues that this is a local action which, under CPLR 507, must be tried in the county where the property at issue is located. CPLR 507 does not extend to cases where the plaintiff seeks a simple money judgment that does not affect the use or title to the property. *Paraco Gas of New York, Inc. v. Colonial Coal Yard, Inc.*, 20 Misc.3d 1112(A), *5 (2008); *McNamara Realty, Inc. v. Hutchinson*, 54 Misc.2d 810, 811 (1967).

Here, the Leidels are seeking payment of rent collected from Verizon's use of the property but the action does not affect the possession, title, use or enjoyment of the property in such a way that this would be a local action that must be tried in Westchester County.² Accordingly, CPLR 507 is inapplicable.

As the Old Stone Defendants move on the same ground as Verizon, their motion for a venue transfer is denied as well.

² In contrast, the previous litigation dealt with whether Verizon could construct the Cell Tower Facility on the property, and the applicability of the restrictive covenant.

In accordance with the foregoing, it is hereby

ORDERED that defendant New York SMSA Limited Partnership's motion for venue transfer is denied; and it is further

ORDERED that defendants John P. Annicelli's and Old Stone Hill Road Associates' cross-motion for venue transfer is denied.

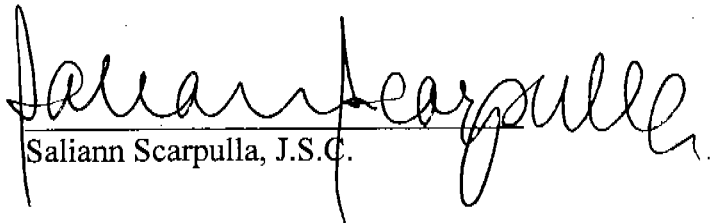
This constitutes the decision and the order of the Court.

Dated: New York, New York
June 16, 2011

FILED

ENTER: JUN 21 2011

NEW YORK
COUNTY CLERK'S OFFICE


Saliann Scarpulla, J.S.C.