

**Contractors Compensation Trust v Jack of Hearts
Carpet Mill Outlets, Inc.**

2011 NY Slip Op 33137(U)

December 6, 2011

Sup Ct, Albany County

Docket Number: 4022-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CONTRACTORS COMPENSATION TRUST
through its licensed Third-Party Administrator,
FIRST CARDINAL, LLC, as Assignee of the
Causes of action of KENNETH WHITNEY,

Plaintiff,

-against-

JACK OF HEARTS CARPET MILL OUTLETS,
INC., and RICH & GARDNER CONSTRUCTION
COMPANY, INC.,

Defendants.

DECISION and ORDER
INDEX NO. 4022-10
RJI NO. 01-11-104638

JACK OF HEARTS CARPET MILL OUTLETS, INC.,

Third-Party Plaintiff,

-against-

JAMES A LAWSON, d/b/a
J&J CARPET AND LINOLEUM

Third-Party Defendant.

RICH & GARDNER CONSTRUCTION
COMPANY, INC.,

Third-Party Plaintiff,

-against-

SYRACUSE MERIT ELECTRIC, INC.,

Third-Party Defendant.

Supreme Court Albany County All Purpose Term, November 10, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

McMahon, Kublick & Smith, PC
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William Gregan, Esq.
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TERESI, J.:

Plaintiff commenced this personal injury action in June 2010, and now moves for a change of its venue and consolidation with an action in Onondaga County. All of the

Defendants, Third Party Plaintiffs and Third Party Defendants in this action oppose Plaintiff's consolidation motion. However, although Defendant/Third Party Plaintiff Rich & Gardner Construction Company, Inc. (hereinafter "Rich & Gardner") opposes the change of venue motion, Defendant/Third Party Plaintiff Jack of Hearts Carpet Mill Outlets, Inc., Third Party Defendant O'Connell Electric Company, Inc. and Third Party Defendant James A. Lawson all consent to this action's venue being changed to Onondaga County. On this record, because Plaintiff demonstrated its entitlement to change the venue of this action, that portion of its motion is granted. Plaintiff failed to establish, however, its entitlement to consolidation.

"A change of venue will only be granted upon a demonstration by the moving party that 'the convenience of material witnesses and the ends of justice will be promoted by the change' (CPLR 510 [3]) and, in general, must be supported with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change... Such an application... must include the names and addresses of each witness, a specific fact-based summary of the proposed testimony and how that testimony is relevant to the issues to be resolved at trial... In addition, it should include an assertion attributed to the witness that he or she is willing to testify, and describe the difficulties that will necessarily be encountered by the witness if venue is not changed." (Cavazzini v Viennas, 82 AD3d 1343, 1344 [3d Dept. 2011], quoting Manchester Tech. v Hansen, 6 AD3d 806 [3d Dept. 2004][internal quotation marks and citations omitted]).

Here, Plaintiff duly demonstrated its entitlement to a change of this action's venue. Plaintiff's attorney's affidavit establishes that he spoke with numerous witnesses to Mr. Whitney's accident, upon which Plaintiff's action is premised, along with Mr. Whitney's doctors.

He “adequately identified [each] witnesses to be called, their willingness to testify, the substance, necessity and materiality of their expected testimony, and the inconvenience they would experience if venue were to remain in [Albany] County” rather than being changed to Onondoga County. (Manchester Tech. v Hansen, 6 AD3d 806, 807 [3d Dept. 2004]). Contrary to Rich & Gardner’s attorney’s contention, “the inconvenienced witnesses [need not] submit affidavits. A movant’s burden is met if there are sworn averments that the witnesses have indicated that they would be inconvenienced.” (Soufan v Argo Pneumatic Co., 170 AD2d 289, 290 [2d Dept. 1991]). As such, Plaintiff’s attorney’s averments sufficiently met its burden. With the burden shifted, three of the four additional parties consented to a change in venue. Rich & Gardner’s attorney’s only additional “forum shopping” objection is based upon no factual proof and is otherwise wholly speculative.

Accordingly, Plaintiff’s motion to change the venue of this action is granted.

Turning to Plaintiff’s motion to consolidate, because they failed to provide notice of this motion to the Onondoga County action’s parties it must be denied. A consolidation motion “should be made on notice to all parties to all of the actions affected.” (Siegel, NY Prac §128, at 230 [5th ed]). Here, Plaintiff made no showing that they noticed the Onondoga County action’s parties on this motion.

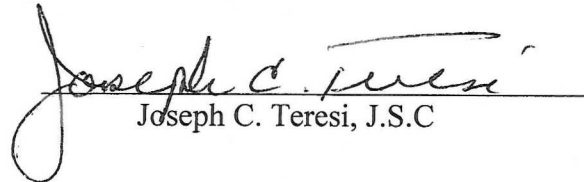
Accordingly, Plaintiff’s motion to consolidate is denied without prejudice.

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

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: December 6, 2011
Albany, New York


Joseph C. Teresi, J.S.C

PAPERS CONSIDERED:

1. Notice of Motion, dated October 17, 2011; Affirmation of Anthony Martoccia, dated October 17, 2011, with attached Exhibits 1-11.
2. Affidavit of William Greagan, dated November 3, 2011, with attached Exhibit A.
3. Affidavit of Kristin Walker, dated October 27, 2011.
4. Letter of Robert Stockton, dated November 2, 2011.
5. Letter of Norah Murphy, dated October 31, 2011.