

Kearney v Capelli Enterprises, Inc.

2012 NY Slip Op 30439(U)

February 24, 2012

Sup Ct, NY County

Docket Number: 104322/11

Judge: Saliann Scarpulla

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SCANNED ON 2/28/2012
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

SALIANN SCARPULLA

Index Number : 104322/2011

PART 19

KEARNEY, ALICIA

vs
CAPPELLI ENTERPRISES, INC.

INDEX NO. _____

Sequence Number : 001

MOTION DATE _____

CHANGE VENUE

MOTION SEQ. NO. _____

_____ /for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

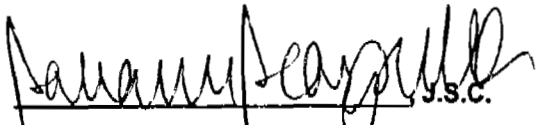
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/24/12


SALIANN SCARPULLA
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
ALICIA KEARNEY,

Plaintiff,

Index No. 104322/11
Submission Date: 1/18/12

-against-

DECISION AND ORDER

CAPELLI ENTERPRISES, INC.,
GEORGE A. FULLER COMPANY, INC., and
NEW ROC ASSOCIATES, L.P.,

Defendants.
----- X

For Plain tiff:
Ogden & Sedaghati, P.C.
202 East 35th Street
New York, New York 10016

For Defendants Capelli Enterprises, Inc., and George A. Fuller Company, Inc.:
Harrington, Ocko & Monk, LLP
81 Main Street, Suite 215
White Plains, New York 10601

For Defendant New Roc Associated, L.P.:
Law Offices of Charles J. Siegel
40 Wall Street, 7th Floor
New York, New York 10005

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

- Notice of Motion 1
- Aff in Support 2
- Mem of Law 3
- Aff in Opp 4

FILED

FEB 28 2012

HON. SALIANN SCARPULLA, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action plaintiff Alicia Kearney (“Kearney”) seeks to recover damages for personal injuries she allegedly sustained on June 7, 2008, when she “was caused to slip and/or trip and fall” while at the premises located at 175 Huguenot Street, New Rochelle, N.Y. (the “premises”). In the complaint, Kearney alleges that the premises were owned, controlled, managed and repaired by defendants Capelli Enterprises, Inc. (“Capelli”), George A. Fuller Company, Inc. (“Fuller”) and New Roc Associates, L.P. (“New Roc”).

Kearney commenced this action by filing a summons and complaint on or about April 11, 2011. On or about April 18, 2011, Kearney filed a verified amended complaint. Capelli and Fuller served a verified answer on or about June 16, 2011, along with a demand for change of venue to Westchester County. New Roc has not submitted papers on this motion, and appears to have not answered the complaint.

Capelli and Fuller contend that Kearney, upon receipt of the demand to change venue, did not consent to the change, nor did she serve an affidavit that either Westchester was the incorrect county or New York the proper county.

Cappelli and Fuller now move pursuant to CPLR §§ 510 and 511 to change the venue of this action to Westchester County. They argue that New York County is not the proper venue as none of the parties reside in New York County, and the incident did not occur in New York County. They assert that according to her attorney's affirmation, Kearney does not reside in the county where counsel maintains its offices, which the affirmation identifies as New York County. Capelli and Fuller also submit affidavits to establish that their principal places of business are in Westchester County, and that is where they accept service of process. Capelli and Fuller state "[u]pon information and belief" that New Roc maintains its offices in White Plains, N.Y., within Westchester County.

Cappelli and Fuller also maintain that "the ends of justice would be promoted" by changing this action's venue to Westchester County, and assert that Kearney is "forum shopping." They note that the incident underlying this action occurred in Westchester County, and that the material witnesses for this action are "based and/or work out of

Westchester County,” and “they would be materially inconvenienced” if they were required to leave Westchester County to testify in New York County.

In opposition, Kearney asserts that New Roc has designated New York County as its county of incorporation, as listed with the Department of State, making New York a proper venue for this action. In support, Kearney submits what appears to be a computer print out from the New York Department of State website.

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. *See Castro v. New York Hosp. Med. Ctr. of Queens*, 52 A.D.3d 251 (1st Dep't 2008).

“The venue of an action is proper in the county in which any of the parties reside at the time of commencement. Furthermore, a domestic corporation is a resident of the county in which its principal office is located.” *Biaggi & Biaggi v. 175 Medical Vision Properties, LLC*, 70 A.D.3d 880 (2d Dep't 2010) (citing CPLR 503(a), (c)). Venue is proper, therefor, “based upon defendant's designation of that county as its corporate residence on the certificate of incorporation it filed with the Secretary of State.” *Rosen v. Uptown General Contracting, Inc.*, 72 A.D.3d 619, 620 (1st Dep't 2010) (citing *Job v. Subaru Leasing Corp.*, 30 A.D.3d 159 (1st Dep't 2006)).

Here, Kearney has not produced New Roc's certificate of incorporation, although it refers to such in its attorney affirmation. Instead, Kearney submitted what appears to be a computer printout from the New York Department of State website, which indicated

New York County as New Roc's county of incorporation.¹ Such computer printouts have been found to be admissible and sufficient to prove a defendant's place of business. *See Brown v. SMR Gateway I, LLC*, 22 Misc. 3d 1139A (Sup. Ct. Kings Co. 2009) (holding that the department of state website printout was admissible as a business records exception to the hearsay rule under CPLR 4518(a) and under State Technology Law §306); *Scarsini Interiors, Inc. v. Just in Time Furniture Warehouse, Inc.*, 2009 N.Y. Misc LEXIS 5373, 2009 NY Slip Op 31702U (Sup. Ct. N.Y. Co. 2009) (uncertified copy printed from government maintained website is exempt from CPLR hearsay rules).

Although Kearney submission is not, on its face, readily identifiable as a printout from the department of state website, the Court has taken it upon itself to check the Department of State website and verifies that the printout submitted is identical to the documents as they appear on the website. *See also Tener Consulting Services, LLC v. FSA Main Street, LLC*, 23 Misc. 3d 1120A (Sup. Ct. Westchester Co. 2009). Defendants Capelli and Fuller have not submitted a reply, and therefore have not even attempted to rebut Kearney's evidence of New Roc's county of incorporation.

Capelli and Fuller also argue that their witnesses will be inconvenienced by having to come from Westchester County to New York county to testify. "[I]t is well settled that a motion for change of venue under CPLR 510(3) 'must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of

¹ The document submitted by Kearney does not have any facial indication that it came from a website, such as a web address or date of download. *Cf. Tener Consulting Services, LLC v. FSA Main Street, LLC*, 23 Misc. 3d 1120A (Sup. Ct. Westchester Co. 2009) (footer on document indicates date of download and web address).

their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue.” *Rosen*, 72 A.D.3d at 620 (quoting *Krochta v. On Time Delivery Serv., Inc.*, 62 A.D.3d 579, 581 (2009)). As Capelli and Fuller have failed to submit anything more than conclusory claims that unidentified witnesses will be inconvenienced, they fail to establish that the ends of justice would be best served by transferring venue to Westchester County. *See Shetty v. Volvo Cars of North America, LLC*, 38 A.D.3d 202 (1st Dep’t 2007). Accordingly, the motion for change of venue is denied.

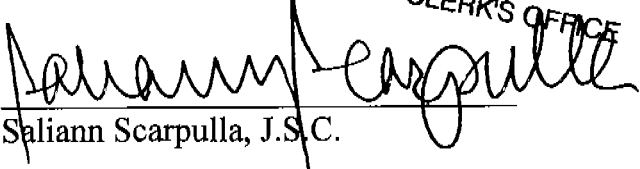
In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants Capelli Enterprises, Inc. (“Capelli”), George A. Fuller Company, Inc. for change of venue is denied.

This constitutes the decision and the order of the Court.

Dated: New York, New York
February 24, 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE