

Agresta v Environmental Temperature Sys. LLC

2012 NY Slip Op 33098(U)

September 24, 2012

Sup Ct, New York County

Docket Number: 100838/2012

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
Justice

PART 46

Index Number : 100838/2012

AGRESTA, FABRIZIO

vs.

ENVIRONMENTAL TEMPERATURE

SEQUENCE NUMBER : 001

EXTEND TIME

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for change venue

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

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

The court denies defendant's motion to change the venue of this action, pursuant to the accompanying decision. C.P.L.R. § 54(b).

FILED

JAN 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/24/12

Lucy Billings

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

FABRIZIO AGRESTA,

Index No. 100838/2012

Plaintiff

- against -

DECISION AND ORDER

ENVIRONMENTAL TEMPERATURE SYSTEM LLC,

Defendant

-----X

FILED

LUCY BILLINGS, J.S.C.:

JAN 04 2013

NEW YORK
COUNTY CLERKS OFFICE

Defendant moves to extend its time to demand a change of venue and to change the venue of this action to Nassau County, because plaintiff's designation of New York County is without basis. C.P.L.R. §§ 510(1), 511(a) and (b). Although plaintiff was injured in New York County due to defendant's alleged negligence and designated venue here, C.P.L.R. § 509, where plaintiff was injured is not a basis for venue. C.P.L.R. § 503. Since the only party that resides in New York is defendant, which maintains its principal place of business in Nassau County, venue would lie there. C.P.L.R. § 503(a) and (c).

To change venue on that basis, defendant must serve a demand to change venue before or with service of an answer. C.P.L.R. § 511(a); Simon v. Usher, 17 N.Y.3d 625, 628 (2011); Herrera v. R. Conley Inc., 52 A.D.3d 218 (1st Dep't 2008); Kurfis v. Shore Towers Condominium, 48 A.D.3d 300 (1st Dep't 2008); Singh v. Becher, 249 A.D.2d 154 (1st Dep't 1998). Defendant then may move to change venue within 15 days after service of a demand to which

plaintiff fails to respond. C.P.L.R. § 511(b); Simon v. Usher, 17 N.Y.3d at 628; Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d 252 (1st Dep't 2000); Singh v. Becher, 249 A.D.2d 154; Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210 (1st Dep't 1994). Defendant must strictly comply with these time requirements. Collins v. Greenwood Mgt. Corp., 25 A.D.3d 447, 449 (1st Dep't 2006); Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d 252; LaMantia v. North Shore Univ. Hosp., 259 A.D.2d 294 (1st Dep't 1999); Philogene v. Fuller Auto Leasing, 167 A.D.2d 178, 179 (1st Dep't 1990).

Here, defendant served its answer March 23, 2012, and its demand to change venue March 26, 2012. Defendant acknowledges that its demand was untimely, but maintains that the court may extend the time for the demand and then consider the motion to change venue.

The court's discretion regarding defendant's motion following an untimely demand to change venue, when based only on commencement of the action in a county outside C.P.L.R. § 503's scope, is limited to conformance with a contract provision regarding venue, policy dictates that place venue in another county, and consolidation. Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210; Pittman v. Maher, 202 A.D.2d 172, 175 (1st Dep't 1994). See Herrera v. R. Conley Inc., 52 A.D.3d at 219; Kurfis v. Shore Towers Condominium, 48 A.D.3d at 301; Howard v. New York State Bd. of Parole, 5 A.D.3d 271, 272 (1st Dep't

2004); Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d at 253. Otherwise the court may not grant the venue change when the demand was untimely. Herrera v. R. Conley Inc., 52 A.D.3d 218; Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210; Pittman v. Maher, 202 A.D.2d at 175.

Defendant does not claim that plaintiff misled defendant as to the propriety of the venue he selected, which would absolve defendant's failure to comply with the statutory time frames. Kurfis v. Shore Towers Condominium, 48 A.D.3d 300; Peretzman v. Elias, 221 A.D.2d 192 (1st Dep't 1995); Pittman v. Maher, 202 A.D.2d at 175; Koschak v. Gates Constr. Corp., 275 A.D.2d 315, 316 (2d Dep't 1996). See Collins v. Greenwood Mgt. Corp., 25 A.D.3d at 449; LaMantia v. North Shore Univ. Hosp., 259 A.D.2d 294; Philogene v. Fuller Auto Leasing, 167 A.D.2d at 179. Rather than misleading defendants into believing venue was adequately premised, the complaint accurately and fully disclosed both parties' residences and thus the lack of basis for the designated venue. Defendant's failure to follow the statutory procedure deprives defendant of its right to a change and preserves plaintiff's right to his choice of venue. C.P.L.R. §§ 509, 511(b); Herrera v. R. Conley Inc., 52 A.D.3d 218; Kurfis v. Shore Towers Condominium, 48 A.D.3d 300; Collins v. Greenwood Mgt. Corp., 25 A.D.3d at 449; Howard v. New York State Bd. of Parole, 5 A.D.3d at 272.

For these reasons, the court denies defendant's motion to

the change venue of this action. C.P.L.R. § 511(b). This decision constitutes the court's order.

DATED: September 24, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLING.
J.S.C.

FILED
JAN 04 2013
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