North Haven Equities, LLC. v Brickhouse Masonry, LLC
2012 NY Slip Op 33950(U)
May 24, 2012
Supreme Court, New York County
Docket Number: 150256/2011E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X
NORTH HAVEN EQUITIES, LLC.,
Plaintiff,

Index Number 150256/2011E
Motion Seq. No. 001

against

DECISION AND ORDER

BRICKHOUSE MASONRY, LLC,
Defendant.
----------X

Appearances:	**Plaintiff**	**Defendant**
	Weitzman Law Offices, LLC By: Raphael Weitzman, Esq. 110 Wall Street, 11th fl. New York NY 10005-3817 (212) 248-5200	Pinks Arbeit & Nemeth, Esqs. By: David V. Falkner, Esq. 140 Fell Court, ste. 303 Hauppauge NY 11788 (631) 234-4400

Papers considered in review of this e-filed motion to change venue:	**E-Filing Documents Numbers**
Notice of motion, Pinks affirmation and exhibits A - L, Pinks supplemental affirmation	21 - 24
Weitzman affirmation in opposition, Cohen affidavit and annexed exhibits A - C	27
Weitzman supplemental affirmation and annexed exhibit	28
Oral argument transcript	29

PAUL G. FEINMAN, J.:

Defendant, Brickhouse Masonry, LLC, moves, pursuant to CPLR 510 and 511, for an order changing the venue from this county to Suffolk County and for sanctions against plaintiff, North Haven Equities, LLC. Plaintiff opposes. For the reasons set forth below, the motion is denied.

BACKGROUND

In this action, plaintiff seeks to recover damages from defendant for malicious prosecution, abuse of process, and libel arising out of defendant's filing of a mechanic's lien and a related civil action in Suffolk County. Plaintiff, a domestic limited liability company, owns real property located at 26 On the Bluff, Sag Habor, New York. Defendant is a contractor who performed work, labor and services for the improvement of the single-family home located on

plaintiff's real property. Defendant, along with several other nonparty contractors, filed mechanic's liens against the property in August of 2009 based on their alleged nonpayment.

According to defendant, on October 14, 2010, plaintiff commenced a special proceeding (index no. 28577/2010) by order to show cause in Suffolk County seeking to summarily vacate the mechanic's liens filed by defendant and the nonparty contractors claiming they were subcontractors not entitled to file a mechanic's lien and were not licensed by the Town of South Hampton and/or the Suffolk County Department of Consumer Affairs. Although defendant was named as a party in that proceeding, it did not respond. By order dated May 4, 2011, a justice of the Supreme Court, Suffolk County, denied plaintiff's petition and dismissed the proceeding holding that the mechanic's liens were not facially invalid and, in any event, "the liens arose as a result of the construction of a new home on petitioner's property and accordingly respondents were not required to be licensed" (Doc. 23, ex. F, May 4, 2011 Suffolk County order). Meanwhile, on December 17, 2010, defendant commenced another action in Suffolk County against plaintiff and others seeking to recover for the work, labor, services and materials which it had furnished to plaintiff. When plaintiff failed to timely appear or answer the complaint in that action, defendant obtained a default judgment against plaintiff in the amount of $61,988.00 (Doc. 23, ex. H, March 21, 2011 Judgment, index no. 45642/2010). Plaintiff's motion to vacate the default judgment and for a preliminary injunction precluding plaintiff from enforcing the default judgment was denied (Doc. 24, ex. A, Sept. 7, 2011 Suffolk County order). While plaintiff's motion to vacate was still pending, plaintiff commenced three additional actions in Suffolk County, each seeking to compel a different mechanic's lien creditor, including defendant, to foreclose their respective mechanic's liens. Plaintiff commenced the instant action on July 26, 2011.

Defendant characterizes plaintiff as a "single-asset corporation," claiming that plaintiff's sole asset is the real property located at 26 On the Bluff in Suffolk County (Doc. 22, Pinks affirm. at ¶ 9). In disputing this characterization, plaintiff submits the affidavit of Scot Cohen, plaintiff's principal, who states that plaintiff is "not a single-asset Limited Liability Company," and the property at 26 On the Bluff is "one of North Haven's assets and is used by [Cohen] as a [s]ummer [h]ome" (Doc. 27, Cohen affid. at ¶ 2). Cohen further explains that he "maintain[s] a permanent residence at 20 E 20TH ST, NEW YORK NY 10003 and hence initiated the foregoing action in the County of New York" (*id.* at ¶ 3). Annexed to plaintiff's "sur-reply affirmation" in further opposition to this motion is a copy of a print-out from the Department of State, Division of Corporations, Entity Information database, for plaintiff, which is dated January 13, 2012 (Doc. 28, ex. A). This print-out lists plaintiff's county and jurisdiction as "New York," and shows plaintiff's DOS process address as "110 WALL ST FLR 11[,] NEW YORK, NEW YORK, 10005" (*id.*). This is the same address that is listed on plaintiff's court filings for plaintiff's attorney.

On August 23, 2011, defendant claims to have served a demand to change the venue or the place of trial from New York County to Suffolk County on plaintiff's counsel. On August 31, 2011, defendant served its answer. Plaintiff claims that it did not receive the demand until August 26, 2011, and it responded the same day. Defendant claims that it did not receive plaintiff's response until August 31, 2011. This motion to change venue followed. In support of the motion, defendant has submitted an affirmation from its attorney, annexing exhibits A through L, and a supplemental attorney's affirmation and exhibit.

ANALYSIS

As the instant action only incidentally involves land in Suffolk County, plaintiff was not

required to designate that county as the venue pursuant to CPLR 507. The policy behind CPLR article 5 in a transitory action is that "venue should be a matter of the plaintiff's choice, limited only by the parties' counties of residence should there be any (CPLR 503 [a]), and the ends of justice (CPLR 510 [2], [3])" (*Johanson v J.B. Hunt Transport, Inc.*, 15 AD3d 268, 270 [1st Dept 2005]). Since plaintiff properly placed venue in New York County based on plaintiff's designation in filings with the Secretary of State, defendant must establish that one of the ends of justice exceptions apply to support its motion for change of venue (*see Job v Subaru Leasing Corp.*, 30 AD3d 159, 159 [1st Dept 2006]). A motion for a discretionary change of venue in a transitory action under CPLR 510 (3) for "the convenience of material witnesses and the ends of justice ..." "must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue" (*Krochta v On Time Delivery Service, Inc.*, 62 AD3d 579, 580-581 [1st Dept 2009]; citing *Leopold v Goldstein*, 283 AD2d 319 [1st Dept 2001]).

Here, defendant claims that the following witnesses reside in Suffolk County: (1) Scot Cohen, plaintiff's principal and the individual who resides in the improved premises in Suffolk County; (2) Windward Builders, Inc., and its principal Joseph Larson, the "alleged general contractors" who resides in Sag Harbor, Suffolk County; and (3) Paul Riberio, principal of defendant and resident of Suffolk County. In opposition, plaintiff argues: (1) Cohen's affidavit shows that he is not a resident of Suffolk County except in the summer; (2) Winward and Larson are nonparty entities and thus irrelevant; and (3) defendant fails to provide an affidavit as to Riberio's residency. Plaintiff's contention that the residency of a nonparty witness is irrelevant is flatly contradicted by the case law quoted by plaintiff (*see* Doc. 27, Weitzman affirm. at ¶ 8;

quoting *Schoen v Chase Manhattan Auto. Fin. Corp.*, 274 AD2d 345 [1st Dept 2000] [party seeking venue change "failed to identify single non-party witness..."]). Rather, the inconvenience that must be shown under CPLR 510 (3) is only that of a material *nonparty* witness (*see Margolis v United Parcel Service, Inc.*, 57 AD3d 371, 372 [1st Dept 2008]; *see also Parker v Ferraro*, 61 AD3d 470, 470 [1st Dept 2009] [defendant submitted affidavit from defendant driver, "whose convenience [was] not a factor for consideration on the motion" for a discretionary venue change]). For these purposes, an employee of a corporate defendant is not viewed as a material nonparty witness (*id.*). Thus, the only witnesses offered by defendant that are relevant to the instant motion are Winward and its principal Larson. However, defendant fails to offer any evidence as to whether they would be inconvenienced by testifying in New York County instead of Suffolk, has not explained the materiality of their testimony, and did not set forth their willingness to testify or whether they have even been contacted (*id.*).

While defendant's position appeals to the court's notions of practicality and expedience, it is premised, legally, on CPLR 510 (3). Because defendant has not put forth sufficient evidence as to the convenience of material witnesses, the court has no choice but to deny it (*see Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 242 [1st Dept 2002]).

The court notes that to the extent that defendant's papers raise issues about whether this action is merely an effort to re-litigate the same claims previously adjudicated in Suffolk, the instant motion was noticed as one for a change of venue pursuant to CPLR 510 and 511and not one seeking dismissal pursuant to CPLR 3211(5). Thus, there is no basis, on this motion, for the court to conduct an analysis of whether this action is barred by principles of res judicata or collateral estoppel.

Accordingly, it is

ORDERED that the motion for change of venue is denied; and it is further

ORDERED that, if it has not already done so, defendant is directed to answer the complaint within 20 days of service of a copy of this order together with notice of its entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Rm. 212, 60 Centre Street, New York, New York on July 25, 2012 at 2:15 P.M.

This constitutes the decision and order of the court.

Dated: May 24, 2012
New York, New York

Laura J. Feinman
J.S.C.