

Continental Cas. Co. v Morgan Hotel Group Co.

2013 NY Slip Op 31131(U)

May 17, 2013

Sup Ct, New York County

Docket Number: 102183/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

RESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 102183/2010
CONTINENTAL CASUALTY COMPANY
vs.
MORGANS HOTEL GROUP CO.
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

is decided in accordance with the annexed decision.

FILED
MAY 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/17/13

CYNTHIA S. KERN, J.S.C.
C.S.K.
J.S.C.

- CHECK ONE: CASE DISPOSED
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 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: Part 55

-----X
CONTINENTAL CASUALTY COMPANY, as Subrogee
of D'AGOSTINO SUPERMARKETS, INC. and
D'AGOSTINO SUPERMARKETS, INC.,

Plaintiffs,

Index No. 102183/10

-against-

DECISION/ORDER

MORGAN HOTEL GROUP CO. and MORGANS
HOTEL GROUP MANAGEMENT LLC, individually
and/or collectively d/b/a HENRY HUDSON HOTEL,
IRVING SCHATZ, IAN SCHRAGER, HENRY
HUDSON HOLDINGS, LLC, MORGANS HOTEL
GROUP CO., MORGANS HOTEL GROUP LLC,
MORGANS HOTEL GROUP MANAGEMENT LLC,
MANAGERS OF 353 WEST 57th STREET
CONDOMINIUM, "ABC CORP" real name unknown,
"DEF CORP" real name unknown, "XYZ CORP"
real name unknown, "JANE DOE" real name unknown
and "JOHN DOE" real name unknown,

FILED
MAY 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affidavits in Opposition to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff D'Agostino Supermarkets, Inc. ("D'Agostino") commenced the instant action
against defendants seeking to recover damages to one of its supermarkets located at 353 West

57th Street, New York, NY (the “premises”) due to the alleged negligence of defendants in their ownership, operation, maintenance and control of the premises. D’Agostino now moves, without opposition, to restore this action to the court’s calendar on the ground that it alleges that this case was erroneously marked off the calendar. Plaintiff further moves, with opposition, for an Order pursuant to CPLR § 510 changing the venue of this action to Westchester County. For the reasons set forth below, D’Agostino’s motion is granted in part and denied in part.

The relevant facts are as follows. D’Agostino commenced an action in Westchester County against defendants seeking to recover for damages to one of its supermarkets after a flood occurred due to the alleged negligence of the defendants in their ownership, operation, maintenance and control of the premises. D’Agostino alleged it sustained losses in the form of business interruption as well as the loss of the value of its business. A separate action was filed by Continental Casualty Company, as Subrogee of D’Agostino Supermarkets, Inc. (“Continental”) against defendants in New York County in which Continental sought to recover the money it paid to D’Agostino pursuant to a policy of insurance for the property damage sustained by D’Agostino due to the aforementioned flood.

On or about August 2, 2010, the Honorable Jane S. Solomon issued an Order transferring the action commenced by D’Agostino from Westchester County to New York County and consolidating the two actions and scheduling a preliminary conference in the consolidated action. On September 27, 2010, a preliminary conference was held before Justice Solomon in which a discovery schedule and deposition dates were agreed upon. Subsequently, Continental settled its action with defendants and a stipulation of discontinuance was filed by Continental’s counsel. On or about October 18, 2011, the instant action was marked disposed by this court due to

Continental's settlement. However, D'Agostino alleges that its claims were not settled as a part of that stipulation of discontinuance and that the case should not have been marked disposed at that time.

D'Agostino's counsel alleges that subsequent to Continental's settlement, it engaged in lengthy negotiations with defendants' counsel in an attempt to effectuate a settlement of this matter but that it was not until the fall of 2012 that the parties determined that the matter needed to be litigated to its conclusion as they could not agree on a settlement amount. Plaintiff now moves for an Order restoring the case to the calendar and for an Order pursuant to CPLR § 510 transferring this action back to Westchester County.

As an initial matter, D'Agostino's motion to restore this case to the calendar is granted without opposition as it has demonstrated a meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action and a lack of prejudice to the defendants. However, that portion of D'Agostino's motion for an Order pursuant to CPLR § 510 transferring this action to Westchester County is denied. Pursuant to CPLR § 510,

The court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county;
2. there is reason to believe that an impartial trial cannot be had in the proper county; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

In this case, plaintiff moves to transfer this action to Westchester County on the grounds that it initially commenced this action in Westchester County and that its principal place of business is located in Westchester County. However, Justice Solomon transferred this action to New York County for the purposes of judicial economy. Although that transfer occurred when

