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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

SENECA INSURANCE COMPANY, INC. a/s/o
The Millstone Lodge, LLC,

Plaintiff,

-against-

TODD BUSH and CARRIE BUSH,

Defendants.



INDEX NO. 107935/11

MOTION SEQ. NO. 002 and 003

TODD BUSH and CARRIE BUSH,

Third-Party Plaintiffs,

-against-

DAVID MASTEN,

Third-Party Defendant.

THIRD-PARTY INDEX NO. 590902/11

The following papers, numbered 1 - 13 were considered on these motions to change venue and for summary judgment:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause, — Affidavits — Exhibits | 1, 2, 3, 4, 8, 9, 10 |
| Answering Affidavits — Exhibits | 5, 6, 11, 12 |
| Replying Affidavits | 7, 13 |

Cross-Motion: [ ] Yes [ X ] No

**Upon the foregoing papers, it is ordered that motion sequence 002 and 003** are consolidated for joint disposition and are decided as indicated below.

This subrogation action was commenced as a result of a flood which occurred at a commercial unit located at 654 Saratoga Road, Burnt Hills, New York (Premises). Plaintiff Seneca Insurance Company, Inc. designated New York County as the place of trial based on the fact that its principal office is located in New York County.

## BACKGROUND

Defendants/third-party plaintiffs Todd Bush and Carrie Bush (together "Bush") are siblings who entered into negotiations, and ultimately a contract to purchase the Premises (Contract), with third-party defendant David Masten (Masten). The Premises was previously operated as a restaurant and bar, and would continue to operate as such. The Contract included the sale of certain equipment, as well as for inspections of the Premises and equipment. The Premises was de-winterized for such inspections. As a result of the de-winterization, a water leak occurred causing flood damage to the Premises. Plaintiff Seneca Ins. Co. alleges that defendants/third-party plaintiffs Bush caused the damage when they de-winterized the Premises without plaintiff's permission. Defendants/third-party plaintiffs Bush allege that third-party defendant Masten de-winterized the Premises, causing the damage.

Defendants/third-party plaintiffs Bush previously moved to change the venue of this action from New York County to Schenectady County. Such motion was denied, by decision/order dated July 12, 2012. Now, defendants/third-party plaintiffs Bush move, for a second time, under motion seq. no. 002, to change venue, pursuant to CPLR §§ 510(3) and 511, from New York County to Schenectady County for the convenience of the witnesses. Plaintiff opposes such motion, and third-party defendant Masten takes no position. Third-party defendant Masten now moves, under motion seq. no. 003, for summary judgment dismissing the third-party complaint. Defendants/third-party plaintiffs Bush oppose the motion for summary judgment, and plaintiff takes no position.

## DISCUSSION

### Motion Seq. No. 002 - Venue

Venue is proper in any county where one of the parties resided when the action was commenced. CPLR § 503(a). For a corporation, residency is in the county where the corporation's principal office is located. CPLR § 503(c). Defendants/third-party plaintiffs Bush are moving, for the second time, to change venue; such motion is, in essence, a motion to renew or reargue.

To succeed on a motion for leave to reargue pursuant to CPLR § 2221, movant must show " 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision' ". *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep't 1992), *lv dismissed in part and denied in part* 80 NY2d 1005 (1992), *rearg denied* 81 NY2d 782 (1993) (citing *Schneider v Solowey*, 141 AD2d 813 [1988]).

> "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted."

*Id.* In the instant motion, defendants/third-party plaintiffs Bush do not even allege that the court previously misapprehended the law or facts. Thus, no arguments have been made which would warrant a reversal of the court's previous determination. Moreover, motions to reargue must be made within 30 days after service of the order determining the motion and written notice of entry. CPLR § 2221(d)(3). Here, the decision/order was served on or about July 18, 2012, and more than 30 days have elapsed, as defendants/third-party plaintiffs Bush failed to make the instant motion (motion seq. no. 002) until October 19, 2012.

Additionally, defendants/third-party plaintiffs Bush's motion fails to meet the requirements for renewal since new or additional facts, which were in existence at the time of the original motion but were then unknown to the movant and were therefore not brought to the court's attention, have not been asserted, nor was an excuse for not having presented those facts on the original motion supplied. *See William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dep't 1992), *lv dismissed in part and denied in part* 80 NY2d 1005 (1992), *rearg denied* 81 NY2d 782 (1993); *Mangine v Keller*, 182 AD2d 476 (1st Dep't 1992). In defendants/third-party plaintiffs Bush's initial motion to change venue, they failed to provide affidavits indicating: (1) the names, addresses and occupations of the witnesses; (2) the facts to which the witnesses would testify, which must be necessary and material; (3) the witnesses'

willingness to testify; and (4) how the witnesses would be inconvenienced. CPLR § 510(3); *Culhane v Jensen*, 179 AD2d 582 (1st Dep't 1992); *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172–73 (2d Dep't 1995).

Here, there is no basis for renewal as defendants/third-party plaintiffs Bush failed to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". *See* CPLR § 2221(e)(2). While defendants/third-party plaintiffs Bush provide the addresses, and additional information, of the alleged material witnesses in this action, they have failed to explain why such new evidence was not presented in their initial motion. Moreover, the affidavits supplied are insufficient to warrant a venue change. Although such affidavits generally provide what each non-party witness would testify to, such submissions failed to set forth specific facts which are necessary and material. CPLR § 510(3). Furthermore, it is undisputed that plaintiff designated a proper venue for this action, as plaintiff's principal place of business is in New York county. Thus, defendants/third-party plaintiffs' second motion to change venue must be denied.

Motion Seq. No. 003 - Summary Judgment

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is

appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence claims unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

Third-party defendant Masten moves for summary judgment, arguing that he was out of town the week the property damage occurred, and, thus, could not have caused the damages. In support, third-party defendant Masten proffers, *inter alia*, his deposition transcript, and the deposition transcripts of defendants/third-party plaintiffs Bush. According to third-party defendant Masten, three days prior to the property damage, defendants/third-party plaintiffs Bush changed the locks at the Premises while he was on vacation, and that he did not receive a copy of the new keys, until he returned home, after the damage to the Premises occurred. While it is undisputed that third-party defendant Masten was out of town on the day the damage occurred, he, nevertheless, has failed to establish entitlement to summary judgment as a matter of law. Third-party defendant Masten states that there is no viable claim for negligence, relying solely on the fact that he did not physically cause the damage, as he was out of town and all of his submitted evidence relates to such undisputed fact.

However, in opposition, defendants/third-party plaintiffs Bush proffer, *inter alia*, a sworn statement, signed by third-party defendant Masten, and submitted to his insurance company, in which he stated that the "tenant turned on water to [the] second floor apartment with water overflow the apartment and damage[d] both apartment and restaurant below." *Kunz Affidavit in Opposition*, Exh. A, Sworn Statement in Proof of Loss. Thus, while third-party defendant Masten argues that he did not physically cause the damage to the Premises, he admits in a sworn statement that his tenant caused the damage.

Further, defendants/third-party plaintiffs Bush also proffer the affidavit of George Gray (Gray), a non-party witness, who performed work in the Premises. According to such affidavit, Gray spoke with third-party defendant Masten, who hired Gray to "go onto the property and repair [the] gas line leak, turn on the water and start the furnace". Gray Affidavit, p.2, ¶ 5. Thus, there is an issue of fact as to how the damage occurred, and whom caused such damage. As such, third-party defendant Masten's motion for summary judgment is denied.

Accordingly, it is

ORDERED that this second motion to change venue is denied; and it is further

ORDERED that third-party defendant Masten's motion for summary judgment is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, on all parties.

**Dated:** 7/8/13

**DORIS LING-COHAN, J.S.C.**

**Check one:** [ ] **FINAL DISPOSITION** [ X ] **NON-FINAL DISPOSITION**

**Check if Appropriate:** [ ] **DO NOT POST**

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