

**Plotkin Family Amagansett Trust v Amagansett
Bldg. Materials, Inc.**

2013 NY Slip Op 31805(U)

August 5, 2013

Supreme Court, New York County

Docket Number: 102296/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

Justice

PART 7

The Plotkin Family Amagansett Trust by its grantor,
Richard L. Plotkin, and co-trustees David R. Plotkin,
Geraldyn B. Kerven and Matthew H. Plotkin,,

Plaintiff,

- v -

Amagansett Building Materials, Inc. and
Keiver-Willard Lumber Corporation ,
Defendants.

FILED

AUG 07 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 102296/10

MOTION SEQ. NO. 003

The following papers, numbered 1 to 5 were read on this Motion by defendant to change venue to Suffolk County.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1,2,3</u>
Answering Affidavits — Exhibits (Memo) _____	<u>4</u>
Replying Affidavits (Reply Memo) _____	<u>5</u>

Cross-Motion: Yes No

Plotkin Family Amagansett Trust (Plotkin Trust or plaintiff) brings this action against defendants Amagansett Building Materials, Inc. (Amagansett) and Keiver-Willard Lumber Co. (Keiver-Willard) (collectively, defendants), in connection with plaintiff's purchase of allegedly defective Cypress d4s lumber (lumber) for use in the construction of a single-family home on plaintiff's property, located at 266 Marine Boulevard, Amagansett, Long Island, New York.

Before the Court is a motion by Keiver-Willard for a change of venue, pursuant to CPLR §§ 510(1) and 511(b) and (c), to transfer this action from New York County Supreme Court to Suffolk County Supreme Court on the grounds that the current venue is improper. Amagansett submits papers in support of Keiver's application. In opposition, plaintiff argues that New York County is the proper venue for the action under CPLR 503(b), as David R. Plotkin, co-trustee of

Plotkin Trust, was a resident of New York County at the time of filing the complaint.

BACKGROUND

Plaintiff commenced the herein action by the filing of its Summons and Verified Complaint on February 22, 2010 in the New York Supreme Court, New York County. Plaintiff's Summons designates New York County as the place for trial and sets forth the basis for venue, pursuant to CPLR 503, is defendant's place of business (Keiver-Willard Affirmation in Support, exhibit A). Simultaneously with its answer, Keiver-Willard served a Demand for a Change of Venue from New York County to Suffolk County (*see id.*, exhibit B; CPLR 511).

In response to defendant's Demand for a Change of Venue, plaintiff submitted the affidavit of Jonathan L. Lerner (Lerner Affidavit) on August 27, 2012, pursuant to CPLR 511(b), advising that venue in the County of New York is proper based on Plaintiff's residence (*see* Plotkin Affirmation, exhibit C, ¶2). Despite the Lerner Affidavit, plaintiff's office was served with a Notice of Motion to Change Venue of trial on September 10, 2012 (*see* Notice of Motion to Change Venue; *see also* Plotkin Affirmation, ¶7).

Currently, before this Court is a motion by Keiver-Willard to change venue in this action from New York County Supreme Court to Suffolk County Supreme Court. In support of its application, Keiver-Willard asserts that contrary to the summons, venue cannot be established pursuant to CPLR 503(c), as neither defendant resides in New York County, nor did they reside in New York County at the time plaintiff commenced this action. Specifically, Keiver-Willard points out that its principle place of business is in Newburyport, MA, and Amagansett's principle place of business is in Suffolk County. Moreover, Keiver-Willard asserts that plaintiff failed to timely provide a sufficient affidavit setting forth facts that New York County is proper in accordance with the CPLR (Keiver Willard Affirmation, ¶¶ 7, 14). In support of Keiver-Willard's application, Amagansett similarly asserts that venue in New York County is improper as neither defendant resides in New York County, which is undisputed by the plaintiff, and the complaint is

devoid of any allegation that either defendant resided in New York County at the time of commencement of this action. Since Amagansett maintains its principle place of business in Suffolk County, and as such resides there pursuant to CPLR 503(c), Amagansett requests that this Court grant the herein motion.

In opposition, plaintiff avers that New York County is the proper venue for the action under CPLR 503(b), based on the residence of David R. Plotkin, co-trustee of Plotkin Trust. Plaintiff asserts that there is a discrepancy between the summons and the Complaint regarding the basis for venue in this action due to a clerical error in the summons.¹ The summons bases venue in New York County on defendant's place of business (CPLR 503[c]), instead of plaintiff's residence (CPLR 503[b]). Plaintiff claims venue is proper under CPLR 503(b) because Trustee David R. Plotkin, as set forth in the Complaint and Lerner Affidavit, was a resident of the County of New York at the time the complaint was filed (see Complaint, ¶1 and ¶5; Plotkins Affirmation, exhibit C). Furthermore, plaintiff proffers that the basis for venue pursuant to CPLR 503(b) is supported by facts put forth in the complaint, including Plotkin's residence in New York County which the defendants had knowledge of by virtue of the allegations in the complaint.

DISCUSSION

CPLR 503 provides in relevant parts as follows:

- "(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced...
- (b) Executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver. An executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver shall be deemed a resident of the county of his appointment as well as the county in which he actually resides.
- (c) Corporation. A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier,

¹ The Court notes that in its Affirmation of Opposition, plaintiff seeks to amend the Summons in accordance with CPLR 305(c) in order to correct the discrepancy between the Summons and the Complaint. Although an affirmation in opposition is an improper vehicle by which to make such an application without a motion, the Court in its discretion will overlook this procedural error and allow plaintiff to issue an amended summons to correct this discrepancy (see CPLR 2001).

shall also be deemed a resident of the county where the cause of action arose.”

CPLR 510 provides:

“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. . .”

The Court finds that venue should not be transferred to Suffolk County as Plotkin, co-trustee of plaintiff, was a resident of New York County at the time the action was commenced, establishing proper venue pursuant to CPLR 503(b) (see *McNamara v Penner*, 123 NYS2d 576, 584 [Sup Ct, Oneida County, 1953] [“An administrator is entitled to elect whether action on behalf of decedent’s estate will be instituted in county where administrator resides or in county of his appointment”]; *Roman v Breteton*, 182 AD2d 556 [1st Dept 1992] [“For purpose of deciding whether plaintiff’s placement of venue in county was proper, controlling date was date of commencement of action, and trial court should have determined whether plaintiff maintained residence in county at that time]).

Furthermore, Keiver-Willard’s contention that venue was improper in New York County under CPLR 305(c) is unpersuasive, as plaintiff merely made a clerical error in the original Summons stating venue was proper due to defendant’s principle place of business instead of co-trustee’s place of residence (see CPLR 2001). Moreover, the original complaint affirmed that co-trustee of plaintiff had residence in New York County at the time the complaint was served, establishing proper venue under CPLR 503(b) (see *Barron v Hadcox*, 262 NYS2d 758, 759 [Sup Ct, Oneida County, 1965] [holding the complaint controls the place of venue when there exists a conflict between the complaint and the summons]). Therefore, the Court finds the complaint should control and venue is proper in New York County pursuant to CPLR 503(b). Accordingly, the defendant’s motion to change venue to Suffolk County is denied and plaintiff is permitted to retain venue in New York County.

CONCLUSION

Upon the foregoing it is

ORDERED that the motion by defendant Keiver-Willard Lumber Co. (motion sequence 003) for a change of venue from New York County to Suffolk County is denied; and it is further,

ORDERED that plaintiff is directed to serve an amended Summons, consistent with this Order, within 30 days of Entry; and it is further,

ORDERED that plaintiff is to serve a copy of this Order with Notice of Entry upon defendants within 30 days of entry; and it is further,

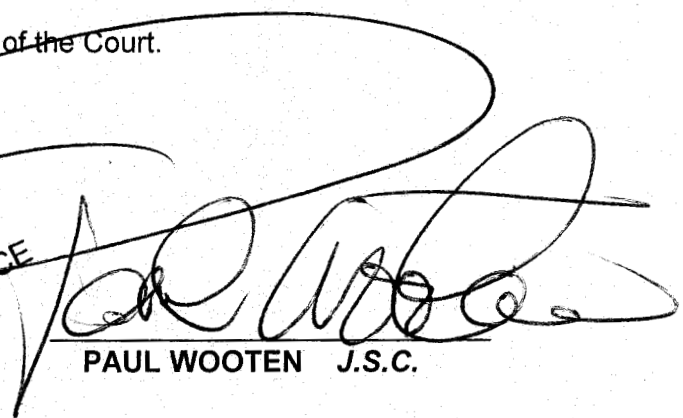
ORDERED that all parties are directed to appear for a preliminary conference at 11:00 a.m. on September 25, 2013 at New York County Supreme Court, 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

FILED
AUG 07 2013

Dated: 8-5-13

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NEW YORK



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE