

Mishqui v Bernini Constr. Corp.
2013 NY Slip Op 34254(U)
March 27, 2013
Supreme Court, Bronx County
Docket Number: Index No. 21160/12E
Judge: Alexander W. Hunter, Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A**

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Segundo Daniel Cargua Mishqui,

Index No.: 21160/12E

Plaintiff,

Decision and Order

-against-

Bernini Construction Corp., Pennbus Realities, LLC,
H Eighth Avenue Associates, LLC, S&E Bridge &
Scaffold, LLC, Rockledge Scaffold Corp., Celta
Construction Corp., IMDN Holdings LLC and
Francesco Sireno,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

Defendant Bernini Construction Corp.'s ("Bernini") motion for an order pursuant to C.P.L.R. 510 and 511, to change venue from Bronx County to New York County, is denied. The Saftler Law Firm's ("Saftler Law") cross-motion for an order, staying this action for the purposes of establishing an attorney's lien, is hereby deemed moot. Celta Construction Corp. ("Celta") and H Eighth Avenue Associates, LLC's ("H Eighth Avenue") cross-motions to change venue of this action from Bronx County to New York County are denied.

The cause of action is personal injuries allegedly sustained by plaintiff while he was performing construction, repairs, and/or alteration work at the premises located at 575 5th Avenue, New York, New York on April 20, 2012.

Plaintiff commenced the instant action by filing a summons and verified complaint on June 12, 2012. Venue was placed in Bronx County based upon defendant's residence. Defendant Bernini served a verified answer on July 20, 2012. Thereafter on August 9, 2012, Bernini served an amended verified answer and a demand for change of venue. To date, plaintiff has failed to respond to defendant's demand for a change of venue. Pursuant to C.P.L.R. 511(a), defendant timely moved for the relief requested herein.

Defendant Bernini asserts that venue should be changed to New York County because the accident occurred in New York County and none of the proper parties herein are residents of Bronx County. The complaint lists Bernini's offices as located at 509 Willis Avenue, Bronx, New York. However, as of February 1, 2005, Bernini's principal executive office has been located at 37 West 20th Street, Suite 806, New York, New York. In addition, plaintiff also lists Celta as a party defendant with an address located at 725 East 135th Street, Bronx, New York. But, venue cannot be based upon the residence of an improper party. Celta is an improper party

to this action as plaintiff's action against Celta is barred by the exclusive remedy of the Workers' Compensation Law.

Defendant Bernini submits the affidavit of Michael Malhas, the president of Bernini. Mr. Bernini states that Bernini was first incorporated on April 17, 1985, with its principal executive office located at 212 West 262nd Street, New York 10471. As of February 1, 2005, Bernini relocated its principal executive office to its current address located at 37 West 20th Street, Suite 806, New York, New York 10011.

Plaintiff's counsel cross-moves for an order staying all proceedings for the purposes of establishing an attorney's lien on behalf of plaintiff's outgoing attorneys and denying the motion to change venue. Plaintiff's counsel asserts that Saftler Law received letters dated June 29, 2012 from plaintiff and his new counsel, indicating that Saftler Law was discharged without cause and that Gorayeb & Associates were retained as new counsel. Based upon prior dealings with Gorayeb & Associates, Saftler Law forwarded a letter detailing the work that has been done on this matter and that an attorney's lien was warranted. Saftler received no response from Gorayeb & Associates. Therefore, Saftler Law seeks an order staying the motion until such time that the file in this case is transferred, after payment of costs and expenses, and the establishment of an attorney's lien. In the alternative, Saftler Law argues that the instant motion should be denied because Bernini and Celta are residents of Bronx County. Plaintiff's counsel further asserts that "there has been no testimony relating to anything in this matter, there is no verification of propriety of venue other than official records."

Defendant Celta takes no position with respect to Saftler Law's cross-motion to establish an attorney's lien on behalf of the outgoing attorney. However, Celta opposes: 1) plaintiff's cross-motion to deny Bernini's motion to change venue and 2) plaintiff's request for a stay of this litigation. Celta avers that this case has no connections with Bronx County and the proper venue for this matter is New York County. Celta maintains that none of the proper defendants in this action are residents of Bronx County. Defendant asserts that a stay in this action is unwarranted as a dispute over an attorney's lien should not delay the resolution of the pending motions to change venue or this litigation in general.

Defendant H Eighth Avenue accepts and adopts the arguments set forth in the motions submitted by defendants Bernini and Celta and requests an order transferring venue to New York County.

In reply, Bernini takes no position as to Saftler Law's cross-motion to establish an attorney's lien on the case file. Contrary to plaintiff's counsel's assertion, there has been testimony verifying the propriety of venue in the form of an affidavit from Michael Malhus. Bernini reiterates that plaintiff venued this action in Bronx County based upon defendant's residence. However, since Bernini was not located in Bronx County at the time this action was commenced, venue in Bronx County is improper. Moreover, plaintiff has failed to provide any basis to stay the instant motion pending a file transfer and the establishment of an attorney's lien.

Plaintiff's new counsel, Silberstein, Awad, & Miklos, P.C. ("Silberstein"), submits an affirmation in opposition to defendant H Eighth Avenue's cross-motion to change venue to New York County. While Gorayeb & Associates was awaiting the transfer of the case file, Silberstein was substituted as plaintiff's new counsel. On September 20, 2012, Silberstein filed a consent to change attorney form executed by plaintiff and Saftler Law and a notice of appearance. Thereafter, Silberstein and Saftler Law entered into a stipulation to honor Saftler Law's lien for the work they have performed in this case. Silberstein has also reimbursed Saftler Law for its disbursements.

Plaintiff argues that: 1) this action is properly venued in Bronx County; 2) Bernini failed to satisfy its burden of proving that plaintiff's choice of venue is improper; and 3) plaintiff has not forfeited his right to select venue should this court decide that Bronx County is an improper venue. Plaintiff avers that a corporation's residence for venue purposes is the address listed in its Certificate of Incorporation. Since Bernini has failed to amend its Certificate of Incorporation, the original designation of Bronx County governs. Plaintiff further asserts that Bernini has failed to submit any evidence to demonstrate that Bernini formally amended its principal office address in its Certificate of Incorporation. In the event, this court deems Bronx County to be an improper county, plaintiff maintains that he has not forfeited the right to select venue since he reasonably relied on an official document, namely, the New York State Department of State Division of Corporations website which listed Bernini's principal executive office as located in Bronx County.

C.P.L.R. 503(c) provides that: "[a] domestic corporation...shall be deemed a resident of the county in which its principal office is located." A corporation's principal office is determined by its Certificate of Incorporation, Discolo v. River Gas & Wash Corp., 41 A.D.3d 126 (1st Dept. 2007); Hill v. Delta Intern. Machinery Corp., 16 A.D.3d 285 (1st Dept. 2005), regardless of where its actual principal office is located. Marko v. Culinary Institute of America, 245 A.D.2d 212 (1st Dept. 1997); DeGiovanni v. Pepsico, Inc., 91 A.D.2d 519 (1st Dept. 1982); Graziuso v. 2060 Hyland Blvd. Restaurant Corp., 300 A.D.2d 627 (2nd Dept. 2002). Defendant Bernini has failed to meet its burden to establish that plaintiff's choice of Bronx County was improper. C.P.L.R. 503(a) and 510(1); Simon v. Usher, 93 A.D.3d 401 (1st Dept. 2012); Hernandez v. Seminatore, 48 A.D.3d 260 (1st Dept. 2008). Bernini has failed to submit any proof to demonstrate that it amended its Certificate of Incorporation to reflect its current principal office in New York County. As such, the address listed in its Certificate of Incorporation is controlling.

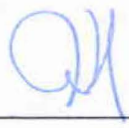
Accordingly, defendant Bernini's motion to change venue of this action from Bronx County to New York County is denied. Saftler Law's cross-motion for an order, staying this action for the purposes of establishing an attorney's lien, is hereby deemed moot. Celta and H Eighth Avenue Associates' cross-motions to change venue of this action from Bronx County to New York County are denied.

Defendant Bernini is directed to serve a copy of this order with notice of entry on all parties by regular and certified mail (return receipt not required) and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: March 27, 2013

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR