

**Marcus Tulio Benavidez-Portillo v G.B. Constr. & Dev., Inc.**

2014 NY Slip Op 31587(U)

June 20, 2014

Sup Ct, New York County

Docket Number: 150145/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
MARCOS TULIO BENAVIDEZ-PORTILLO,

Plaintiff,

Index No. 150145/13

- against-

G.B. CONSTRUCTION AND DEVELOPMENT,  
INC. and G.B. CONSTRUCTION LLC,

Defendants.

-----X  
G.B. CONSTRUCTION AND DEVELOPMENT,  
INC.,

Third-party Plaintiff,

-against-

MACOR CONSTRUCTION, INC.,

Third-party Defendant

-----X  
JOAN A. MADDEN, J.

Third-party defendant Macor Construction, Inc. ("Macor") moves pursuant to CPLR 503, 510 and 511, to change the venue of this action from this court to the Supreme Court, Suffolk County. Plaintiff opposes the motion, and cross moves to sever the third-party action. Defendant/third-party plaintiff G.B. Construction and Development, Inc. (G.B.) and Macor oppose the cross motion. For the reasons below, the motion is granted and the cross motion is denied.

Plaintiff seeks to recover damages for injuries he allegedly sustained on September 13, 2011, when he fell from a roof at 9 Webb Hill Road, Great Neck, New York, while performing construction work. Plaintiff is a resident of Nassau County. Plaintiff was employed by Macor. G.B. was the general contractor on the project, and its principal place of business is in Suffolk

County. At the time the action was commenced, venue was proper in New York County based on the location of defendant G.B. Construction LLC's (G.B. LLC) principal place of business. After plaintiff moved for a default judgment against G.B. and defendant G.B. LLC, plaintiff agreed to withdraw the motion as against G.B. on condition that G.B. waive all jurisdiction defenses and consent to venue in New York County. Plaintiff subsequently discontinued the action as against G.B. LLC. G.B. then joined Macor as a third-party defendant on July 1, 2013. Macor's principal place of business is Suffolk County.

With its answer dated October 11, 2013, Macor served a demand to change venue from this court to Suffolk County. When plaintiff did not consent to the demand, Macor filed this motion on October 21, 2013. Plaintiff opposes the motion arguing, *inter alia*, that as a third-party defendant, Macor may not move to change venue and that, in any event, the motion should be denied as venue was proper when the action was filed and G.B. has consented to venue in New York County.

As a preliminary matter, contrary to G.B.'s position, a third-party defendant, like Macor, may seek to change venue. See e.g., Kearns v. Johnson, 238 AD2d 121 (1<sup>st</sup> Dept 1997)(granting third-party defendants' motion to change venue as a matter of right)<sup>1</sup>. In addition, Macor has complied with the procedure for changing venue as a matter of right, by serving a demand with its answer (CPLR 511 (a)) and upon plaintiff's refusal to consent to a change of venue, moving

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<sup>1</sup>In contrast, a third-party defendant may not seek a change of venue as a matter of right, where the venue was proper until it was joined as a third-party defendant. See Sanchez v. Project Adventure, Inc., 260 AD2d 151 (1<sup>st</sup> Dept 1999)(holding that contrary to City's position, "bringing in a municipality as a third-party defendant does not render improper ( see, CPLR 510[1] ) venue previously designated in a county other than the one in which the municipality is situated")

to change venue “within fifteen days after service of the demand.” CPLR 511(b).

CPLR 503(a), provides that “[e]xcept 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; or, if none of the parties then resided in the state, in any county designated by plaintiff.” CPLR 503(c) provides that “[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....” Here, neither G.B. nor Macor has a principal office in New York County. Moreover, plaintiff is a resident of Nassau County. In addition, while G.B. consented to venue in this court, Macor was not a party to that agreement and cannot be bound by it. Accordingly, the motion to change venue should be granted.

On the other hand, the cross motion to sever should be denied. CPLR 603 permits a court to sever a claim or action for trial “[i]n furtherance of convenience or to avoid prejudice.” CPLR 1010 which applies specifically third party actions, provides that “[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim...[and that] in exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.”

While in determining whether to sever a third party action the court considers issues of judicial economy and prejudice to the third-party plaintiff (Vasquez v. G.A.P.L.W. Realty, Inc., 254 AD2d 232 [1<sup>st</sup> Dept 1998]), it also takes into account whether the main action will be delayed as a result of the third-party action, particularly where there has been undue or inexcusable delay in prosecuting the third party claims. Blechman v. I.J. Peiser’s and Sons, Inc.,

186 AD2d 50 (1<sup>st</sup> Dept 1992); Pena v. City of New York, 222 AD2d 233 (1st Dept 1995).

Here, the court finds that upon consideration of various factor, including the interest in judicial economy, it would be inappropriate to sever the third-party action, which seeks contractual indemnification to the extent that G.B. is held liable in the main action. Moreover, while discovery has begun in the main action, it is not nearly complete. Accordingly, the cross motion to sever must be denied.

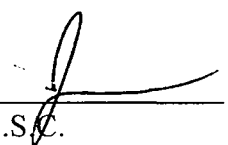
In view of the above, it is

ORDERED that the motion to change venue of this action for this court to the Supreme Court, Suffolk County is granted; and it is further

ORDERED that venue of this action is changed from this court to the Supreme Court, County of Suffolk, and upon service of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, Suffolk County.

ORDERED that the cross motion to sever the third-party action is denied.

Dated: June 10, 2014

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
**J.S.C.**