

<b>Plavnik-Stybel v Ionescu</b>
2015 NY Slip Op 31423(U)
July 30, 2015
Supreme Court, Kings County
Docket Number: 503771/2015
Judge: Martin M. Solomon
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ELENA PLAVNIK-STYBEL,  
individually and on behalf of AMITYVILLE FAMILY  
MEDICAL CARE P.L.L.C., and WEST OAK STREET  
REALTY, LLC,

Plaintiff,

**Decision/Order**

- against -

**Index No. 503771/2015**

DANITA IONESCU and CHRISTOPHER IONESCU a/k/a  
CHRIS IONESCU a/k/a MICH IONESCU,

Defendants,

and

AMITYVILLE FAMILY MEDICAL CARE P.L.L.C., and  
WEST OAK STREET REALTY, LLC,

Nominal Defendants.

-----X  
**RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED ON THE REVIEW OF  
THIS MOTION FOR SUMMARY JUDGMENT.**

<b>PAPERS</b>	<b>NUMBERED</b>
<b>Notice of Motion and Annexed Affidavits</b>	<b>1</b>
<b>Affirmations in Opposition</b>	<b>2</b>
<b>Plaintiff's Memorandum of Law</b>	<b>3</b>
<b>Reply Affirmation</b>	<b>4</b>
<b>Defendants' Memoranda of Law</b>	<b>5, 6</b>

**UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:**

Plaintiff Plavnik-Stybel brings this derivative action on behalf of Amityville Family Medical Care P.L.L.C. and West Oak Street Realty, LLC, against defendants Danita Ionescu and Christopher Ionescu ("the Ionescus"), seeking money judgments and an accounting based on theories of breach of fiduciary duty, waste, conversion, negligence, and unjust enrichment. The Ionescus now move to change the venue of this proceeding from Kings County to Suffolk County pursuant to Civil Practice Law and Rules § 511, alleging that Plavnik-Sytbel does not live in Kings County, and that Kings County is not a proper venue under CPLR § 510(1) because Plavnik-Stybel does not live in

Kings County and that venue should be based on the residence of Amityville Family Medical Care P.L.L.C. and West Oak Street Realty, rather than the residence of Plavnik-Stybel.

In support of their motion, the Ionescus submit a copy of a New York State Department of State record listing Plavnik-Stybel as the CEO of Amityville Family Practice Associates, P.C. The Ionescus also submit, in their reply affirmation, a copy of a LexisNexis printout, which shows various addresses attributed to Plavnik-Stybel, a Suffolk County Small Claims Assessment Review, an IRS Schedule K-1 from 2013 listing the county of Plavnik-Stybel's residence as Suffolk County, and a mortgage record from the City of New York listing Plavnik-Stybel as a mortgagor at the Suffolk County address listed on the Schedule K-1.

The Second Department has not ruled on whether a member of an LLC bringing a derivative suit on behalf of an LLC may designate the county where he lives as the venue of said suit, and the Limited Liability Company Law does not address derivative suits. However, prior rulings by the Court of Appeals and the Second Department provide a framework to address this issue.

When "examining acts of the managers and members, analogies are frequently made to the Business Corporation Law and the Partnership Law and acts of directors, stockholders and partners." (Bruce A. Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, Limited Liability Company Law, 2014 Pocket Part at 27.)

Using one such series of analogies, the Court of Appeals held, "Members of a limited liability company (LLC) may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law." *Tzolis v Wolff*, 10 NY3d 100, 102, 884 NE2d 1005, 1005 [2008].

In *Tzolis*, the Court of Appeals detailed how elements of the court-created derivative action and the subsequent rules regarding how that action is prosecuted can now be found in the Business Corporation Law and the Partnership Law. *See Tzolis v Wolff*, 10 NY3d at 108-109. The Court has since applied the *de facto* corporation doctrine to LLCs, *see In re Hausman*, 13 NY3d 408, 412 [2009], and applied the piercing the corporate veil doctrine to LLCs, *see Conason v Megan Holding, LLC*, 25 NY3d [2015]. In light of these rulings, it makes sense to examine the residence of a member of an LLC bringing suit on behalf of the LLC in light of the existing rules for other forms of business.

In a derivative suit brought by an LLC member on behalf of the LLC, the plaintiff must sue in his individual capacity. *See Mizrahi v Cohen*, 104 AD3d 917, 919 [2013]. Likewise, Business Corporation Law § 626(a) provides that the stockholder who brings a suit on behalf of a corporation is "styled" the plaintiff in the action. This stockholder, if a natural person, may assert residence based on the county of his residence pursuant to CPLR § 503(a). In the case of an unincorporated association, the president or treasurer "suing or being sued on behalf of the association, shall be deemed a resident of...the county where he actually resides" under CPLR § 503(d). Finally, CPLR

§ 503(d) also provides that a “partnership or an individually-owned business shall be deemed a resident of any county in which...the partner or individual owner suing or being sued actually resides.”

Under the circumstances presented here, this court sees no reason to deviate from the rules established for similar cases pertaining to other forms of business. Furthermore, the Ionescus present no reason why a member of an LLC suing derivatively should be treated differently from a stockholder or partner who designates the county that he resides in as venue in a derivative suit. Therefore, this court holds that a member of an LLC suing on behalf of the LLC may designate venue based on the county or counties where he actually lives.

We now turn to the Ionescus’ claim that venue is improper because Plavnik-Stybel does not live in Kings County.

A plaintiff may properly designate venue as being in the county where he resides on the date of the commencement of the action. *See O’Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 170 [2d Dept 1995].

For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency. Residence means living in a particular place, while domicile means ‘living in that locality with intent to make it a fixed and permanent home.’ In the context of determining the proper venue of an action, a party may have more than one residence.

In order to prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff’s choice of venue is improper, and also that the defendant’s choice of venue is proper. To succeed on [this] motion [defendants are] obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in Kings County. Only if [defendants make] such a showing [will] the plaintiff [be] required to establish, in opposition, that the venue...selected was proper. *Deas v Ahmed*, 120 A.D.3d 750, 750 [2d Dept 2014] (internal citations omitted).

If defendants fail to meet their burden, the motion to change venue should be denied. *Campbell v The Western Beef*, 123 AD3d 966 [2d Dept 2014].

In *Gruenwald v Polatseck*, defendants met their *prima facie* burden by submitting plaintiffs’ driving records, various hospital records, a United States postal service confirmation, and ledger entries from a market which showed purchases by plaintiffs in the county that defendants alleged plaintiffs resided in. *Gruenwald v Polatseck*, 114 AD3d 904 [2d Dept 2014].

The court has used other combinations of documents and testimony to establish residency for venue purposes. In *Galette v Byrne*, the Second Department held that testimony from plaintiff, her aunt, and her mother combined with documentary evidence that included a copy of a driver's license, voter registration documents, and a bank statement identifying her residence sufficiently supported a referee's determination that plaintiff resided in Kings County. *Galette v Byrne*, 122 AD3d 677 [2d Dept 2014]. In *Kelly v Karsenty*, plaintiff established residency by submitting a copy of a three-year lease for a cooperative apartment, dated two years before the commencement of the action, that stated plaintiff was to reside at the apartment; a bank statement; a copy of a New York State tax bill; and a union membership card. All of these documents listed plaintiff's address.

In *Gruenwald, Galette, and Kelly*, the parties submitted documentation that a party who resided in a particular location might be expected to have as a result of his intention to stay.

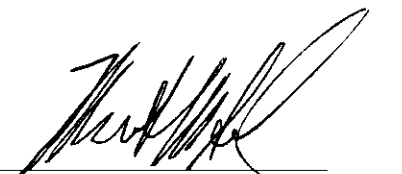
Under the circumstances presented here, Small Claims Assessment Review and the City of New York mortgage record, and the Schedule K-1 all list the same address in Stony Brook for Plavnik-Stybel. Taken together, these documents tend to show that Plavnik-Stybel resides in Suffolk County.

The probative value of the deed to property in Kings County provided by Plavnik-Stybel is inconclusive, as the deed lists the same address in Stony Brook as Plavnik-Stybel's residence, and is granted both to Plavnik-Stybel and a Michele Stybel. With respect to both the cable bill and the lease submitted by Plavnik-Stybel, both are dated after the commencement of this action, and are of little probative value in proving Plavnik-Stybel's county of residence for venue purposes.

Under these circumstances, defendants have met their *prima facie* burden and their motion must be granted.

For the foregoing reasons, defendants' motion is granted. The Clerk of the Supreme Court of Kings County is directed to transfer the files to the Clerk of the Supreme Court of Suffolk County, and the Clerk of the Supreme Court of Suffolk County is directed to issue an index number upon payment of any appropriate fee.

Dated:  
July 30, 2015

  
Martin Solomon, J.S.C.