Mid-Hudson Props., Inc. v Klein
2015 NY Slip Op 32887(U)
January 16, 2015
Supreme Court, New York County
Docket Number: 152006/14
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
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MID-HUDSON PROPERTIES, INC.,

Plaintiff,

-against-

Index No. 152006/14

Motion Seq. 001

STEVEN KLEIN, MICHAEL VARBLE, KLEIN VARBLE & GRECO, P.C., KLEIN VARBLE & ASSOCIATES, P.C., and JOHN DOES 1-3,

Defendants.
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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action concerning a commercial lease, plaintiff Mid-Hudson Properties, Inc. ("plaintiff") moves pursuant to CPLR 3120 to compel defendants Steven Klein ("Klein"), Michael Varble ("Varble"), Klein Varble & Greco, P.C. ("KVG"), and Klein Varble & Associates, P.C. ("KVA") (collectively, "defendants") to provide written discovery, and for Klein and Varble to appear for depositions.

Defendants oppose the motion and cross-move pursuant to CPLR 510(3) to change venue of this action from New York County to Dutchess County.

Factual Background[1]

Plaintiff, a corporation with its offices located at 75 Rockefeller Plaza in Manhattan, owns a multi-story office building located at 235 Main Street in Poughkeepsie (Dutchess County), New York (the "Building"). On July 7, 2011, plaintiff and Klein, as landlord and tenant, respectively, entered into a five-year lease regarding a portion of the Building's third floor (the "Lease"). Thereafter, Klein assigned the Lease to KVG, Klein's law firm. Subsequently,

[1] The Factual Background is taken from plaintiff's complaint and the parties' moving papers.

plaintiff and KVG entered into a modification of the Lease which altered the Lease's rental payment terms.

Thereafter, in September 2011, after plaintiff had expended over $200,000 for customized tenant improvements, KVG entered into possession of the premises and paid its base rent obligations until August 2013.

Since August 2013, KVG has failed to pay the rent due and owing under the Lease, as well as related arrears and rent escalations.

Before commencing this action, and while KVG continued to occupy the premises, plaintiff brought a nonpayment summary proceeding against KVG. In that proceeding, in which KVG appeared, plaintiff recovered a judgment against KVG for $10,779.34. Additionally, plaintiff commenced a second nonpayment proceeding against KVG and was awarded a judgment for $29,272.01. Both judgments remain unsatisfied.

On June 5, 2012, Klein, Varble, and others (*i.e.*, John Does 1 to 3) formed a new entity -- KVA -- based on claims of financial hardship regarding tax liens. KVA continued to occupy the Building at the same third floor location as KVG, while serving KVG's same clients, and using KVG's same furniture and employees. KVA's principals were also identical to KVG's except that Kevin Greco ("Greco"), one of KVG's original principals, was ousted.

In January 2014, KVA vacated the premises and relocated to another location (also in Poughkeepsie), where it has continued with the practice of law with the same principals and employees, while utilizing the same furniture and equipment and servicing the same clients.

Plaintiff claims that KVA is the alter ego of all other defendants, and its establishment constitutes a scheme to evade payment of monies owed to plaintiff. By the complaint, plaintiff

brings causes of action under the New York Debtor and Creditor Law, and for, *inter alia*, breach of the Lease and unjust enrichment.

In September 2014, plaintiff served discovery demands seeking a bill of particulars, documents, and photographs, and notices for depositions of defendants (to be held in New York City). However, defendants have not responded to any of these demands, and have not appeared for depositions.

In the instant motion, plaintiff seeks a self-executing order requiring defendants to respond to its discovery demands and for Klein and Varble to appear at depositions by a date certain, and directing that noncompliance will result in the striking of defendants' answer pursuant to CPLR 3126.

In opposition, defendants note that plaintiff has not yet served a bill of particulars, and that no proceedings in this matter have taken place. As to plaintiff's discovery demands, defendants aver that they will provide the outstanding written discovery in short order.

In support of their cross-motion, defendants further contend that venue should be changed from to Dutchess County on the grounds that the convenience of material witnesses and the ends of justice will be promoted by such change.

Defendants aver that plaintiff recently served subpoenas on three non-party witnesses -- Michael Ducey ("Ducey"), Greco, and Stella Isaza ("Isaza") --all of whom reside and/or work in Dutchess County. Defendants' counsel further asserts that he or members of his office have interviewed these witnesses, all of whom have stated that it would be an inconvenience and a hardship to testify in New York County, due to the distance between Dutchess County and New York County. Moreover, Greco and Isaza reside, and are solo law practitioners at their

respective firms, in Dutchess County. Based on defendants' counsel's conversations with Greco and Isaza, travel to and from New York County for depositions and/or trial would "greatly impact their respective abilities to maintain their practices and fulfill their client obligations in a professional manner."

Furthermore, defendants intend to call at least three other witnesses[2] at trial who reside and/or work in Dutchess County, and will testify as to several issues at the heart of this matter (*e.g.*, the condition of the premises, plaintiff's failure to keep the premises in good repair, and plaintiff's failure and refusal to respond to tenant complaints as to repairs and maintenance). Mazzetti owns and operates Ameriprise Financial Services in Poughkeepsie. Gross is a bookkeeper who lives and works in Dutchess County, and has children for whom she cares. Vetrano is a solo law practitioner who resides and works in Dutchess County. Based upon counsel's conversations with these witnesses, travel to and from New York would "greatly impact their respective abilities to maintain their jobs and/or practices and fulfill their employment and family obligations." Nevertheless, all witnesses are ready and willing to testify, provided they can do so in Dutchess County.

Defendants argue that they have satisfied the legal standard for a venue change by averring the following: the names, locales and occupations of the respective witnesses; the facts as to which the prospective witnesses will testify at trial; that the witnesses are, in fact, willing to testify; and how the witnesses would be inconvenienced but for a venue change. Counsel further states that the above criteria were properly satisfied by way of an attorney affirmation, given that

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[2] These other witnesses are David Mazzetti ("Mazzetti"), Darlene Gross ("Gross"), and Dennis Vetrano ("Vetrano"). Defendants also state that they intend to call an employee or employees of the New York State Department of Labor, but do not provide any further details to such witness or witnesses.

counsel has personal knowledge of the facts. And, as to the subpoenaed witnesses, since plaintiff proffered and subpoenaed them, the burden by the above standard should even not apply to them.

Moreover, the interests of justice would be best served by changing venue to Dutchess County. The subject property is located in Dutchess County, and the Lease was negotiated and executed in, and allegedly breached, therein. And, all of the witnesses in the action reside in Dutchess County, and all proof relative to the matter is located in Dutchess County. Moreover, a change of venue may lead to a speedier trial, as the court may take judicial notice that New York County has a more congested trial calendar. Additionally, the place where the cause of action arose is a significant, and often the controlling, factor to be considered in evaluating a motion to change venue.

In further support of its motion, plaintiff adds that Klein and Varble have failed to appear for their depositions at least three times, and that counsel has failed to return several telephone calls and letters attempting to reschedule the depositions.

In opposition to defendants' cross-motion, plaintiff states that it is a New York corporation with its principal offices located in New York County. Plaintiff's principals all have had offices located in Manhattan for the past ten years since plaintiff's inception. All documents relating to plaintiff's business are located in New York County.

Also, defendants' counsel failed to disclose that two of the non-party witnesses referenced in the cross-motion (Ducey and Greco) have already appeared at depositions, which were conducted in Manhattan (Ducey) and White Plains (Greco). Counsel further misleads the court regarding plaintiff's unserved bill of particulars, as defendants have not yet made a demand for same. And, as to the other non-party witness (Isaza), she is the subject of a default for

nonpayment of rent and is about to be sued for same. Thus, it is no surprise that an alleged statement of inconvenience by this witness would be relied up on by defendants. On this note, the court's discretion is more properly exercised by keeping the action in New York County.

When the convenience of defendants' proposed witnesses is weighed against that of witnesses located in New York County, it is evident that venue should remain in New York County. The fact witnesses to be called on plaintiff's behalf include contractors who worked at the premises (Ducey and Fernando Biagioni ("Biagioni")). Ducey and Biagioni (who reside in Tuckahoe, Westchester County) have indicated their willingness to appear in New York County for their testimony. Also, Anker Management, the Building's property manager, is located in Hartsdale, Westchester County, which is closer to Manhattan than to Dutchess County. Moreover, plaintiff's counsel or Sean Dweck (both are principals are plaintiff) will be called as a witness to testify as to the ownership and condition of the building, and both have offices in Manhattan. Further, Mark Cohen, CPA ("Cohen") will be called to testify to damage calculations; his offices are in Purchase (Westchester County), which is closer to Manhattan. The same holds true for Stillman Management, which is located in Mamaroneck (Westchester County), which will testify as to the habitable condition of the premises.

Defendants' counsel further misleads the court by stating that the Lease was negotiated and finalized in Dutchess County. The Lease was prepared in Manhattan, forwarded to Klein by mail from Manhattan, and thereafter returned by Klein to plaintiff's counsel's office in Manhattan.

And, the statement that defendants intend to call those people named in the cross-motion as witnesses in the action is specious at best. Plaintiff's motion, if granted, would render the

cross-motion moot. Plaintiff further contends that the cross-motion is untimely, as it was made without proper notice.[3]

Discussion

The court will consider the merits of defendants' cross-motion, even assuming it was made without proper notice. Plaintiff, which submitted a reply to the cross-motion, has not demonstrated (or even argued) that it has been prejudiced by the cross-motion (*see Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532 [1st Dept 2013]).

While venue of an action is properly placed in the county in which any of the parties resided at the time of commencement of the action, a court "may [upon motion] change the place of trial of an action where ... the convenience of the material witnesses and the ends of justice will be promoted by the change" (CPLR 510(3); *see also Bernstein v Bayrock Group, LLC*, 2009 WL 6829469 [Sup Ct Westchester Cty 2009]).

In a motion made under CPLR 510(3), the burden is on the party moving for a change of venue (*see Book v Horizon Asset Mgmt.*, 105 AD3d 661 [1st Dept 2013]; *Jansen v Bernhang*, 149 AD2d 468, 469 [2d Dept 1989]). As to the convenience of material witnesses, the movant must demonstrate that a preponderance of material witnesses reside in a different county from where the cause of action arose (*see Chimarios v Duhl*, 152 AD2d 508, 509 [1st Dept 1989]).

The movant must also "provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue"

[3] According to defendants' notice of cross-motion, the motion is dated October 24, 2014, and has a return date of October 30, 2014.

(*Peribanez v University Hill Apartments Inc.*, 2014 WL 7001527 [Sup Ct New York Cty 2014] *citing Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424, 425 [1st Dept 2003]). An attorney affirmation may suffice as the requisite affidavit (*see Torres v Larsen*, 195 AD2d 285 [1st Dept 1993]).

"The materiality of the witnesses' expected testimony must be established. 'It is not sufficient that the testimony be merely relevant in some way; rather it must bear on a central issue' and must not be 'merely cumulative of evidence that can be obtained by other means' (Weinstein-Korn-Miller, NY Civ Prac ¶ 510.18 [2d ed]). Thus, the substance of the witness's testimony must be detailed with sufficient particularity to permit a finding of necessity and materiality" (*see Bernstein, supra*, at * 10 *citing 25/27 Corp. v Mormile*, 43 AD3d 1154 [2d Dept 2007] and *Andros v Roderick*, 162 AD2d 813, 814 [3d Dept 1990]).

Notwithstanding, the convenience of a party or its employees is not a factor in determining a motion made under this section (*see Moshin v Port Auth. of N.Y. & N.J.*, 83 AD3d 536 [1st Dept 2011]; *Gissen v Boy Scouts of Am.*, 26 AD3d 289 [1st Dept 2006]). Moreover, the convenience of non-party material witnesses residing outside of the respective counties at issue is not to be considered (*see Bernstein, supra*; *Lundgren v Lovejoy, Wasson, Lundgren and Ashton*, 82 AD2d 912 [2d Dept 1981]; *Slavin v Whispell*, 5 AD2d 296 [1st Dept 1958]).

With respect to the promotion of the ends of justice, this factor is promoted in rural counties where there is less calendar congestion, so as to give the action a speedier trial (*see Samuels v Ramada, Inc.*, 190 AD2d 636 [1st Dept 1993] (proper exercise of discretion to change venue from New York County to Monroe County)). Moreover, where an action arose is a significant factor in a transitory action (*see Coles by Coles v LaGuardia Medical Group, PC*, 161

AD2d 166 [1st Dept 1990]).

Defendants meet their burden under the above standard. Defendants point to the witnesses Greco, Isaza, Mazzetti, Gross, and Vetrano in support of their claims.[4] All of these witnesses reside and/or work in Dutchess County, and defendants' counsel affirms that travel to and from New York County for testimony would negatively impact their abilities to maintain their employment and/or familial obligations (*see e.g. Chiappa v Macaluso*, 96 AD2d 895 [2d Dept 1983] (motion to change venue from Bronx County to Westchester County granted in part due to fact that non-party witnesses were employed in Westchester County); *Bahadur v New York State Dept. of Correctional Services*, 2011 11718261 [Sup Ct Queens Cty 2011] (in granting motion to change venue from Queens County to Oneida County, court found that non-party witnesses who worked in Oneida County would be inconvenienced by travel to and from Queens County)). And, these witnesses' expected testimony pertains to the condition of the premises, which all parties appear to agree is material to this action.[5]

Defendants further provide other reasons to support a change of venue, including, *inter alia*, that the subject property and events leading up to this litigation are located/occurred in Dutchess County. Moreover, the goal of fostering speedy trials can better be accomplished in Dutchess County than New York County.

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[4] Defendants also point to Ducey, but plaintiff noted in reply that Ducey testified at a deposition in Manhattan. Thus, and as discussed below, the court will presume that Ducey's convenience would not be affected by keeping this action in New York County.

[5] The same result follows even if the convenience of Mazzetti, Gross and Vetrano is not considered due to counsel's failure to include these witnesses' addresses in his affirmation (*see, e.g. Bernstein, supra*). However, plaintiff does not raise this argument in opposition, and, in any event, defendants proffer two witnesses (Greco and Isaza) and provide all required information under the controlling legal standard compared to plaintiff's showing of, at most, one witness, supporting plaintiff's position herein.

Once the moving party has submitted evidence to support a change of venue, it is incumbent upon the non-moving party to establish the basis for their choice of venue by identifying their own non-party witnesses whose convenience would be fostered by keeping the action in the selected county (*see Bernstein* and *Jansen*, *supra*).

Under the controlling caselaw, however, plaintiff proffers, at most, only one non-party witness (Ducey) whose convenience would arguably be fostered (or at least not negatively affected) by keeping this action in New York County. Although Ducey resides in Dutchess County, he testified at a deposition in Manhattan. Thus, even assuming defendants' statement that Ducey now claims that it would be an inconvenience and a hardship for him to testify in New York County is false, as the only non-party witness proffered by plaintiff in support of keeping venue in New York County, defendants' cross-motion must be granted.

The convenience of plaintiff's other proffered witnesses may not be considered, as those witnesses are either party witnesses (Jack Dweck (plaintiff's counsel), and Sean Dweck), or they are not located in New York County or Dutchess County (Biagioni, Anker Management, Cohen, Stillman Management) (*see Moshin*, *Bernstein*, *Lundgren*, and *Slavin*, *supra*). The court also notes that New York County -- designated by plaintiff on the basis of its corporate residence – and the fact that its principal offices and documentation are located there, bear no material relationship to the controversy at issue (*see Timber Hill Associates, Ltd. v. Shultis*, 157 AD2d 579 [1st Dept 1990]). And, plaintiff's remaining contentions are speculative and unsupported by any authority.

Accordingly, defendants have established their entitlement to a change of venue.

Furthermore, it is well-settled that, as a matter of policy, once a court determines to grant

a party's motion for a change of venue, it is preferable to defer ruling upon any other issues presented by the parties and leave their resolution to the justice to whom the case is to be assigned in the county to which venue has been changed (*see* CPLR 511[d]; *Diamond v Papreka*, 7 Misc 3d 1006(A), 801 NYS2d 232 [Sup Ct Kings Cty 2005] *citing Taylor v New York City Transit Authority*, 131 AD2d 460, 462 [2d Dept 1987]).

As such, the court denies, without prejudice to renew in the proper forum, plaintiff's motion to compel discovery.

Conclusion

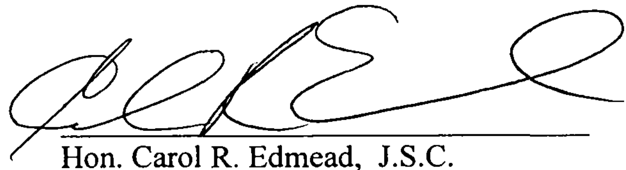
Based on the foregoing, it is hereby

ORDERED that defendants' cross-motion made pursuant to CPLR 510(3) is granted, and the venue of this action is changed from this Court to the Supreme Court, Dutchess County, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Dutchess upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that plaintiff's motion is denied without prejudice to renew in Supreme Court, Dutchess County;

ORDERED that the proceedings in this matter are stayed until the Clerk of the Supreme Court, County of Dutchess receives the papers on file in this action.

This constitutes the decision and order of the Court.



Dated: January 16, 2015

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD