Fish v Davis
2016 NY Slip Op 30869(U)
May 9, 2016
Supreme Court, New York County
Docket Number: 159576/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15
---X
JENNIFER FISH,

Plaintiff,

- v -

PAULA DAVIS, RICHARD C. SACHER,
and J615 CORP.,

Defendants.
---X

Index No. 159576/2015

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This action arises out of a Shareholder Agreement between Plaintiff, Paula Davis, and Richard C. Sacher concerning their respective interests in defendant, J615 Corp., an entity formed in May 1991 for the purpose of purchasing "one single family dwelling plus three accessory buildings on a 1.2 acre parcel of land located at 615 North Broadway in the Upper Nyack, New York known as the Jewett Estate" ("the Estate"). The "single family dwelling and three accessory building on the Estate were known as the Carriage House, Cow Bar, Polliwog Cottage, and Garden Spot."

The Complaint alleges after J615 purchased the Estate, and in furtherance of the Shareholder Agreement, the parties made an application to the Village of Upper Nyack Board of Standards and Appeals "for approximately 14 difference variances for lot area, front, side and rear yard setbacks in order to subdivide the 1.2 acre Estate into 4 lots which would bear separate ownership and each contain one of the four existing structures on the Estate." The application was denied, and "[a]s such, the Estate cannot be subdivided into four fee simple lots, each containing one structure, as was intended by Plaintiff and the Individual Defendants and as was provided for in the Shareholder Agreement." The Complaint alleges in 2013, Plaintiff made

efforts to create a "cooperative regime in furtherance of trying to parcel out to Plaintiff and the Individual Defendants the various structures of the Estate assigned to each as provided for in the Shareholder Agreement"; however, Individual Defendants have refused to move forward with a cooperative regime. The Complaint alleges three cause of action: Plaintiff seeks rescission of the Shareholder Agreement; an Order "directing defendants to specifically perform the Shareholder Agreement such that Plaintiff shall become the owner of lots containing Cow Barn and Polliwog Cottage"; and breach of the Shareholder Agreement and money damages.

Defendants interposed an Answer on October 15, 2015. Four months after interposing an Answer which contains no affirmative defenses based on improper venue, Defendants move for an Order, pursuant to CPLR §§ 507 and 510(3), changing the venue of this action from the New York County to Rockland County. Defendants contend that the matter should be transferred from New York County to Rockland County because: "(1) the causes of action arose in Rockland County; (2) the relief requested by Plaintiff directly affects the title to real property in Rockland County; (3) the relief requested affects the use and employment of real property located in Rockland County; [and] (4) the contract that forms the gravamen of Plaintiff's complaint affects the use and enjoyment of real property located in Rockland County." Plaintiff opposes.

CPLR § 510(1) permits a court, upon motion, to change the place of trial of an action where "the county designated for that purpose is not a proper county." (CPLR § 510[1]). Pursuant to CPLR § 511, a defendant seeking to change the place of trial upon the ground of improper venue, "shall serve a written demand that the action be tried in a county he specifies as proper." (CPLR § 511[b]). This statute further provides:

> Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county

> specified by the defendant is not proper or that the county designated by him is proper.

(*Id.*).

CPLR § 507 provides, "The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." (CPLR § 507]). "The mere fact that the *title* to real estate is involved in an action does not necessarily bring the case within the provisions of this section; but the section applies if the judgment demanded involves *a change* in the title. An action to rescind an executed contract of sale of land, the necessary effect of which would be to affect the change of title, is within the section." (*Nassau Hotel Co. v. Barnett*, 164 A.D. 203, 205[1st Dept 1914]). Common types of real property actions include ejectment, partition, dower, mortgage foreclosure, waste, nuisance, trespass, breach of contract for the sale of real property and actions affecting a leasehold interest.

In opposition, Plaintiff raise the issue of timeliness of the motion to change venue and further contend that contrary to Defendants' allegations, Plaintiff's claims do not seek relief that would affect "title to, or the possession, use or enjoyment of real property." Plaintiff states, "What is at issue are the financial obligations vis-à-vis the property given their initial investments."

Here, Defendants provide no evidence that they served any demand to change venue prior to bringing this motion, as required under CPLR § 511[b], and therefore their motion to change venue pursuant to CPLR § 507 is denied.

To the extent that Defendants' motion also seeks to change venue based on the convenience of material witnesses, CPLR § 510(3) permits a court, upon motion, to change the place of trial of an action where "the convenience of material witnesses and the ends of justice will be promoted by the change." (CPLR § 510[3]). Upon a motion made pursuant to § 510(3), the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change. (*Cardona v. Aggressive Heating, Inc.*, 180 A.D.2d 572, 572 [1st Dep't 1992]). This showing must include: (1) the identity of the proposed witnesses; (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced; (3) that the witnesses have been contacted and are available and

willing to testify for the movant; (4) the nature of the anticipated testimony; and, (5) the manner in which the anticipated testimony is material to the issues raised in the case. (*Id.*).

Defendant Sacher, in his supporting affidavit, identifies two prospective non-party witnesses in his affidavit. Sacher identifies non party Steven L. Abel, Esq., an attorney who resides and practices in Rockland County, as a witness. Sacher states that Abel "will testify as to the intent of the parties involved at the time of the original formation of J615." In opposition, as to Abel's purported knowledge, Plaintiff argues that the four corners of the Shareholder Agreement, not the intent of the parties controls. Sacher also identifies the Clerk of the Village of Upper Nyack as an additional witness. Sacher states that the Clerk will testify as to the reasons for the denial of the parties' subdivision request. In opposition, Plaintiff argues that the written decision dated November 28, 2000 denying the subdivision request speaks for itself, and the reason why the application was denied is not relevant to Plaintiff's claims. As such, Plaintiff argues that the testimony from the Clerk of the Village of Upper Nyack is not necessary.

Here, assuming arguendo that Defendants have identified material witnesses, Defendants fail to identify the nature of the inconvenience that witnesses located in Rockland County would suffer in the absence of a change of venue. Accordingly, Defendants fail to make a sufficient showing to support a change of venue pursuant to CPLR § 510(3). (*See Gersten v. Lemke*, 68 A.D.3d 681, 681 [1st Dep't 2009] [finding that, "bare assertions of inconvenience" are insufficient, without more, to warrant a change of venue under CPLR § 510(3)]).

Wherefore, it is hereby,

ORDERED that Defendants' motion for a change of venue is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MAY 9, 2016
MAY 09 2016

EILEEN A. RAKOWER, J.S.C.