

**Allen v LMC Indus. Contrs.**

2017 NY Slip Op 31381(U)

June 26, 2017

Supreme Court, New York County

Docket Number: 151607/2017

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. Kalish  
*Justice***

**PART 29**

**James Allen and Wanda Allen**

INDEX NO. 151607/2017  
MOTION SEQ. 001

- v -

**LMC Industrial Contractors,**

The following papers, numbered 1-3 were read on the Defendant's motion for change of venue pursuant to CPLR 2214(b)

Defendant's motion ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>1</u>
Plaintiff's Opposition ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>2</u>
Defendant's Reply and Opposition to Cross Motion ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>3</u>

Upon the foregoing papers, the Defendant LMC Industrial Contractors' ("LMC") motion for change of venue in the underling action is granted as follows:

Background

The Plaintiffs brought the underlying personal injury action against the Defendant for injuries that the Plaintiff James Allen allegedly sustained from an accident that occurred on or about November 5, 2015. The Plaintiff alleges that LMC entered into a contract with James Allen's employer Southern Tier Express, Inc. ("Southern Tier"), under which Southern Tier's employees were to off load certain windmill parts for Southern Tier and re-flag, re-sock and re-install warning devices attached to said windmill parts. The Plaintiffs allege in sum and substance that during the course of said work, Allen was caused to fall from a dangerous height and sustained serious injuries due to the Defendant's negligence. Plaintiffs allege that the accident occurred on LMD's property at or near Dansville, New York.

Parties' arguments on the instant motion

LMC argues in support of the instant motion, in sum and substance that the basis for the instant action being brought in New York County is due to a "mistake" by the company (the "Company") that the Defendant hired to handle some of LMC's legal filings. Specifically, LMC argues that LMC was originally intended to be and remains a Livingston County company. The Defendant argues that LMC's original certificate of incorporation and bylaws designated LMC's corporate residence in Livingston County, and that LMC's principle place of business is Livingston County. LMC further argues that when it amended its original certificate of incorporation with the New York Department of State on December 30, 1993, the only change was to change the company's name (from Livingston Mechanical Contractors, Inc.) to LMC and that the corporate residence, principle office and service remained the same (all located in Livingston, New York).

LMC argues that the New York Division of Corporation's resent designation of New York County as LMC's "county" and "jurisdiction" is the result of an error and unilateral act by the Company that LMC hired to perform some of its legal filings in October of 2015. LMC argues that during the course of the underlying lawsuit, it learned for the first time that the Company unilaterally changed LMC's "county" and "jurisdiction" to New York County on the publicly searchable feature of the Department of Corporations website. LMC argues that said change was made without LMC's knowledge or consent, and that LMC did not file any documents with the Department of State reflecting said change. LMC further argues that on April 26, 2017, the Company changed LMC's "county" back to Livingston County. LMC attaches with its moving papers a receipt from the New York Department of State dated April 26, 2017 for a "correction" to indicate that LMC's "Dom." is Livingston County.

In addition, LMC argues that it never designated or authorized New York County as its county of residence or jurisdiction, that LMC's facilities are located in Livingston County, that the Plaintiff's alleged accident occurred in Livingston County, and that the "contract" between LMC and Southern Tier was entered into by LMC in Livingston County. LMC further argues that the Plaintiff lives in or around Livingston County, that all of the material and nonparty witnesses are located in Livingston County, and that it would be an inconvenience and hardship for them to travel from Livingston County to New York County for trial.

In opposition, the Plaintiffs argue that they have the right to select a venue and that New York County is a proper venue to bring the underlying action. Specifically, the Plaintiffs argue that LMC's place of domiciliary was New York County as of the date that the Plaintiffs commenced the underlying action, and that LMC designated New York County as its principle place of business. The Plaintiffs further argue that the Defendant has failed to show how testifying in New York County would be of great inconvenience to the parties and/or nonparty witnesses. Plaintiffs attach with their opposition papers, copies of LMC's registration statements on file with the Secretary of New York State, dated February 7, 2017 and April 4, 2017.

In reply, the Defendant reiterated its arguments for change of venue and further argues that the Plaintiffs have neither cross-moved to keep the venue in New York County nor argued why the underlying action should remain in New York County.

#### Analysis

"Upon a motion to change venue, the defendant bears the initial burden of establishing that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed" (*Feldman v Court Order, Inc.*, 2016 NY Slip Op 31134(U) [NY Sup Ct NY Cnty June 13, 2016] citing *Hernandez v Seminatore*, 48 AD3d 260[1st Dept 2008]; *Book v Horizon Asset Mgt.*, 105 AD3d 661, 662,[1st Dept 2013]). "Generally, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*Feldman v Court Order, Inc. supra* citing *Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431[1st Dept 2015]).

Upon review of the submitted papers, the Court finds that the Defendant has met its burden of proof to establish that the venue for the underlying action should be changed from New York County to Livingston County. Although the Court recognizes that the Plaintiffs' choice to bring the underlying action in New York County was correct based upon LMC's designation of New York County as its place of jurisdiction at the time Plaintiff commenced the action, the Court finds that the Defendant has established that the change in designation from Livingston County to New York County was the result of a mistake by the Company LMC hired to handle it's legal filings, and that the Company made this change without LMC's consent.

Further, the Plaintiffs do not dispute that the parties and nonparty witnesses that will be called to testify are all located in or in close proximity to Livingston County, which is approximately 340 miles away from New York County. The Plaintiffs' only basis for bringing the underlying action in New York County was based upon LMC's designation of New York County as its county of jurisdiction. As stated, this was a sufficient basis for Plaintiffs to bring the action in New York County. However, based upon LMC's argument that said change in designation was done in error (and without LMC's consent) and the fact that all of the parties and witnesses are physically located in or in close proximity to Livingston County, the Court finds that there is a sufficient basis to change the venue of the underlying action from New York County to Livingston County.

Given the approximately 340 mile distance between Livingston County and New York County, moving the underlying action to Livingston County would be significantly more convenient for the parties and all of the potential nonparty witnesses. In addition, given the heavy case volumes handled by the Supreme Court for New York County, it is very likely that the Plaintiffs' instant action shall proceed to trial much more expediently in Livingston County than it would in New York County. As such, the Court also finds that moving the underlying action from New York County to Livingston County would be in no way prejudicial to the Plaintiff.<sup>1</sup>

Accordingly and for the reasons so stated, it is hereby

ORDERED that the venue of the underlying action is changed from the New York State Supreme Court for New York County to the New York State Supreme Court for Livingston County. It is further

ORDERED that the Defendant shall served a copy of the instant order with notice of entry upon the Plaintiff within 20 days of the date of the instant order. It is further

ORDERED that the Defendant shall file with the New York County Clerk a copy of the instant order with proof of service, within 30 days of the date of the instant order. It is further

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<sup>1</sup> The Court notes that Plaintiff's counsel has offices in Olean, New York, approximately 350 miles from New York City.

ORDERED that the Defendant shall serve a copy of the instant order with notice of entry upon the Supreme and County Court Chief Clerk of Livingston County, within 30 days of the date of the instant order.

Upon Defendant's filing of a copy of this order with proof of service and payment of appropriate fees, if any, the New York County Clerk is directed to transfer the papers on file in this action to the Livingston County Clerk's office.

The foregoing constitutes the Order and Decision of the Court.

Dated: *June 26*, 2017

  
**HON. ROBERT D. KALISH**  
J.S.C.

- 1. Check one: .....  CASE DISPOSED     NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED     DENIED     GRANTED IN PART     OTHER
- 3. Check as appropriate: .....  SETTLE ORDER     SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE