

<b>Donaldson v Bunch &amp; Sons Constr., LLC</b>
2018 NY Slip Op 30852(U)
May 7, 2018
Supreme Court, New York County
Docket Number: 153103/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 153103/2017

MELISSA DONALDSON and ALEXANDER DONALDSON,

MOTION DATE N/A

Plaintiffs,

MOTION SEQ. NO. 001

- v -

BUNCH AND SONS CONSTRUCTION, LLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for CHANGE VENUE

Upon the foregoing documents, it is ordered that the motion is denied.

In this action by plaintiffs Melissa Donaldson and Alexander Donaldson seeking to recover damages for, inter alia, negligence and breach of a construction contract, defendant Bunch and Sons Construction, LLC moves, pursuant to CPLR 503 and 511, to change the venue of this action from Supreme Court, New York County to Supreme Court, Ulster County. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about December 30, 2015, Melissa Donaldson and Alexander Donaldson (collectively "plaintiffs") entered into an agreement ("the contract") with defendant Bunch and Sons Construction to perform certain repairs and renovations of their vacation home located at 68

Rogue Harbor Road, Kerhonkson, New York, in Ulster County (“the premises”). Doc. 1, at pars. 2, 4; Doc. 7, at pars. 2-3; Doc. 9.<sup>1</sup> The contract provided, inter alia, that defendant was to “indemnify and hold harmless [plaintiffs] from and against all claim[s], damages, losses, expenses, legal fees or other costs arising or resulting from [defendant’s] performance of the work . . .” Doc.1, at par. 6; Doc. 9. In order to perform its work, defendant was given keys to the premises so that it could enter at any time to perform its work. Doc. 1, at par. 9; Doc. 7, at par. 5. Plaintiffs instructed defendant that, during the course of the work it performed pursuant to the contract, defendant was to activate the security alarm any time it left the premises. Doc. 1, at par. 9; Doc. 7, at pars. 5, 8. However, on or about November 19 or 20, 2016, defendant allegedly failed to activate the alarm, an unidentified individual entered the premises, and the premises were completely destroyed by fire. Doc. 1, at pars. 10-11; Doc. 7, at pars. 6-8.

On April 3, 2017, plaintiffs commenced the captioned action against defendant in Supreme Court, New York County seeking damages for, inter alia, negligence and breach of contract. Doc. 1. Defendant was served via the Secretary of State pursuant to section 303 of the Limited Liability Company Law on April 20, 2017. Doc. 3. On or about June 12, 2017, defendant served a demand, pursuant to CPLR 511(b), to transfer the venue of this matter to Ulster County. Docs. 4, 13.

In an affidavit dated June 13, 2017, plaintiffs’ counsel acknowledged receipt of defendant’s demand to change venue and rejected the same. Doc. 15. In doing so, plaintiffs’ counsel asserted, inter alia, that venue was properly placed in New York County since plaintiffs resided there. *Id.*, at par. 3. Counsel further maintained that defendant’s argument that venue should be changed to Ulster County (pursuant to CPLR 507) because the action “affect[ed] the title to or the possession, or the use or enjoyment of real property” was without merit. *Id.*, at par. 3(e). Counsel further

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

asserted that “there [were] no viable non-party witnesses in this matter” except Livewatch Security, LLC, the security alarm company, a Delaware Corporation registered in Monroe County, New York. *Id.*, at par. 3(f).

Defendant now moves, pursuant to CPLR 503 and 511, seeking to change the venue of this matter to Supreme Court, Ulster County “in the interest of justice, and for the convenience of material non-party witnesses.” Doc. 4. In support of the motion, defendant submits a purported affidavit of Timothy Bunch (“Bunch”), president of defendant corporation. *Id.*<sup>2</sup> In the purported affidavit, Bunch chronicles the history and nature of the work he performed for plaintiffs. Bunch also insists that, when he left the premises on November 19, 2016, he locked the door and activated the alarm system. Doc. 4, Bunch Aff., at par. 13. He further represents that he lost all of the equipment he had at the premises as a result of the fire. *Id.*, at par. 19. In March of 2017, Bunch filed mechanics liens against the premises for the loss of his destroyed equipment and the amount of his unpaid labor and he states that he intends to foreclose on those liens. *Id.*, at pars. 22-24. Bunch further represents that the venue of the captioned action should be changed to Ulster County for the convenience of several witnesses he names whom, he claims, will need to testify at trial. Doc. 4, at pars. 30-31.

In a memorandum of law in support of the motion, defendant’s attorney argues that plaintiffs improperly designated New York County as the venue of this action. Counsel asserts that venue must be transferred to Ulster County pursuant to CPLR 507 since that section provides that, if “the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property”, then the case must be tried in “the county in which any part of the subject of the

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<sup>2</sup> Although the copy of this affidavit originally submitted to the court was not executed, this defect has been remedied (see Doc. 21) and this Court, in its discretion, accepts the affidavit as if it had been properly executed in the first instance. See CPLR 2001.

action is situated.” Further, counsel maintains that, since claims to foreclose on the mechanics liens will be filed in Ulster County, and that the claim in the captioned action “should be brought in defense of and as set offs” to the foreclosure proceedings, venue must be laid in Ulster County. Alternatively, counsel asserts that venue must be transferred to Ulster County in the interest of justice and for the convenience of the witnesses, all of whom, except plaintiffs, reside in Ulster County. Finally, defendant’s attorney demands reimbursement of the costs of making the instant motion.

In a reply affirmation in further support of the motion, defendant argues, inter alia, that this case must be tried in Ulster County based on the convenience of material witnesses.

#### LEGAL CONCLUSIONS:

Defendant moves for a change of venue based on plaintiffs’ alleged failure to venue this action in the proper county.

The plaintiff can defeat the motion if either [its] choice of venue was proper under CPLR 501 or 503-508, or the proposed venue designated in defendant’s demand was improper. *Agway, Inc. v Kervin*, 188 AD2d 1076 (4<sup>th</sup> Dept 1992).

Vincent C. Alexander, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C511:2.

Here, defendant fails to demonstrate that plaintiffs designated an improper venue. The face of the summons clearly states that venue of this action is based on plaintiffs’ residence in New York County. Doc. 1. Additionally, in her affidavit in opposition to the motion, plaintiff Melissa Donaldson avers that she lives with her husband, plaintiff Alexander Donaldson, at her “permanent

residence” in New York County and that the home plaintiffs owned in Kerhonkson, New York was their vacation home. Doc. 7, at par. 1. Indeed, defendant’s attorney even concedes that “[t]his action’s only connection to New York County is the residence of the plaintiffs.” Doc. 4, Memo of Law in Opp., at p. 4. Thus, venue in New York County is clearly proper. See CPLR 510(1).

Defendant’s contention that this action must be venued in Ulster County based on CPLR 507 is without merit. CPLR 507 provides as follows:

Real property actions

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.

Here, since a judgment on plaintiffs’ causes of action for negligence and breach of contract would not affect the real property they own in Ulster County, defendants are not entitled to a change of venue on this ground. *See Port Bay Assocs. v Soundview Shopping Center*, 197 AD2d 848 (4<sup>th</sup> Dept 1993) (landlord-tenant dispute regarding interpretation of payment terms of a lease did not seek judgment that would affect title to, or the possession, use or enjoyment of the subject real property); *Weinstein Enterprises, Inc. v Great Atlantic & Pacific Tea Co.*, 112 AD2d 219 (2d Dept 1985) (landlord’s cause of action for damages based on tenant’s breach of covenant to keep premises in good repair did not affect title to, or possession, use or enjoyment of the subject property for purpose of determining venue).

Given defendant’s failure to establish that New York County is an improper venue in this action, its motion must be denied pursuant to CPLR 510(1). *Pinos v Clinton Café & Deli, Inc.*, 139 AD3d 1034 (2d Dept 2016).

Defendant's argument that "the convenience of material witnesses and the ends of justice will be promoted by the change [of venue]" to Ulster County (CPLR 510[3]) is also without merit. In order to obtain a change of venue on such grounds, defendant must show "(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." *Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 (1st Dept 1992); see *Brown v New York City Health & Hosp. Corp.*, \_\_\_ AD3d \_\_\_, 70 NYS3d 828 (1st Dept 2018); *Gissen v Boy Scouts of Am.*, 26 AD3d 289, 290-291 (1st Dept 2006).

Although defendant sets forth the names of several witnesses whom it claims will need to testify in this case, and represents that they all reside in Ulster County, it does not represent that each of these possible witnesses have been contacted and are willing and able to testify for defendant in this matter. Doc. 4, Memo. Of Law in Supp., at p. 5-7). Further, not all of these individuals are identified and defendant does not explain how the testimony of each of these proffered witnesses would be material herein. *Id.*

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to change venue by defendant Bunch and Sons Construction, LLC is denied, and plaintiffs' action shall proceed in New York County; and it is further

ORDERED that defendant shall serve and file its answer to the complaint within thirty (30) days of the filing of this order with NYSCEF; and it is further

ORDERED that all counsel shall appear for a preliminary conference in this matter on September 25, 2018 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/7/2018

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: