Licata v Builders First Source
2018 NY Slip Op 32301(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 157201/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

----------X **INDEX NO.** 157201/2017

SALVATORE LICATA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

BUILDERS FIRST SOURCE,

Defendant. **DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for CHANGE VENUE.

Upon the foregoing documents, it is ordered that the motion is **denied** and the cross-motion is **granted**.

In this Labor Law action seeking damages for personal injuries, defendant ProBuild Company, LLC, d/b/a Builders FirstSource a/s/h/a Builders FirstSource moves, pursuant to CPLR 503, 510,[1] and 511, to change the venue of this action. Plaintiff Salvatore Licata opposes the motion and cross-moves, pursuant to CPLR 602, to consolidate this action with *Salvatore Licata v Rizzo Corporation and Holt Construction Corp.*, Index No. 154589/2017, also venued in New York County. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **denied** and the cross-motion is **granted**.

[1] Although the affirmation in support of the motion seeks relief pursuant to CPLR 510, the notice of motion does not seek relief pursuant to that section.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the captioned action in Supreme Court, New York County by filing a summons and verified complaint on August 10, 2017. NYSCEF Doc. 1.[2] The summons reflected the "[b]asis of [v]enue" as "[d]efendants principal place of business in related action." *Id.* While plaintiff also alleged in the complaint that defendant "was and still is a foreign corporation duly authorized to do business or doing business in the State of New York" and that defendant "was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York," plaintiff further alleged that "defendant in a related action, **RIZZO CORPORATION** . . . was the general contractor at the premises under construction at the Orange County Government Center located at 255 Main Street in the Town of Goshen, County of Orange and State of New York." *Id.*, at pars. 1-3.

The substantive claim against defendant in this action was that, on April 24, 2017, plaintiff was allegedly injured while lawfully performing unloading activities in a manner that was, *inter alia*, dangerous and hazardous in violation of New York State Labor Law Sections 200, 240, and 241(6); certain sections of Rule 23 of the New York State Industrial Code; and Article 1926 of OSHA, which caused him to sustain serious and severe injuries while working at the construction site at 255 Main Street in Goshen, New York. *Id.*, at par. 14.

On September 28, 2017, defendant filed the instant motion seeking to change venue of this matter to Westchester County, pursuant to CPLR 503, 510, and 511, on the grounds that plaintiff failed to plead or establish that he or any other party in this action resided in or maintained a principal place of business in New York County at the time this action was commenced. In support of the motion, defendant asserts that, since "ProBuild is a Delaware corporation with its principal

[2] Unless otherwise noted, all references are to the documents filed in NYSCEF in connection with this matter.

place of business in Dallas, Texas" (Doc. 7, at par. 5) and none of the parties reside in New York County, venue there is improper and that, since plaintiff lives in Westchester County, venue should be transferred there.

In opposition to the motion, plaintiff argues that New York law designates the principal office of a corporation, as stated in its certificate of incorporation filed with the New York Secretary of State, as its principal place of business. A printout from the New York State Department of State website indicates that an entity named Builders FirstSource – Northeast Group, LLC ("Builders") designated New York County as its principal place of business (Doc. 14). In support of its cross-motion to consolidate, pursuant to CPLR 602, plaintiff asserts that the two actions arise from the same event and should therefore be consolidated in New York County, the venue of the initial action.

In opposition to plaintiff's cross-motion, non-parties The Rizzo Electric Company a/s/h/a Rizzo Corporation ("Rizzo") and Holt Construction Corp. ("Holt") first argue that the cross-motion is procedurally improper because it was served on prior counsel and since a consent to change attorney form (Doc. 19) was filed on October 16, 2017 and the cross-motion was filed on November 8, 2017, service was improper. Second, these non-parties oppose plaintiff's cross-motion on the merits and argue that venue was not properly filed in New York County in the first action to which they are defendants because, upon information and belief, Rizzo's principal place of business is in Rockland County and Holt's principal place of business is in Putnam County. Additionally, the non-parties state that plaintiff is a resident of Westchester County.

In reply, defendant reiterates its initial argument, but also asserts that Westchester County is "the proper and more convenient county." Doc. 21, at par. 2. Defendant partially opposes plaintiff's cross-motion to consolidate by asserting that, although it believes the actions should be

consolidated, the consolidated action should be venued in Westchester County because, according to filings with the Department of State for the State of New York, Rizzo is a Connecticut company authorized to do business in New York and designates Putnam County as its principal place of business for venue purposes (Doc. 22) and Holt is a New York company with its principal place of business in Rockland County (Doc. 23). In this respect, defendant argues that plaintiff incorrectly identifies the entity involved in this litigation as Builders, while the correct name of the entity is ProBuild Company LLC ("ProBuild"). According to an affidavit in support submitted by Carin Brock, a senior attorney for Builders FirstSource, Inc., ProBuild operates a facility located at 149 Temple Hill Road in Vails Gate, New York under the d/b/a "Builders FirstSource;" however, this is not the same entity as Builders. Doc. 24, at pars. 3, 5, 7. Instead, defendant argues that ProBuild is a Delaware business authorized to do business in New York, with its principal place of business in Dallas, Texas, which, according to a printout from the New York State Department of State's website, designates its county of residence in New York as Orange County. Doc. 25.

LEGAL CONCLUSIONS:

The proponent of a motion to change venue pursuant to CPLR 510(3) must demonstrate "that the convenience of material witnesses would be served by the change" (*Cardona v Aggressive Heating*, 180 AD2d 572, 572, 580 NYS2d 285 [1st Dept 1992]). In doing so, the moving party must set forth: "(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.*). (*Rodriguez-Lebron v Sunoco, Inc.*, 18 AD3d 275, 276 [1st Dept 2005]).

Raised for the first time in its reply to the instant motion, defendant conclusorily states that Westchester County is "the proper and more convenient county." Doc. 21, at par. 2. Even if this Court could properly consider this argument, defendant's failure to meet the requirements set forth in *Rodriguez-Lebron* and *Cardona* require that the action remain in New York County, where it was properly venued in the first instance. (*See* CPLR 503(a); *DLJ Mtge. Capital, Inc. v Kontogiannis*, 110 AD3d 522, 523 [1st Dept 2013] [stating that venue in New York County is appropriate because the first action was filed in that county]; *Ali v Effron,* 106 AD3d 560 [1st Dept 2013] [same]; *Job v Subaru Leasing Corp.,* 30 AD3d 159, 159 [1st Dept 2006] ["Defendant['s] attempt to cure these deficiencies in their reply papers improperly raised new facts not responsive to the opposition papers, and should not be considered."]; *cf. Kramer, Levin, Nessen, Kamin & Frankel v Int'l 800 Telecom Corp.,* 190 AD2d 538, 539 [1st Dept 1993]). While the facts may appear to support a change in venue, non-parties Rizzo and Holt's opposition to the instant motion is a misnomer because the propriety of the venue for the action to which they are parties is an issue that should have been raised in that action. However, venue was never challenged by Rizzo and Holt in that action, and any such motion would now be deemed untimely (*see* CPLR 511[b]). Thus, defendant's argument that venue in New York County in this action is improper because venue in the first action was improper is without merit. (*See, e.g., Pittman v Maher,* 202 AD2d 172, 176 [1st Dept 1994]; *Public Service Mut. Ins. Co. v. ITT Hartford Group, Inc.,* 249 AD2d 78, 78 [1st Dept 1998] ["Although plaintiff is correct that defendants, having failed to timely demand a change of venue as of right upon the ground that venue was improperly laid in New York County, must establish more than the action's initially improper venue to support a discretionary change

thereof."]).

Further, CPLR 503(a) provides that the "place of trial shall be in the county in which one of the parties resided when [the action] was commenced." While defendant argues that CPLR 503(c) provides the means to determine the residence of a corporation, such that a "domestic corporation or a foreign corporation . . . shall be deemed a resident of the county in which its principal office is located" (CPLR 503[c]), "[t]he sole residence of a limited liability company [LLC] for venue purposes is the county where its principal office is located as designated in its articles of organization" (*Dyer v 930 Flushing, LLC,* 118 AD3d 742, 742 [2d Dept 2014]), which is an LLC's equivalent of a corporation's certificate of incorporation (*Graziuso v 2060 Hylan Blvd. Restaurant Corp.,* 300 AD2d 627, 628 [2d Dept 2002]).

Here, plaintiff selected the venue based upon the New York State Department of State's website based upon the facts as he knew them when the complaint was filed. The website designated New York County as the principal place of business for Builders. Since neither printout from the New York State Department of State's website for ProBuild or Builders was properly certified or authenticated by the head of the New York State Department of State, nor was a factual foundation laid to admit the printouts as business records, they are inadmissible. (*Id.*, at 742-43). Moreover, defendant nowhere in its motion papers annexed a certified copy of the articles of organization in order to prove it resides outside of New York County as required by the New York Limited Liability Law. (*Id.*). Although defendant asserts that ProBuild was incorrectly named by plaintiff, this Court cannot consider this argument since it was raised for the first time in defendant's reply papers. Even if this Court were to consider this argument, however, it still fails (*See Job,* 30 AD3d 159), since Mr. Brock's affidavit in support of defendant's motion only refers to a property located in Vails Gate with a different address than the construction site at issue.

Accordingly, since plaintiff "properly relied upon [defendant's] designation in selecting venue" (*Cooper v Mobil Oil Corp.*, 264 AD2d 578, 578 [1st Dept 1999]) and "defendant failed to establish that the county designated by the plaintiff in the first instance was improper" (*Dyer*, 118 AD3d 743), defendant's motion is denied.

With respect to plaintiff's cross-motion, plaintiff has adequately established that the above-captioned action and the other action arise from the same set of facts, so consolidation would serve the interests of justice and judicial economy. (*See DLJ Mtge. Capital, Inc.*, 110 AD3d at 523 [1st Dept 2013]; *Murphy v 317-319 Second Realty LLC*, 95 AD3d 443 [1st Dept 2012]).

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant ProBuild Company, LLC, d/b/a Builders FirstSource s/h/a Builders FirstSource is denied; and it is further

ORDERED that the cross-motion by plaintiff Salvatore Licata is granted, and the case currently pending in this County, entitled *Salvatore Licata v. Rizzo Corporation and Holt Construction Corp.*, bearing Index No. 154589/17, is consolidated for all purposes with the captioned action under Index No. 154589/2017, and the pleadings in each action shall stand as the pleadings in the consolidated action; and it is further

ORDERED that the consolidated action shall hereinafter bear the following caption:

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SALVATORE LICATA,

Plaintiff,

Index No. 154589/2017

- against -

RIZZO CORPORATION, HOLT CONSTRUCTION CORP., and BUILDERS FIRSTSOURCE,

Defendants.
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and it is further

ORDERED that counsel for plaintiff is directed to e-file a completed "Notice to County Clerk" (Form EF-22, available on the NYSCEF site), with a copy of this order attached thereto, and which shall be designated as a "Notice to County Clerk – CPLR 8019(c)" in the drop-down menu on NYSCEF, within 20 days after this order is entered, and the Clerk is directed to mark this Court's records to reflect the consolidation and amendment of the caption; and it is further

ORDERED that counsel for plaintiffs is directed to e-mail a copy of this order to the General Clerk's Office, at genclerk-ords-non-mot@nycourts.gov, with the subject "Service of Order – Consolidation," within 20 days after this order is entered, and the Clerk is directed to effectuate the consolidation and amendment of the caption; and it is further

ORDERED that a discovery conference will be held in the consolidated action in Part 2, at 80 Centre Street, Room 280, on January 15, 2018 at 2:15 p.m.; and it is further

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

9/18/2018
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE