

Burgos v Benco Constr. Inc.
2018 NY Slip Op 33158(U)
December 7, 2018
Supreme Court, New York County
Docket Number: 154571/2018
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X INDEX NO. 154571/2018

ARMANDO BURGOS

Plaintiff,

MOTION DATE 07/27/2018,
08/15/2018

- v -

MOTION SEQ. NO. 001 002

BENCO CONSTRUCTION INC.,

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 37

were read on this motion to/for CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 31, 32, 33, 34, 35, 36, 38

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is

Motion sequence nos. 001 and 002 are consolidated herein for disposition.

In sequence no. 001, defendant Benco Construction moves, pursuant to CPLR 503, 510 (1), and 511 (a), for an order transferring venue of this matter to Supreme Court, Westchester County. In sequence no. 002, plaintiff Armando Burgos moves, pursuant to CPLR 602, for an order consolidating for all purposes the action at bar with *Burgos v GTL Construction, LLC*, bearing Supreme Court, New York County index no. 154328/2017 (*GTL Construction* action), under that index number.

Burgos, a Rockland County resident, commenced the instant negligence action on May 16, 2018. In the complaint, he alleges that, on April 20, 2017, during the course of his employment by Force Services LLC, a New Jersey corporation, he sustained serious

personal injury during a construction project at commercial building located at the Cross County Shopping Mall in Yonkers, New York, when he fell from a loading dock.

Benco Construction maintains its principal place of business in Westchester County, allegedly performed work at the construction project and was allegedly negligent, careless, and reckless in the ownership, operation, management, maintenance, supervision, use, and control of the site where the accident occurred, that caused the accident in whole or in part.

On July 18, 2018, Benco Construction served and filed an answer and, pursuant to CPLR 511 (b), timely served and filed a demand to change venue to Westchester County. Burgos objected to the demand on the ground that venue here is proper in the *GTL Construction* action, which will soon be consolidated with this action.

On May 10, 2017, prior to commencement of the instant action, Burgos commenced the *GTL Construction* action against defendants GTL Construction, LLC, Ashkenazy Acquisition Corp., and AAC Cross County Mall, LLC on allegations that their separate and combined negligent conduct caused Burgos' alleged accident. GTL Construction admittedly maintains its principal place of business in Westchester County, and was the general contractor on the project (*see GTL Construction* action, GTL Construction answer ¶ Third). Ashkenazy Acquisition maintains its principal place of business in New York County, and is allegedly the owner and/or manager of the project site. AAC Cross County Mall maintains its principal place of business in Westchester County, and is allegedly the owner and/or manager of the project site. Each of the three *GTL Construction* action defendants served and filed an answer to the complaint.

Subsequently, in that action, GTL Construction commenced a third-party action against third-party defendants Wesbuilt Construction Managers LLC and Force Services, LLC, Burgos' employer, on allegations that each was performing work at the project and that each negligently caused Burgos' accident in whole or in part. Each of the third-party defendants served and filed an answer to the third-party complaint.

In the *GTL Construction* action, Burgos moves, without opposition, to consolidate that action with the action at bar.

Benco Construction now seeks to change venue on the ground that venue here was not properly designated because neither Burgos nor Benco Construction resided in New York County when this action was commenced and the alleged accident occurred in Westchester County.

In opposition, Burgos seeks to consolidate this action with the *GTL Construction* action under that action's index number on the grounds that both actions arise out of the same issues of law and fact, that the *GTL Construction* action was commenced prior to commencement of the instant action, and that the proper venue of the consolidated actions is New York County, the undisputed county of residence of Ashkenazy Acquisition.

Benco Acquisition opposes consolidation on the sole ground that venue in the action at bar is improper.

The motion to change venue is denied. Venue is proper "in the county in which one of the parties resided when it was commenced" (CPLR 503 [1]). "A domestic corporation . . . shall be deemed a resident of the county in which its principal office is

located" (CPLR 503 [c]). Therefore, venue of the action at bar is properly designated in Rockland County, where Burgos resides, or Westchester County, where Benco Construction resides.

However, applying CPLR 503 without reference to the *GTL Construction* action would result in two actions that arise out of the same law and facts being litigated in two separate venues, or would necessitate a third motion to consolidate. Either scenario is an inefficient use of court resources and money.

Venue of the *GTL Construction* action is properly designated in New York County, Ashkenazy Acquisition's place of residence.

The motion to consolidate for all purposes is granted. "Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right" (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994] [internal quotation marks and citation omitted]; *see* CPLR 602).

There is no dispute that all the actions are in the early stages of discovery and that all arise out of the same incident and involve common questions of law and fact and are pending before the Supreme Court, New York County. Neither Benco Construction, nor the *GTL Construction* action defendants, can demonstrate that undue prejudice will result from consolidation because all actions were recently commenced and discovery has not begun in any of them.

In granting consolidation, the court, "may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay" (CPLR 602 [a]), including considering venue.

Venue of the consolidated action is properly designated in New York County, on the ground that Ashkenazy Acquisition maintains its principal place of business here (*see* CPLR 510 [b]).

Accordingly, it is

ORDERED that motion sequence no. 001, defendant's motion to change venue, is denied in its entirety; and it is further

ORDERED that motion sequence no. 002, plaintiff's motion to consolidate this action with *Burgos v GTL Construction, LLC, et al.*, bearing Supreme Court, New York County index no. 154328/2017, is granted; and it is further

ORDERED that the consolidation shall take place under index no. 154328/2017 and that the consolidated action shall bear the following caption:

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

-----X
ARMANDO BURGOS,

Plaintiff,

-against-

Index No. 154328/2017

GTL CONSTRUCTION, LLC, ASHKENAZY
ACQUISITION CORP., AAC CROSS COUNTY
MALL, LLC, and BENCO CONSTRUCTION INC.,

Defendants.

-----X

GTL CONSTRUCTION LLC,

Third-Party Plaintiff,

-against-

WESBUILT CONSTRUCTION MANAGERS LLC
and FORCE SERVICES, LLC,

Third-Party Defendants.

-----X;

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action, and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidated hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format, if this action is a hard-copy matter, or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

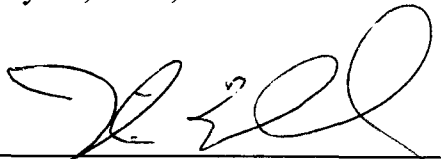
ORDERED that, as applicable and insofar as is practical, the Clerk of the Court shall file the documents being consolidated in the consolidated case file under the index

number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations to such documents in the e-filing records of this court so as ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format, if this action is a hard-copy matter, or, if it an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid Protocol; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, New York, NY, on February 20, 2019, at 9:30 a.m.

<u>12/7/2018</u>			
DATE		DAVID BENJAMIN COHEN, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

HON. DAVID B. COHEN
J.S.C.