

Matter of Aaron v Steele
2018 NY Slip Op 33811(U)
February 2, 2018
Supreme Court, Ulster County
Docket Number: 17-2186
Judge: Richard L. Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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In the Matter of the Application of
JUDY L. AARON, JOSHUA T. AARON and STEVEN L. AARON,

Petitioners,

-against-

KIMBERLY A. STEELE and THE STEELE LAW FIRM, P.C.,

Respondents.

For an Order Pursuant to CPLR 2304, 3101(a)(4), 3103 and
5240 Quashing Subpoenas *Duces Tecum* and/or Protective
Order.

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Motion Return Date: December 6, 2017

APPEARANCES:

Petitioners:

Michael J. Hutter, Esq.
Powers & Santola, LLP
39 North Pearl Street
Albany, NY 12207

Respondents:

Kimberly A. Steele, Esq.
Steele Law Firm, PC
949 County Route 53
Oswego, NY 13126

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Mott, J.

Respondents in this special proceeding move, *inter alia*, for a change of venue to
Oswego County where a prior judgment was entered in favor of Respondent The Steele
Law Firm, P.C., ("Firm") and whose means of enforcement Petitioners challenge herein.
Petitioners oppose.

Background

Respondent Kimberly L. Steele ("Steele") resides, and the Firm is a corporation domiciled, in Oswego County that does not have a regular place for the transaction of business in Ulster County. The Firm obtained a judgment, entered July 11, 2017,¹ ("judgment") for attorney's fees against Petitioner Steven L. Aaron ("Aaron") and the remaining defendants in the Oswego Action. Judy L. Aaron and Joshua T. Aaron are Aaron's wife and son, respectively.

On August 18, 2017, this petition was filed, seeking to quash Steele's subpoenas *duces tecum* issued in the Oswego Action, a protective order and costs, alleging that same were not properly served and are facially defective and patently abusive in scope. On August 21, 2017, Respondents served a demand to change venue to Oswego County Supreme Court. On August 25, 2017, an Order to Show Cause ("Order") issued upon Respondents' August 22, 2017 request, which was copied to Petitioners by facsimile, electronic and regular mail. Said Order directed service by electronic transmission and overnight mail on or before August 29, 2017, and stayed the petition herein pending the determination of this motion. Same was served upon Petitioners' prior attorney on August 22, 2017, by electronic and overnight mail on August 28, 2017.

¹ *The Steele Law Firm, P.C. v. Steven L. Aaron, F&K Supply, Inc., d/b/a Fowler and Keith Supply Co., Never More Now Corp. and David Lenefsky*, Index No. 13-0295 ("Oswego Action"). Plaintiff was granted summary judgment as to Steven L. Aaron, F & K Supply, Inc. d/b/a Fowler and Keith Supply Co. and Never More Now Corp. for \$305,069.79, plus statutory interest. The action as to David Lenefsky was dismissed.

The parties have been directed to first brief the venue issue in this and a related Ulster County action,² which is decided simultaneously herewith in a separate Decision and Order, as these matters are not consolidated.

Parties' Contentions

Respondents claim that they are entitled to a change of venue to Oswego County, as of right, pursuant to CPLR §§ 511, 5221(a)(4) and 5240. They cite that the subject subpoenas are returnable in Oswego County pursuant to CPLR §§ 2304,³ 2308⁴ and pertain to the enforcement of the judgment, rendering Oswego County the proper venue since Respondents have no residence/domicile or regular place of business in Ulster County. Further, they contend that this proceeding, which concerns the enforcement of a judgment, is governed by the more specific venue provision of CPLR § 5221(a)(4). Moreover, they claim that since the disclosure devices for which Petitioners seek a protective order arise from the Oswego Supreme Court enforcement efforts, the latter is the appropriate venue to seek a protective order regarding the subject discovery devices, pursuant to CPLR § 3103. Finally, they seek attorney's fees and costs on this motion.

² By Order to Show Cause dated October 5, 2017, Aaron seeks preliminary injunctive relief against Kimberly A. Steele and The Steele Law Firm, P.C., enjoining the use or enforcement of any judgment-enforcement devices, vacating the existing ones and awarding money damages for, *inter alia*, *prima facie* tort and abuse of process. In response, Respondents have moved, *inter alia*, to dismiss that action as duplicative of the instant petition. *Steven L. Aaron v. Kimberly A. Steele and the Steele Law Firm, P.C.*, Index No. 17-2725; see, e.g., *Aaron v Steele Law Firm, P.C.*, 127 AD3d at 1385, 1388 [3d Dept 2015] (a request for court action under CPLR § 5240 is properly commenced as a "special proceeding").

³ CPLR § 2304 mandates that "a motion to quash, fix conditions or to modify a subpoena shall be made promptly in the court in which the subpoena is returnable."

⁴ CPLR § 2308 states, "Failure to comply with a subpoena issued by a judge, clerk or officer of the court is punishable as a contempt of court, in the court to which same is returnable."

Petitioners claim that Respondents failed to follow CPLR § 511 procedures for a change of venue when they filed a motion seeking same within 36 hours of their demand for same upon Petitioners, thereby vitiating any claim of right. Further, they aver that a change of venue should be denied in the Court's discretion because Petitioners live and work in Ulster County, the records sought to be discovered are in said county and Petitioners should not be required to travel back and forth to Oswego County to supply them when they are more easily made available in Ulster County.

Discussion

Change of venue as of right requires a timely written demand that venue be changed to a county that the respondent specifies as proper. "Thereafter," respondent may move to change venue within fifteen days after service of its demand, "unless within five days after such service," the petitioner services a written consent" to change venue as requested. CPLR § 511 [a], [b]. Where a party fails to comply with this statutory procedure for changing venue, a court may only consider such a change in its discretion. *Aaron v Steele Law Firm, P.C.*, 127 AD3d at 1387.

Here, it is undisputed that the demand was timely, that the motion to change venue was made within fifteen days thereof and that Petitioners did not provide a written response within the statutory five days. Further, CPLR § 511 lacks language preventing the filing of a motion for a change of venue as of right until after the five-day period for Petitioners' response has expired. Rather, it limits only the time within which such motion may be made. Accordingly, Respondents have met the procedural requirement for a change of venue as of right.

Further, CPLR § 5240 permits a court to deny, limit, condition, regulate extend or modify the use of any enforcement procedure and CPLR § 5221(a)(4) provides that a special proceeding is authorized by Article 52 to enforce an entered judgment. In addition, it provides that such proceeding,

“shall be commenced ... in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person.” CPLR § 5221(a)(4).

Here, there is no qualifying nexus sufficient to render Ulster County an appropriate venue for proceedings on the enforcement of a judgment, as Respondents do not reside or regularly conduct business in Ulster County. Therefore, Ulster County is an improper forum for a special proceeding against Respondents concerning the enforcement of the Oswego County judgment. *Aaron v Steele Law Firm, P.C.*, 127 AD3d 1385. Further, Petitioners failed to timely serve an affidavit showing that the county specified by the Respondents is not proper or that Ulster County is a proper venue. CPLR § 511 (b). Therefore, Respondents' motion to change venue to Oswego County is granted.

Accordingly, the motion is granted to change venue to Oswego County, to which all other relief sought herein is referred.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Respondents, who are required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the proceeding.


All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
February 2, 2018

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RICHARD MOTT, J.S.C.

Papers Considered:

1. Order to Show Cause dated August 25, 2017 (Cahill, J.), Notice of Petition and Affirmation of Christopher Burns, Esq., and Verified Petition of Judy L. Aaron and Affidavit of Steven L. Aaron, dated August 17, 2017 with Exhibits A-1 to A-5 to B;
2. Affidavit and Memorandum of Law of Kimberly A. Steele, Esq., dated August 22, 2017 with Exhibits 1-6;
3. Answering Affirmation of Christopher Burns, Esq., dated September 13, 2017;
4. Reply Affidavit and Memorandum of Law of Michael J. Hutter, Esq., dated November 7, 2017 with Exhibits 1-10;
5. Reply Affidavit of Kimberly A. Steele, Esq., dated September 18, 2017;
6. Memorandum of Law and Affidavit of Michael J. Hutter, Esq., dated November 29, 2017 with Exhibits 1-5;
7. Sur-Sur Reply Affidavit and Memorandum of Law of Kimberly A. Steele, Esq., dated November 30, 2017 with Exhibits 1-2.