

<b>Cabrera v Provident Alpine Partners, LP</b>
2019 NY Slip Op 30809(U)
April 1, 2019
Supreme Court, New York County
Docket Number: 153719/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 153719/2017

LUIS CABRERA and MARIA CAPELO,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 001

- v -

PROVIDENT ALPINE PARTNERS, LP,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 32, 34

were read on this motion to change venue.

Defendant moves pursuant CPLR §§ 510(1) and 511 for an order transferring this action from New York County to Nassau County. Plaintiffs oppose.

I. RELEVANT BACKGROUND

On April 11, 2017, plaintiffs commenced this action in this county claiming that Luis had sustained personal injuries as a result of defendant's violation of the Labor Law at defendant's construction site in Queens County. (NYSCEF 16).

On August 3, 2017, defendant served and efiled its verified answer to plaintiffs' verified complaint (NYSCEF 4), and on August 4, 2017, served and efiled an amended verified answer, in which it asserts that New York County is an improper venue, and that this action should be transferred to Nassau County, its principal place of business (NYSCEF 17).

On April 6, 2018, defendant sent plaintiff a written demand that the action be transferred to Nassau County. (NYSCEF 19). By letter dated May 9, 2018, plaintiffs consented to

defendant's demand to the extent of agreeing to transfer the case to Queens County. (NYSCEF 20).

By affidavit dated August 13, 2018, the principal of the managing agent of defendant's building where the accident occurred, states that defendant's principal place of business is in Nassau County, and that defendant has never filed as a business entity in New York County. (NYSCEF 22).

On August 15, 2018, defendant filed this motion. (NYSCEF 14).

## II. CONTENTIONS

Defendant contends that as plaintiffs are residents of Connecticut and defendant is a resident of Nassau County, this action should be litigated in Nassau County as it has no office in any other county in New York State. It argues that pursuant to CPLR 503(a), before its amendment post-dating this action, an action could be commenced in the county in which one of the parties resides, and that therefore, Nassau County is the only proper venue.

Defendant also asserts that its motion is timely because the issue of improper venue was preserved as an affirmative defense in its amended answer. In any event, its delay in moving to change venue is excusable as it had taken time to resolve the issue without motion practice. It observes that plaintiffs are not prejudiced by a transfer of venue absent a significant exchange of discovery. (NYSCEF 14-23).

In opposition, plaintiffs maintain that the motion is untimely as it was not served within 15 days of defendant's demand. To the extent that New York County is an improper venue, they ask that the case be transferred the action to Queens County, a proper venue given that many of the events giving rise to plaintiffs' claims occurred there. (NYSCEF 25-30).

In reply, defendant reiterates its arguments. (NYSCEF 32).

### III. ANALYSIS

Pursuant to CPLR 503(a) and (c), the place of trial of an action “shall be in the county in which one of the parties resided when [the action] was commenced” or “the county in which a substantial part of the events or omissions giving rise to the claim occurred,” and if a party is a domestic or foreign corporation, then the party will be “deemed a resident of the county in which its principal office is located.”

A demand to change venue on the ground that the county designated in the complaint is improper shall be served with or before the service of the answer. (CPLR 511[a], [b]). A defendant then has within 15 days of service of the demand to move pursuant to CPLR 510(1) for an order transferring venue on the ground that the county designated for trial is improper. (CPLR 511[b]; *Jackson v City of New York*, 127 AD3d 552, 553 [1<sup>st</sup> Dept 2015]). The defendant bears the burden of establishing that the plaintiff’s choice of venue is improper and that the defendant’s choice of venue is proper. (*Young Sun Chung v Kwah*, 122 AD3d 729, 730 [2d Dept 2014]; *Fiallos v New York Univ. Hosp.*, 85 AD3d 678, 678 [1<sup>st</sup> Dept 2011]). If the defendant satisfies this burden, the burden shifts to the plaintiff to establish that the selected venue is proper. (*Chehab v Roitman*, 120 AD3d 736, 737 [1<sup>st</sup> Dept 2014]). Even if the motion is untimely, a court retains discretion to change venue. (*Demirovic v Performance Food Grp., Inc.*, AD3d , 2019 NY Slip Op 01560 [2d Dept 2019]).

Here, as defendant filed this motion more than four months after it served its demand on plaintiffs, the motion is untimely.

Neither party has demonstrated that this action was initiated in the proper venue, as none of the parties resides in New York County and the events giving rise to plaintiffs’ claims occurred elsewhere. As it is undisputed that defendant’s principal place of business is in Nassau

County, and as plaintiffs fail to articulate any prejudice suffered if the case were transferred there, a change of venue to Nassau County is warranted.

Plaintiffs' request, in the alternative, to transfer the action to Queens County is not considered as they chose an improper venue in the first instance. (*Nunez v Yonkers Racing Corp.*, 153 AD3d 1355, 1356 [2d Dept 2017] ["By selecting an improper venue in the first instance, the plaintiff forfeited the right to choose venue"]; Siegel, NY Prac § 123 at 252 [6<sup>th</sup> ed 2018], citing *Kelson v Nedicks Stores, Inc.*, 104 AD2d 315, 316 [1<sup>st</sup> Dept 1984]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for a change of venue is granted and venue of this action is changed from this Court to the Supreme Court, County of Nassau; it is further

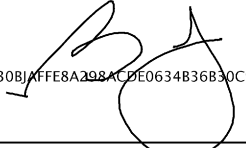
ORDERED, that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Nassau and shall mark his records to reflect such transfer; it is further

ORDERED, that, within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; it is further

ORDERED, that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Nassau County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED, that such service upon the Clerk of this Court shall be made in accordance

with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessibly at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).

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**BARBARA JAFFE, J.S.C.**

4/1/2019  
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE