

Donaldson v Bunch & Sons Constr. LLC
2019 NY Slip Op 30928(U)
April 1, 2019
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 2EFM

Justice

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INDEX NO. 153103/2017

MELISSA DONALDSON and ALEXANDER DONALDSON,

Plaintiffs,

MOTION SEQ. NO. 002

- 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 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51

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

Upon the foregoing documents; it is ordered that the motion is granted to the extent set forth below.

In this action by plaintiffs Melissa Donaldson (“Ms. Donaldson”) and Alexander Donaldson (“Mr. Donaldson”) (hereinafter collectively “the Donaldsons”) seeking to recover damages for, inter alia, negligence and breach of a construction contract, defendant Bunch and Sons Construction, LLC (“BSC”) moves: 1) pursuant to CPLR 620,¹ to consolidate this action with the case of *Bunch & Sons Construction, LLC v Alexander C. Donaldson and Melissa Donaldson and John/Jane Doe 1 – John/Jane Doe 10* commenced under Supreme Court, Ulster County Index Number 17-2188 and to transfer venue of that case to Supreme Court, New York County; or in the alternative 2) pursuant to CPLR 620, directing that the captioned action be tried jointly with the action of *Bunch and Sons Construction, LLC v Alexander C. Donaldson and*

¹ It is evident that the Donaldsons’ references to CPLR 620 are typographical errors given that CPLR 602 addresses consolidation and CPLR 620 does not exist.

Melissa Donaldson and John/Jane Doe 1 – John/Jane Doe 10 commenced under Supreme Court, Ulster County Index Number 17-2188, and to transfer venue of that case to Supreme Court, New York County; or, in the alternative 3) pursuant to CPLR 3211(a)(4), to dismiss the case of *Bunch and Sons Construction, LLC v Alexander C. Donaldson and Melissa Donaldson and John/Jane Doe 1 – John/Jane Doe 10* commenced under Supreme Court, Ulster County Index Number 17-2188; and 4) for such other relief as this Court deems just and proper. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this action are set forth in detail in this Court's decision and order dated May 7, 2018 and filed May 8, 2018 (motion sequence 001). Doc. 25. Additional facts are set forth herein as necessary to decide the instant motion.

On August 18, 2017, BSC commenced an action against the Donaldsons in Supreme Court, Ulster County styled *Bunch & Sons Construction, LLC v Alexander C. Donaldson and Melissa A. Donaldson and "John/Jane Doe 1 - John/Jane Doe 10"* under Ulster County Index Number 17-2188 ("the Ulster County action"). Doc. 34.² As its first cause of action in the Ulster County action, BSC sought to foreclose a mechanic's lien it had filed on the real property located in the Town of Wawarsing, County of Ulster, at 68 Rogue Harbor Road, Kerhonkson, New York, 12446, which bears tax map identifier Section 75.2, Block 1, Lot 4.110 ("the premises"). Doc. 34 at par. 3. BSC claimed that, although it had contracted with the Donaldson's in the amount of \$127,860.04 to perform work at the premises, the Donaldsons had only paid it \$95,087.69, leaving

² The John and Jane Doe defendants were alleged to be any unknown tenants or occupants of the premises.

a balance of \$32,772.35. Doc. 34 at pars. 6-7. BSC's mechanic's lien was recorded in the Office of the Ulster County Clerk on March 17, 2017 as Instrument Number 2017-00000209 and an amended mechanic's lien was filed on March 21, 2017. Doc. 34 at par. 9; Doc. 39.

As its second cause of action in the Ulster County action, BSC alleged that the Donaldsons breached the contract they had with the company and owed it \$32,772.35, plus interest from January 10, 2017. Doc. 34 at pars. 13-15.

By decision and order entered May 8, 2018, this Court denied BSC's motion (motion sequence 001), to change the venue of the captioned action to Ulster County on the ground that the Donaldsons designated an improper venue. Doc. 25 at 4-5. This Court further held that BSC failed to establish that a change of venue to Ulster County was warranted based on the convenience of material witnesses. Doc. 25 at 6. Additionally, this Court held that BSC was not entitled to a change of venue to Ulster County pursuant to CPLR 507 "since a judgment on plaintiffs' cause of action for negligence and breach of contract would not affect the real property they own in Ulster County ..." Doc. 25 at 5.³

On or about May 30, 2018, counsel for the Donaldsons served BSC with a demand to change venue pursuant to CPLR 509, 510 and 512. Doc. 42.

The Donaldsons filed the instant application seeking the relief set forth above on July 5, 2018. Doc. 30. In support of the motion, the Donaldsons argue that the Ulster County action must be consolidated with the captioned action since the facts of the two actions are identical, i.e. they both arise from the performance of a construction contract, and because BSC would not be prejudiced if the actions were consolidated. Although the Donaldsons acknowledge that the Ulster County action "includes a cause of action for foreclosure of a [m]echanic's [l]ien", they assert that

³ BSC filed motion sequence 001 on June 21, 2017 (Doc. 4), prior to the commencement of the Ulster County action on August 18, 2017. Doc. 34. Thus, the venue of the lien foreclosure action was not addressed on that motion.

“there is no significant distinction between [the lien foreclosure] cause of action and the breach of contract actions common to both the [captioned action] and the Ulster County actions, because there is privity between the parties.” Doc. 45 at 2-3.

The Donaldsons further assert that consolidation of the two actions is warranted in the interests of the convenience of the parties, judicial economy, and in order to avoid inconsistent results. Doc. 45 at 4-5. Additionally, the Donaldsons maintain that this action should be consolidated in New York County since the captioned action was commenced prior to the Ulster County action.

In the alternative, the Donaldsons assert that the Ulster County action must be dismissed pursuant to CPLR 3211(a)(4) on the ground that another action for breach of contract arising from the same transaction, i.e., the captioned action, is pending between the parties. They maintain that, although BSC’s Ulster County action seeks foreclosure of its mechanic’s lien in addition to a breach of contract, this does not prevent dismissal pursuant to CPLR 3211(a)(4) since “there is little functional distinction between a cause of action for foreclosure on a lien and a breach of contract.” Doc. 45 at 8.

In opposition to the motion, BSC argues that, although “[i]t makes sense to consolidate the two actions”, its action to foreclose on the mechanic’s lien must be venued in Ulster County pursuant to CPLR 507. Doc. 46 at pars. 3, 5, 7. Thus, for all intents and purposes, it consents to the consolidation of the actions so long as the consolidated action is venued in Ulster County. Doc. 46 at par. 11.

In reply, the Donaldsons argue that “this Court has already determined that venue is proper in New York County.” Doc. 47 at par. 5. They further assert that, in both actions, “the parties are identical, and all claims arise out of the respective parties’ performance or breach of a construction

contract." Doc. 47 at par. 7. Additionally, they maintain that this Court's refusal to consolidate the actions in Supreme court, New York County could lead to inconsistent results. Doc. 47 at par. 7.

LEGAL CONCLUSIONS:

CPLR 602(a) provides as follows:

- (a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

As noted above, the parties agree that the captioned action and the Ulster County actions should be consolidated but differ over where the consolidated action should be venued. "Generally, where actions commenced in different counties have been consolidated pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present." *Clark v Clark*, 93 AD3d 812, 816 (2d Dept 2012) quoting *Gomez v Jersey Coast Egg Producers*, 186 AD2d 629, 630 (2d Dept 1992). However, in an action affecting title to, or the possession, use, or enjoyment of, real property, "CPLR 507 mandates that the venue for such an action be the county in which the property is situated." *Clark*, 93 AD3d at 816 quoting *GAM Prop. Corp. v Sorrento Lactalis, Inc.*, 41 AD3d 645, 646 (2d Dept 2007); see *Edward Joy Co. v McGuire & Bennett, Inc.*, 199 AD2d 1015, 1015 (4th Dept 1993) (action to foreclose a mechanic's lien must be brought in the county in which the real property is located).

Since the captioned action and the Ulster County action involve common issues of law and fact, they should be consolidated. However, since a true consolidation would result in all parties being on both sides of the caption, a joint trial should be ordered instead of consolidation. See

Rogin v Rogin, 90 AD3d 507, 508; *Bass v France*, 70 AD2d 849, 849-850 (1st Dept 1979). As noted previously, the Donaldsons seek consolidation or joint trial in New York County, and not Ulster County. However, “[r]egardless of whether a specific request is made to the court to change venue, the court may change venue to the appropriate forum in connection with a motion to consolidate or for a joint trial pursuant to CPLR 602 (a) (see *Smith v Witteman Co.*, 10 AD2d 793, 197 NYS2d 877 [1960]; Siegel, NY Prac § 116, at 218 [5th ed]).” *Clark*, 93 AD3d at 816. The joint trial of these actions, given the mechanic’s lien, must thus proceed in Ulster County, where the real property at issue is located. see *GAM Prop. Corp.*, 41 AD3d at 646. This Court, in its discretion, therefore consolidates the captioned action and the Ulster County action for joint trial in Ulster County and, given this result, need not address the parties’ remaining contentions.

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

ORDERED that plaintiffs’ motion is granted to the extent of consolidating for joint trial the captioned action with the action styled *Bunch & Sons Construction, LLC v Alexander C. Donaldson and Melissa A. Donaldson and “John/Jane Doe 1 - John/Jane Doe 10”*, pending under Supreme Court, Ulster County Index Number 17-2188; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, Ulster County and, upon service by plaintiffs of this order with notice of entry and payment of the appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action under Index Number 153103/17 to the Clerk of the Supreme Court, Ulster County for joint trial with the action pending in that court known as *Bunch & Sons Construction, LLC v Alexander*

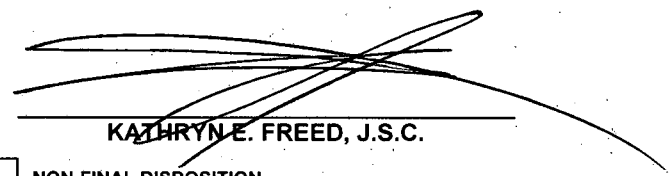
C. Donaldson and Melissa A. Donaldson and "John/Jane Doe 1 - John/Jane Doe 10", pending under Supreme Court, Ulster County Index Number 17-2188 ; and it is further

ORDERED that, within 30 days from entry of this order, plaintiffs are directed to serve a copy of this order, with notice of entry, upon the Clerk of the Trial Support Office of the Supreme Court, Ulster County, who is directed to mark the court's records to reflect the consolidation for joint trial; and it is further

ORDERED that the Clerk of the Supreme Court, Ulster County, upon receipt of a copy of this order, with notice of entry, shall, without further fee, assign an index number to the transferred action and consolidate for joint trial the captioned action with the action styled *Bunch & Sons Construction, LLC v Alexander C. Donaldson and Melissa A. Donaldson and "John/Jane Doe 1 - John/Jane Doe 10"*, pending under Supreme Court, Ulster County Index Number 17-2188; and it is further

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

4/1/2019
DATE


KATHRYN E. FREED, J.S.C.

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