

<b>Spenser v E.W. Howell Constr. Co., LLC</b>
2019 NY Slip Op 31755(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 161219/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

-----X

KAREN SPENSER

Plaintiff,

- v -

E.W. HOWELL CONSTRUCTION COMPANY, LLC,

Defendant.

-----X

INDEX NO. 161219/2018

MOTION DATE 04/18/2019

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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

were read on this motion to/for CHANGE VENUE

In this personal injury accident, plaintiff is seeking to recover damages allegedly sustained as the result of a workplace accident, wherein plaintiff claims that she was injured when two wooden studs fell from a height and struck her. Defendant seeks an order pursuant to CPLR 503(a)(c), 510(1) and 511(a)(b), transferring venue from New York County to Nassau County, on the grounds that plaintiff's designation of New York County is improper as none of the parties are residents of New York County. Plaintiff opposes the motion and cross moves for an order transferring venue to Kings County, conceding that her original choice of venue was improper.

"[A] motion for change of venue under CPLR 510 is addressed to the sound discretion of the trial court" (*Rodriguez v Wilson*, 201 AD2d 636, 636-637, 608 N.Y.S.2d 250 [2d Dept 1994]). "[T]o prevail on a motion pursuant to CPLR 510 (1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and also that the defendant's choice of venue is proper" (*Pinos v Clinton Cafe & Deli, Inc.*, 139 AD3d 1034, 1035, 33 N.Y.S.3d 322 [1st

Dept 2016)]; accord *Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509, 874 N.Y.S.2d 18 [1st Dept 2009] ["[D]efendant's burden on an application to change venue is limited to establishing that the designated county is improper"]. If a defendant meets this burden, "the plaintiff [is] required to establish, in opposition, that the venue selected was proper" (*Young Sun Chung v Kwah*, 122 AD3d 729, 730, 996 N.Y.S.2d 153 [2d Dept 2014]).

Here, plaintiff concedes that venue, initially selected in New York County, was improper. Plaintiff contends that defendant's request to transfer venue to Nassau County should be denied however, because defendant initially sought to change venue to Kings County where the accident occurred. Plaintiff argues that the court should disregard the evidence submitted in support of defendant's motion to transfer venue to Nassau County, including the affidavit of defendant's Risk Manager and its corporate filings with New York State which indicate that "E.W. Howell Co. is a Foreign Limited Liability Company organized under the laws of Delaware and authorized to do business in the State of New York with Nassau County designated as the principal place of business." (NYSCEF Doc. Nos. 9 and 15). Plaintiff does not submit any proof to contest the evidence submitted by defendant in support of its motion, nor does it submit any affidavits in support of its cross motion seeking to transfer venue to Kings County.

"If a plaintiff selects an improper venue, and this selection is challenged by the defendant, the plaintiff then forfeits the right to select venue." (*Lynch v. Cyprus Sash & Door Co., Inc.*, 272 A.D.2d 260, 261, 708 N.Y.S.2d 94 [1st Dept 2000]). See also (*IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 A.D.3d 464, 44 N.Y.S.3d 9 [1st Dept 2016]); (*Montilla v. River Park Associates*, 282 A.D.2d 389, 723 N.Y.S.2d 670 [1st Dept 2001]).

On a motion to change venue, pursuant to CPLR 510 (1), "defendant's burden . . . is limited to establishing that the designated county is improper" (*Garced v Clinton Arms Assoc.*, 58 AD3d at 509).

Having designated an improper county for venue and having failed to submit an affidavit showing either that her designation was proper or that defendant's designation was improper, plaintiff has forfeited her right to select the venue (see *Lynch v Cyprus Sash & Door Co.*, 272 AD2d 260, 261, 708 NYS2d 94 [1st Dept 2000]). Accordingly, it is hereby

ORDERED that defendant's motion for a change of venue is granted and plaintiff's cross motion for a change of venue is denied and venue of this action is changed from this Court to the Supreme Court, County of Nassau; and 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; and 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; and 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* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

6/18/2019  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: