

Newport E. Inc. v Sviba Floral Decorators, Inc.

2021 NY Slip Op 30155(U)

January 15, 2021

Supreme Court, New York County

Docket Number: 655693/2018

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

NEWPORT EAST INC.,

Plaintiff,

- v -

SVIBA FLORAL DECORATORS, INC., CATHERINE SVIBA,
and BARRY KARLIN,

Defendants.

-----X

INDEX NO. 655693/2018
MOTION DATE 04/16/2019
MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 57

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 58

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is hereby

ORDERED that the motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) and to change the venue from New York to Delaware County pursuant to CPLR 510 and 511 of defendant Barry Karlin (motion seq. no. 001) and of defendant Sviba Floral Decorators, Inc. (motion seq. no. 002) and of defendant Catherine Sviba Karlin (motion sequence no. 003) are denied in their entirety; and it is further

ORDERED that defendants shall serve and file an answer to the complaint pursuant to CPLR 3211(f); and it is further

ORDERED that it appearing to this court that the amount of damages sustained by the plaintiff in this action may be less than the sum demanded and that the Civil Court of the City of New York would have had jurisdiction of this action but for the amount of damages demanded, it is now hereby

ORDERED that this action shall be removed to the Civil Court of the City of New York, New York County pursuant to CPLR 325 (d); and it is further

ORDERED that, within 30 days from entry of this order, the counsel for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court, who is hereby directed to transfer the file in this action to the Civil Court of the City of New York, New York County; and it is further

ORDERED that such service upon the Clerk 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, within 30 days from entry of this order, counsel for the plaintiff shall contact the staff of the Clerk of the Court and shall cooperate with the staff in effectuating the transfer of the file in this case to the Civil Court; and it is further

ORDERED that the file in this case shall be delivered to the Civil Court if the case is a hard-copy matter and, if it is an e-filed one, shall be transferred through the New York State Courts Electronic Filing System in accordance with any applicable Administrative Order of the Chief Administrative Judge governing e-filing in the Civil Court.

DECISION

Moving defendants submit one half column story of approximately 250 words published by the New York Post on November 18, 2018, a nine sentence article with subtitled photographs published on the website of the New York Post on that same date, and the four page article, including photographs, published by Channel 4 New York on its website on November 19, 2018, as evidence to support their motion to change the place of the trial of this action to Delaware County on the grounds that the negative publicity contained therein demonstrate a strong possibility that an impartial trial could not be obtained in New York County. This court disagrees that these three articles are consequential enough to "in tone or content establish that the entire jury pool of [New York County], or even a significant portion thereof, was so barraged with unduly unfair or negative publicity about [defendants] to preclude even an attempt at the selection of a fair and impartial jury" (citations omitted) (De Bolt v Barbosa, 280

Barbosa, 280 AD2d 821, 825 [3d Dept. 2001]). As the record is, therefore, "'devoid of any factual situations from which the court might conclude that [these newspaper articles] have affected public opinion or any residents of the county who might be prospective jurors to the extent of precluding a fair and impartial trial' (citations omitted)" (supra, 825-826), a change of venue is unwarranted.

The documentary evidence, comprised of the unsigned written proposal and invoices issued by defendant Catherine Sviba to plaintiff, does not irrefutably establish that the moving defendants were not parties to the oral agreement relating to the floral arrangement transaction at issue here (see Cottone v Selective Surfaces, LLC, 68 AD3d 1038, 1039 [2nd Dept. 2009]). In addition, the court agrees with plaintiff that "[i]f service predominates and the transfer of title to personal property is an incidental feature of the transaction, the contract does not fall within the ambit of the [Uniform Commercial] Code" (Schenectady Steel Co., Inc. Bruno Trimpoli General Const. Co.,

Inc., 43 AD2d 234, 237 [3d Dept. 1974]). It is without peradventure that the foliage and other decorations were only incidental to the "arrangement" service provided by the contractor at bar.

1/15/2021
DATE

Debra A. James, J.S.C.
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: