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| <b>Santiago v Tristate Realty LLC</b>  |
| 2021 NY Slip Op 30193(U)   |
| January 21, 2021   |
| Supreme Court, Kings County  |
| Docket Number: 502976/2019   |
| Judge: Debra Silber  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9

LILLIAN SANTIAGO,

Plaintiff,

-against-

TRISTATE REALTY LLC,  
TRISTATE REALTY HOLDINGS LLC,  
and 106 WEST 83RD STREET LLC,

Defendants.

DECISION/ORDER

Index No. 502976/2019  
Motion Seq. No. 001  
Date Submitted: 1/14/21

Action #1

LILLIAN SANTIAGO,

Plaintiff,

-against-

BLUE SQUARE CONSTRUCTION LLC,  
ACACIA NETWORK HOUSING, INC., and  
BRONX ADDICTION SERVICES INTEGRATED  
CONCEPTS SYSTEM, INC. A/K/A (BASICS),

Defendants.

Index No. 501803/2020  
Motion Seq. No. 001  
Date Submitted: 1/14/21

Action #2

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of a motion by defendants in Action #1 to consolidate Action #2 into Action #1 and a motion by defendants in Action #2 to change venue and for other relief*

| Papers   | NYSCEF Doc.  |
|--|--------------|
| Notice of Motion, Affirmations and Exhibits Annexed.....             | <u>8-18</u>  |
| Notice of Motion (Action #1), Affirmations and Exhibits Annexed..... | <u>6-10</u>  |
| Affirmation in Opposition, Affidavits, and Exhibits Annexed.....     | <u>20-29</u> |
| Reply Affirmation.....   | <u>31</u>    |

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

On January 23, 2017, plaintiff claims she slipped and fell on interior stairs leading down to a cafeteria in a building located at 106 West 83<sup>rd</sup> Street, New York, NY. In

February, 2019, she commenced Action #1 against the property owner (106 West 83<sup>rd</sup> Street LLC) and two similarly named entities, Tristate Realty LLC and Tristate Realty Holdings LLC. It is not known how these two entities are related to the accident.

Service of process was effectuated in June, 2019. One law firm answered the complaint on behalf of all three defendants, even though there is no affidavit of service filed with regard to service on defendant Tristate Realty LLC. Their answer is dated February 18, 2020 but was not rejected as untimely by plaintiff. Before the answer in Action #1 was served and filed, plaintiff commenced the second action by filing the summons and complaint in January of 2020. It is not clear who the three defendants are in relation to the accident. Perhaps they are tenants at the premises. Process was not effectuated until September of 2020, but no objection was made that it was untimely, and the Governor's Executive Orders seem to have tolled all civil time limits, statutes, regulations and other requirements from March 7, 2020 to November 3, 2020. On October 22, 2020, defendants in Action #1 filed the motion to consolidate the two actions.

On October 30, 2020, a stipulation was entered into between plaintiff's counsel and counsel for two of the three defendants in Action #2, which granted defendants until November 30, 2020 to answer the complaint. Defendant Blue Square has not answered or appeared in the action. Then, the two defendants filed their answer (E-File Doc #5) on December 2, 2020, two days late, simultaneously with a Demand to Change the Place of Trial (Doc #3) to New York County. The answer was rejected by plaintiff's attorney as untimely just hours later (Doc #7). This motion followed a few days later and within the 15 days required by CPLR 511. Defendants' counsel seeks to change the venue to New York County, claiming that Kings County is an improper venue for

Action #2, and requests an order directing the plaintiff to accept their “untimely” answer.

Both motions were submitted on January 14, 2021, on consent and without oral argument.

### Discussion

Defendants in Action #1 move to consolidate that action with Action #2. Plaintiff was served with the motion via e-file and has not opposed it. Defendants in Action #2 were not served with the motion, as there is no affidavit of service filed, but counsel for the two answering defendants in Action #2 indicates he is aware of the motion, because plaintiff made him aware of it in plaintiff’s December 2, 2020 response to his demand to change venue. He then says at ¶ 13 of his affirmation, filed December 11, 2020, “even if the actions end up being consolidated down the road, it does not detract from the fact that the plaintiff chose an improper venue in the within action, forfeiting her right to choose venue.”

Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*see Longo v Fogg*, 150 AD3d 724, 725 [2d Dept 2017], citing *Brown v Cope Bestway Express, Inc.*, 99 AD3d 746, 952 NYS2d 220 [2012]; *Alizio v Perpignano*, 78 AD3d 1087, 1088, 912 NYS2d 132 [2010]; *Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 845 NYS2d 414 [2007]). Here, plaintiff does not oppose the consolidation motion, nor do the defendants in Action #2. It is undisputed that these two actions arose out of the same incident and involve common questions of law and fact. The interests of justice and judicial economy warrant relief under CPLR 602 (a). The sole issue is where the cases should be heard.

When consolidation or joint trials are ordered under CPLR 602 (a), venue should generally be placed in the county where the first action was commenced (*see Nigro v Pickett*, 39 AD3d 720, 722, 833 NYS2d 655 [2007]). Special circumstances, however, may warrant the court, in its discretion, to place venue elsewhere (*see Brown v Cope Bestway Express, Inc.*, 99 AD3d 746, 748 [2d Dept 2012], citing *Gomez v Jersey Coast Egg Producers*, 186 AD2d 629, 630, 588 NYS2d 589 [1992]; *Deutsch v Wegh*, 269 AD2d 487, 487 [2d Dept 2000]). Special circumstances include the residences of the parties, the residence of the witnesses, including the police officer who responded, the doctors who treated the plaintiffs, and eyewitnesses to the accident (*see T T Enters. v Gralnick*, 127 AD2d 651 [2d Dept 1987]). Nobody is claiming any special circumstances in this motion.

In Action #1, the defendants did not object to plaintiff's choice of venue, which is stated to be based on the principal place of business of defendant Tristate Realty LLC. The time for defendants to object has passed. The summons clearly states that plaintiff lives in Queens. In plaintiff's opposition to the motion to change venue, plaintiff's counsel states (Doc #20) at ¶ 2: "Your affirmant [sic] opposes the subject motion on the basis that the filing of this action in Kings County is proper, given the existence of the related prior action filed in Kings County which arises from the same incident occurring on January 23, 2017 (entitled: Lillian Santiago, Plaintiff -against- Tristate Realty LLC; Tristate Realty Holdings LLC; 106 West 83rd Street LLC, pursuant to Kings County Supreme Court Index No.: 502976-2019) which action includes a corporate [sic] defendant (TRISTATE REALTY LLC) which maintains its principal office in the County of Kings, City and State of New York; and which defendant has appeared by counsel.

Furthermore, counsel for defendants in said related action have already brought a motion for consolidation of this action with the subject action, pursuant to CPLR 602." There is no case cited for this proposition. The court does note that if the plaintiff had moved to amend her complaint to add the defendants in Action #2, that motion would have been granted and then there would be one defendant whose principal place of business was the basis for venue in Kings County for the action, instead of this situation.

The time to demand a change of venue is either before the answer is served or with the answer (CPLR 511). Here, it was served with the answer, but the answer was late. The stipulation extending defendants' time to answer the complaint does not mention an extension of time to demand a change of venue. The toll in the Governor's Executive Order 202.67 ended on November 3, 2020. The stipulation gave defendants until November 30, 2020 to answer the complaint. They did not do so. The demand claims the proper county is New York County because that is where the accident occurred, although plaintiff lives in Queens and the moving defendants are based in the Bronx. The court finds that because the demand was due on October 11, 2020, or, November 3, 2020 under Executive Order 202.67 (issued October 4, 2020), it was late, and thus the venue of the action is one that may be determined pursuant to the court's discretionary powers under CPLR 510, not under 511.

As the property owner's attorney has made the motion to consolidate, is representing all the defendants in the earlier action, and he was not served with the motion to change venue, and as Manhattan's courts are only one mile from Brooklyn's courts, the court finds that the action should stay in the county where plaintiff placed it.

The court finds that the plaintiff's rejection of defendants' answer in Action #2 because it was two days late, in the midst of the Covid-19 Pandemic, was unreasonable, and defendants' answer must be accepted by plaintiff. The courts favor disposition of matters on the merits, not based on the imposition of meritless defaults.

Accordingly, it is **ORDERED** that defendants' motion in Action #1 is granted and a Consolidation Order is issued simultaneously herewith.

It is further **ORDERED** that the branch of defendants' motion in Action #2 to transfer venue to New York County is denied, as defendants' demand to change the place of trial was served on December 2, 2020, when the summons and complaint were served, by service upon the Secretary of State, on September 11, 2020. Thus, even with the toll granted by the Governor's Executive Order to November 3, 2020, the demand was untimely.

It is further **ORDERED** that the branch of defendants' motion in Action #2 to compel plaintiff to accept the defendants' late answer is granted. Plaintiff has not demonstrated any prejudice which occurred because the stipulation said the answer was due on November 30, 2020 but the answer was e-filed on December 2, 2020, two days later.

This constitutes the decision and order of the court.

Dated: January 21, 2021

ENTER:



Hon. Debra Silber, J.S.C.