

Pappas v Kefalas

2022 NY Slip Op 31979(U)

June 23, 2022

Supreme Court, New York County

Docket Number: Index No. 651837/2020

Judge: Margaret Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 PETROS PAPPAS, ARINDALE ENTERPRISES LTD.,

INDEX NO. 651837/2020

Plaintiff,

MOTION DATE 01/04/2022

- v -

VASSILIOS KEFALAS, KAY DEVELOPMENT LLC,
 PARKVIEW ESTATES I LLC, K-SHER CORP.

MOTION SEQ. NO. 003

Defendants.

**DECISION + ORDER ON
 MOTION**

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 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for

CONSOLIDATE/JOIN FOR TRIAL

Plaintiffs Petros Pappas and Arindale Enterprises Ltd move pursuant to CPLR 602(a) for an order consolidating this action in this court (New York County action) with a related action that is pending in the Supreme Court of New York, County of Nassau, captioned *Kefalas v Pappas, et. al.*, Index No. 610245/2020 (the Nassau County action). Defendants Vassilios Kefalas, Kay Development, LLC, Parkview Estates I LLC, and K-Sher Corp oppose the motion and cross move for an order consolidating the two actions in Nassau County.¹

Background

Pappas and Kefalas met in 2001 and have worked together as business associates in multiple business and real-estate ventures. Pappas and Kefalas collectively owned and managed three properties, one in New York County (the Manhattan project) and two in Valley Stream in Nassau County. The "Parkview" property is a residential property in Nassau County that Kefalas and Pappas own 49% and 51% respectively. Pappas acquired 51% ownership by investing approximately \$1,000,000. Each individual retains 50% ownership in the other Nassau County property, known as the "K-Sher" project. In 2010, Pappas and Kefalas entered into an agreement regarding the Manhattan project where Pappas

¹ Defendants initially opposed the motion on the grounds that it sought to merge the captions of two actions in connection with the consolidation instead of consolidating the actions for joint trial and discovery (NYSECF # 84). The issue is moot since plaintiffs subsequently agreed that consolidation should be in the form advocated by the defendants.

purchased the property for \$30 million and was to pay Kefalas \$30,000 per month for the project's predevelopment phase. The parties also agreed that upon selling the Manhattan project, Pappas and Kefalas would divide the profit 87.5% and 12.5% respectively. The Manhattan project sold in 2013 for approximately \$64 million.

Plaintiffs commenced the New York County action by filing a summons with notice on May 25, 2020, and a complaint on October 1, 2020 (NYSCEF # 1). The complaint was amended on January 20, 2021 (NYSCEF # 79-Amended Complaint). The Amended Complaint asserts claims for, *inter alia*, unjust enrichment, breach of fiduciary duty, breach of contract and conversion arising out of the parties' real-estate projects and loans that defendants have allegedly not repaid. Plaintiff seeks \$7.76 million in damages and an accounting (*id.*, ¶¶ 83-254). Defendants filed an answer to the Amended Complaint on February 19, 2021 (NYSCEF # 81).

Kefalas commenced the Nassau County action on September 24, 2020, by filing a Summons with Notice (Nassau County Action, NYSCEF # 1). The complaint in the Nassau County action, filed on February 8, 2021, asserts causes of action against Pappas and four individual defendants which Pappas allegedly controls, for breach of joint venture, breach of fiduciary duty, and abetting breach of fiduciary duty, unjust enrichment, and accounting (NYSCEF # 80, ¶¶ 65-85). The answer in the Nassau County action was filed on January 4, 2022 (NYSCEF # 90).

The parties both seek to consolidate this action and the Nassau County action on the grounds that the two actions pertain to common questions of law and fact, and specifically the financial and accounting issues regarding the parties' Valley Stream and Manhattan properties. Plaintiffs, however, argue that the actions should be consolidated in New York County while defendants argue that Nassau County is the proper venue for the actions.

Plaintiffs argue that the court should follow that general rule and consolidate the actions in New York County where the first action was filed, instead of in Nassau County where Kefalas commenced the Nassau County action four months later rather than asserting counterclaims in this action which plaintiffs characterize as "a transparent effort at forum shopping" (NYSCEF # 77-Pltfs' MOL at 4). Plaintiffs also argue that no special circumstances exist that require deviating from the first filed rule. In this regard, plaintiffs argue that New York County is a proper venue since a substantial part of events occurred here, discovery is significantly advanced here and consolidation in New York County will not delay proceedings. Moreover, plaintiffs argue that none of the material witnesses will be inconvenienced by litigation in New York County, rather than Nassau County.

In opposition and in support of their cross motion to consolidate the actions in Nassau County, defendants assert that New York County is not the proper venue

for consolidation, and therefore special circumstances exist to depart from the first to file rule. In particular, they argue that, under CPLR 503 and 510(1), plaintiffs' designation of New York County as the venue for this action are improper since none of parties resided or did business in the county at the time this action was commenced (citing *Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]). Defendants also argue that under CPLR 507 and 510(1), Nassau County is the mandatory venue because certain of plaintiffs' claims and allegations affect title to, and possession of, property in Nassau County (citing e.g., *Patiwana v Shah*, 162 AD3d 1059 [2d Dept 2018]; *Bohlen Indus. of N. Am., Inc. v Flint Oil & Gas, Inc.*, 95 AD2d 753 [1st Dept 1983]).

Defendants alternatively argue that under CPLR 510(3), the court should exercise its discretion to transfer venue to Nassau County based on the convenience of material witnesses. In support of this argument, defendants rely on the affirmation of their counsel in which counsel lists the names of material witnesses who are expected to testify at trial, and their relationship to the action, their town of residence, and that it would be more convenient for these witnesses for the action to be tried in Nassau (NYSCEF # 88, ¶¶ 13 a-d). In addition, defendants argue that all the books and records of the subject ventures are located in Nassau County.

In reply, plaintiffs argue that the venue of this action is not based on the residence of the parties but on the grounds that a substantial part of the underlying events occurred in New York county (citing CPLR 503[a]). In addition, plaintiffs argue that venue in New York County is not precluded by CPLR 507 because under New York law, when, as here, shareholders dispute their ownership interest in an entity which owns real property, such dispute is not considered to affect title to, or possession of, real property (citing *Fish v Davis*, 146 AD3d 485 [1st Dept 2017]). As for defendants' argument for a discretionary change in venue pursuant to CPLR 510, plaintiffs argue that a request to change venue on this ground is untimely and procedurally defective as defendants failed to submit the required proof to demonstrate that New York County is an inconvenient venue for material witnesses.

Discussion

Under CPLR 602 (a), “[w]hen actions involve[e] a common question of law or fact. . . the court, upon motion, may order a joint trial [or consolidation] of any or all the matters in issue. . . to avoid unnecessary costs or delay.” Here, it is undisputed that consolidation is appropriate because of common issues of law and fact surrounding the financial and accounting issues raised in the New York and Nassau County actions. At issue is whether the venue of the consolidated actions should be in this court or in the Supreme Court, Nassau County.

Absent special circumstances, two actions should be consolidated in the venue where the first action was commenced (*Harrison v Harrison*, 16 AD3d 206, 207 [1st Dept 2005]). Special circumstances warranting departure from the first filed rule have been found when the county of the later commenced action is the location of the underlying events, the residence of majority of witnesses and of the evidence, and/or where the consolidated action can be “most efficiently handled and tried” (*Ferolito v Vultaggio*, 115 AD3d 541, 542 [1st Dept 2014]; see also *Lema v 1148 Corp.*, 176 AD3d 653, 654 [1st Dept 2019]).

Here, the court finds that no special circumstances exist to justify deviating from the first filed rule. First, while the parties are not New York residents, venue is proper in New York County as the location where “a substantial part of the events or omissions giving rise to the claim[s] occurred” (CPLR 503 [a]). Specifically, the Manhattan property, which is one of the three properties at issue, is located on Maiden Lane in New York County (NYSCEF # 79, 55). Additionally, numerous New York County based entities were involved in the property including lawyers, consultants, engineers, brokers, and lenders, and it is alleged that there are more than \$5 million in damages related to the Manhattan property (*id.*, ¶¶ 55-77). Thus, the fact here are unlike those in *Lopez v Chaliwit* (268 AD2d at 377) on which defendants rely. The court in *Lopez*, a personal injury case, deviated from the first filed rule because the county where the second action was filed was the location of “all prospective nonparty witnesses [and]...was also the site of plaintiff’s accident and most of her ensuing medical treatment.”

Next, regarding defendants’ argument that the actions should be consolidated in Nassau County under CPLR 507, this provision states that “[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.” In this New York County action, plaintiffs assert claims for, *inter alia*, unjust enrichment, breach of fiduciary duty, breach of contract and conversion arising out of the parties’ real-estate projects and loans that Kefalas allegedly has not repaid, and seek \$7.76 million in damages and an accounting. (NYSCEF # 79, ¶¶ 83-254). In the Nassau County action, the complaint asserts causes of action against Pappas and four individual defendants, whom Pappas allegedly controls, for breach of joint venture, breach of fiduciary duty, and abetting breach of fiduciary duty, unjust enrichment, and an accounting (NYSCEF # 80, ¶ 65-85). As these Nassau County actions concern the payment and accounting regarding properties as business ventures, not the title or use of the subject properties, CPLR 507 does not apply here and a change of venue to Nassau County based on this provision is unwarranted. (see *Fish v Davis* 146 AD3d at 486 [denying change of venue based on CPLR 507 as the action “essentially seeks a determination of the individual parties’ rights as shareholders of defendant corporation, which owns real property [in the county to which a change of venue was sought]”).

The remaining issue concerns whether this court should permit a discretionary change of venue for this action to Nassau County. Under CPLR 510 (3), courts have discretion to grant venue changes when “the convenience of material witnesses and the ends of justice will be promoted.” To establish a right to change venue on this ground, the movant must submit affidavits that “(1) contain the names, addresses, and occupations of witnesses expected to be called; (2) disclose the facts upon which such witnesses are expected to testify, in order that the court may determine whether such witnesses are material and necessary; (3) demonstrate that such witnesses are willing to testify; and (4) show that the witnesses would be inconvenienced absent a change in venue” (*O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169 [2d Dept 1995]; see also *10 Two Trees Lane LLC v Mahoney*, 192 AD3d 468 [1st Dept 2021]).

Under this standard, defendants are not entitled to a discretionary venue change for material witness’ convenience since they do not submit affidavits from material nonparty witnesses. Instead, they rely on counsel’s affirmation which identifies the witnesses and generally summarizes expected witnesses’ relationship to the action, but does not provide the facts on which the witnesses are expected to testify or their full addresses. (NYSCEF # 88, ¶ 13 a-d). Under these circumstances, defendants have not met their burden of establishing a basis for a discretionary change of venue of this action to Nassau County (*see 10 Two Trees Lane LLC v Mahoney*, 192 AD3d at 469-470 [finding that an action pertaining to property in Suffolk County where defendants had their principal place of business, a discretionary change of venue from New York to Suffolk County was unwarranted where moving defendants did not submit the nonparty witness’ affidavit and relied on counsel’s affirmation which failed to show “with sufficient particularity the facts upon which the nonparty [witness] was expected to testify...[or] ...to set forth [the witness’] name, address, and occupation, or how he would be inconvenienced absent a change of venue”]).

Accordingly, as there is no basis to depart from the first to file rule, the two actions will be consolidated before this court in New York County.

Conclusion

In view of the above, it is

ORDERED that the plaintiffs’ motion to consolidate the two actions in New York County is granted, and defendants’ cross motion to consolidate the two actions in Nassau County is denied; and it is further

ORDERED that the action *Kefalas v. Pappas, et al*; Index No. 610245/2020, pending in the Supreme Court, Nassau County, shall be consolidated in the Supreme

Court, New York County with *Pappas et al v Kefalas et al*; Index No. 651837/2020 for discovery and joint trial; and it is further

ORDERED that, within 30 days from entry of this order, counsel for plaintiffs shall serve a certified copy of this order upon the Clerk of the Supreme Court, Nassau County, and shall pay the appropriate fee, if any, for such transfer and shall contact the staff of said Clerk to arrange for the effectuation of the transfer in an efficient manner; and it is further

ORDERED that service upon the Clerk of the Supreme Court, Nassau County shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Supreme Court, Nassau County, shall transfer the documents on file under Index No. 610245/2020 to the Clerk of this Court for the purpose of consolidation for joint trial and discovery; and it is further

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

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), mark his records to reflect the consolidation for discovery and joint trial; and it is further

ORDERED that such service upon the Clerk of the 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 this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred from the Supreme Court, Nassau County under a New York County Index Number or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the actions consolidated for discovery and joint trial; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation for joint trial and discovery only by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*.

6/23/2022

DATE



MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE