

Mott v Bank of Am. Corp.
2022 NY Slip Op 33948(U)
November 23, 2022
Supreme Court, New York County
Docket Number: Index No. 160149/2021
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

THEODORE MOTT,

Plaintiff,

- v -

BANK OF AMERICA CORPORATION, LEVITTOWN ASSOCIATES, LLC, BNF CONTRACTORS, INC.,

Defendant.

-----X

BNF CONTRACTORS, INC.

Plaintiff,

-against-

ANDREW JAMES INTERIORS, INC.

Defendant.

-----X

BANK OF AMERICA CORPORATION, LEVITTOWN ASSOCIATES, LLC

Plaintiff,

-against-

ANDREW JAMES INTERIORS, INC.

Defendant.

-----X

INDEX NO. 160149/2021
MOTION DATE 05/27/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party
Index No. 595207/2022

Second Third-Party
Index No. 595207/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for CHANGE VENUE.

In this action for personal injuries, third-party defendant/second third-party defendant Andrew James Interiors, Inc. (Andrew James) moves, pursuant to CPLR 503, 510, and 511, for

an order transferring the venue of this action from New York County to Nassau County. The motion is denied.

Plaintiff Theodore Mott (plaintiff) was allegedly injured on November 19, 2020, when he slipped on the roof of a Bank of America building located at 3287 Hempstead Turnpike in Hempstead, New York (NY St Cts Elec Filing [NYSCEF] 44, complaint ¶¶ 2, 5). He alleges that he was an employee of Andrew James on the date of the accident (*id.*, ¶ 39). Plaintiff commenced this action in New York County based upon the alleged principal place of business of defendant/second third-party plaintiff Bank of America Corporation (BOA). In its answer, BOA admitted that it “was a National Banking Association organized under and by virtue of the laws of the State of Nevada and authorized to conduct business in the State of New York” (NYSCEF Doc No. 45, verified answer with cross claims ¶ 2).

On February 15, 2022, defendant BNF Contractors, Inc. commenced a third-party action against Andrew James (NYSCEF Doc No. 46). On March 16, 2022, BOA and Levittown Associates, LLC brought a second third-party action against Andrew James (NYSCEF Doc No. 47). Together with its answer to the second third-party complaint, on May 24, 2022, Andrew James served a demand requesting to change venue to Nassau County (NYSCEF Doc Nos. 47, 48).

CPLR 503 provides that “[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff” (CPLR 503 [a]).

To 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 (*see Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]). If the

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 [2d Dept 2014]).

The residence of a party for the purposes of venue is the residence when the action is commenced (*Santulli v Santulli*, 228 AD2d 247, 248 [1st Dept 1996]). “A foreign corporation’s designation of the location of its office in a statement filed with the Secretary of State constitutes a designation of its residence for venue purposes under CPLR § 503 (c)” (*Shetty v Volvo Cars of N. Am., LLC*, 38 AD3d 202, 202-203 [1st Dept 2007]; *accord Bailon v Avis Rent A Car*, 270 AD2d 439, 440 [2d Dept 2000]).

Plaintiff contends that the motion to change venue is timely. This argument is unpersuasive. A demand to change venue “shall be served with the answer or before the answer is served” (CPLR 511 [a]). CPLR 511 (b) provides that:

“[t]he defendant shall serve a written demand that the action be tried in a county he [or she] specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant”

(CPLR 511 [b]). Andrew James was entitled to answer the second third-party complaint (*see* CPLR 1008; *see also Penniman v Fuller & Warren Co.*, 133 NY 442, 444 [1892]; *Corea v Browne*, 45 AD3d 623, 624 [2d Dept 2007]). In addition, Andrew James’s demand was served with its answer to the second third-party complaint, as required by CPLR 511 (a) (NYSCEF Doc Nos. 47, 48). Andrew James also met the filing requirements of CPLR 511 (b) by moving to change venue within 15 days after serving its demand to change venue (NYSCEF Doc Nos. 42, 48). Moreover, contrary to plaintiff’s contention, “[t]he fact that [Andrew James] was brought into the action as a third-party defendant does not diminish [its] right to move for a change of venue as of right” (*Kearns v Johnson*, 238 AD2d 121, 122 [1st Dept 1997]).

However, Andrew James has failed to show that plaintiff's choice of venue in New York County is improper. By failing to respond to Andrew James's demand, plaintiff has not forfeited his right to select venue (*compare Lynch v Cyprus Sash & Door Co., Inc.*, 272 AD2d 260, 261 [1st Dept 2000]; *see also McDermott v McDermott*, 267 App Div 171, 172-173 [1st Dept 1943] [finding plaintiff's failure to respond to defendant's demand merely "merely permits defendant, at his option, to move for change of venue in the county named in the demand, or in an adjoining county, rather than in the county named in the summons"]; Siegel, NY Prac § 123 [6th ed] ["P's failure (to respond to D's demand under CPLR 511 [b] within five days after service of the demand) does not automatically entitle D to the venue change; it merely gives D a broader option on where to move for it. Nor does P, by omitting to respond, forfeit the right to resist the motion. Wherever D moves, P may still oppose the motion and show that his chosen county is proper or that D's is not"]).

Additionally, Andrew James failed to submit BOA's certificate to do business in New York (*see Janis v Janson Supermarkets LLC*, 161 AD3d 480, 480 [1st Dept 2018]; *DeMichael v Jaeger*, 70 AD3d 759, 760 [2d Dept 2010]; *Nagle v L.O. Realty Corp.*, 286 AD2d 130, 132 [1st Dept 2001]). Moreover, BOA did not admit that its designated office location was outside New York County; it only admitted that it was a Nevada corporation authorized to do business within the state (NYSCEF Doc No. 45 ¶ 2). Even if BOA did not actually have an office in New York County, "the designation made by defendant in its application for authority still controls for venue purposes" (*Crucen v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 139 AD3d 538, 539 [1st Dept 2016]).


Finally, Andrew James failed to submit any affidavits to show that a change of venue would be warranted based upon the convenience of material witnesses (*see CPLR 510 [3]*;

Krochta v On Time Delivery Serv., Inc., 62 AD3d 579, 580-581 [1st Dept 2009]; *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172-173 [2d Dept 1995]).

Accordingly, it is

ORDERED that the motion (sequence number 001) of third-party defendant/second third-party defendant Andrew James Interiors, Inc. to change venue is denied; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court’s review and signature, within thirty (30) days.

<u>11/23/2022</u> DATE		 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE