

**Perkins Eastman Architects, D.P.C. v White Plains
Hosp. Med. Ctr., Inc.**

2023 NY Slip Op 30916(U)

March 23, 2023

Supreme Court, New York County

Docket Number: Index No. 653890/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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PERKINS EASTMAN ARCHITECTS, D.P.C.

Plaintiff,

- v -

WHITE PLAINS HOSPITAL MEDICAL CENTER, INC.,

Defendant.

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INDEX NO. 653890/2022

MOTION DATE 03/17/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for CHANGE VENUE.

Defendant’s motion to consolidate and change venue is granted.

Background

Plaintiff seeks purportedly unpaid fees arising out of its architectural services contract with defendant to design a new \$230 million facility in White Plains. Plaintiff claims it is owed at least \$1.85 million. In June 2022, plaintiff filed a mechanic’s lien in Westchester County arising out of the same dispute. After filing the lien, the parties apparently attempted to mediate this dispute in October 2022 (as required under the contract). The efforts to mediate failed and this lawsuit, filed on October 22, 2022, followed.

Defendant seeks to consolidate this action with one pending in Westchester County and then to move both cases to Westchester County Supreme Court. It observes that in the Westchester case, defendant here (as plaintiff in Westchester) seeks damages incurred as a result of plaintiff’s purported breach of its obligations under the parties’ agreement (the same

agreement upon which plaintiff sues). Defendant alleges that plaintiff's design was faulty and cites examples of an MRI Suite placed directly above a loading dock and inadequate exterior brickwork on the façade.

Defendant insists that both cases share common questions of law and fact. It also maintains that Westchester County is the correct venue for the consolidated actions as both cases are about construction of a building in White Plains. Defendant points out that because plaintiff also filed a mechanic's lien on the property, any litigation over the lien would have to be in Westchester County, where the lien was filed.

In opposition, plaintiff emphasizes that because it filed its case first (by two days), any consolidated case would have to be litigated in New York County. It argues that no exceptional circumstances are present that justify moving the cases to Westchester County. Plaintiff opposes the branch of the motion that seeks consolidation on the ground that the existence of two pending cases in two different venues is defendant's fault. It argues that defendant should have simply filed the causes of action in the Westchester case as counterclaims in this matter. Plaintiff emphasizes that it resides in New York County and so its selection of this county is a proper venue.

Plaintiff insists that there would be no undue hardship for defendant to litigate this case in New York County. It points out that defendant's lawyer is located in Nassau County and insists the defendant's representative, Joseph Mannino, is from Wisconsin.

In reply, defendant claims it identified two witnesses who would be inconvenienced by the designation of New York County as a venue for the consolidated action and argues that venue is proper in Westchester County. It maintains that it did not have to assert counterclaims in this action and was entitled to pursue its own case in Westchester. Defendant also argues that it

commenced its case in Westchester on October 21, 2022 while plaintiff started this case on October 19, 2022 so it had no actual notice before defendant started its own matter.

Discussion

“CPLR 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. Although great deference is to be accorded to the motion court's discretion, there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519, 782 NYS2d 21 [1st Dept 2004] [citations omitted]).

“When two actions are pending in the Supreme Court in different counties, the motion to consolidate may be made in either county, and in the order consolidating the two actions, the court must necessarily fix the venue of the consolidated action. In deciding the venue issue, the court, in its sound discretion, must consider a number of factors, including the county where the cause of action arose and where the parties and witnesses are located” (*Woods v County of Westchester*, 112 AD2d 1037, 1038, 492 NYS2d 829 [2d Dept 1985] [citation omitted]).

First, both cases at issue clearly involve common questions of law and fact. Both involve a dispute about the same contract and project. A review of the complaints in both actions makes it abundantly clear that the claims involve the same subject matter and are exactly the type of cases that are routinely consolidated.

Second, plaintiff's assertion that defendant purposefully filed another case in a different county as part of a forum shopping effort is without merit. The timeline shows that this case was filed on October 19, 2022 and not served on defendant until October 24, 2022 (NYSCEF Doc.

No. 2). Defendant's case was commenced in Westchester on October 22, 2022. And so, defendant did not even know about this case until after it commenced the Westchester case. And the instant dispute is about a medical center located in White Plains so defendant's selection of Westchester County for its matter is not forum shopping.

The next question is whether or not both cases should be transferred to Westchester County (plaintiff did not cross-move to have both cases here). Certainly, plaintiff is correct that it was entitled to pick New York County as it has its office here (CPLR 503[a]). Moreover, defendant's moving papers did not establish that various witnesses located in Westchester County compels a change of venue. Westchester County is not so far away that litigating a case in New York County is an insurmountable burden. Many residents of Westchester commute into Manhattan daily; in fact, defendant's attorneys (who are seeking to move this case to Westchester) are located on Long Island. Plus, as plaintiff pointed out, the only affidavit from defendant is from someone whose LinkedIn profile suggest he lives in Wisconsin (NYSCEF Doc. No. 34).

But the Court's analysis does not end there. "Absent exceptional circumstances involving the convenience of material witnesses, the venue of a consolidated action should be the county in which the first action was commenced" (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 340, 821 NYS2d 162 [1st Dept 2006]). "The aforementioned 'first-in-time rule,' however, is malleable, yielding and bending in an appropriate case possessing 'special circumstances' (*Daibes v Cheng*, 33 Misc 3d 618, 624, 930 NYS2d 412 [Sup Ct, Queens County 2011] [internal quotations and citations omitted]). "The determination as to whether special circumstances are present is addressed to the sound discretion of the court" (*Eber-NDC, LLC v Star Indus., Inc.*, 14

Misc 3d 1228(A) [Sup Ct, Nassau County 2007] [citation omitted]). The Court finds that such exceptional circumstances are present here: the mechanic's lien.

Plaintiff filed a mechanic's lien based on the exact same dispute in Westchester County on June 13, 2022 (NYSCEF Doc. No. 19); this was well before either lawsuit was filed. Defendant contends it served a Lien Law § 59 demand on plaintiff. It points out that plaintiff could respond by commencing a foreclosure action which, of course would have to be started in Westchester County—the location of the lien (CPLR 507). Although plaintiff says in opposition that it is not foreclosing on this lien and will withdraw it, it did not attach any evidence that it withdrew the lien. And defendant pointed out in reply that the lien has not yet been withdrawn and that the itemized statement it received from plaintiff keeps open the possibility that plaintiff could sue to foreclose on this lien at any moment.

The Court observes that the Second Department has held that two cases should be consolidated in the venue of the later-filed case where the second-in-time action involved a lien (*GAM Prop. Corp. v Sorrento Lactalis, Inc.*, 41 AD3d 645, 646, 838 NYS2d 633 [2d Dept 2007] [finding that CPLR 507's mandate for venue required a case to be consolidated in the venue which involved a lien claim, even though another case was filed first]). Certainly, the instant facts differ as plaintiff has not yet commenced an action based upon the lien. But the Court finds that plaintiff cannot have it both ways. It cannot file a lien in one county and then commence an action in another county while still holding out the possibility that it could sue in the other county based on the lien, all concerning the exact same dispute.

Plaintiffs are afforded wide latitude to pick a preferred location to bring a lawsuit, subject to a few exceptions. But a plaintiff is not permitted to force defendant to play a game of whack-a-mole and potentially defend disputes in different locations about the same exact subject matter.

While plaintiff was absolutely entitled to bring the instant case in New York County, the Court finds that the existence of an active lien in Westchester County constitutes special circumstances to justify changing the venue to Westchester County. Plaintiff's assertion that it did not intend to pursue a case based on the lien is not sufficient.

Accordingly, it is hereby


ORDERED that defendant's motion for a change of venue is granted and venue of this action is changed from this Court to the Supreme Court, County of Westchester County where it shall be consolidated with a currently pending case under Index Number 67362/2022; 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 Westchester 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, Westchester County, so as to ensure an efficient transfer and consolidation and to 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)].

<u>3/23/2023</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE