

**Gonzalez v Semer**

2023 NY Slip Op 31170(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 161614/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

-----X

EDWIN GONZALEZ,

Plaintiff,

- v -

SIMONE SEMER, MARK SEMER, GASTHALTER & CO.,  
SWAGTIME,

Defendant.

-----X

SIMONE SEMER, MARK SEMER

Plaintiff,

-against-

KAEL CONTRACTING CORP.

Defendant.

-----X

INDEX NO. 161614/2021

MOTION DATE 04/26/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595181/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 74, 75

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after oral argument, which took place on December 20, 2022, where Ernest S. Buoncore, Esq. appeared for Plaintiff Edwin Gonzalez (“Plaintiff”), Thomas A. Noss, Esq. appeared for Defendant Gasthalter & Co.’s (“Gasthalter”), Melissa Aristizabal, Esq. appeared for Defendants Simone Semer and Mark Semer (the “Semer Defendants”), and Stuart Wagner, Esq. appeared for Defendant Swagtime, Gasthalter’s motion seeking summary judgment dismissing the Complaint and all cross-claims against them is granted. Defendant Swagtime’s cross-motion for summary judgment dismissing the Complaint and all

cross-claims against them is similarly granted. The Semer Defendants cross-motion to change venue is also granted.

### **I. Background**

Plaintiff initiated this action on December 29, 2021 alleging personal injuries arising out of construction at a home located at 48 Bayeau Road in New Rochelle, New York (the “Semer Residence”) (NYSCEF Doc. 1). On July 13, 2021, Plaintiff was an employee of Third-Party Defendant Kael Contracting (“Kael”) who was retained to work on the Semer Residence (*id.* at ¶¶ 38-39). Plaintiff was allegedly injured after he fell from the roof due to the negligence of Defendants (*id.* at ¶ 42). Plaintiff pleads in the alternative that Swagtime, the Semer Defendants, and Gasthalter all owned, managed, controlled, or operated the Semer Residence. Plaintiff likewise pleads in the alternative that Swagtime, the Semer Defendants, and Gasthalter all contracted with Kael to work on the Semer Residence.

Gasthalter, Swagtime, and the Semer Defendants all filed Answers (NYSCEF Docs. 4, 5, and 11). The Semer Defendants also interposed a Third-Party Complaint naming Kael as a Third-Party Defendant (NYSCEF Doc. 9). Kael filed its Answer to the Third-Party Complaint (NYSCEF Doc. 23)

On April 12, 2022, Gasthalter made the instant motion for summary judgment (NYSCEF Doc. 25). Gasthalter provided the affidavit of Jonathan Gasthalter (“Mr. Gasthalter”), the managing partner of Gasthalter (NYSCEF Doc. 37). Mr. Gasthalter testified that his company is a strategic communications firm located at 777 Third Avenue, New York, New York 10017 which has never had any connection to the Semer Residence (*id.* at ¶¶ 1-5). Mr. Gasthalter swore that Gasthalter has never entered any agreement with Kael, let alone any agreement related to the Semer Residence (*id.* at ¶¶ 6-9). Mr. Gasthalter swore that he conducted a diligent search of his records

for any connection his company may have to the Semer Residence, and that Gasthalter only learned about work being performed at the Building when it was served with the Summons and Complaint (*id.* at ¶ 9). Gasthalter argues, therefore, it owed no duty of care to Plaintiff, nor could have caused Plaintiff's injuries (NYSCEF Doc. 27).

On April 26, 2022, the Semer Defendants cross-moved to change venue (NYSCEF Doc. 39). The Semer Defendants argue that Gasthalter is the only defendant with any connection to New York County, and if they are dismissed, the action should be transferred to Westchester County, which is where the accident occurred (NYSCEF Doc. 40).

On June 7, 2022, Swagtime cross-moved for summary judgment (NYSCEF Doc. 47). Simone Semer ("Simone") is the founder and president of Swagtime (NYSCEF Doc. 50 at ¶ 1). Simone swore that she and her husband, Mark Semer, reside at the Semer Residence (*id.* at ¶ 2). However, Simone swore that Swagtime has no ownership interest in the Semer Residence (*id.*). Simone stated that while Swagtime has a mailing address at the Semer Residence, no work for the entity is done at the location (*id.*). Simone states that Swagtime never hired Kael to do any work at the Semer Residence, and its only connection to the Semer Residence is a mailing address (*id.* at ¶¶ 6-9). Swagtime argues, that summary judgment is appropriate, as it owed no duty to Plaintiff nor could have caused Plaintiff's accident (NYSCEF Doc. 48).

In opposition to the motion and both cross-motions, Plaintiff submitted one five-page affirmation (NYSCEF Doc. 53). Plaintiff argues that summary judgment should be denied because there has been no discovery. However, Plaintiff provides no basis for why he named Gasthalter as a Defendant, nor does Plaintiff describe what facts discovery might yield which would warrant denial of summary judgment. There is no affidavit from Plaintiff in opposition to the motion contradicting any of the facts raised by the Defendants.

In reply, Gasthalter argues that Plaintiff is required to show what facts may be uncovered in discovery which would raise a triable issue of fact. However, Plaintiff has failed to do so in his opposition (NYSCEF Doc. 55 at ¶ 15). Gasthalter argues that the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is insufficient to deny a motion for summary judgment.

## **II. Discussion**

### **A. Gasthalter's Motion for Summary Judgment**

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1<sup>st</sup> Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

“A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” *DaSilva v Haks Eng'rs*, 125 AD3d 480, 482 [1st Dept 2015]; *Orange County-Poughkeepsie Ltd. Partnership v Bonte*, 37 AD3d 684 [2d Dept 2007] [“[t]o speculate that something might be caught

on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on [a summary judgment motion”]).

It is undisputed that Gasthalter is a communications firm located in Manhattan, while the Semer Residence is a residential home in New Rochelle. No party has proffered any evidence that Gasthalter has any connection to the Semers or to the Semer Residence. Gasthalter has provided sworn testimony that it has no connection to the Semer Residence or Kael Contracting. Gasthalter has provided sworn testimony that it conducted a search of its records and could find no connection to either the Semer Residence or Kael Contracting. In response, Plaintiff failed to provide any basis for why he named Gasthalter in the Complaint. Plaintiff’s attorney merely states, in conclusory terms, that discovery might yield some connection between the Semer’s and Gasthalter. However, this conclusory argument, without any evidentiary basis, is insufficient to defeat summary judgment (*DaSilva v Haks Eng’rs*, 125 AD3d 480, 482 [1st Dept 2015]).

The Court finds that Gasthalter has met its prima facie burden. Indeed, summary judgment is routinely granted when a moving party demonstrates that it had no connection to the area where an injury occurred, or where the connection to the site of the injury is too attenuated due to the passage of time (*Camacho v City of New York*, 135 AD3d 482 [1st Dept 2016]; *Amini v Arena Const. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]; *Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005]).

Notably, neither the Semer Defendants, nor Kael, who presumably would be in possession of information sufficient to defeat Gasthalter’s motion, have not filed any opposition or produced any documents to raise an issue of fact. Therefore, Gasthalter’s motion for summary judgment dismissing Plaintiff’s Complaint against it is granted (*see O’Jon v Brown*, 147 AD3d 570 [1st Dept

2017]). As Gasthalter has demonstrated that it has no connection to the Semer Residence, and therefore owed no duty to Plaintiff for injuries sustained when falling from the roof of the Semer Residence, any cross-claims for contribution or indemnification must likewise be dismissed against Gasthalter (*Higgins v TST 375 Hudson, LLC*, 179 AD3d 508 [1st Dept 2020]).

### **B. Swagtime's Cross-Motion for Summary Judgment**

Swagtime's motion for summary judgment is granted. Tort liability arises out of the breach of a duty owed to another (*See Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817 [2016]; *see also Santiago v City of New York*, 206 AD3d 679 [2d Dept 2022] [A landowner's duty of care to maintain his or her property in a reasonably safe condition is premised on the landowner's exercise of control over the property, as the person in possession and control of the property is best able to identify and prevent any harm to others]). As established by the affidavit of Simone Semer, Swagtime, as a corporate entity, had no control over the Semer Residence. Nor did Swagtime supervise or contract for any construction work on the Semer Residence. Therefore, Swagtime owed no duty to Plaintiff stemming from his fall from the Semer residence roof. (*see Eckardt v Starr Bldg. Realty LLC*, 106 AD3d 477 [1st Dept 2013] [where a defendant has no control over the site of an injury, it cannot be liable for injuries sustained at the site of the injury]; *see also Kelly v Kowsky*, 299 AD2d 865 [4th Dept 2002] [defendant cannot be liable for allegedly dangerous condition without supervision or control of the general condition of the premises]).

While Swagtime admits that it has a mailing address at the Semer Residence, Plaintiff has not submitted, nor can the Court locate, any precedent which states that a mailing address alone is sufficient to impose tort liability. Indeed, to impose liability on individuals and entities for injuries which occur wherever they have a mailing address, even where they exercise no control over the property, would widen the universe of potential defendants in premises liability actions beyond

rhyme or reason. Neither the Semer Defendants nor Kael have proffered any information to defeat Swagtime's cross-motion. Therefore, Swagtime's cross-motion is granted.

### **C. The Semer Defendant's Cross-Motion to Change Venue**

Pursuant to CPLR §§ 510(1) and (3), a court may, upon motion "change the place of trial of an action where the county designated for that purpose is not a proper county" or where "the convenience of material witnesses and the ends of justice will be promoted by the change." As the Semer Defendants correctly point out, there is a plethora of First Department precedent holding that where "venue is initially placed on the basis of the principal place of business of an improper party, a motion to change venue should be granted after the action is dismissed as against the improper party" (*Scuorzo v Safdar*, 134 AD3d 511 [1st Dept 1994] quoting *Chow v Long Is. R.R.*, 202 AD2d 154, 155 [1st Dept 1994]; see also *Baulieu v Ardsley Assoc. L.P.*, 85 AD3d 554, 556 [1st Dept 2011]; *Crew v St. Joseph's Med. Ctr.*, 19 AD3d 205, 206 [1st Dept 2005]; *Clase v Sidoti*, 20 AD3d 330, 331 [1st Dept 2005]).

As venue is based solely on the principal place of business of Gasthalter, who the parties and the Court<sup>1</sup> agree is an improper party, transfer to Westchester County is appropriate. As Westchester County is the venue where all remaining parties reside, and is the location of the accident, that is the appropriate venue.

The only opposition that Plaintiff provides is that "it is premature to grant a change of venue before the proper basis for venue has been litigated" (NYSCEF Doc. 54 at ¶ 7). Plaintiff argues that "venue in New York County is properly based upon the residence of defendant Gasthalter" (*id.*). However, the cross-motion is not premature, and this was Plaintiff's opportunity to litigate why venue in New York is proper. Plaintiff failed to show the Court why Gasthalter

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<sup>1</sup> Except for Plaintiff, who, again, provides no basis for why they started this action against Gasthalter.

should be a named defendant in this action. Moreover, Plaintiff has failed to show why, given Gasthalter's dismissal, venue should not be transferred to Westchester. Therefore, pursuant to First Department precedent, and by operation of CPLR §§ 510(1) and (3), the Semer Defendant's cross-motion to transfer venue to Westchester County is granted.

Accordingly, it is hereby,

ORDERED that Defendant Gasthalter & Co.'s motion for summary judgment is granted, granted and the Complaint and all cross-claims against Gastlater & Co. are dismissed; and it is further

ORDERED that Defendant Swagtime's motion for summary judgment is granted, and the Complaint and all cross-claims against Defendant Swagtime are dismissed; and it is further

ORDERED that the 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; 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 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)]; and it is further

ORDERED that within ten days of entry, counsel for Simone and Mark Semer shall serve a copy of this Decision and Order, with notice of entry on all parties and the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/13/2023  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, 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