

CDG Indus., Inc. v Soni

2025 NY Slip Op 30567(U)

February 13, 2025

Supreme Court, New York County

Docket Number: Index No. 653187/2024

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

CDG INDUSTRIES, INC. D/B/A CEDAR DEVELOPMENT
GROUP, UNDERHILL LAND LLC

Plaintiff,

- v -

TUSHAR SONI, NISHTHA DALAL,

Defendant.

-----X

INDEX NO. 653187/2024

**MOTION DATE 09/19/2024,
10/23/2024**

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for TRANSFER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24

were read on this motion to/for ORDER OF PROTECTION.

Upon the foregoing documents, defendants’ motion is denied, and plaintiff’s cross-motion is denied.

Background

CDG Industries (“Plaintiff”) is a general contractor that was hired to build a second home for Tushar Soni and Nishtha Dalal (collectively, “Defendants”) in Catskill, New York, Greene County. The contract was dated September 22, 2022 (the “Contract”) and contained a payment schedule and granted Plaintiff certain express easements. The project ran into some issues with obtaining a certificate of occupancy, and it has spawned several lawsuits in Greene County involving Plaintiff, Defendants, the town, and a neighbor. In June of 2024, Plaintiff filed the present lawsuit in New York County, seeking various breach of contract or quasi-contract claims and a declaratory judgment that would confirm the rights of the parties regarding the express easements set forth in the Contract.

Discussion

Defendants bring the present motion seeking to transfer venue to Greene County, pursuant to CPLR § 507. Plaintiff has cross-moved to retain venue in New York County, for sanctions, and to strike the Defendants' Answer and for a default judgment as a result. At the outset, the Court declines to issue sanctions. For the reasons that follow, both the motion and the cross-motion are denied.

CPLR § 3217 Does Not Bar Withdrawal of Fifth Cause of Action

Defendants argue that the present lawsuit falls under CPLR § 507, which states that “[t]he place of a 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.” Plaintiffs argue that this action sounds in breach of contract, including the claim about the easements, and therefore CPLR § 507 is inapplicable. They also seek in their reply papers to withdraw the fifth cause of action requesting a declaratory judgment on the easements in order to avoid appearance of implicating CPLR § 507. In response to this purported withdrawal, Defendants cite to CPLR § 3217 and argue that once an answer has been filed, a plaintiff cannot unilaterally withdraw a claim or cause of action.

The issue of whether or not a plaintiff may unilaterally abandon a cause of action in their reply papers, or if CPLR § 3217 bars any such unilateral abandonment of a claim after the answer has been filed has not been clearly decided. CPLR § 3217 has been cited to when stopping a court from allowing the withdrawal of an action in its entirety just before reply papers were to have been served. *Citidress II Corp. v. Hinshaw & Culbertson LLP*, 59 A.D.3d 210, 211 (1st Dept. 2009). But there are multiple instances of appellate courts allowing plaintiffs to withdraw causes of action through their reply papers. *See, e.g., Eriksen v. County of Suffolk*, 154

A.D.3d 721, 723 (2nd Dept. 2017); *Noy v. Everest Equities, Inc.*, 27 A.D.3d 629, 630 (2nd Dept. 2006); *Haire v. Bonelli*, 57 A.D.3d 1354, 1356 n. 2 (3rd Dept. 2008); *Hubbard v. Kamen*, 29 A.D.3d 339, 339 (1st Dept. 2006); *Gordon v. Verizon Communications, Inc.*, 148 A.D.3d 146, 156-57 (1st Dept. 2017). Ultimately, the Defendants have not met their burden of showing that CPLR § 3217 blocks Plaintiff from withdrawing the fifth cause of action without their permission, and therefore the cause of action is considered withdrawn.

CPLR § 507 Does Not Apply to Breach of Contract Claims

The remaining claims for breach of contract must be examined to see if the judgment that Plaintiff demands (here, a money judgment) would “affect the title to, or the possession, use or enjoyment of” the house in Catskill. Clearly, with the fifth cause of action withdrawn, there would be no impact on a party’s possession of, use of, or the title to the Catskills house. Therefore, CPLR § 507 does not apply and there is no requirement to transfer venue to Greene County. *See Bronx Car Parks Sys., Inc. v. Fordham Hill Owners’ Corp.*, 220 A.D.3d 440, 440 (1st Dept. 2023)(denying venue transfer when breach of contract claim sought to determine the parties’ repair responsibilities for a garage).

Defendants Have Not Established an Inconvenient Forum

Defendants have also requested that the Court transfer venue pursuant to CPLR § 510(3), which give a court the discretion to transfer cases where “the convenience of material witnesses and the ends of justice will be promoted by the change.” They cite to the ongoing cases in Greene County and the ongoing dispute over the town’s refusal to issue a certificate of occupancy as requiring the deposition of witnesses located in Greene County. But general statements that nonparty witnesses would be inconvenienced by a plaintiff’s choice of venue is not sufficient to warrant venue transfer under CPLR § 510(3). *Corner of Walnut LLC v.*

Tompkins Ins. Agencies, Inc., 225 A.D.3d 465, 466 (1st Dept. 2024). Instead, the defendant must submit a particularized affidavit with “the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted.” *Id.* Here, none of that information has been provided. Therefore, the standard for venue removal under CPLR § 510(3) has not been met.

Pleadings Will Not Be Stricken and a Preliminary Conference Is Ordered

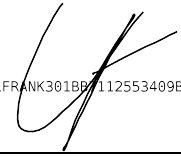
In their cross-motion, Plaintiff seeks to have the Defendants’ pleadings stricken and as a result, a default judgment entered against them. The crux of the issue is that the parties disagreed on the order of discovery, and at one point Defendants’ counsel used inappropriate language in an email exchange. Defendants then moved for a protective order which stayed discovery, a move which Plaintiff characterizes as frivolous and grounds for striking the pleadings and sanctions. The Court declines to issue sanctions or strike the pleadings, and therefore the cross-motion for a default judgment is denied. As regards motion seq. 002 for a protective order, the Court is resolving this motion by ordering a preliminary conference for April 22nd, 2025, at 11:00 a.m. Accordingly, it is hereby

ADJUDGED that defendants’ motion to transfer venue is denied; and it is further

ADJUDGED that plaintiff’s cross-motion is denied; and it is further

ORDERED that the parties appear for a virtual preliminary conference over Microsoft Teams on April 22nd, 2025, at 11:00 a.m.

20250213140823LFRANK301BB7112553409BB916D6ACDFBEAF1E



2/13/2025

DATE

LYLE E. FRANK, 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