

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**Application of Joseph Yahudai,**

**Petitioner,**

**In the Matter of the Application for Dissolution of  
True Gate Holding, Ltd., a New York Domestic  
Corporation**

**v.**

**Mehry Noghrei,**

**Respondent.**  
-----X

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 003558-13  
Motion Seq. No: 1  
Submission Date: 4/15/13**

**The following papers having been read on this motion:**

**Notice of Motion, Affirmation in Support and Exhibits.....X  
Affidavit in Opposition and Exhibits.....X  
Reply Affirmation and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Respondent Mehry Noghrei ("Respondent") on March 25, 2013 and submitted on April 15, 2013. For the reasons set forth below, the Court grants the motion and directs that the venue of this matter is transferred from New York County to Nassau County.

**A. Relief Sought**

Respondent moves for an Order, pursuant to Business Corporation Law ("BCL") § 1112 and CPLR §§ 503, 510 and 511, changing the venue and the place of trial of this proceeding from New York County to Nassau County.

Petitioner Joseph Yayudaii ("Petitioner") opposes the motion.

## B. The Parties' History

Counsel for Respondent ("Respondent's Counsel") affirms that True Gate Holding, Ltd. ("True Gate"), the corporation ("Corporation") at issue in this litigation, was formed on November 19, 1997 and its Certificate of Incorporation (Ex. A to Naidich Aff. in Supp.) reflects that its office was to be located in Nassau County. Subsequently, Petitioner and Respondent executed a Shareholders Agreement ("Agreement") (*id.* at Ex. B) pursuant to which Petitioner and Respondent would each own 50% of the stock of True Gate. The Agreement also provided that Petitioner would lend \$275,000 to True Gate to purchase a mortgage ("Mortgage") held by Joanne Sims, which was then in foreclosure. The mortgage encumbered commercial property located at 75-79 East 115<sup>th</sup> Street, New York, New York which was owned in part by Nourallah Baroukhian ("Baroukhian"), the son-in-law of Respondent.

Respondent's Counsel affirms, further, that Petitioner asserted that he provided \$275,000 to purchase the Mortgage which was assigned to True Gate and, by separate assignment, reassigned from True Gate to Petitioner. True Gate was dissolved by proclamation of the State of New York in 2001 due to non-payment of taxes at which time the Mortgage was assigned from True Gate to Petitioner but Petitioner did not record the assignment until 2008.

After recording the assignment, Petitioner commenced a mortgage foreclosure action against Baroukhian naming the Petitioner as plaintiff. By Order dated March 16, 2012 (Ex. C to Naidich Aff. in Supp.), Justice Marcy S. Friedman of the Supreme Court, New York County dismissed that mortgage foreclosure action, without prejudice to Petitioner's right to bring a new action consistent with her decision, and also dismissed the counterclaims with prejudice. That decision is the subject of a pending appeal.

On November 1, 2012, Petitioner "apparently caused True Gate to be reinstated as an active corporation" (Naidich Aff. in Supp. at ¶ 9). Respondent's Counsel provides copies of the Business Corporation Biennial Statement signed by Petitioner as the purported president of True Gate for the filing period of November 2011 which reflects that True Gate's address was still in Nassau County (*id.* at Ex. D) and a Division of Corporations Entity Information Report dated November 5, 2012 confirming that True Gate's office was in Nassau County (*id.* at Ex. E).

On November 20, 2012, Petitioner commenced a proceeding in the Supreme Court, New York County, to dissolve True Gate pursuant to BCL §§ 1104 and 1104-a (Ex. F to Naidich Aff. in Supp.). The petition in that proceeding states that True Gate has its offices in Great Neck, Nassau County, New York. Petitioner also filed a motion seeking judicial permission to commence the foreclosure action that was previously dismissed, substituting True Gate as the plaintiff in place of Petitioner individually. Following an appearance in Supreme Court, New York County, Petitioner was directed to brief the issue of whether the foreclosure was barred by the applicable statute of limitations, and Respondent was directed to submit opposition papers.

On January 22, 2013, Respondent served his opposition papers which included a Verified Answer (Ex. G to Naidich Aff. in Supp.) which outlined deficiencies in Petitioner's papers, including that 1) the application for a corporate dissolution was required to be by Order to Show Cause; 2) both the Corporation and the State Tax Commission must be named as respondents and served with the Order to Show Cause and supporting papers; 3) the date of hearing for the dissolution must be no less than four (4) weeks after the issuance of the Order to Show Cause; 4) the Order to Show Cause must be published in a newspaper in the county in which the office of the corporation is located as of the date of the order, in this case Nassau County; and 5) pursuant to BCL § 1112, corporate dissolution proceedings must be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action, or the presentation to the court of the petition in such a proceeding, in this case Nassau County. Respondent also served Petitioner's Counsel with a Demand for Change of Venue pursuant to CPLR § 511(b) which is dated January 18, 2013 ("Initial Demand") (*id.* at Ex. H).

Respondent's Counsel affirms that, at an appearance on February 7, 2013 before Justice Friedman (transcript at Ex. I to Naidich Aff. in Supp.), Justice Friedman agreed with Respondent that the proceeding was improperly commenced and should have been brought by Order to Show Cause. She directed Petitioner to file an Order to Show Cause, as required by the BCL, to provide for publication as well as service on the State Tax Commission, and address the other deficiencies in the initial papers.

Following that appearance, Petitioner brought an Order to Show Cause Why Insolvent Corporation Should not be Dissolved and to Amend the Petition which was accompanied by an affidavit in support of Petitioner (Ex. J to Naidich Aff. in Supp.). In paragraph 27 of his affidavit, Petitioner affirmed that “[t]he amendment to the Petition sought herein is to correct the address of the Corporation, which is located in New York County, and to reflect the persons to be served with the [Order to Show Cause], pursuant to BCL § 1106.” The Certificate of Change on which Petitioner relied in asserting that the Corporation is located in New York County (*id.* at Ex. K) is dated February 7, 2013 and was received by the Department of State at 3:04 p.m. on that date, the same date that the parties appeared before Justice Friedman. Respondent submits that this purported change was “a sham and without legal effect” (Naidich Aff. in Supp. at ¶ 18) as the Certificate of Change did not change the location of the office of the corporation. The Certificate of Change provides that 1) “[t]he county location, within this state, in which the office of the corporation is located, is changed to [N]ew [York];” 2) the address to which the Secretary of State shall forward copies of process accepted on behalf of the Corporation is changed to the address of Petitioner’s counsel, whose office is located in New York County; and 3) Petitioner’s counsel is designated as the Corporation’s registered agent on whom process against the Corporation may be served.

Respondent timely interposed an Answer to Amended Petition dated March 13, 2013 (Ex. L to Naidich Aff. in Supp.) and timely served an Amended Demand for Change of Venue on the same date (“Amended Demand”) (*id.* at Ex. M). Respondent did not receive a response to the Amended Demand.

### C. The Parties’ Positions

Respondent submits that Nassau County, the county designated in True Gate’s Certificate of Incorporation as the location of its office, is True Gate’s residence for venue purposes. Thus, pursuant to BCL § 102(a)(10), CPLR § 503(a), and applicable case law, the venue and place of trial should be transferred to Nassau County. Respondent also contends that, because he served a Demand for Change of Venue with his original Answer and an Amended Demand for Change of Venue with his Answer to Amended Petition, to which Petitioner did not respond, Respondent is entitled to have the venue of this proceeding changed to Nassau County, citing CPLR § 511(b) and applicable case law.

Respondent also argues that Petitioner's attempt to create a proper venue in New York County was ineffective because 1) pursuant to CPLR § 503(a), the residence of a party for venue purposes must be determined as of the date of the commencement of the action; and 2) the Certificate of Change, which simply changed the address of the registered agent for service of process, did not alter the location of the office of the corporation, which remains in Nassau County. Respondent provides a copy of a recent decision in the Supreme Court of Queens County titled *NYC Water Works LLC, and NYC Water Works, Inc. v. Water Works Piping Inc. et al.*, Index Number 1694-13 (Ex. N to Naidich Aff. in Supp.) which, Respondent contends, supports his position.

In opposition, Petitioner submits that Respondent's motion to change venue pursuant to CPLR § 511(b) is untimely because it was not served within fifteen (15) days of the Initial Demand. Petitioner contends, further, that the Amended Demand was improper and cannot serve as a basis to circumvent the statutory 15 day requirement.

Petitioner also argues that venue is not required in Nassau County pursuant to BCL § 1112 where, as here, Petitioner seeks various types of relief in addition to dissolution. Petitioner also submits that the Certificate of Change was effective in changing the Corporation's office location.

In reply, Respondent submits that he was required to respond to the Order to Show Cause within the time frame directed by Judge Friedman in the Order to Show Cause, and Judge Friedman directed that opposition papers be served by March 14, 2013. Accordingly, on March 13, 2013, Respondent served and filed his papers, including the Answer to Amended Petition and Amended Demand. On March 22, 2013, eight (8) days after the filing and service of the Amended Demand, Respondent served and filed the instant motion. Thus, Respondent submits, his motion was timely pursuant to CPLR § 511(b).

## RULING OF THE COURT

CPLR § 503(a) provides as follows:

Except 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. A party resident in more than one county shall be deemed a resident of each such county.

CPLR § 503(c) provides as follows:

Corporation. A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier, shall also be deemed a resident of the county where the cause of action arose.

CPLR §§ 510(1) - (3) provide that the Court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county; or
2. there is reason to believe that an impartial trial cannot be had in the proper county; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

CPLR § 511, titled "Change of place of trial," provides in pertinent as follows

(a) Time for motion or demand. A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other grounds shall be made within a reasonable time after commencement of the action.

(b) Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he 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. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

Business Corporation Law § 1112 provides as follows:

An action or special proceeding under this article [for dissolution] shall be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding.

Preliminarily, the Court concludes that the motion is timely pursuant to CPLR § 511. Judge Friedman, concluding that Petitioner had commenced his action for dissolution improperly, provided Petitioner with the opportunity to file his Order to Show Cause seeking dissolution and, as noted by Respondent, Respondent was required to serve and file his opposition papers within the time frame directed by Judge Friedman. Respondent served those opposition papers, including his Amended Demand, by the deadline set in the Order to Show Cause. Under these circumstances, the Court concludes that Respondent was required to file his motion within fifteen days of that response, which he has done.

Even assuming *arguendo* that the instant motion is untimely pursuant to CPLR § 511, the Court nonetheless grants the motion pursuant to CPLR 510(1) based on the Court's conclusion that New York County is not a proper county. Paragraph three of the Corporation's 1997 Certificate of Incorporation states that the office of the Corporation is to be located in Nassau County, New York. Moreover, the Division of Corporations Entity Information Report dated November 5, 2012 confirms that True Gate's office was in Nassau County. This action was commenced on November 20, 2012 when Petitioner filed a petition in the Supreme Court, New York County, to dissolve True Gate pursuant to BCL §§ 1104 and 1104-a. Thus, pursuant to CPLR §§ 503(a) and (c), the place of trial shall be in Nassau County, where the Corporation had its principal place of business when the action was commenced. *See Bakht v. Southridge Cooperative Section 4, Inc.*, 70 A.D.3d 988 (2d Dept. 2010) (trial court properly granted defendant's motion for reargument and change of venue to Queens County where defendant's certificate of incorporation designated Queens County as place of defendant's principal place of business). The fact that Petitioner commenced the action in a procedurally improper manner, and subsequently filed an Order to Show Cause and supporting papers that complied with the statutory requirements for a dissolution action, does not alter the fact that the action was commenced by the filing of the initial Petition. In addition, venue is proper in Nassau County,

pursuant to BCL § 1112, because the Corporation's office was located in Nassau County when Petitioner moved for dissolution of the Corporation, and dissolution is the gravamen of the relief that Petitioner seeks.

Accordingly, the Court grants the motion and orders that the venue of the above entitled action be and is hereby changed from the County of New York to the County of Nassau.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on July 9, 2013 at 9:30 a.m.

ENTER

DATED: Mineola, NY

June 5, 2013

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
JUN 17 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE