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Sicignano v Hymowitz
2014 NY Slip Op 51100(U)
Decided on July 21, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on July 21, 2014

Supreme Court, Kings County

<p>Dorothy Sicignano, RAYMOND SICIGNANO, AND VALERIE FONTANA, Plaintiff(s),</p> <p>against</p> <p>Lee Dennis Hymowitz, BARBARA HYOMOWITZ, MICHAEL M. FREEMAN, BARBARA FREEMAN, LOUIS Q. MARETT, AND MARGUERITE MARETT, Defendant(s),</p>

500442/14

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Carolyn E. Demarest, J.

Defendants move, pursuant to Civil Practice Law and Rules §§ 503, 510 and 511, to change the venue of the instant action from Kings County to Nassau County.

BACKGROUND

All parties are stockholders of 510 Gate Avenue, Inc. (the "Corporation"), a domestic corporation of the State of New York. The county in which the office of the Corporation is to be located in the State of New York, as listed in the Certificate of Incorporation, is Kings County. The plaintiffs Dorothy Sicignano, Raymond Sicignano, and Valerie Fontana, residents of New York County, New Jersey, and Texas respectively, own 8.25%,

8.25%, and 5.5% of the Corporation respectively. The defendants Barbara Hymowitz, Barbara Freeman, and Marguerite Marette own 33%, 33%, and 12% of the Corporation respectively. The defendants Lee Dennis Hymowitz and Michael M. Freeman were Directors and Officers of the Corporation from the [*2]time of its formation until their resignation in 2012. The defendant Louis Q. Marette is the President and a Director of the Corporation since the formation of the Corporation. The Corporation owned the land and buildings located at 498-520 Gate Avenue, Brooklyn, New York. The Corporation sold 498 Gate Avenue, Brooklyn, New York to Postgraduate Center for Mental Health on July 17, 2012 for a total of \$1,750,000.00. The Corporation sold 510-520 Gate Avenue, Brooklyn, New York (the "Property") to Paul J. Cooper Center for Human Services, Inc. on October 15, 2010 for a total of \$5,000,000.00. The Corporation secured a loan made to Paul J. Cooper Center for Human Services, Inc. in the sum of \$5,000,000.00 with a note dated October 2010 and a mortgage against the Property dated October 1, 2011 (the "Mortgage"). Plaintiffs asserted three causes of action in the Complaint. The first is a petition for judicial dissolution of the Corporation, pursuant to Business Corporation Law § 1104-a, alleging that Defendants have been guilty of illegal, fraudulent, and oppressive actions towards Plaintiffs by failing to enforce the terms of the Mortgage, looting, wasting, and diverting assets of the Corporation, withholding corporate information from Plaintiffs, and excluding Plaintiffs from the management of the Corporation. The second alleges negligence, and the third alleges breach of fiduciary duty. Plaintiffs sought liquidation of the Corporation, as well as economic and compensatory damages.

Plaintiffs commenced this action in Kings County on the basis that the Property is located in Kings County. Plaintiffs argue that the relief sought "would affect the title to, or the possession, use or enjoyment of real property" and, therefore, pursuant to CPLR § 507, the proper venue is where the Property is situated.^[EN1]

Defendants argue that the Corporation only owns a mortgage against the Property, not the Property itself, and, therefore, Kings County is an improper venue and Defendants are entitled to defend the matter in Nassau County, pursuant to CPLR §§ 503(a), 510 and 511, as none of the parties are residents of Kings County and all Defendants are residents of Nassau County.

DISCUSSION

Venue may be changed as of right on the ground that the county designated is not a proper county (CPLR § 510[1]) or on the discretionary ground that the convenience of material witnesses and ends of justice will be promoted by the change (CPLR § 510[3]). Here, the defendants are not entitled to a change of venue as of right because Kings County is a proper venue, pursuant to Business Corporation Law § 1112. Further, the defendants are not entitled to a discretionary change of venue because they have not met the burden of demonstrating that the [*3]convenience of material witnesses and the ends of justice would be promoted by the change.

Defendants argued that Plaintiffs' choice of venue was improper because CPLR § 503(a)^{FN21} is controlling and no parties resided in Kings County when this action was commenced. However, this argument is unavailing because, in an action seeking judicial dissolution, Business Corporation Law § 1112 is controlling for determining venue. Business Corporation Law § 1112 prescribes that "an action or a special proceeding under this article 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." "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation" (Business Corporation Law § 102). Here, the plaintiffs clearly seek judicial dissolution of the Corporation, pursuant to Business Corporation Law § 1104-a, and the Certificate of Incorporation states Kings County as the location of the office of the Corporation. Since "the office of the corporation" was located in Kings County at the time Defendants commenced this dissolution proceeding, Kings County is a proper venue. Plaintiffs assert that the Corporation has offices at c/o Hyomwitz & Freeman, 30 E 33rd Street, New York, New York, 10016. However, "the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county" (*Hamilton v Corona Ready Mix, Inc.*, 21 AD3d 448, 449 [2d Dept 2005]). The principal office of the corporation as stated in its certificate "is conclusive evidence of its residence" (*In re Capitol Nat. Corp.*, 225 AD 773, 774 [2d Dept 1928]). Hence, Kings

County is a proper venue for this action and the defendants are not entitled to a change of venue as of right.

Further, even assuming that Defendants instead moved pursuant to CPLR § 510(3), "the party moving for a change of venue pursuant to CPLR § 510(3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change" (*Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908 [2d Dept 2008]). "In doing so, the moving party must set forth (1) the names, addresses, and occupations of prospective witnesses, (2) the facts to which the witnesses will testify at trial, so that the court may judge whether the proposed evidence of the witness is necessary and material, (3) a statement that the witnesses are willing to testify, and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed" (*id.*). "A discretionary change in venue pursuant to CPLR § 510(3) should be granted only upon the basis of a showing required by the above criteria" (*O'Brien v. Vassar Bros. Hosp.*, 207 AD2d 169, 175 [2d Dept 1995]). Here, the defendants fail to meet this burden. Defendants only assert that all Defendants reside in Nassau County, and none of the parties reside in Kings County. However, "a discretionary change of venue under CPLR § 510(3) is addressed to the convenience of *nonparty* witnesses" (*In re Dissolution of Supplier Distribution Concepts, Inc.*, 80 AD3d 869, 871 [3d Dept 2011]). "The defendants themselves are not witnesses for the purpose of deciding a motion pursuant to CPLR § 510(3)" (*O'Brien*, 207 AD2d at 173). Therefore, the defendants are not entitled to a discretionary change of venue.

CONCLUSION

Accordingly, the defendants' motion to change venue is denied. Counsel shall appear in Commercial Division I at 9:45am on September 17, 2014 for a preliminary conference. The foregoing constitutes the decision and order of the court.

E N T E R,

Carolyn E. Demarest

J. S. C.

Footnotes

Footnote 1: CPLR § 507 provides that "the place of 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." In seeking dissolution of the Corporation, Plaintiffs alleged, in the Complaint, that Defendants failed to enforce the terms of the Mortgage. Enforcement of the Mortgage may result in a mortgage foreclosure action. A foreclosure of the Mortgage will affect the underlying real property and venue will be required to be placed in Kings County, where the Property is situated (*Scotto v Kodosi*, 102 AD3d 947, 949 [2d Dept 2013]; *Singh v Becher*, 249 AD2d 154, 154-55 [1st Dept 1998]). However, these speculations are irrelevant for the purpose of determining venue.

Footnote 2: CPLR § 503(a) provides that "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."

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