

<b>NCCMI Inc. v Bersin Props., LLC</b>
2015 NY Slip Op 30972(U)
June 8, 2015
Supreme Court, New York County
Docket Number: 650276/2015
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : COMMERCIAL DIVISION PART 49

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NCCMI INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 650276/2015  
Mot. Seq. No.: 001

BERSIN PROPERTIES, LLC, COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, PASSERO ASSOCIATES, ENGINEERING, ARCHITECTURE & SURVEYING P.C., SIMPLEXGRINNEL LP, SWOOP I, INC., MARK W. TIEDEMANN, ARCHITECT, P.C., SPEZIO PROPERTY SERVICES, INC., UNITED STATES POSTAL SERVICES, REGAL CINEMAS, INC., STEEL BOLT LLC D/B/A STEVE & BARRY'S NEW YORK LLC, ROC N BURGERS LLC, YF ROCHESTER II LLC, ID PERFUMES, INC. F/K/A ADRENALINA, INC., BRAVO BRIO RESTAURANT GROUP, INC., FOREVER 21 RETAIL, INC., SOHO 119 ROCHESTER LLC D/B/A SOHO 119, THE YANKEE CANDLE COMPANY, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and JOHN DOES 1-200, their heirs, devisees and personal representatives and his, their or any of their successors in right, title and interest, the names of the last two hundred defendants being unknown to plaintiff, the persons or parties intended to be any person in possession of or claiming interest in or against the property described in the verified complaint, and whose interest may not be protected under applicable emergency rent laws,

Defendants.

-----X  
O. PETER SHERWOOD, J.:

According to the complaint, this action is brought in an effort to foreclose on several mortgaged properties. The mortgages were issued to secure payment of a loan of over \$55 million to Bersin Properties, LLC (Bersin). The loan was to aid Bersin's efforts to develop a mall, the Medley Centre, in Rochester, New York, which is in Monroe County. The mortgaged properties which are the subject of this action are also located in Monroe County. This action is related to another action, *Bersin Properties, LLC v Nomura Credit & Capital, Inc. & NCCMI, Inc.*

(452630/2014), which was transferred to this court by the Supreme Court in Monroe County in October, 2014.

Now, defendant Bersin Properties, LLC, moves to transfer venue of this action to Monroe County on the ground that CPLR Section 507 requires that

“[t]he 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.”

Plaintiff NCCMI, Inc., the mortgage holder, argues that the properties were mortgaged pursuant to a loan agreement, and that in the loan agreement Bersin agreed that

“any legal suit, action or proceeding against lender or borrower arising out of or relating to this agreement shall be instituted in any federal or state court in New York County, New York and borrower waives any objection which it may now or hereafter have to the laying of venue of such suit, action or proceeding, and borrower hereby irrevocably submits to the jurisdiction of any such court in any suit, action or proceeding”

(Loan Agreement, Sinatra Aff, Exhibit A, ¶ 10.3[b]). NCCMI argues that the CPLR specifically allows that a “written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial,” subject to an exception only if “an impartial trial cannot be had in the proper county” (CPLR § § 501, 510[2]). “A contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would be, for all practical purposes deprived of its day in court” *Trump v Deutsche Bank Trust Co Americas*, 65 AD3d 1329, 1331 (2d Dept 2009)(internal quotation marks omitted). NCCMI points to a case from the New York Supreme Court in Kings County, which held that “a contractual forum selection clause, such as the one at issue here, trumps” CPLR section 507 (*A.C.E. Elevator Co., Inc., v V.J.B. Construction Corp.*, 192 Misc2d 258, 259 [Sup Ct, Kings County, 2002] followed by *C.V., Inc. v WNC Tarrytown Co., LLC*, 4 Misc 3d 1013(A) [Sup Ct, Westchester County, 2004], *Sabo v Canderio*, 7 Misc 3d 1013(A) [Sup Ct, Rockland County, 2005]). Bersin

argues that *A.C.E Elevator* was incorrectly decided, is not binding on this court, and this court should not follow it.

The decision in *A.C.E. Elevator* was based on a comparison of the language in sections 503 and 507, each of which makes a statement about where trial “shall” be held. Bersin distinguishes the language of the statutes, noting that section 503, which undisputedly may be trumped by an agreement, allows that section 503 shall be applied “[e]xcept where otherwise prescribed by law.” Bersin argues that this phrase allows for the application of section 501 and permits an agreement to trump the venue requirements of section 503. Bersin points out that section 507 does not have such a clause, and argues that, therefore, section 507 cannot be trumped by section 501.

The terms of section 501, however, provide that an agreement as to venue “shall be enforced” subject only to section 510(2), which allows a trial to be moved if “there is reason to believe that an impartial trial cannot be had in the proper county.” Therefore, section 501 is not subordinate to section 510(1), which holds a trial may be moved if “the county designated for that purpose is not a proper county.” Accordingly, if the suit is brought in a location pursuant to a forum selection clause, it may be held in an *improper* county, which is consistent with the *A.C.E. Elevator* court’s decision that a contractual forum selection clause trumps the venue provision in section 507. While the language of sections 503 and 507 differs, the intent that they should defer to an agreement of the parties pursuant to section 501 appears to be the same.

Bersin also argues that allowing the case to be heard here is against public policy, pointing out that the property at issue, the mortgages, and several of the defendants are resident in Monroe County (Reply at 6). However, while this dispute has significant ties to Monroe County, a contractual forum selection clause “is prima facie enforceable unless shown to be unreasonable” (*Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 288 [1st Dept 2006]). Bersin has not shown the selection to be unreasonable.

Finally, Bersin argues that the case should be transferred because another defendant, County of Monroe Industrial Development Agency (COMIDA), can only be sued in Monroe

County, pursuant to CPLR Section 505(a).<sup>1</sup> However, COMIDA has appeared in this action, and has not made any objection to the venue. COMIDA has, accordingly, waived any objection to venue in New York.

The Court has considered plaintiff's remaining arguments and finds them to be without merit.

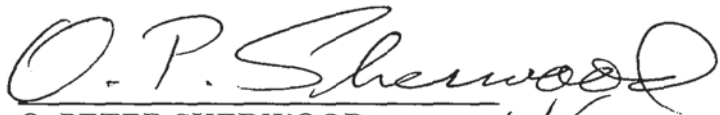
Accordingly, the motion of defendant Bersin Properties, LLC, to transfer venue is DENIED. It is further

**ORDERED** that all counsel for the respective parties shall appear for a status conference on Tuesday, June 16, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

**DATED: June 8, 2015**

**ENTER,**

  
**O. PETER SHERWOOD**  
**J.S.C.** 6/8/15

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<sup>1</sup> Which states: "The place of trial of an action by or against a public authority constituted under the laws of the state shall be in the country in which the authority has its principal office or where it has facilities involved in the action."