

J&A Concrete Corp. v Everest Reins. Co.
2026 NY Slip Op 26068
May 7, 2026
Supreme Court, Bronx County
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J&A Concrete Corp., Plaintiff(s),

v

Everest Reinsurance Company, ZURICH AMERICAN INSURANCE COMPANY, TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA AND THE MORGANTI GROUP, INC.,
Defendant(s)

Supreme Court, Bronx County

Decided on May 7, 2026

Index No. 813988/25E

FIDEL E. GOMEZ, J.

[*1]

In this action for, *inter alia*, breach of contract, defendants move seeking, *inter alia*, an order pursuant to CPLR § 510 changing the venue of this action to Albany County on grounds that the venue chosen by plaintiffs is improper. Defendants saliently aver that insofar as the agreement between plaintiff and defendant THE MORGANTI GROUP, INC. (Morganti) requires that any actions arising from the agreement be venued in the Supreme Court of the State of New York in the County of Albany, the venue chosen by plaintiff is improper. Plaintiff opposes the instant motion asserting that insofar as the labor and payment bond issued by defendants EVEREST REINSURANCE COMPANY (Everest), ZURICH AMERICAN INSURANCE COMPANY (Zurich), and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA (Travelers) requires that any actions with respect to the bond be commenced in the county in which the project for which the bond was issued took place, the venue chosen is proper.

For the reasons that follow hereinafter, defendants' motion is granted.

The instant action is for alleged breach of contract, quantum meruit, and payment on a labor and payment bond (bond). The complaint^{FN1}, filed on June 30, 2025, states that on January 14, 2022, Morganti executed an agreement with nonparty New York City School Construction Authority (SCA) for the construction of a school (the project) at 2060 Lafayette Avenue, Bronx, NY. Thereafter, on May 6, 2022, plaintiff and Morganti executed an agreement (the subcontract) whereby Morganti retained plaintiff to perform, *inter alia*, concrete work at the project. Although the agreed upon price for plaintiff's work was initially \$10,746,856.51, due to additional work, the sum was thereafter adjusted. Plaintiff performed all the work under the subcontract, but was only paid \$8,744,553, leaving \$2,002,303.51 due and owing. As a [*2]condition to the execution of the contract with the SCA, Morganti procured a bond issued by Everest, Zurich, and Travelers, as sureties, said bond in the sum of \$57,799,000, and issued for the benefit of those who performed work and provided materials on the project. Plaintiff made a claim for the sums owed to it by Morganti to Everest, Zurich, and Travelers and has not been paid by them. Based on the foregoing, plaintiff interposes three causes of action. The first is for breach of contract, wherein it is alleged that by failing to pay plaintiff all sums due under the subcontract despite plaintiff's full performance thereunder, Morganti breached the subcontract. The second cause of action is for quantum meruit, wherein it is alleged that plaintiff is entitled to recover from Morganti the reasonable value of the services it provided. The last cause of action is for payment on a bond, wherein it is alleged that the bond issued by Everest, Zurich, and Travelers was for the benefit of those who provided work and materials at the project and that despite making a demand for payment under the bond, plaintiff has not been paid. Plaintiff premises venue in this action based on the terms of the bond.

Standard of Review

A transitory action is "an action that can be brought in any venue where defendant can be personally served with process" (*Black's Law Dictionary*, 32 [7th Ed. 1999]). All things being equal, a transitory action should be tried where the cause of action arose (*Clark v New Rochelle Medical Center*, 170 AD2d 271, 271 [1st Dept 1991]; *Kim v Flushing Hospital and Medical Center*, 138 AD2d 252, 253 [1st Dept 1988]).

However, Article 5 of the CPLR fixes the venue of certain actions based on factors, such as type of action, residence of the parties, the status of the party being sued, and the kind of defendant being sued. CPLR § 501 prescribes venue based upon an agreement by the parties. CPLR § 503 prescribes venue in transitory actions based on the residence of the respective parties or where "a substantial part of the events or omissions giving rise to the claim occurred." CPLR § 504 prescribes venue in actions against municipalities. CPLR § 505 prescribes venue in actions involving public authorities. Lastly, with respect to actions involving real property, CPLR § 507 requires that where the judgment sought "would affect the title to, or the possession, use or enjoyment of, real property [venue] shall be in the county in which any part of the subject of the action is situated."

CPLR § 510 sets forth the grounds for changing the venue of a particular action and CPLR § 511 sets forth the procedure for seeking the change. Specifically, CPLR § 510(1) authorizes a change of venue when the county designated by the plaintiff is improper. A defendant seeking to challenge the chosen venue on grounds that it is improper must first comply with CPLR § 511, which requires that a demand to change venue be interposed with or prior to the service of an answer and that a motion for a change of

venue be made within fifteen days thereafter. The time period prescribed by CPLR § 511 is not merely directory but requires strict compliance (*Obas v Grappell*, [43 AD3d 431](#), 431 [2d Dept 2007]; *Pittman v Maher*, 202 AD2d 172, 174 [2d Dept 1994]). Failure to comply with the mandates of CPLR § 511, particularly the timing requirements for making a motion to change venue, mandates denial of a defendant's motion to change venue (*Singh v Becher*, 249 AD2d 154, 154 [1st Dept 1998]; *Obas* at 431; *Pittman* at 174). Despite the foregoing, when due to a plaintiff's willful omissions and misleading statements regarding his/her residence, there is noncompliance or a delay in moving to change venue or serving the required demand as prescribed by CPLR § 511, such failure does not bar a belated motion to change venue based on the impropriety of the venue chosen by the plaintiff (*LaMantia v N. Shore Univ. Hosp.*, 259 AD2d 294, 294 [1st Dept 1999])["As a general [*3]matter, strict compliance with the time requirements set forth in CPLR 511 (a) and (b) is required when defendants allege that venue was improperly placed. Nevertheless, noncompliance should be excused where it was caused by plaintiff's willful omissions and misleading statements so long as defendant moves promptly after ascertaining plaintiff's residence" (internal citations and quotation marks omitted).]; *Koschak v Gates Const. Corp.*, 225 AD2d 315, 316 [1st Dept 1996]; *Philogene v Fuller Auto Leasing*, 167 AD2d 178, 179 [1st Dept 1990]; *Pittman v Maher*, 202 AD2d 172, 174 [1st Dept 1994]). Stated differently, when a defendant fails to timely move for a change of venue based upon representations made by the plaintiff leading the defendant to conclude that the venue chosen was proper, defendant may move for a change of venue well after the fifteen day statutory period, provided he/she moves promptly upon discovering that the wrong venue was chosen (*LaMantia* at 294; *Koschak* at 316; *Philogene* at 179). To be sure, in *Philogene*, the court granted defendants' belated motion to change venue after they discovered, at a deposition, that plaintiff did not reside in the county where the action was initially venued (*id.* at 178). Although the motion was belatedly made, the court held that the delay was attributable to plaintiff's misrepresentation of his residence within the summons and complaint, wherein he represented that he lived in New York County the county where the action was first venued (*id.* at 178). At his deposition, however, plaintiff testified that he had been residing in Richmond County when the action was commenced (*id.* at 178). Thus, the Court held that simply representing an incorrect residence within a complaint constituted willful misrepresentation, allowing defendants to make the belated motion to change venue and the grant of the same (*id.* at 179).

Pursuant to CPLR § 501, 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." Accordingly, it is well settled that "parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract and such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Knight v New York and Presbyt. Hosp.*, [42 NY3d 699](#), 703 [2024] [internal quotation marks omitted]; *Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Boss v Am. Express Fin. Advisors, Inc.*, [6 NY3d 242](#), 247 [2006]; *Hunt v Landers*, 309 AD2d 900, 901 [2d Dept 2003]) or "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, for all practical purposes, be deprived of its day in court" (*Puleo v Shore View Ctr. for Rehabilitation and Health Care*, [132 AD3d 651](#), 652 [2d Dept 2015] [internal quotation marks omitted]; *Bhonlay v Raquette Lake Camps, Inc.*, [120 AD3d 1015](#), 1016 [1st Dept 2014]; *KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, [72 AD3d 650](#), 651 [2d Dept 2010]).

Accordingly, parties, by agreement, can choose to venue an action in state court, federal court, which part of the state, namely the county, where a dispute shall be heard, or which state to venue an action (*New York and Presbyt. Hosp.* at 498; *Boss* at 247 ["We express no opinion on the merits of plaintiffs' argument. It could and should have been made to a court in Minnesota—the forum the parties chose by contract."]; *Lowenbraun v McKeon*, [98 AD3d 655](#), 656 [2d Dept 2012] ["Supreme Court should have transferred venue from Nassau County to Queens County."]; *Hunt* at 901 ["The plaintiff offered no valid ground for setting aside the forum selection clause. Accordingly, the defendants' motion to transfer venue from Kings County to Sullivan County should have been granted."]).

Unlike other motions seeking to change the venue of an action because the venue chosen is improper, when the venue change sought is pursuant to CPLR § 501, namely that an agreement between the parties prescribes a different venue, the portion of CPLR § 511(a) requiring service of a demand to change venue prior to, or with an answer is not required and as such, rather than 15 days from the service of the foregoing demand, a motion to change venue need only be made "within a reasonable time after commencement of the action" (CPLR § 501[a]; *Puleo* at 652 ["As a threshold matter, and contrary to the plaintiff's contention, Crown was not required to serve the plaintiff with a written demand to change venue pursuant to CPLR 511(a) before making its motion."]; *Medina ex rel. Valentin v Gold Crest Care Ctr., Inc.*, [117 AD3d 633](#), 634 [1st Dept 2014] ["Moreover, since defendant moved to change venue based on the written agreement, it was not required to serve a written demand for a change of venue with or prior to its answer before making the motion, and the motion needed only to be made within a reasonable time after commencement of the action, as it was here" [internal citations and quotation marks omitted].; *Hendrickson v Birchwood Nursing Home Partnership*, [26 AD3d 187](#), 187 [1st Dept 2006] ("he motion was brought within a reasonable time after commencement of the action.")).

Generally, when a defendant makes a motion seeking to change the venue pursuant to CPLR § 510(1), ostensibly, the court must first determine, given the type of action, what venue provision governs and what constitutes proper venue. Thereafter, it is defendant's burden to establish that, given the type of action, the venue chosen was improper thereby warranting a change in venue. In order to avoid a change of venue, the plaintiff must then demonstrate that the venue chosen was proper. Once the court determines that plaintiff has selected an improper venue and that defendant has complied with CPLR § 511, it should grant a defendant's motion to change venue (*Burstein v Fazzari*, 239 AD2d 375, 375 [2d Dept 1997]; *Simpson v Sears, Roebuck and Co.*, 212 AD2d 473, 474 [1st Dept 1995]; *Nixon v Federated Department Stores, Inc.*, 170 AD2d 659, 660 [2d Dept 1991]). Indeed, in *Simpson*, the court, noting that venue in transitory actions was governed by CPLR § 503(a), which at the time prescribed proper venue based on the residence of the parties, held that plaintiff's choice to set venue based on the situs of the alleged accident was improper (*id.* at 473). As such, the court found that plaintiff's choice of venue was improper and after determining that defendant complied with the CPLR § 511, granted defendant's motion to change venue to the proper county and denied plaintiff's cross-motion to retain the improper venue (*id.* at 474).

Notably, a defendant's motion may be denied and the improperly picked venue retained if plaintiff demonstrates that the venue chosen serves a cognizable purpose, such as the convenience of material witnesses (*Buterbaugh v Del Pesce*, 160 AD2d 584, 585 [1st Dept 1990]). However, when the plaintiff seeks denial of the defendant's motion to change venue while concomitantly seeking either to retain an improper venue or seeks a discretionary venue change, such relief must be requested by cross-motion

and failure to cross-move mandates the grant of defendant's motion (*Sellars by Sellars v Tubbs*, 171 AD2d 1025, 1015-1026 [4th Dept 1991] ["Supreme Court erred in denying defendant Tubbs' motion for a change of venue from Bronx County to Erie County and instead sua sponte changing venue to New York County, the county in which plaintiffs reside. Plaintiffs were not entitled to the relief granted by the court because they failed to cross-move for a change of venue."]; *Pitegoff v Lucia*, 97 AD2d 896, 897 [3d Dept 1983]).

It is well settled that a plaintiff forfeits the right to select the venue in an action if he/she [*4] chooses an improper venue in the first instance (*Lynch v Cyprus Sash & Door Co., Inc.*, 272 AD2d 260, 261 [1st Dept 2000]; *Kelson v Nedicks Stores, Inc.*, 104 AD2d 315, 316 [1st Dept 1984]; *Burstein* at 375; *Nixon* at 660; *Papadakis v Command Bus Co.*, 91 AD2d 657, 657 [2d Dept 1982] Furthermore, a plaintiff's failure to respond to a defendant's demand to change venue militates in favor of change of venue to the venue selected by the defendant (*Lynch* at 261 ["Moreover, a plaintiff's failure to serve an affidavit in response to the defendant's demand, either showing that the county designated by the defendant is improper, or that the county the plaintiff designates is proper, supports a transfer of venue to the county demanded by the defendant."]).

Venue changes pursuant to CPLR §§ 510(2) and (3), unlike venue changes pursuant to CPLR § 510(1), are not changes granted as a matter of right - instead, such venue changes are left to the sound discretion of the trial court (*Connor v Rami I, Inc.*, 234 AD2d 58, 59 [1st Dept 1996]; *Hartigan v Kurian*, 224 AD2d 299, 299 [1st Dept 1996]; *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 170 [2d Dept 1995]). As such, such venue changes sought pursuant thereto do not require that defendant serve a demand to change venue pursuant to CPLR § 511 and such motions can be made within a reasonable time after the action is commenced (*Roberto v M.C. and E.D. Beck, Inc.*, 254 AD2d 404, 405 [2d Dept 1998]; *Pittman* at 174). To that end, some courts have taken the position that such a motion can be made at anytime (*Soufan v Argo Pneumatic Co., Inc.*, 170 AD2d 289, 291 [1st Dept 1991] ["A motion pursuant to CPLR 510 may be made at any time."]), while others hold that such a motion can be made at any time before trial (*Toro v Gracin*, 148 AD2d 364, 364 [1st Dept 1989]; *Gennaro v Grossfeld*, 186 AD2d 718, 718 [2d Dept 1992]; *Korman v City of New York*, 89 AD2d 888, 888 [2d Dept 1982]). Nevertheless, the length of the delay is often dispositive and motions made after discovery has been initiated or absent a reasonable excuse, have often been denied as untimely and on grounds of lack of due diligence (*Schneeweiss* at 273 [Motion to change venue denied when made a year after joinder of issue, after the preliminary conference and absent a meritorious explanation for the delay.]; *Boriskin v Long Is. Jewish-Hillside Med. Ctr.*, 85 AD2d 523, 523 [1st Dept 1981] [Motion seeking to change venue made five and on-half years after action was commenced was denied when facts upon which motion was premised were in existence at time action was commenced.]; *Grzesiak v Abraham & Straus Stores*, 72 AD2d 729, 731 [1st Dept 1979] [Motion to change venue denied when made after five years after action had been initiated, after discovery had been conducted, and after no explanation for the delay was proffered.]). However, the pertinent inquiry is whether the delay in making the motion outweighs the factors mandating the change of venue (*Gennaro* at 718 [Court granted motion seeking change of venue despite a three year delay in making the motion on grounds that the action had no nexus to the original venue and stated. Court held that the factors mandating change of venue outweighed the delay in making the motion.]; *Roberto* at 405).

On a motion to change venue pursuant to CPLR § 510(3), where it is alleged that the convenience of the witnesses would best be served by the change, the moving party must (1) provide the names, addresses, and occupations of all prospective witnesses; (2) provide the facts about which said witnesses will testify so as to allow the court to ascertain whether said witnesses are material and necessary; (3) establish that the witnesses are willing to testify; and (4) establish how the witnesses would be inconvenienced absent the change in venue (*Gissen v Boy Scouts of Am.*, [26 AD3d 289](#), 290 [1st Dept 2006]; *Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424, 425 [1st Dept 2003]; *Iassinski v Vassiliev*, 220 AD2d 372, 373 [1st Dept 1995]; [*5]*Alvarez v D & K Const., Inc.*, 221 AD2d 224, 225 [1st Dept 1995]; *Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 [1st Dept 1992]; *Frey v Fun Tyme Ski Shop*, 163 AD2d 11, 12 [1st Dept 1990]; *O'Brien* at 172). The failure to establish any of the foregoing requirements warrants denial of the motion to change venue (*Gissen* at 291; *Martinez* at 425; *Iassinski* at 373; *Alvarez* at 225; *Cardona* at 573; *Frey* at 13; *O'Brien* at 173)

With regard to whether a witness will be inconvenienced by the chosen venue, the movant must not only demonstrate the same (*Connor* at 59; *Martinez* at 425; *Alvarez* at 225), but must also proffer more than general statements of inconvenience (*Hartigan* at 299 ["The general statements of several nonparty post-operative treating physicians that it would be more convenient for them to testify in Westchester County, rather than Bronx County, are insufficient to warrant a change of venue."]; *Clark v New Rochelle Hosp. Med. Ctr.*, 170 AD2d 271, 271 [1st Dept 1991]). Indeed, a claim that witnesses live and work in a venue other than the one chosen is, by itself, insufficient to establish that the chosen venue presents an inconvenience to the witnesses in an action (*Cardona* at 573). Similarly, the movant on a motion to change venue on grounds that the same would serve the convenience of witnesses must demonstrate that the testimony such witnesses intend to provide is material to the issues in an action, and the failure to do so warrants denial of the motion (*Raynor v HK Sys., Inc.*, [30 AD3d 226](#), 226 [1st Dept 2006]; *Rollinson v Pergament Acquisition Corp.*, 228 AD2d 186 [1st Dept 1996]; *Iassinski* at 373; *Schneeweiss v Pelkey*, 138 AD2d 271, 272 [1st Dept 1988]).

Since a party cannot be heard to complain about any inconvenience posed by a properly chosen venue, on an application for a discretionary venue change, any inconvenience the chosen venue causes a party's employee is to be accorded little weight (*Gissen* at 291; *Martinez* at 425; *Sanchez v Project Adventure, Inc.*, 260 AD2d 151, 152 [1st Dept 1999]; *Rollinson* at 186).

When a defendant fails to comply with CPLR § 511 and makes no showing requiring a venue change under CPLR §§ 510(2) or 510(3), a change in venue is nevertheless entirely within the court's discretion (*Pittman* at 175). However, such discretion should be used sparingly, such as when venue is controlled by contract binding the parties, the failure to comply with the time requirements prescribed by CPLR § 511 are not egregious, a venue change is required by consolidation, or where judicial policy requires that the case be venued elsewhere (*id.* at 175). Notably, courts have routinely granted venue changes in cases where the change is sought for none of the statutory reasons. In *Young Hee Kim v Flushing Hosp. and Med. Ctr.* (138 AD2d 252 [1st Dept 1988]), the court granted a change of venue even though it determined that the venue was proper when the case was commenced because the case no longer had a nexus to the county of original venue (*id.* at 253). Specifically, in *Young Hee Kim*, after the action was commenced, the plaintiff moved to another county different than where the case had been initially venued and thus, the court held that the action no longer had any connection to the initial venue chosen (*id.* at 253). In cases where venue has been chosen based on a party's residence rather than the county of

occurrence, and where the venue change sought is solely discretionary, courts have consistently granted motions to change the venue of the action to the county of occurrence (*Young Hee Kim at 253 Ford v Servistar Corp.*, 133 AD2d 23, 24 [1st Dept 1987]), or to the county where medical treatment was received (*Siegel v Greenberg*, 85 AD2d 516, 517 [1st Dept 1981]). In *Ford*, it was clear that venue was properly chosen based on defendant's place of business (*id.* at 24). However, the court reasoned that the action ought to have been tried in the county of occurrence since there was little nexus to the action of original venue (*id.* at 24). In *Kudelski v 450 Lexington Venture* (198 AD2d 157 [1st Dept 1993]), the [*6] court granted a discretionary venue change reasoning that the only nexus to the initially chosen venue had been severed (*id.* at 157-158). In *Gennaro*, the court granted a discretionary venue change despite a three year delay in seeking the same after concluding that the action had no nexus to the originally chosen venue (*Gennaro* at 718). In *Wilson v Sponable* (77 AD2d 799 [4th Dept 1980]), the court held that since CPLR § 510(3) allows the court to consider whether the change in venue promotes the "ends of justice," the court is free to consider other factors in deciding whether to change venue (*id.* at 800).

Applicable Law

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, [1 NY3d 470](#), 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

The proscription against judicial rewriting of contracts is particularly important in real property transactions, where commercial certainty is paramount, and where the agreement was negotiated at arm's length between sophisticated, counseled business people (*Vermont Teddy Bear Co., Inc.* at 475). Specifically, in real estate transactions, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck (*Grace v Nappa*, 46 NY2d 560, 565 [1979]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of NY*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long-standing rule the court in *Metzger* stated that

[i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud [*7] or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*Metzger* at 416 [internal citations omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; see *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; see *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id.* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*, 227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002])

Discussion

Defendants' motion to change the venue in this action is granted. Significantly, defendants establish that the venue chosen by plaintiff with respect to the claims against Morganti is improper

thereby forfeiting the right to retain the venue chosen, even if it is an otherwise proper venue as concerns respect to the remaining defendants.

In support of the instant motion, to the extent relevant, defendants submit the subcontract between plaintiff and Morganti. The subcontract is dated May 6, 2022 and evinces that Morganti and SCA entered into a contract for the project which involves the erection of a school. Section 1 of the subcontract states that Morganti was retained as a subcontractor to provide all labor and materials with regard the work in an exhibit appended thereto. Section 27 states that the subcontract is "the entire agreement between the parties hereto with respect to the matters covered herein. No other agreement, representations, warranties, or other matters, oral or written, shall be deemed to bind the parties hereto." Section 29 states "[a]ny action or proceeding arising out of this Agreement shall be commenced only in the Supreme Court of the State of New York in the County of Albany."

In opposition to the motion, plaintiff submits the bond issued by Everest, Zurich, and Travelers. The bond is dated December 22, 2021 and evinces that Everest, Zurich, and Travelers, as sureties, issued a bond to Morganti, as principal, in connection to the project, and in the sum of \$57,799,000. SCA was the obligee under the bond. Under the bond, the sureties were required to make payments to any one having a contract with Morganti or any subcontractor retained by it arising from claims related to work on the project and who had not been paid by Morganti. Section 3 and 3(c) of the bond state that

[n]o suit or action shall be commenced hereunder by any claimant . . . Other than in State court competent jurisdiction in and for the country or other political subdivision of the State in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.

Based on the foregoing, defendants motion is granted.

As noted above, CPLR § 510(1) authorizes a change of venue when the county designated by the plaintiff is improper. Thus, a defendant seeking to challenge the chosen venue on grounds that it is improper must ordinarily comply with CPLR § 511, which requires that a demand to change venue be interposed with or prior to the service of an answer and that a motion for a change of venue be made within fifteen days thereafter. The time period prescribed by CPLR § 511 is not merely directory but requires strict compliance (*Obas* at 431; *Pittman* at 174). Failure to comply with the mandates of CPLR § 511, particularly the timing requirements for making a motion to change venue, mandates denial of a defendant's motion to change venue (*Singh* at 154; *Obas* at 431; *Pittman* at 174).

Notably, pursuant to CPLR § 501, 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." Accordingly, it is well settled that "parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract and such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Knight* at 703 [internal quotation marks omitted]; *Brooke Group Ltd.* at 534; *Boss* at 247; *Hunt* at 901) or "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, for all practical purposes, be deprived of its day in court" (*Puleo* at 652 [internal quotation marks omitted]; *Bhonlay* at 1016 [1st Dept 2014]; *KMK Safety Consulting, LLC* at 651).

Accordingly, parties, by agreement, can choose to venue an action in state court, federal court, which part of the state, namely, the county, where a dispute shall be heard, or which state to venue an action (*New York and Presbyt. Hosp.* at 498; *Boss* at 247; *Lowenbraun* at 656; *Hunt* at 901).

Unlike other motions seeking to change the venue of an action because the venue chosen is improper, when the venue change sought is pursuant to CPLR § 501, namely that an agreement between the parties prescribes a different venue, the portion of CPLR § 511(a) requiring service of a demand to change venue prior to, or with an answer is not required and as such, rather than 15 days from the service of the foregoing demand, a motion to change venue need only be made "within a reasonable time after commencement of the action" (CPLR § 501[a]; *Puleo* at 652; *Medina ex rel. Valentin* at 634; *Hendrickson* at 187).

When a defendant makes a motion seeking to change the venue pursuant to CPLR § [*8]510(1), ostensibly, the court must first determine, given the type of action, what venue provision governs and what constitutes proper venue. Thereafter, it is defendant's burden to establish that given the type of action, the venue chosen was improper thereby warranting a change in venue in order to avoid a change of venue, the plaintiff must then demonstrate that the venue chosen was proper. Once the court determines that plaintiff has selected an improper venue and that defendant has complied with CPLR § 511, it should grant a defendant's motion to change venue (*Burstein* at 375; *Simpson* at 474; *Nixon* at 660).

A defendant's motion may be denied and the improperly picked venue retained if plaintiff demonstrates that the venue chosen serves a cognizable purpose, such as the convenience of material witnesses (*Buterbaugh* at 585). However, when the plaintiff seeks denial of the defendant's motion to change venue while concomitantly seeking either to retain an improper venue or seeks a discretionary venue change, such relief must be requested by cross-motion and failure to cross-move mandates the grant of defendant's motion (*Sellars by Sellars* at 1015-1026; *Pitegoff* at 897).

Lastly, it is well settled that a plaintiff forfeits the right to select the venue in an action if he/she chooses an improper venue in the first instance (*Lynch* at 261; *Kelson* at 316; *Burstein* at 375; *Nixon* at 660; *Papadakis* at 657) Furthermore, a plaintiff's failure to respond to a defendant's demand to change venue, militates in favor of change of venue to the venue selected by the defendant (*Lynch* at 261).

Here, the subcontract between plaintiff and Morganti expressly requires that, with respect to any action against Morgaanti arising from the work governed by the subcontract, any action has to be brought in Albany County. To be sure, Section 29 states "[a]ny action or proceeding arising out of this Agreement shall be commenced only in the Supreme Court of the State of New York in the County of Albany." Moreover, the subcontract contains a merger clause, namely, Section 27, which states that the subcontract is "the entire agreement between the parties hereto with respect to the matters covered herein. No other agreement, representations, warranties, or other matters, oral or written, shall be deemed to bind the parties hereto."

Accordingly, this action against Morganti, seeking to litigate the latter's alleged breach of the subcontract, falls within the ambit of Section 29, and should have been brought in Albany County.

Again, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace* at 565). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms

contained therein (*Greenfield* at 569). Thus "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc.* at 475). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace* at 548[internal quotation marks omitted]).

Here, where the subcontract's venue provision is clear and unambiguous, prescribing [*9]venue in this action against Morganti in Albany, the venue chosen by plaintiff violates the subcontract and therefore, violates CPLR § 501. Thus, because the venue chosen by plaintiff as against Morganti is improper, Morganti's motion must be granted as a matter of right pursuant to CPLR § 510(1).

Nothing submitted or urged by plaintiff avails it.

To the extent that Section 3 and 3(c) of the bond state that

[n]o suit or action shall be commenced hereunder by any claimant . . . Other than in State court competent jurisdiction in and for the country or other political subdivision of the State in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere, it does not avail plaintiff.

First, even if the bond required that this action be venued in Bronx County, which as will be discussed hereinafter, it does not, this would not negate the fact that as to Morganti, this action has been improperly venued.

Second, the language in the bond only governs an action against Everest, Zurich, and Travelers since they, and not Morganti, are the sureties under the express terms of the bond. Indeed, contrary to plaintiff's assertion, because the bond creates an independent obligation imposing upon Everest, Zurich, and Travelers, as sureties, a duty independent of the subcontract to make plaintiff whole (*Blandford Land Clearing Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 260 AD2d 86, 95 [1st Dept 1999] ["In any event, the plain language of the payment bond creates an independent obligation to pay for labor and materials furnished in connection with the contract for the improvement of the owner's real property subject to defeasance only upon payment by the contractor."]), the assertion that the foregoing defendants had to be joined in this action, and that the action was venued as required by the bond is meritless. Indeed, it is well settled that in an action on a bond, the principal is not a necessary party and the beneficiary under the bond may proceed solely against the surety (*Huber Lathing Corp. v Aetna Cas. and Sur. Co.*, 132 AD2d 597, 598 [2d Dept 1987] ["Finally, we cannot agree with the defendant that PRV or Union Indemnity were necessary parties to the instant action, since we determine that joinder of these parties is not necessary to accord complete relief between the persons who are parties to the action. With respect to PRV we note that it is not unusual for the beneficiary of a guarantee to sue a guarantor or surety alone, apart from any action against the principal debtor" [internal citations omitted].; *Manufacturers & Traders Tr. Co. v Franz*, 46 AD2d 161, 162 [4th Dept 1974] ["By its express terms the

guaranty is one of payment because it provides that the creditor may proceed directly against the guarantor without attempting to enforce the obligation against the debtor."]; *Vetter v Welz & Zerweck*, 143 AD 121, 123 [2d Dept 1911] ["Once the principal has actually committed a default, for which the surety is responsible, as a general rule a cause of action immediately arises against the surety. And, consequently, as a general rule, and in the absence of any express or implied stipulation to the contrary, the creditor need not, before suing the surety, sue the principal debtor, even though such principal debtor be quite solvent."]; *Union Switch & Signal, Inc. v St. Paul Fire and Mar. Ins. Co.*, 226 FRD 485, 490 [SDNY 2005] ["New York cases have made clear that suits such as the instant one, in which a surety but not the principal is sued by an alleged creditor, are common and permissible under New York law."]). Hence, plaintiff could have proceeded against Everest, Zurich, and Travelers in a separate action, thereby avoiding running afoul of the venue provision in the subcontract. It chose not to do so at its peril.

Third, even if, as urged, plaintiff was required to sue all parties at the same time, contrary to plaintiff's assertion, the bond does not require that this action be venued in Bronx County. To be sure, the express, clear, and unequivocal language in the bond only requires that an action arising therefrom be venued in the United States because the project took place in this "country", and not, as urged, in the "county" where the project took place. While plaintiff urges that the bond contains a typographical error in that "country" should read "county," such that the venue chosen in - Bronx County - is proper, this Court is prevented from altering the express language in the bond. Again, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). Thus, the clear, unequivocal, and express language in the bond only requires that this action be venued in a court within the United States and fails to mandate a specific location therein. Accordingly, there is simply no merit to the assertion that the bond required that this action be venued in Bronx County.

Fourth, even if the bond required that the action on the bond be venued in Bronx County, it could not have altered the venue provision in the subcontract as concerns Morganti. To be sure, Section 27 of the subcontract is a merger clause, which states that "the entire agreement between the parties hereto with respect to the matters covered herein. No other agreement, representations, warranties, or other matters, oral or written, shall be deemed to bind the parties hereto." To that end, "[m]erger clauses are not mere boilerplate. They provide further protection for the interests of certainty and finality" (*Torres v D'Alesso*, [80 AD3d 46](#), 53 [1st Dept 2010]). Accordingly, when a contract contains a merger clause, it "precludes extrinsic proof to add to or vary its terms" (*Matter of Primex Intern. Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 600 [1997] ["The merger clause accomplishes this objective by establishing the parties' intent that the Agreement is to be considered a completely integrated writing. A completely integrated contract precludes extrinsic proof to add to or vary its terms" [internal citations omitted].). Thus, the bond - impermissible extrinsic proof - could not, and did not obviate that Albany be the venue in any action against Morganti. Indeed, here even if extrinsic proof could alter the subcontract to make the venue provision in the bond applicable, the fact that Everest, Zurich, and Travelers seek to venue this action in Albany, is proof that the bond's venue provision does not place venue in an action thereunder in Bronx County. Indeed, such assertion also militates against any argument that country in the bond was supposed to be "county."

Lastly, State Finance Law § 137 does not avail plaintiff. (*id.* ["A payment bond required pursuant to this section may provide that the place of trial of an action on the bond shall be in the county in which the contract of the contractor who furnished the bond was to be performed or if such contract was to be performed in more than one county, then in any such county, and not elsewhere."]). Contrary to plaintiff's assertion, the law is not compulsory but rather permissive. In other words, while the party issuing the bond can require that an action on the bond be tried, and therefore, venued in the county where the project for which the bond was issued is located, it does not require it. Here, as noted above, in compliance with State Finance Law § 127, the bond does not require that an action on the bond be venued in Bronx county, where the project is located.

Having chosen an improper venue as against Morganti, the instant motion to change the venue of this action to Albany is granted. To the extent that Bronx County is a permissible [*10]venue with respect to the action against the remaining defendants, plaintiff's violation of CPLR § 501 nevertheless precludes it from retaining the venue of this action. The law is clear, once an improper venue is chosen, even where, as here, the venue against other defendants is proper, a plaintiff forfeits the right to choose the venue. This is especially true here, where Everest, Zurich, and Travelers seek to have this action venued in Albany and where plaintiff opposes severance of the action against Morganti. It is hereby

ORDERED that the Clerk of the Court transfer the file in this action to the Clerk of the Court in the Supreme Court, Albany County. It is further

ORDERED that defendants and serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : May 7, 2026

Bronx, New York

FIDEL E. GOMEZ, JSC

FOOTNOTES

Footnote 1 On May 22, 2026, after defendants interposed an answer, plaintiff filed an amended complaint interposing an additional cause of action for coverage under an insurance policy. The amended complaint has no bearing on this Court's decision and warrants no discussion.

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