

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

MILL COMM, LLC and AARON WEXLER,

Plaintiff,

- against -

BOARD OF MANAGERS OF THE MILL  
BUILDING and MAXWELL-KATES, INC.,

Defendant.

TRIAL / LAS PART 27  
NASSAU COUNTY

Index No. 612824/17

Motion Sequence No. 001

CORRECTED

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1</u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Briefs: Plaintiff's / Petitioner's . . . . .	<u>          </u>
Defendant's / Respondent's . . . . .	<u>          </u>

The defendants move for an order pursuant to (i) CPLR 501 and CPLR 511 transferring the venue of this action from Nassau County to New York County as the settlement agreement between the parties expressly provides; (ii) pursuant to CPLR 2201 staying this action pending the Court's determination of the venue. The defendants also seek costs, expenses and attorneys' fees incurred in connection with this application.

The plaintiffs commenced this declaratory judgment action to enforce their rights under certain provisions of the parties' settlement agreement entered into on or about

November 14, 2013. The defense alleges the settlement agreement was designed to achieve a final settlement of various claims by the parties in connection with repairs to a condominium building, and was an arms-length transaction negotiated by the parties represented by counsel.

The defense contends there can be no dispute that the forum selection clause negotiated here is clear and unambiguous and required any action to enforce the terms of the parties' settlement agreement must be brought in a Court located in New York County. The defense points to Article 12 which states: "In any action to enforce this Agreement, each party consents to the exclusive jurisdiction of the state or United States courts located in the Borough of Manhattan." The defense asserts the plaintiffs' selection of the venue in Nassau County fails as a matter of law given the settlement agreement's provision governing the selection of the venue and the statutory mandate of the CPLR.

The plaintiffs oppose this motion, and assert Aaron Wexler, the plaintiff resides in Nassau County, New York hence venue in Nassau County is proper pursuant to CPLR 503(a). The plaintiffs aver the action does not seek enforcement of the parties' settlement agreement rather the action seeks a declaration of the plaintiffs' rights that they are not in breach of the settlement agreement, and challenge the defendants' repair breach notice and failure to cure notice. The plaintiffs point out Article 3(b) of the parties' settlement agreement relates specifically to this type of challenge that is it provides a repair breach notice may be brought in a "court of competent jurisdiction" without limitation.

The defendants reply to the plaintiffs' opposition. The defense asserts the parties' settlement agreement must be read as a whole, and the forum selection clause here requires a change to New York County. The defense points out the plaintiffs fail to show unreasonableness, unjustness or that the forum selection clause was the product of fraud or overreaching. The defense contends the plaintiffs seek to adjudicate facts, to wit whether the repairs were completed rather than to decide issues of law. The defense maintains that Article 3(b) in the parties' settlement agreement does not take precedence over Article 12.

Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact.

*Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99-100, 890 N.Y.S.2d 16 [1<sup>st</sup> Dept 2009]).

The Court determines the defendants fail to satisfy the CPLR 501 and CPLR 511 burdens. In opposition, the plaintiffs fail to show the specific language of Article 3(b) in the parties' settlement agreement takes precedence over the subsequent general language of Article 12 (*see generally Isaacs v. Westchester Wood Works, Inc.*, 278 A.D.2d 184, 718 N.Y.S.2d 338 [1<sup>st</sup> Dept 2000]).

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil

action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

Under 22 NYCRR § 130-1.1 [c], conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

This Court considered “(1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (*see* 22 NYCRR § 130-1.1 [c]). This Court finds the plaintiffs’ conduct was not frivolous as required in 22 NYCRR § 130-1.1.

ORDERED that the motion is GRANTED, and it is also,

ORDERED that upon entry of this order the clerk of this court is directed to deliver to the clerk of the Supreme Court, New York County, not Suffolk County all papers filed in this action pursuant to CPLR § 511(d). A copy of this order shall be served on all parties by movant.

ORDERED that the branch of the motion is DENIED seeking costs, expenses and

attorneys' fees incurred in connection with this application.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: **March 1, 2018**

ENTER:

A handwritten signature in black ink, appearing to be the initials 'J.S.C.', written over a horizontal line.

J. S. C.

NON FINAL DISPOSITION