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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ONEIDA

THE LANDMARKS SOCIETY OF GREATER UTICA, JOSEPH BOTTINI, #NOHOSPITALDOWNTOWN, BRETT B. TRUETT, JAMES BROCK, JR., FRANK MONTECALVO, JOSEPH CERINI, AND O'BRIEN PLUMBING & HEATING SUPPLY, a division of ROME PLUMBING AND HEATING SUPPLY CO. INC.,

Petitioners-Plaintiffs

For a Judgment pursuant to Article 78 and Section 3001 of the Civil Practice Laws and Rules,

against-

PLANNING BOARD OF THE CITY OF UTICA, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ERIK KULLESEID, ACTING COMMISSIONER, DORMITORY AUTHORITY OF THE STATE OF NEW YORK AND MOHAWK VALLEY HEALTH SYSTEM,

Respondents-Defendants.

AFFIDAVIT OF KATHYN F. HARTNETT IN SUPPORT

Index No. 02797-19

RJI:

JUDGE MACKEY

STATE OF NEW YORK)

ss:

COUNTY OF ONEIDA)

I, **KATHRYN HARTNETT,** being duly sworn, deposes and states as follows:

1. I am assistant corporation counsel for the City of Utica, New York. Part of my assigned responsibilities is to attend meetings of the City of Utica Planning Board and provide advice on land use matters that require approvals from the Planning Board.

2. I have personally represented the City Planning Board in connection with an application by Mohawk Valley Health System ("MVHS") to construct a new Health Care Campus

in the City of Utica, including the environmental review process and land use approval process. As such, I am familiar with the facts, circumstances and proceedings in this case.

3. I make this affirmation in support of the City Planning Board's motion to change the place of trial of the Proceeding from Albany County to Oneida County and to stay the time to respond on the merits until such time as the Proceeding can be properly transferred to Oneida County and any outstanding motions are addressed and decided.

5. Accordingly, for the reasons set forth in this affirmation and in the supporting affirmation of MVHS's counsel, Kathleen M Bennett, the City requests that the place of trial be moved to Oneida County.

Procedural History

6. Plaintiff's brought this proceeding in Albany County as hybrid Article 78/Declaratory Judgment Action on May 8, 2019. Named Respondents/Defendants were the Planning Board of the City of Utica, Mohawk Valley Health System, New York State Office of Parks, Recreation, and Historic Preservation (OPRHP), and the Dormitory Authority of the State of New York (DASNY).

7. The Petition/Complaint challenged the Planning Board's environmental impact review process for MVHS's Project (causes of action 3, 4 and 5), as well as the issuance of a Letter of Resolution between MVHS, DASNY, and OPRHP that addressed the Project's impacts on historical and archaeological resources and corresponding mitigation strategies (causes of action 1 and 2).

8. Respondents timely moved on June 13, 2019 for dismissal of the Hybrid Proceeding. Following oral argument on October 31, 2019 and prior to the motion being decided,

on November 4, 2019, Petitioners submitted to the Court and served on Respondents an "Amended Petition" which added a Sixth Cause of Action.

9. The proposed Sixth Cause of Action challenged the Final Site Plan Approval granted by Respondent Planning Board on September 19, 2019.

10. This Amended Petition also conceded that all causes of action were brought pursuant to Article 78 and as such the rules governing proceedings rather than actions should apply.

11. Respondents timely moved on November 22, 2019 to Strike or Dismiss the "Amended Petition."

12. By Decision entered and served on December 26, 2019, Hon. L. Michael Mackey, JSC, Albany County, dismissed Causes of Action 1, 2, and 6.

13. On December 31, 2019, I served a demand for change of place of trial, as of right, pursuant to CPLR 511. A copy of said Demand is attached hereto as.

14. This demand was timely brought, as Respondents in this case have not yet answered the Petition. *See* CPLR 511.

15. On Friday, December 10, 2020, I was served by regular mail with Affidavits in Opposition to the City's demand by Steven Grant, Brett Truett, and Attorney Thomas West.

16. On Tuesday, January 21, 202, a proposed Order to Show Cause on a Motion to Change Place of Trial was reviewed by Hon. Patrick MacRae, JSC, Oneida County. Judge MacRae declined to sign the Order, and I thereafter timely moved that same day in Albany County to Change the Place of Trial to Oneida County.

17. On Tuesday, January 28, 2020, I was served with Petitioners' Cross-Motion to Retain Venue in Albany County, including an Affirmation by Attorney Thomas West ("West Affirmation".)

18. I make this Affidavit in Reply and in Opposition to Petitioners' Cross-Motion

Petitioners' Opposition to Respondent Planning Board's Motion

19. Petitioners essentially argue 1) that in this case, venue provisions are in conflict, and that as long as the choice of venue satisfies for one respondent, they have made a proper choice of venue; 2) that the Second Class Cities Law § 242 does not apply to the Planning Board; 3) that Respondent Planning Board has waived its right to move for change of venue; and 4) that there are discretionary grounds to support retaining venue in Albany county, including judicial economy and inability to get an impartial trial in Oneida County.

20. Each of Petitioners' arguments fail.

21. Petitioners assert that since venue was proper in Albany for DASNY and OPRHP, they properly placed venue in Albany County. In support, they cite Rampe v. Guiliani, 227 A.D.2d 605 (2d Dep't 1996) ("Where mandatory provisions are in conflict, other factors such as where the action was first commenced . . . and discretionary grounds for a change in venue ... may be considered").

22. First, and as argued in my Affirmation of January 21, 2020, there is no conflict among venue provisions. See Hartnett Affirmation, ¶¶ 30-37.

23. Petitioner had a choice of venue when it came to DASNY and OPRHP, but no choice when it came to Respondent Planning Board, pursuant to Second Class Cities Law § 242. Thus, this proceeding was improperly venued in Albany County, because the only proper venue for any action or special proceeding against the City of Utica Planning Board is Oneida County. Actions against the Planning Board may only be brought in Oneida County, and there is no conflict, because Oneida County would have also been proper venue for Respondent's DASNY and OPRHP. Hartnett Affirmation, ¶¶ 30-31.

24. This provision of the law states, in relevant part, that with respect to a city of the second class such as the City of Utica, "[t]he place of trial of all actions and proceedings against the city, or any of its officers, *boards or departments* shall be the county in which the city is situated." Second Class Cities Law § 242 (emphasis added).

25. Established rules of statutory construction mandate that general venue provisions, such as those set forth in CPLR 506, which Petitioners rely on, "must yield" to a more specific rule, such as that proscribed by Second Class Cities Law § 242, if there is a conflict between the general and the specific. Matter of Zelazny Family Enters., LLC v. Town of Shelby, No. 19-00028, 2019 WL 7043554, at *1 (N.Y. App. Div. Dec. 20, 2019) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 397).

26. In fact, there is no conflict between the general and specific laws in this instance, inasmuch as venue is also proper in Oneida County under either CPLR §§ 504 or 506 – and indeed, is mandatory if CPLR § 504(2) is deemed to be the applicable general provision. Hartnett Affirmation, ¶¶ 27-28, 30-35; Zelazny at *3-*5. As such, the City of Utica Planning Board has established that Oneida County, the county designated in its demand for change of the place of trial, is the only proper venue for this proceeding. See Id.; Second Class Cities Law § 242.

27. Still in search of a conflict among venue provisions where there is none, Petitioners dispute that the reasoning of Zelazny would apply in this case, because the planning board is not a "board" as contemplated by SCCL § 242. This is a tortured reading of the statute and Zelazny, wholly unsupported by law. The Planning Board is a board of the city, and SCCL § 242 applies to "all actions and proceedings against the city, or any of its officers, *boards or departments . . .*" If, as Petitioner argues, this statute applies only to challenges of legislative acts, see West Affirmation ¶ 78, the words of the statute are meaningless, as it also applies to "boards and

departments" which are not legislative bodies. This interpretation flatly contradicts the plain language of the statute and in no way comports with any rule of statutory construction.

Petitioners' Discretionary Motion Fails

28. Petitioners make three main arguments to retain venue in Albany County. First, that Respondent's made their demand too late; second, that Respondent's waived their right to change venue when they engaged in motion practice in Albany Supreme Court; and third, that it is in the interest of judicial economy to keep this matter in Albany County to prevent further delays, with all previous delays being unfairly attributed to Respondents by Petitioners.

29. Respondent's demand was timely made.

30. CPLR R. 511 plainly provides that a demand for change of the place of trial on the ground that the county designated is improper is timely where it is served "with the answer or before the answer is served." CPLR R. 511(a). The City of Utica Planning Board has not yet served an answer to the Petition in this proceeding, nor has its time to do so expired. Hartnett Affirmation, ¶ 3. Thus, the demand for change of the place of trial that the City of Utica Planning Board served on December 31, 2019 (Hartnett Affirmation, ¶ 13, Ex. C), was timely served "before the answer." CPLR R. 511(a). Agostino Antiques, Ltd. v. CGU-Am. Employers' Ins. Co., 6 A.D.3d 469, 470 (2d Dept. 2004) ("[The plaintiff's] choice of venue was improper, and accordingly, the plaintiff forfeited its right to select the venue of this action. Thereafter, when the defendant . . . properly served with its answer a demand for change of venue pursuant to CPLR 511 (b) followed by a motion to change venue to a proper county pursuant to CPLR 503 (a), 510, and 511, the motion should have been granted" [*internal citations omitted*]).

31. The case law makes clear that the timeliness requirement of CPLR R. 511(a) is to be interpreted literally: a demand served with or before the respondent's answer is timely. This

is true regardless of whether the respondent's time to answer was extended, whether the respondent engaged in motion practice prior to answering, or whether the respondent removed the case to federal court and it was remitted back to state court prior to answering and serving a demand for change of place of trial. See Zelazny Family Enters., LLC, at *6-*7; Am. Tax Funding, LLC v. Druckman Law Group PLLC, 175 A.D.3d 1055, 1055 (4th Dept. 2019); N. County Communications Corp. v. Verizon New York, Inc., 196 Misc. 2d 149, 151-153 (Sup. Ct. Albany County 2003).

32. For instance, in Am. Tax Funding, LLC, the court rejected the plaintiff's contention that the defendant's motion for a change of venue was untimely, stating:

> Supreme Court properly determined that defendant's motion was timely and in compliance with the procedure set forth in CPLR 511. We agree with defendant that the court's prior order granting it leave to serve a late answer pursuant to CPLR 3012 (d) effectively extended the time for it to serve its written demand for a change of venue. Defendant timely served its written demand on May 9, 2017, 'before the answer [was] served' on May 15, 2017.

Am. Tax Funding, LLC, 175 A.D.3d at 1055 *(alteration in the original) (internal citations omitted).*

33. In N. County Communications Corp., Supreme Court, Albany County likewise rejected a challenge to the timeliness of a demand for change of the place of trial, notwithstanding that the defendants removed the action to federal court two days before their time to answer the complaint in state court expired, defendants made an untimely motion to dismiss in federal court, the federal court remanded the case back to state court before the untimely motion to dismiss was fully submitted and directed the defendants to file a motion to dismiss in state court, the defendants failed to timely answer or move to dismiss the complaint in state court, and the defendants' demand to change venue was not served until after all of this – some seven months after the action was

commenced. N. County Communications Corp., 196 Misc. 2d at 151-52. The court found that, although the defendants were already in default by the time they served the demand, their time to answer was effectively extended by a letter that the plaintiff sent to the defendants, advising that they were in default and stating that the plaintiff would seek a default judgment if an answer was not served within 20 days. *Id.* at 152. Thus, in assessing the timeliness of the defendants' demand for change of venue, the court concluded that:

> CPLR 511 simply requires that a demand for change of venue be *made with or before the answer*. The statute does not provide that the demand be made within the time the answer is required. Thus, given that the court construes plaintiff's letter as an extension to file an answer, and that a demand to change venue may be made with the answer, the court determines that defendants' demand and subsequent motion were timely.

Id. at 152-53 (*emphasis in the original*) (*internal citations omitted*).

34. Supreme Court, Albany County also found that a demand to change the place of trial was timely served in a case where, following a "lengthy factual and procedural background," the plaintiffs served an amended complaint, which the defendants moved to dismiss prior to answering. Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc., No. 901476-14, 58 Misc. 3d 1207(A), 2017 N.Y. Misc. LEXIS 5191, *2, *5, *6 n.3 (Sup. Ct. Albany County Nov. 6, 2017). It was only after the court issued its decision on the defendants' motions (granting them in part and denying them in part), that the defendants served their answers to the amended complaint and their demands to change the place of trial. Id. at *5-6. The court ultimately held that, "'plaintiffs' choice of venue was improper and they have accordingly forfeited their right to select the venue to this action.' Accordingly, the branch of the . . . Defendants' motions seeking to transfer venue *must* be granted." Id. at *13 (*emphasis added*) (*internal citations omitted*).

35. Indeed, New York courts – including the Court of Appeals – have even repeatedly held that demands for change of the place of trial are timely when they are not served until the defendant or respondent serves an amended answer, having failed to serve such a demand with the initial answer. Ross v. City of Rochester, 8 N.Y.2d 1067, 1068 (1960); Penniman v. Fuller & Warren Co., 133 N.Y. 442, 444-45 (1892); Valley Psychological, P.C. v. Gov't Employees Ins. Co., 95 A.D.3d 1546, 1547 (3d Dept. 2012) ("Initially, we note that there is no dispute that defendant had the right to file an amended answer to the complaint (*see* CPLR 3025 [a]), and since that amended answer superseded [*sic.*] its prior answer, defendant had the right to serve with it a demand for a change of venue. Since defendant's motion to change venue was filed within 15 days of the service of that demand, Supreme Court should not have denied it as untimely" [*internal citations omitted*]); Corea v. Browne, 45 A.D.3d 623, 624 (2d Dept. 2007) ("The defendants substantially complied with [CPLR R. 511(a)] when they served a demand together with the amended answer and made a motion within the 15-day period required under the statute, even though they failed to serve a demand together with the original answer").

37. Here, the City of Utica Planning Board's demand for change of the place of trial was unquestionably timely, because it was served prior to the Planning Board's answer. CPLR R. 511(a). The fact that Respondents-Defendants engaged in motion practice prior to answering – as was their absolute right to do under CPLR R. 3211 – has no bearing on the timeliness of the demand. *See* Zelazny Family Enters., at *6-*7; Am. Tax Funding, LLC, 175 A.D.3d at 1055; *N.* County Communications Corp., 196 Misc. 2d at 151-53; Belair Care Ctr., Inc., 2017 N.Y. Misc. LEXIS 5191 at *5-*6, *13; *see also* Ross, 8 N.Y.2d at 1068; Penniman, 133 N.Y. at 444-45; Valley Psychological, P.C., 95 A.D.3d at 1547; Corea, 45 A.D.3d at 624.

38. Moreover, Respondent has not waived any right to demand a change of venue as of right. In Zelazny Family Enters., LLC, the court held that, contrary to the petitioners' contention, the "respondents did not waive their right to challenge venue by seeking additional time to answer," concluding "that the extension of time to answer . . . provided respondents additional time to answer and therefore additional time to serve a timely demand to change venue." Zelazny Family Enters., LLC, at *6-*7. The court also held that the respondents did not waive their right to challenge venue by participating in a pre-answer motion to consolidate. Id. at *7.

39. In fact, the Zelazny court indicated that nothing less than affirmative waiver would show that a town had waived its right to proper venue: "Although counsel for respondents consented to consolidate the first and second proceedings in Niagara County, he indicated no implicit or explicit agreement with the assertion of counsel for the Frontier petitioners that venue was proper in Niagara County. Respondents therefore did not waive their right to challenge venue." Zelazny Family Enterprises, LLC, at *7.

40. Petitioners also assert that they cannot have an impartial trial in Oneida County: "Retaining venue in Albany County is a proper exercise of this Court's discretion to insure an impartial trial in this matter. Such could not be obtained in Oneida County due to the intensive publicity and highly politically-charged atmosphere respecting the Hospital Project." West Affirmation ¶ 108.

41. There are no jury trials for Article 78 proceedings (see generally CPLR § 7804), so Petitioners must be implying that the Supreme Court Judges of Oneida County are impartial "[d]ue to the highly politically-charged nature of this project proposal and the relentless, multi-faceted media blitz in which MVHS has engaged to garner public support for the downtown hospital

project (which has fueled further community division), hearing this matter in Oneida County is improper as not promoting the ends of justice or allowing for an impartial trial." See West Affirmation ¶ 7. This is an extraordinary assertion that casts aspersions on the characters of the judges of Oneida County Supreme Court, and is made only to provide a post hoc rationalization for Petitioners' forum shopping at the outset of this litigation.

42. While true that the Supreme Court has discretion to change venue where "there is reason to believe that an impartial trial cannot be had in the proper county, a change of venue based on absence of impartiality "requires a showing of facts which demonstrate a strong possibility that an impartial trial" cannot be had. Jablonski v. Trost, 245 A.D.2d 338, 339–40 (2d Dep't 1997. Thus "[m]ere belief, suspicion or feeling are not sufficient grounds for the granting of the motion" Id. *(internal citations and quotations omitted.)*

43. Petitioners have made no such showing in this case. Ironically, Justice MacRae of the Oneida County Supreme Court recently refused to sign Respondent's Order to Show Cause regarding change of venue. Clearly, the judges in Oneida County are not beholden to some media campaign or political machine that would render their decision-making impartial and biased toward Respondents.

44. Truly, Petitioners brought this case in Albany County to inconvenience the Planning Board and MVHS. Every single filing made by Respondent Planning Board requires Fed Ex overnight service, coordination with a process server to handle filing in Albany County (all at additional expense to the City of Utica), and, when appearances or a filing deadline so require, a 160 mile round trip. This is all for a matter relating to a property located in Oneida County, a

decision made by a Planning Board located in Oneida County, and brought by Petitioners that are all located in Oneida County.

45. Petitioners also claim that keeping this matter in Albany County aids in judicial economy because a change in venue only contributes to a delay, which West characterizes as an eight-month delay caused by Respondents. See West Affirmation ¶ 25-34, 108.

46. But Respondents have not caused a delay in this case. Respondents timely filed initial motions to dismiss in June of 2019. The Court called for oral argument on the motions to be held to be held on October 31, approximately four months after the motions were filed. Shortly thereafter, on November 4, 2019, Petitioners attempted to supplement their Petition, without leave of the Court, and Respondents were then forced into additional motion practice to deal with Petitioners' time-barred claim challenging final site-plan approval. The Court agreed that claim was time-barred when issuing its decision on the motions on December 23, 2019. Respondent Planning Board then timely demanded a change of venue on December 31, 2019.

47. As discussed, *supra*, this motion practice is not a waiver. And, it was in fact in the interest of judicial economy that Respondents chose to bring motions to dismiss in Albany County, because that provided the fastest route to what was reasonably expected to be an expedient resolution through dismissal. It took longer than expected for a decision to be issued, and a good portion of that delay is attributable to Petitioners for attempting to supplement their Petition without leave, precipitating further successful motion practice by Respondents.

48. It is also, of course, well understood that this Court has a burdensome caseload and that certain delays in proceedings are unavoidable. But, even eight months later, since a court must

now reach the merits on this case, Respondents must invoke their entitlement to have the merits heard in Oneida County because it is the proper county for this proceeding.

49. Therefore, it cannot fairly be said that Respondents have caused any delay. Moreover, to the extent Petitioners attempt to attribute delay to Respondents as something calculated to allow razing of as many buildings as possible, this argument is highly prejudicial to Respondents because it implies it is being done unlawfully or through some loophole in the law. Stated simply, buildings are being razed because this project is allowed to continue. Petitioners never sought any temporary relief to halt the project while this litigation proceeds. Respondent MVHS is also a non-profit organization without an unlimited supply of money, and they have prudently continued on with the project despite the litigation because every day of delay increases its own costs.

50. Furthermore, and contrary to Petitioners contentions, this Court has not reached the merits of this case, and since there has not yet been an answer and return, is not fully familiar with the merits of this case. See West Affirmation ¶ 28. It cannot fairly be said that judicial economy would be more than marginally affected by transfer of this proceeding to Oneida County, because no court has yet considered the merits.

WHEREFORE, your deponent respectfully requests 1) that the Respondent Planning Board of the City of Utica's Motion to Change the Place of Trial be granted, 2) for a stay of all proceedings in the Albany County Supreme Court until such time as the matter is transferred to Oneida County Supreme Court, 3) for such other and further relief as the Court may deem just and proper.

Dated: January 31, 2020

KATHRYN F. HARTNETT, ESQ.
ASSISTANT COPORATION COUNSEL FOR
THE CITY OF UTICA

Sworn to before me this
31st day of January, 2020

Notary Public

TRACEY A. MILLS
NOTARY PUBLIC
NO. 01MI6185254
QUALIFIED IN
ONEIDA COUNTY
COMM. EXP.
04-14-20
STATE OF NEW YORK