

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

---

GREGORY WERLINICH,

Plaintiff,

- against -

STACY K. WEISSMAN, HEIMER ENGINEERING, P.C.,  
RICHARD L. HEIMER and SHAENA HEINTZ,

Defendants.

---

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 6398/10  
Motion Seq. No.: 01  
Motion Date: 04/23/10

---

**The following papers have been read on this motion:**

---

	Papers Numbered
<u>Notice of Motion, Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition by Plaintiff and Affidavit</u>	<u>2</u>
<u>Affirmation in Opposition by Defendant Weissman, Affidavit and Exhibit</u>	<u>3</u>
<u>Reply Affirmation, Affidavit and Exhibits</u>	<u>4</u>

Defendants Heimer Engineering, P.C. (“Engineering”) and Richard L. Heimer (“Heimer”) move, pursuant to CPLR §§ 510(1) and 511(b), for an order changing the place of trial of the above entitled action from Westchester County, State of New York to Nassau County, State of New York, upon the ground that the county designated by plaintiff is not the proper county based on a written contract between the parties which places venue in the Supreme Court of Nassau County. Both plaintiff and defendant Stacy K. Weissman (“Weissman”) oppose the motion.

Defendants Engineering and Heimer submit that the county designated by plaintiff in its Summons and Verified Complaint, Westchester County, is an improper place of trial, since defendant Engineering, plaintiff and defendant Shaena Heintz (“Heintz”) allegedly entered into

a pre-inspection agreement prior to defendant Engineering performing an inspection for plaintiff and defendant Heintz (the ex-wife of plaintiff) of the dwelling at issue in the Westchester matter. *See* Defendants' Affirmation in Support Exhibit D. Defendants Engineering and Heimer assert that said agreement states that any litigation between them will be held in the courts located in Nassau County, New York. Defendants note that defendant Heintz was not named as a defendant in plaintiff's Westchester County action, but was named in defendants Engineering and Heimer's Answer as a defendant pursuant to CPLR § 3019(d).

Defendants Engineering and Heimer further state that "...in order...to cross-claim against the other person who is a party to the pre-inspection agreement...the answer containing the cross-claim needed to be filed with a summons. This person [defendant Heintz] has not been served at this time because my clients wish to wait until the issue of venue is resolved, at which time a Summons with the correct court named in the caption shall be served."

Plaintiff argues that neither he nor defendant Weissman are signatories to the pre-inspection agreement, that both are Westchester County residents and that the subject property is located in Westchester County. Plaintiff further argues that "one of the causes of action is for rescission, which, per CPLR § 507, must be litigated in the county where the subject premises are located. Given the foregoing, the Court should not sever these related matters to the prejudice of the Plaintiff."

Plaintiff alternatively asserts that, even if the pre-inspection agreement had been signed by plaintiff, it would still not be enforceable under the provisions of CPLR § 4544 and/or General Obligations Law § 5-702.

In her opposition to the motion, defendant Weissman asserts the same arguments as plaintiff - that she was not a signatory to the pre-inspection agreement, that she is a resident of Westchester County and that there is a rescission cause of action alleged.

First, with respect to plaintiff's arguments under CPLR § 4544 and/or General Obligations Law § 5-702, the Court finds that defendant Engineering's pre-inspection agreement complies with the statute requirements specifying size of type used as well as the "plain language rule." Therefore, plaintiff's arguments with respect to same are without merit.

With respect to plaintiff and defendant Weissman's claim that CPLR § 507 governs with

respect to venue in the instant matter due to the alleged recision cause of action, CPLR § 501 trumps the requirements found in CPLR § 507. *See A.C.E. Elevator Co., Inc. v. V.J.B Construction Corp.*, 192 Misc.2d 258, 746 N.Y.S.2d 361 (Kings County Sup. Ct. 2002); *C.V., Inc. v. WNC Tarrytown Company, LLC*, 4 Misc.3d 1013(A), 791 N.Y.S.2d 868 (Westchester County Sup. Ct. 2004). As the court held in *A.C.E. Elevator Co., Inc. v. V.J.B Construction Corp.*, “[f]irst, pursuant to the express terms of CPLR § 501, a contractual forum selection clause is enforceable except in a situation governed by CPLR § 510(2), which is not relevant here. Hence, applying the interpretive canon of *inclusio unius est exclusio alterius*, the Legislature’s failure to exempt CPLR § 507 from the grasp of CPLR § 501 necessarily demonstrates that the statutory scheme does not preclude parties from contractually fixing venue in a foreclosure action. Stated otherwise, had the Legislature intended that a written agreement fixing venue could not be enforced in an action affecting real property, it would have necessarily included a reference to CPLR § 507 within the body of CPLR § 501 as it did with section 510(2).” *Id.*

To the extent that plaintiff and defendant Weissman argue that the convenience of the parties should outweigh the venue provision, the Court does not agree with their arguments. Neither plaintiff nor defendant Weissman provided in their opposition papers the names and addresses of their prospective witnesses and a statement of facts concerning the nature of each witness’s testimony. As such, plaintiff and defendant Weissman’s arguments concerning the convenience of the witnesses does not rise to the level necessary for the Court to exercise its discretion and override the contractually-selected venue. *See id.*; *Kenron Awning and Window Corp. Of Eastern New York v. Abbott*, 43 Misc.2d 552, 251 N.Y.S.2d 593 (Onondaga County Sup. Ct.1964).

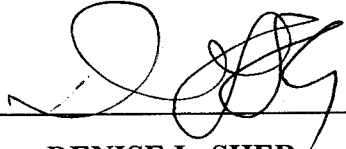
Consequently, based upon the above, defendants Engineering and Heimer’s motion seeking a change of venue is hereby granted. Defendants Engineering and Heimer adequately demonstrate that venue is proper in Nassau County pursuant to CPLR §501.

Accordingly, it is hereby directed that the venue of this proceeding is changed from Supreme Court, Westchester County to Supreme Court, Nassau County and the Clerk of the Supreme Court, Westchester County is to transfer the file in the instant action to the Clerk of the

Supreme Court, Nassau County upon service of a copy of this order with notice of entry and payment of any applicable fees, if any, and this proceeding is stayed until venue is so transferred.

This constitutes the decision and order of this Court.

**ENTER:**

A handwritten signature in black ink, appearing to read 'Denise L. Sher', is written over a horizontal line.

**DENISE L. SHER**  
**A.J.S.C.**

Dated: Mineola, New York  
July 14, 2010

**ENTERED**  
JUL 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE