

**Exhibit B to Rosof Affidavit -  
Decision and Order of the Honorable  
Mary Ann Brigantti-Hughes in  
Index No. 302683/07, dated November 29, 2010**

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SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX

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Present: Honorable Mary Ann Brigantti-Hughes

DEC 21 2010

WALTER GARCIA

Plaintiff,

DECISION/ORDER

-against-

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CPS 1 REALTY LP, CPS 1 LLC, CPS 1 REALTY GP LLC,  
EL-AD PROPERTIES NY LLC, EL-AD 52 LLC,  
THE EL-AD GROUP LTD., 49 EAST 21 LLC, FAIRMOUNT  
HOTEL MANAGEMENT LP and TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK,

Defendants.

CPS1 REALTY LP, CPS 1 LLC, EL-AD PROPERTIES  
NY LLC and THE EL-AD GROUP LTD.,

Third-Party Index No.:  
84081/09

Third-Party Plaintiffs,

-against-

NOVA DEVELOPMENT GROUP, INC.

Third-Party Defendant.

The following papers numbered 1 to 6 read on Third-Party Defendant motion to change venue noticed August 18, 2010 duly submitted on the Motion Calendar of October 26, 2010 of Part IA15 by stipulation of the parties.

<u>Papers Submitted</u>	<u>Numbered</u>
Third-Party Defendant's Notice of Motion, Affirmation in Support, & Exhibits	1, 2, 3,
Third-Party Defendant's Memorandum of Law in Support	4
Plaintiff's Affirmation in Opposition & Exhibits	5, 6

Upon the foregoing papers, the Third-Party Defendant Nova Development Group, Inc. seeks an Order pursuant to CPLR § 510(1) and 511(b) to change the venue of this matter to the Supreme Court, Suffolk County.

*Background*

This action is for personal injury sustained by Plaintiff on May 2, 2006 at the Plaza Hotel located in New York County, New York. Plaintiff fell off a scaffold at said location during the

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course of his employment with Third-Party Defendant Nova Construction Corp. (hereinafter, Nova). Plaintiff commenced an action against Defendant CPS 1 Realty LP, which was served on the Defendant on November 6, 2007. The summons and verified complaint falsely asserted that venue was based on Plaintiff's residency and provided what is now learned to be a false Bronx address. Plaintiff served an amended verified complaint on December 23, 2009 to include additional defendants. The amended summons likewise falsely asserted that venue was based on Plaintiff's residency in Bronx County, yet the verified complaint states that at time of the accident and all relevant times therein, Plaintiff resided in Brentwood, New York. The amended verified complaint did not specify that Brentwood is located in Suffolk County. Defendant CPS 1 Realty LP commenced a third-party action against Nova on December 21, 2009. An amended third-party complaint was served by all third-party plaintiffs against Nova on March 5, 2010. The amended verified complaint was attached as part of this amended third-party complaint. Nova interposed its answer to the third party complaint on April 28, 2009. At Plaintiff's deposition held on August 5, 2010, the Plaintiff testified that he resides in Bayshore, New York (which is located in Suffolk County) and has not resided elsewhere for the past 10 years. On August 6, 2010, Nova served a Demand for a Change of Venue on Plaintiff, demanding a change of venue from the Bronx to Suffolk County based on Plaintiff's deposition testimony. Plaintiff did not respond. Nova now submitted the instant motion on August 18, 2010 seeking a change of venue from the Bronx to Suffolk County based on Plaintiff's deposition testimony. In its opposition papers, Plaintiff contends that, as a third-party defendant to a third party action, Nova lacks standing to move for a change of venue in the underlying action. Plaintiff also contends that Nova failed to meet the time limitations set forth in CPLR §511(b) to make a motion to change venue, despite having notice of Plaintiff's Suffolk County residence as of the date of service of the amended third party complaint (which included a copy of amended verified complaint stating Plaintiff resided in Brentwood, New York) and upon receipt of subsequent discovery documents.

Standard of Review

CPLR 503(a) provides, "Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resides when [the action] was commenced." CPLR §510 enables the court to change the place of a trial on motion where the county designated is not the proper county. CPLR §511(a) states that a motion for change of venue based on improper county designation "shall be served with the answer of before the answer is served." CPLR §511(b) sets forth the guidelines for a motion to change venue. In pertinent part, it provides that "the defendant" shall serve a written demand for a change of venue to the proper county", and "[t]hereafter the defendant may then move to change the place of trial within fifteen days after service of the demand..."

The first issue raised by Plaintiff in its opposition papers is whether a third-party defendant has standing to move for a change of venue since CPLR §511(b) specifically refers to the movant as the "defendant". In Champlain Creameries, the Court specifically addressed this issue of "whether a third-party defendant may move for a change of venue where his answer is addressed solely to the third-party complaint and plaintiff does not amend his complaint to

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include a claim against the third-party defendant.” Champlain Creameries, Inc. v. Hovey, Stanter & Co., Inc. et al., 141 N.Y.S.2d 271, 274 (Sup. Court., Special Term, New York County 1955). In its ruling, the Court held that, in accordance with N.Y. Civ. Prac. Act §193-a(4), the third-party defendant “shall at all times have the rights of a party adverse to the plaintiff,” including “all procedural remedies available to the original defendant to defeat the plaintiff.” Id. at 274. The Court concluded that there is “no sound reason why the court should be precluded from transferring the action upon a third-party defendant’s motion” Id. at 274. The Court has discretion in entertaining an application for a change of venue by a third-party defendant in the interest of “flexibility as well as broad judicial supervision when necessary in the interest of all of the parties and the proper functioning of the work of the courts.” Id. at 273. Thus, it is clear the third-party defendant Nova has standing to move for a change of venue in this matter.

The second issue raised by Plaintiff in its opposition papers is whether Nova’s failure to meet the strict time limitations set forth in CPLR §511(b) to bring a motion for change of venue preclude said motion. The Appellate Division, First Department has held that “noncompliance with the statutory time requirement should not act as a bar where, as here, a plaintiff’s willful omissions and misleading statements regarding his residency are the cause of such noncompliance and the defendant moves promptly after ascertaining the true state of affairs.” Philogene v. Fuller Auto Leasing et al., 167 A.D.2d 178, 179, 561 N.Y.S.2d 250, 251 (1st Dept. 1990); see also Herrera v. R. Conley Inc., et al., 53 A.D.3d 218, 869 N.Y.S.2d 21 (1st Dept. 2008) (“For a change in venue predicated on a plaintiff’s designation of an improper county [CPLR §510(1)], the demand must be served within or prior to the answer [CPLR §511(a)], unless plaintiff’s misleading statements regarding residence caused defendants’ untimely service of the demand, in which case the delay may be excused.” Id. at 218).

In the instant matter, it is Plaintiff’s willful omissions and misleading statements regarding his residency which caused the Defendant’s delay in moving for a change of venue. Plaintiff’s initial summons indicated that venue was predicated on Plaintiff being a resident of Bronx County and provided a false Bronx address. The supplemental complaint misleadingly alleges that the Plaintiff resided in Brentwood, New York, omitting the fact that Brentwood is located in Suffolk County. Yet the summons attached thereto still nonetheless alleged that venue was predicated on Plaintiff being a resident of Bronx County when, in fact, the Plaintiff resides in Suffolk County. The fact that subsequent medical examinations and discovery documents set forth Plaintiff’s current address as Brentwood, New York does not put the Defendant on notice that Plaintiff was a resident of Brentwood, New York (Suffolk County) at the time the action was commenced in accordance with CPLR §503(a). The record reflects that on August 5, 2010, the Plaintiff’s testimony at his deposition clarifies these misleading statements and/or willful omissions by testifying that he resides in Bayshore, New York (Suffolk County) and has not resided elsewhere for the past 10 years. The next day, Nova served a Demand for a Change of Venue on Plaintiff, demanding a change of venue from the Bronx to Suffolk County based on Plaintiff’s deposition testimony. Nova now submitted the instant motion on August 18, 2010 seeking a change of venue from the Bronx to Suffolk County based on Plaintiff’s deposition

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testimony. Nova promptly moved for a change of venue upon ascertaining the facts regarding Plaintiff's residency at the time Plaintiff commenced the action. The action occurred in New York County and despite misleading statements and/or willful omissions in its pleadings, Plaintiff resided in Suffolk County at the time of the accident. This action bears no connection to the Bronx County whatsoever. Based on the foregoing, this Court grants Nova's motion for a change of venue from Bronx County to Suffolk County.

**ORDERED**, that Third-Party Defendant's motion to change venue of this action to Suffolk County is hereby **granted**.

The above constitutes the decision and order of this Court.

Dated: November 29, 2010



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Hon. Mary Ann Brigantti-Hughes, J.S.C.