

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

JOHN C. BERKERY, SR.,	: JANUARY TERM, 2003
	:
Plaintiff,	: No. 03975
	:
v.	: Commerce Program
	:
BARRY GREEN,	:
	:
Defendant.	: Superior Court Docket
	No. 2113 EDA 2003

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**OPINION**

**Albert W. Sheppard, Jr., J. .... August 20, 2003**

This Opinion is respectfully submitted in support of this court’s Order, dated May 19, 2003, which sustained the Preliminary Objection of defendant Barry Green (“Green”) based on venue considerations and transferred the matter to the Montgomery County Court of Common Pleas.

For the reasons discussed, this court respectfully submits that its Order should be affirmed.

**Facts**

The operative facts may be briefly summarized. Plaintiff contends that in June 1999, he and Green entered into an oral agreement to buy and sell distressed real estate through a joint venture. Complaint, ¶ 5. No written agreement was executed by the parties. However, plaintiff asserts that the parties considered the joint venture to be in effect on July 12, 1999, when Green purchased four

properties at a Montgomery County Sheriff's Tax Lien Sale to be held in a constructive trust for the joint venture. Compl., ¶ 14.

Plaintiff alleges that on August 17, 1999, defendant Alan Feldman, Esquire, filed the appropriate documents to create a joint venture named First Equity Management Corporation ("FEMC") and caused FEMC to be incorporated in Delaware with Green as its "sole incorporating officer." Compl., ¶ 16. Plaintiff further asserts that on August 24, 1999, FEMC purchased seven properties at a Chester County Tax Sale. Compl., ¶ 17.

On January 29, 2003, Berkery began this action by filing a Writ of Summons which was served on Green at his home in Montgomery County. Preliminary Objections of Defendant Barry Green to Plaintiff's Complaint ("Prelim. Obj."), ¶ 6, Plaintiff's Reply to Preliminary Objections of Defendant Barry Green ("Pltf's Reply"), ¶ 6. On February 21, 2003, Berkery, acting *pro se*, filed a Complaint against Green and Feldman, alleging Statutory Breach of Fiduciary Duty (Count I), Common Law Breach of Fiduciary Duty (Count II), Common Law Fraud (Count III), Legal Malpractice (Count IV), Breach of Common Law Duty of Good Faith and Fair Dealing (Count V), and Violation of 15 Pa.C.S. § 1508 (Count VI). Berkery certified that he sent the Complaint to Green's lawyer in Montgomery County. See Certificate of Service to Complaint.

The Complaint states that Berkery is a resident of Montgomery County, residing at 2115 Fairwold Lane, Fort Washington, Pennsylvania 19034, and that Green is also a resident of Montgomery County, residing at 727 Canterbury Lane, Villanova, Pennsylvania 19085. Compl., ¶¶ 1-2. The Complaint identifies Feldman as an attorney with offices at 1608 Walnut Street, 19th Floor, Philadelphia, Pennsylvania 19103. Compl., ¶ 3.

On March 13, 2003, Green filed Preliminary Objections to the Complaint arguing that the Complaint should be dismissed for improper venue, failure to conform to law or rule of court, failure to attach the joint venture agreement referenced in the Complaint, failure to attach a verification, failure to plead fraud with particularity, insufficient pleading as to Counts I, II and V of the Complaint, and a demurrer to Counts I, II, III, V and VI of the Complaint. The Preliminary Objections also argued that the Complaint's requests for attorney fees and punitive damages should be stricken.

On May 15, 2003, plaintiff and counsel for defendant Feldman jointly filed a Stipulation to dismiss all claims against Feldman. This court approved that Stipulation.<sup>1</sup>

Subsequently, by Order dated May 19, 2003, this court sustained Green's Preliminary Objection based on venue grounds and transferred the action to the Montgomery County of Court of Common Pleas. Plaintiff has appealed this Order.

### **Discussion**

The issue presented is whether this court properly transferred venue from Philadelphia County to Montgomery County.

Rule 1006(a), provides:

Except as otherwise provided by Subdivisions (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law.

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<sup>1</sup> Defendant Feldman had also filed preliminary objections to the Complaint on April 1, 2003, prior to the Stipulation to dismiss Feldman from the action.

Pa. R. Civ. P. 1006(a). Our Superior Court has held that “[a] plaintiff’s choice of forum is given great weight and a defendant has the burden in asserting a challenge to the plaintiff’s choice of venue.” Gilfor v. Altman, 770 A.2d 341, 343 (Pa. Super. 2001) (affirming transfer of venue from Philadelphia County to Montgomery County and holding that based on Rule 1006(a), venue did not lie in Philadelphia as to the individual defendant), quoting Masel v. Glassman, 456 Pa. Super. 41, 45, 689 A.2d 314, 316 (1997) (citations omitted) (affirming transfer of venue from Philadelphia County to Bucks County). See also Kring v. University of Pittsburgh, No. 1323 WDA 2002 and 1449 WDA 2002, 2003 WL 21266825, \*2 (June 3, 2003) (the doctrine that plaintiff’s choice of forum should be given deference does not apply where the only question is whether venue in a particular county is proper or not proper).

Here, Berkery argues that venue in Philadelphia County is proper because according to Rule 1006(a), an action against an individual may be brought in a county where the individual may be served, and Green could have been served in Philadelphia County, even though he was actually served in Montgomery County. Memorandum of Law Contra Defendant Barry Green’s Preliminary Objections (“Pltf’s Memorandum”), p. 3. Berkery relies on Rule 402(a)(2)(iii) which provides: “Original service may be served by handing a copy at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.” Pa. R. Civ. P. 402(a)(2)(iii).

The basis of Berkery’s argument is that Green could have been served at an office on 11631 Caroline Road in Philadelphia County. Pltf’s Reply, ¶ 8; Pltf’s Memorandum, p. 4. According to Berkery, Green had operated a company called International Lithography Corporation at that Philadelphia office until 1996 when he sold the company, and that later, Green “replevined” the

business and currently operates a company there named Phoenix Lithographing Corporation. Pltf's Memorandum, p. 4. Berkery also claims that the corporate headquarters for FEMC is at that same Philadelphia address. Pltf's Memorandum, p. 5, n.1 and Ex. D.

In responding to Berkery's arguments regarding where service could have been made, Green disputes the location of FEMC and instead, asserts that its principal place of business and corporate headquarters are in Montgomery County. Green's Memorandum, p. 3. Green admits that he conducts "some business in Philadelphia," but does not state that he maintains an office in Philadelphia, for Phoenix Lithographing Corporation or any other corporation. Green's Memorandum, p. 3.

Green emphasizes in his challenge to venue that the standard for individuals should not be confused with the standard for corporations. Green's Memorandum, p. 3. The test for an individual is whether the county where the action was filed is a location where the individual "may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law." Pa. R. Civ. P. 1006(a). "The rule that venue lies against a defendant because of the defendant's regular conduction of business in a county applies to corporations and other similar entities, but such rule does not apply to individuals." Gilfor, 770 A.2d at 345. Green concludes that despite the fact that he conducts "some business" in Philadelphia, that does not necessitate venue in Philadelphia. Id.

Significantly, despite Berkery's hypothetical arguments regarding where Green could have been served, Berkery admits that he served Green with the Writ of Summons in Montgomery County, not Philadelphia County. Pltf's Reply, ¶ 6. Berkery also certified that he sent the Complaint

to Green's lawyer in Montgomery County rather than sending it to Philadelphia County. See Certificate of Service to Complaint.

Berkery argues next that the pertinent transactions or occurrences took place in Philadelphia County, stressing that the oral agreement between Berkery and Green took place at a "Philadelphia restaurant." Pltf's Reply, ¶ 8; Pltf's Memorandum, p. 5. Green, on the other hand, denies that he entered into any agreement with Berkery, but asserts that any discussions between him and Berkery regarding the possibility of an agreement occurred in Montgomery County, which Green claims is where FEMC maintains its principal place of business and corporate headquarters. Prelim. Obj., ¶ 7; Green's Memorandum, p. 3.

As for the subject matter of the alleged agreement, Berkery does not claim that the transactions for the purchase of the properties took place in Philadelphia County or that the properties themselves are located in Philadelphia County. Pursuant to Berkery's Complaint, the transactions by Green and FEMC to purchase distressed property in furtherance of the alleged joint venture occurred at sheriff sales in Montgomery County and Chester County. Compl., ¶¶ 14, 17. The properties are located in those counties.

In summary, Berkery admits that he is a resident of Montgomery County. Compl., ¶ 1. Green, too, is also a resident of Montgomery County. Compl., ¶ 2. Berkery chose to serve Green with the Writ of Summons in Montgomery County, and sent the Complaint to Green's lawyer in Montgomery County as well. The location of the alleged oral agreement to create a joint venture to purchase and sell distressed property is disputed, but it is clear from the Complaint that Green and FEMC purchased properties at sheriff's sales in Montgomery County and Chester County. Compl., ¶¶ 14, 17. The properties at issue are located in Montgomery County and Chester County. Id.

Despite the permissive nature of Rule 1006(a), allowing venue over an individual where the individual “may” be served, the court does not find venue in Philadelphia County to be appropriate in this particular instance. For these reasons, the court transferred venue to Montgomery County.<sup>2</sup>

**Conclusion**

It is respectfully submitted that this court’s Order dated May 19, 2003, should be affirmed.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

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<sup>2</sup> Before the Stipulation to dismiss Feldman from this action, Berkery argued that pursuant to Pa. R. Civ. P. 1006(b), maintaining claims against Green in Philadelphia County was appropriate because Feldman, another defendant, maintained offices in Philadelphia. Plaintiff’s Reply, ¶ 8. Pa. R. Civ. P. 1006(b) provides that an action to enforce joint or joint and several liability against two or more defendants may be brought against all defendants in any county in which venue may be laid against any one of the defendants.

However, on May 15, 2003, Berkery and Feldman filed a Stipulation that Feldman should be dismissed from the case. Absent Feldman, Pa. R. Civ. P. 1006(b) does not provide Berkery with a basis for maintaining the action in Philadelphia County.