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**Cambridge Swinerton, LLC, ORDER DENYING DEFENDANT NEW  
ALENCO WINDOWS, LTD.'S MOTION TO TRANSFER VENUE**

Alice D. Bonner  
*Fulton County Superior Court, Judge*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
BUSINESS CASE DIVISION  
STATE OF GEORGIA

CAMBRIDGE SWINERTON, LLC,	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION FILE NO.:
	)	2016CV274513
GILBANE BUILDING CO.,	)	
TRAVELERS CAS. & SURETY CO.	)	
OF AMERICA, LLC, WHOLESAL	)	
BUILDING PRODUCTS, INC., and	)	
NEW ALENCO WINDOWS, LTD.,	)	Bus. Ct. Div. 1
Defendants,	)	
	)	
WHOLESALE BUILDING PRODUCTS, INC.,	)	
Third Party Plaintiff,	)	
	)	
v.	)	
	)	
NEW ALENCO WINDOWS, LTD.,	)	
Third Party Defendant.	)	

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**ORDER DENYING DEFENDANT NEW ALENCO WINDOWS, LTD.'S**  
**MOTION TO TRANSFER VENUE**

The above styled matter is before the Court on Defendant New Alenco Windows, Ltd.'s ("New Alenco") Motion to Transfer Venue. Based on the dismissal from this action of all Fulton County resident Defendants, in the foregoing motion New Alenco asks the Court to transfer venue to Montgomery County, Georgia, the location where Defendant/Third Party Plaintiff Wholesale Building Products, Inc. (a now dissolved corporation) last maintained its registered agent. *See Ross v. Waters*, 332 Ga. App. 623, 625, 774 S.E.2d 195, 197 (2015) (holding that the proper venue in a suit against a dissolved corporation is the county where the dissolved corporation had its last registered office).

“Georgia follows the law of vanishing venue whereby ‘[i]f all defendants who reside in the county in which an action is pending are discharged from liability...a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper.’” Hankook Tire Co. v. White, 335 Ga. App. 453, 453–54, 781 S.E.2d 399, 399 (2016) (quoting O.C.G.A. § 9-10-31(d)). *See* Robinson v. Star Gas of Hawkinsville, Inc., 243 Ga. App. 112, 113, 533 S.E.2d 97, 98 (2000) (“[T]he trial court loses venue as to the nonresident defendant if no judgment is taken against the resident defendant, whether the resident is found not liable or dismissed with prejudice”).

However, “[i]t is well-settled that personal jurisdiction and venue are generally defenses that may be waived if not raised at the proper time.” AIM DMC One, LLC v. Frank Gates Serv. Co., 325 Ga. App. 440, 443, 754 S.E.2d 82, 84 (2013). Indeed, “the defense of improper venue may be waived by a nonresident defendant, and such a waiver may be express or implied.” *Id.* (citing Empire Forest Products v. Gillis, 184 Ga. App. 542, 543(1), 362 S.E.2d 77 (1987)). *See* Hodge v. Howes, 260 Ga. App. 107, 108, 578 S.E.2d 904, 905 (2003) (“In order for a defendant's acts to serve as a waiver of [a] previously asserted objection to jurisdiction, his acts or omissions to act, relied on, should be so manifestly consistent with and indicative of an intention to voluntarily relinquish a then known particular right or benefit, that no other reasonable explanation of his conduct is possible”) (citing Marsh v. Wright Mem. Mortuary, 197 Ga. App. 736–737(1), 399 S.E.2d 232 (1990)). *See, e.g.,* Hodge, 260 Ga. App. at 109 (finding defendant waived claim of lack of personal jurisdiction raised in motion to dismiss where he moved for summary judgment without reserving or reasserting jurisdictional defense and actively participated in case until final judgment was issued without asking the court to address his jurisdictional defense); Taylor v. Career Concepts, Inc., 184 Ga. App. 551, 362 S.E.2d 128

(1987) (nonresident defendant's failure to object to improper venue prior to entry of summary judgment against him waived defense that trial court lacked jurisdiction over him following entry of summary judgment for resident joint obligor).

Here, having considered the record, the Court finds New Alenco waived any defense of improper venue following dismissal of the Fulton County Defendants. In its original Complaint, Cambridge Swinerton, LLC (“CS”) asserted venue was proper in the Superior Court of Fulton County because Defendants Gilbane Building Company (“Gilbane”), Travelers Casualty and Surety Company of America (“Travelers”), and EP II, LLC (“EP”) maintained registered agents for service of process in Fulton County.<sup>1</sup> Pursuant to the parties’ consent motion, EP was dismissed without prejudice from this action on Feb. 22, 2017. On Jul. 17, 2018, CS and Gilbane formally announced a settlement of their claims and jointly moved to dismiss: CS’s claims and counterclaims against Gilbane without prejudice; CS’s claims and counterclaims against Traveler’s with prejudice; Gilbane’s claims and counterclaims against CS without prejudice; and Gilbane’s claims and counterclaims against Cambridge Builders & Contractors, LLC and Swinerton Builders, Inc. with prejudice. No party opposed CS and Gilbane’s motion, and the Joint Motion to Dismiss Claims and Parties was granted on Aug. 23, 2018.

Although New Alenco was on notice as of Jul. 17, 2018 that CS and Gilbane sought dismissal from this action of the remaining Fulton County Defendants, New Alenco did not object to the motion or amend its responsive pleading to assert a defense of improper venue. Instead, New Alenco continued to affirmatively avail itself of the jurisdiction of this Court including, *inter alia*: filing New Alenco Windows, Ltd.’s Motion for Reconsideration of the

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<sup>1</sup> See Original Complaint, ¶¶ 2-4, 7-8. New Alenco did not assert a defense of improper venue in its Answer to Wholesale’s Third-Party Complaint. It first raised the defense in the Answer of New Alenco Windows, Ltd.’s to Second Amended Complaint, filed Nov. 15, 2018 after the Court granted CS’s Motion for Leave to Amend the First Amended Complaint to Add Direct Claims Against Third-Party Defendant New Alenco Windows, Ltd.

Court's Order Granting Gilbane Building Company's Motion to Compel (Jul. 27, 2018); filing New Alenco Windows, Ltd.'s Response in Opposition to Gilbane Building Company's Submittal of Attorneys' Fees (filed Aug. 10, 2018); filing Third-Party Defendant New Alenco Windows, Ltd.'s Reply Brief in Support of Motion for Summary Judgment (filed Aug. 15, 2018); appearing before this Court on Aug. 24, 2018 and presenting oral argument on its Motion for Summary Judgment without asserting/reserving a defense of improper venue or alerting the Court of its intent to seek a transfer of venue in light of the dismissal of Gilbane and Travelers; filing a Stipulation Extending Time, wherein CS and New Alenco stipulated to an extension of time for New Alenco to respond to CS's Motion for Leave to Amend the First Amended Complaint to Add Direct Claims Against Third-Party Defendant New Alenco Windows, Ltd. (filed Sept. 14, 2018); filing Third-Party Defendant New Alenco Windows, Ltd.'s Response in Opposition to Plaintiff's Motion for Leave to Amend the First Amended Complaint to Add Direct Claims Against Third-Party Defendant New Alenco Windows, Ltd. (filed Sept. 21, 2018); filing Third-Party Defendant New Alenco Windows, Ltd.'s Reply Brief in Support of Motion for Reconsideration (filed Sept. 26, 2018); and requesting a certificate of immediate review of the Court's Order on Pending Motions and Order Granting Plaintiff Cambridge Swinerton, LLC's Motion for Leave to Amend the First Amended Complaint to Add Direct Claims Against Third-Party Defendant New Alenco Windows, Ltd. (Oct. 19, 2018); and presenting proposed amended case management deadlines to the Court (November 2018).

The Court finds New Alenco's actions affirmatively and manifestly indicate an intention to voluntarily relinquish any defense of improper venue following the dismissal of the Fulton County Defendants and demonstrate an intent and desire to avail itself of the jurisdiction of this Court. Accordingly, New Alenco's Motion to Transfer Venue is hereby DENIED.

SO ORDERED this 3<sup>rd</sup> day of January, 2019.

Alice D. Bonner  
ALICE D. BONNER, SENIOR JUDGE  
Fulton County Superior Court  
Business Case Division  
Atlanta Judicial Circuit

**Copies to all services contacts registered with eFileGA**

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