STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

SBA NETWORK SERVICES., f/k/a
COM NET CONSTRUCTION SERVICES, INC.,
Individually and as successor by
merger to SBA, INC. And SBA/ATLANTIC
TELCOM SERVICES, INC., f/k/a/
ATLANTIC TELCOM, INC.,

Plaintiffs,

v.

FRED A NUDD CORPORATION,
GEORGE R UNDERHILL, AND UNDERHILL
CONSULTING ENGINEER, P.C.,

Defendants.

DECISION AND ORDER

Index #51706

Defendants George R. Underhill and Underhill Consulting Engineer, P.C. (Underhill) have brought two motions. The first of those motions is a motion to dismiss or stay a portion of the within action against them pursuant to CPLR 327 (a) on the ground of forum non conveniens. Plaintiffs, while opposing that motion on its merits, contend that Underhill's laches and inexcusable delay in moving for relief precludes granting the motion. For the reasons that follow, the motion is denied.

Plaintiff commenced this action seeking damages arising from its purchase of approximately 74 cell phone towers from defendant Fred A. Nudd Corporation (Nudd) for installation in several states. Nudd designed and manufactured the towers. Underhill, as an engineer licensed in the states where the towers were to be located, reviewed the drawings for Nudd to ensure that the towers

would comply the design specifications. Upon reviewing the drawings of a tower to be located in a particular state, Underhill stamped those drawings as a professional engineer licensed in that state. The towers were installed by plaintiff in New York, as well as Connecticut, Florida, Georgia, Massachusetts, North Carolina, New Hampshire, Ohio, South Carolina, Pennsylvania and Wisconsin. Only seven of the towers, however, were installed in New York.

The complaint alleges that the towers were deficient in that they did not meet the design specifications "regarding the structural integrity of the Towers for a specific antenna design load."[1] In response to Underhill's interrogatories, plaintiff additionally alleged that "the monopoles did not meet ... the EIA/TIA-222-F standard for wind speed and radial ice."[2] While stating several causes of action against Nudd, the complaint states a single cause of action against Underhill for negligently certifying the drawings.

Underhill's motion is directed at so much of the complaint as it relates to the towers located outside New York State. Underhill contends that, as only seven of the towers are located in New York, the court will be required to apply the respective

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[1]Specific antenna design loads were set forth in each contract.

[2]TIA/EIA-22-F is a uniform standard across the United States. Each contract specifically references that standard.

laws of each of the other states where the towers are located in order to determine whether Underhill negligently certified the towers as meeting the building codes of those states. Underhill additionally contends that there are other potential conflict of law questions, involving issues such as privity, joint and several liability, and measure of damages. Underhill therefore urges the court to exercise its discretion under CPLR 327(a) to grant the relief requested in order to avoid the determination of claims that have no significant nexus to this State.

CPLR 327(a) provides that: "When the court finds in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." This provision codifies the common law doctrine of forum non conveniens and is recognized as placing "the burden on the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere" (*Grizzle v The Hertz Corp.*, 305 AD2d 311, 312). "Among the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the

availability of an alternative forum" (*id* at 312). The laches and inexcusable delay of a defendant in bringing a motion pursuant to CPLR 327(a), however, in itself, provides a basis to deny the motion (*see Corines v Dobson,* 135 AD2d 390, 392).

The case in *Corines* had been pending in New York for 18 months, during which discovery and pretrial conferences took place. The note of issue and certificate of readiness had been filed without objection and the matter had been placed on the trial calendar before the defendant moved to dismiss the action on forum non conveniens grounds. On appeal, it was held that: "Under these circumstances, even if warranted, dismissal for forum non conveniens should not have been granted. The defendant having taken advantage of the resources of the New York Courts should not, at such late point in time, be allowed to remove the action" (*id* at 393). Indeed, it has been held that a defendant's "laches and inexcusable delay in moving for relief *preclude[s]* dismissal on forum non conveniens grounds" (emphasis added) (*Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin, P.C.,* 231 AD2d 1, 5; *see Natl. Union Fire Ins. Co. of Pittsburgh, PA. v Worley,* 257 AD2d 228, 232; *Bock v Rockwell Mfg. Co.,* 151 AD2d 629, 631).

Here, it is undisputed that this action has been pending since June 2002, and that twice the matter has been scheduled for trial, most recently for February 15, 2005. Venue was originally

in Monroe County, subsequently transferred to Wayne County, and thereafter to the Seventh Judicial District Commercial Division. Extensive discovery has been completed, plaintiff having provided more than 9,000 pages of documents in response to defendants' demands. A referee was appointed on stipulation by the parties to oversee remaining discovery demands and that referee has directed that documentary discovery be completed by December 3, 2004, and that depositions be completed by the end of January 2005. At this point in the process, Underhill cannot claim that New York is an inconvenient forum.

In any event, consideration of the other relevant factors leads to the conclusion that Underhill has not sustained its burden on its motion. Although plaintiff is not a New York corporation, the defendants are residents of New York and New York is where the contracts were drafted, the towers were designed and manufactured, Underhill performed its work and most of the witnesses reside. Contrary to Underhill's contention, the building codes of the applicable states have little, if any, relevance to the issues as framed by the complaint and plaintiff's responses to Underhill's interrogatories. The underlying question with reference to Underhill is whether it properly certified the tower plans in light of the required antenna design loads and the TIA/EIA-22-F standard. Furthermore, Underhill's motion has not been joined by Nudd and

thus this matter will proceed in New York regardless of the disposition of this motion.

Underhill cites potential choice of law problems, but those problems are "not a determinative factor" (*Bock*, 151 AD2d at 630). A court should "'not be overly eager to dismiss an action on that ground when [as here] other factors militate against dismissal'" (*id* at 630, quoting *Temple v Temple*, 97 AD2d 757, 758).

The other motion brought by Underhill seeks an order pursuant to CPLR 3108 and 3111 directing the issuance of an open commission to enable Underhill to depose non-party witnesses in four states. The witnesses include various individuals allegedly hired by plaintiff to analyze the towers. Although plaintiff does not oppose that relief in principle, it contends that such depositions are unduly burdensome and that it would be more cost effective to use interrogatories. The motion is granted, subject to such protective orders as are applied for and granted by the referee, inasmuch as the parties have stipulated to the appointment of a referee to supervise disclosure and "[a]ll motions or applications made under this article shall be returnable before [him]" (CPLR 3104 [c]).

CONCLUSION

The motion to dismiss or stay a portion of the action pursuant to CPLR 327(a) is denied. The motion for an order

pursuant to CPLR 3108 and 3111 directing the issuance of an open commission is granted subject to the supervision of the referee.

At oral argument, the parties agreed to an extension of the scheduling order. The following dates shall be adhered to:

(1) Complete depositions of the parties, by February 11, 2005.

(2) Complete all depositions, except those contemplated by the open commissions, by March 15, 2005. Complete the depositions pursuant to the open commissions, by May 1, 2005.

(3) File Note of Issue by May 15, 2005.

(4) Day Certain for Trial: September 12, 2005, at 9:30 am.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 25, 2005
Rochester, New York