

QBE Ins. v M.C.A.A.

2007 NY Slip Op 30553(U)

March 29, 2007

Supreme Court, New York County

Docket Number: 0602091/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 602091/2006

QBE INSUFANCE

vs

M.C.A.A.

Sequence Number : 003

CHANGE VENUE

INDEX NO. _____

MOTION DATE 3/19/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this declaratory judgment action, defendant M.C.A.A. (d/b/a "The Barracks") (hereinafter, "The Barracks") moves pursuant to CPLR 510(1) and 511(a) and (b) to change the place of venue of this action from New York County to Suffolk County.

Plaintiff, QBE Insurance Corporation ("plaintiff"), opposes the motion, and cross moves for an order pursuant to CPLR 510(3) retaining venue in New York County.

Background

The Barracks is a tavern located in Suffolk County, New York. In 2006, an action was commenced against The Barracks, alleging that as a result of decedent Jillian McLees becoming intoxicated at The Barracks in violation of the "Dram Shop Act," she was involved in a fatal, one car accident in Suffolk County (the "underlying action"). In connection with a certain commercial liability policy (the "Policy"), plaintiff appointed counsel to defend The Barracks in the underlying action, pursuant to a reservation of plaintiff's right to withdraw from coverage after the determination of the underlying action.

Dated: _____

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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION [* 1] 003
Check if appropriate: DO NOT POST REFERENCE

Plaintiff subsequently commenced the instant action seeking, *inter alia*, a declaration that any punitive damages recovered against The Barracks in the underlying action are uninsurable and not covered by the Policy.

Instant Motion

Defendant contends that on January 11, 2007, The Barracks served a demand for change of venue of this action to Suffolk County. Plaintiff did not consent to the change of venue within the requisite time period, but served an Affidavit of Proper County, rejecting the demand on the ground that plaintiff is a foreign corporation with its principal place of business located in the City, County and State of New York.

Defendant argues that New York County is improper because defendants in the underlying action do not reside in New York County and all defendants are residents of Suffolk County. Further, the circumstances underlying the claim took place in Suffolk County; the witnesses are located in Suffolk County; and the insured business is located in Suffolk County. Defendant also contends that the complaint alleges that material misrepresentations were made by the insured in the application for commercial insurance. Both the broker who obtained the insurance application of the insured and who assisted the insured in filing the application with the plaintiff, and the controlling agent "on the account," are located in Suffolk County. The only basis for venue in New York County is plaintiff's place of business. Since every other fact and issue that revolves around the complaint deals with parties located in Suffolk County, including non-parties, change of venue under section 511(a) and (b) for the convenience of material witnesses is warranted.

In opposition, plaintiff argues that as a motion to change venue for the convenience of material witnesses should be brought pursuant to CPLR 510(3), defendant's motion to change venue pursuant to CPLR 510(1) is erroneous. Plaintiff claims that the demand to change venue was untimely, in that although defendant cited no grounds for the demand pursuant to CPLR 511(a) and (b), the demand stated that the county designated was improper. Thus, said demand was essentially one pursuant to CPLR 510(1), which must be served prior to or with defendant's answer. Also, defendant's motion, which was made beyond the proscribed 15 days after the demand was served, is untimely.

In any event, argues plaintiff, defendant failed to make the requisite showing of how the two possible witnesses identified by defendant will be inconvenienced, that they have been contacted and are willing to testify, the nature of their anticipated testimony, and how such testimony is material.

On the other hand, in support of retaining venue in New York County, plaintiff contends that its primary place of business is located at 88 Pine Street, New York, New York, and submits a New York State Insurance Department website page for plaintiff, which lists such location as plaintiff's address. Plaintiff contends that it intends to call witnesses who either live and/or work in New Jersey, for whom New York County is more convenient. These witnesses are: (1) James Drummond and Diana Clydesdale, plaintiff's underwriters, who are available and willing to testify about decisions made regarding the subject policy and application for insurance; (2) George Stickle, its claims manager, who is available and willing to testify about the material misrepresentations of the application; (3) Lisa Fellows, the underwriter of the first policy issued

to The Barracks, who is willing and available to testify about The Barrack's original application; and (4) an underwriting officer of plaintiff's New York office, who will testify about plaintiff's underwriting guidelines for the relevant time periods. Plaintiff also submits a series of maps showing the relative distances between the locations of its material witnesses. Thus, plaintiff argues, the material witnesses it intends to call at trial would be greatly inconvenienced if venue were changed to Suffolk County, while the two witnesses The Barracks intends to call would not be so inconvenienced.

In reply, defendant claims that the witnesses in support of plaintiff's claim do not work or reside in New York; the underwriters are located in Pennsylvania and the broker who wrote the Policy is in Suffolk County. Further, venue should be changed to Suffolk County to avoid the loss of material non-party witnesses, who have no stake in the action, that can claim hardship in traveling four counties to the place of trial.

In response, plaintiff maintains that its principle place of business is located in New York, New York.

Analysis

CPLR 510(1) provides that the "court, upon motion, may change the place of trial of an action where: the county designated for that purpose is not a proper county. . . ."

Pursuant to CPLR 503, venue based on residence is proscribed as follows: "Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced" CPLR 503(c) mandates that a foreign corporation authorized to do business in New York shall be deemed to be a resident of "county in which its principal office is located." A corporation is a resident of the county in which its principal office is located, despite its maintenance of an office or facility in another county (CPLR 503(c)). As it is uncontested that plaintiff's principal place of business is located in the County of New York, New York County is a proper venue for this action. Thus, to the degree defendant's motion relies upon CPLR 510(1) to change venue of this action to Suffolk County, such motion is denied.

With respect to defendant's reliance on CPLR 511(a), such section states as follows:

A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served *with the answer or before the answer is served*. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.
(Emphasis added).

It is uncontested that defendant's answer was served on August 17, 2006, and that the defendant's demand to change venue was served well after this date in January 2007. Therefore, defendant's demand is untimely pursuant to CPLR 511(a). Thus, to the extent defendant's motion rests upon CPLR 511(a), such motion is denied.

Furthermore, CPLR 511(b) states as follows:

(b) The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter *the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant.* Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper. (Emphasis added).

It is uncontested that plaintiff did not serve a written consent to change the place of trial to Suffolk County, and that defendant did not serve its motion within the proscribed 15-day period after the demand was served. Thus, the instant motion is also untimely.

In any event, defendant's motion to change venue pursuant to CPLR 510(3) is unwarranted. It is well settled that a party seeking a discretionary change of venue pursuant to CPLR 510(3) bears the burden of demonstrating that a change is appropriate and, generally, must support the application with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change (*see Stainbrook v Colleges of the Senecas*, 237 AD2d 865, 656 NYS2d 946 [1997]; *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 622 NYS2d 284 [1995]; *Andros v Roderick*, 162 AD2d 813, 557 NYS2d 722 [1990]). To obtain a discretionary change of venue under CPLR 510(3), "the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue" (*Rodriguez v Port Auth.*, 293 AD2d 325, 326, 740 NYS2d 323 [1st Dept 2002], *citing Cardona v Aggressive Heating*, 180 AD2d 572, 580 NYS2d 285). Defendant has failed to meet this burden.

At the outset, the Court notes that the facts and circumstances of the underlying Dram Shop action, as well as the convenience of witnesses in that action, are wholly irrelevant to the instant motion. Instead, the convenience of the material witnesses to the instant litigation, which concerns the subject insurance policy, is at issue in this motion. In this regard, defendant has failed to submit any affidavits of the "broker" or "controlling agent" indicating, their availability, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue. Thus, defendant failed to establish its initial burden on the motion.

Based on the foregoing, defendant failed to establish entitlement to a change the place of venue from New York County to Suffolk County under CPLR 510(1) or 511 (a) and (b).¹

¹ The Court also notes that the submissions indicate that plaintiff's witnesses will experience more difficulty and hardship in traveling from New Jersey to Suffolk County, than defendant's witnesses will in traveling from Suffolk County to New York County.

Accordingly, it is hereby

ORDERED that the motion by defendant M.C.A.A. (d/b/a "The Barracks") pursuant to CPLR 510(1) and 511(a) and (b) to change the place of venue from New York County to Suffolk County is denied; and it is further

ORDERED that the cross-motion by plaintiff, QBE Insurance Corporation for an order pursuant to CPLR 510(3) retaining venue in New York County is granted; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated 3/29/07

ENTER:  , J.S.C.

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HON. CAROL EDMED
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REFERENCE