

Verizon N.Y., Inc. v Keyspan Gas E. Corp.

2007 NY Slip Op 31735(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0118833/2006

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 : 118833/2006

VERIZON NEW YORK, INC.

vs

KEYSPAN GAS EAST CORP.

Sequence Number : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE 6/19/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Hawkeye Construction, LLC., which was joined by defendants Keyspan Gas East Corporation and Keyspan Energy Corporation, is denied; and it is further

ORDERED that the parties shall enter into a preliminary conference forthwith; and it is further

ORDERED that defendant Hawkeye serve a copy of this order and decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/19/07

[Handwritten Signature]

J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
VERIZON NEW YORK, INC.,

Plaintiff,

Index No. 118833-2006

-against-

DECISION/ORDER

KEYSPAN GAS EAST CORPORATION,
KEYSPAN ENERGY CORPORATION,
HAWKEYE CONSTRUCTION, LLC, AND
OCEAN ELECTRIC CORPORATION,

Defendants.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
JUN 21 2007

MEMORANDUM DECISION

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff, Verizon New York, Inc., commenced this action to recover expenses it incurred in repairing underground cables located on Hempstead Turnpike in Hempstead, New York. According to the complaint, defendants Keyspan Gas East Corporation ("Keyspan Gas"), Keyspan Energy Corporation ("Keyspan Energy"), Hawkeye Construction, LLC. ("Hawkeye") and Ocean Electric Corporation ("Ocean Electric"). Plaintiff alleges that defendants owned and/or operated equipment in a manner which caused severe damage to plaintiff's telecommunication cables along Route 24 in Nassau County.

Hawkeye, and Keyspan Gas and Keyspan Electric (the "Keyspan defendants") now move to change the venue of this property damage action from New York County to Nassau County, as of right pursuant to CPLR 501 [1] or in the alternative, for the convenience of material witnesses pursuant to CPLR 501 [3]. Hawkeye argues that plaintiff's assertion that plaintiff's principal place of business is the basis of venue in this action is misplaced. Hawkeye contends that the principal place of business for both Hawkeye and Ocean Electric is in Suffolk County. Further, plaintiff's own witness, Robert T. Lembo, is a Local Manager who works out of plaintiff's PPM Air Compressor Unit in Nassau County, and this unit is responsible for the investigation of the damage and its repairs. Hawkeye believes that Mr. Lembo had conversations with Keyspan employee, Patrick Boyle, and that each will testify about his observations of the markings and

drilling and damages allegedly incurred. Therefore, plaintiff has more than one principal place of business “and it should be the place of business responsible for the repairs for which it seeks recovery.” Since venue is improper, plaintiff forfeited its right to select the venue of this action and Hawkeye is entitled to choose the place of trial.

Furthermore, change of venue of this action to Nassau County, where the action arose, would be more convenient for the witnesses to travel.

The Keyspan defendants adopt Hawkeye’s motion, adding that their principal place of business is also located in Nassau County. Keyspan Gas and Keyspan Electric contend that the incident and most of the witnesses in this action are located in Nassau or Suffolk County. Thus, as Verizon’s principal place of business is the only connection to New York County, it is insufficient in and of itself to base venue in New York County.

Plaintiff opposes the motion, arguing that no aspect of its operations in Nassau County could rationally suggest that its function is meant to serve as plaintiff’s principal office. Since plaintiff’s principal office is located in New York County, CPLR 510[3] is inapplicable. Furthermore, defendants failed to meet the requirements under CPLR 510 [3] to establish the inconvenience of material witnesses.

Analysis

It is settled that upon a motion by defendant to change said venue defendant bears the burden to establish that the plaintiff’s choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v Pahlavi*, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, cert. denied 469 U.S. 1108, 105 S.Ct. 783 [1984]; *Clark v Michael Ahem Production Service, Inc.* 181 A.D.2d 514, 580 N.Y.S.2d 360 [1st Dept.1993]; *Bradley v Plaisted*, 277 A.D. 620, 102 N.Y.S.2d 295 [3d Dept.1951], leave denied, 278 A.D. 127, 103 N.Y.S.2d 661). In addition, it is settled that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed” (see, *Gulf Oil Corp. v Gilbert*, 330 U.S. 501, 508 [1947]; *Waterways Limited v Barclays Bank, PLC*, 174 A.D.2d 324 327, 571 N.Y.S.2d

208 [1st Dept.1991]; *Temple v Temple*, 97 A.D.2d 757, 468 N.Y.S.2d 388 [2d Dept 1983]).

CPLR 510 [1]

A party seeking to change venue of an action pursuant to CPLR 510 [1] bears the burden of establishing that “the county designated for that purpose is not a proper county” in that plaintiff has failed to comply with the rules specified in CPLR 501 and 503-508 or some other venue-regulating statute (McKinney's Consolidated Laws of New York Annotated). CPLR § 503, which provides for venue based on residence, for example, states that “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; or, if none of the parties then resided in the state, in any county designated by the plaintiff. *A party resident in more than one county shall be deemed a resident of each such county*” (emphasis added). CPLR 503 [c] defines the residence of a corporation: “A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located” The “principal office” of a domestic corporation is determined by the designation in its certificate of incorporation (*see Velasquez v Delaware River Valley Lease Corp.*, 18 A.D.3d 359, 360, 795 N.Y.S.2d 221, 222 [1st Dept 2005] [“The designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue”]; *see also Lombardi Assoc. Ltd. v Champion Ambulette Serv. Inc.*, 270 A.D.2d 775, 704 N.Y.S.2d 370 [3d Dept 2000], *citing Panco Dev. Corp. v Platek*, 262 A.D.2d 292, 691 N.Y.S.2d 545 [2d Dept 1999], *Cintas Corp. v Ralph Pontiac-Honda*, 256 A.D.2d 1094, 684 N.Y.S.2d 808 [4th Dept 1998], *Conway v Gateway Assocs.*, 166 A.D.2d 388, 561 N.Y.S.2d 190 [1st Dept 1990]).

Defendant's contention that plaintiff maintains more than one principal place of business and “that part of plaintiff's business that was responsible for the repairs is located in Nassau County, and not New York County” is wholly insufficient to establish that plaintiff's basis of venue is improper. Defendant failed to submit the certificate of incorporation, or any

documentary evidence indicating that the principal office of plaintiff is located in Nassau County. Curiously, the only evidence submitted in support of Hawkeye's motion is an affidavit of David Hoffberg, counsel for plaintiff, wherein he attests that plaintiff filed with the NYS Department of State, Division of Corporations "with its principal executive Office located at 140 West Street, 29th Floor, New York, New York 10007." Notably, plaintiff's "Specialist in the Claims Department" also submitted an affidavit attesting that plaintiff's principal place of business according to the New York State Division of Corporations is located in New York County. Yet, Hawkeye failed to submit any countervailing proof establishing that New York County is not the principal place of plaintiff's business. Moreover, defendant failed to point to any caselaw permitting this Court to consider the location of one of plaintiff's operation facilities as a principal office of a domestic corporation. And, even accepting defendant's argument that the part of plaintiff's business responsible for making the repairs at issue is "one principal place" of plaintiff's business (see defendant's motion ¶ 16), such contention would not render New York County improper as a matter of law, since CPLR 503 provides that a party "resident in more than one county shall be deemed a resident of each such county."

Therefore, since plaintiff is deemed a resident of the county in which its principal place of business is located (CPLR § 503 [c]), *to wit*: New York County, the motion to change venue on the ground of CPLR 501 [3] is denied.

CPLR 510 [3]

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 A.D.2d 865, 656 N.Y.S.2d 946 [1997]; *O'Brien v Vassar Bros. Hosp.*, 207 A.D.2d 169, 622 N.Y.S.2d 284 [1995]; *Andros v Roderick*, 162 A.D.2d 813, 557 N.Y.S.2d 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 A.D.2d 325, 326, 740 N.Y.S.2d 323, *citing Cardona v Aggressive Heating*, 180 A.D.2d 572, 580 N.Y.S.2d 285).

The submissions fail to include affidavits from *any* witness detailing the nature of his or her testimony, his or her ability and willingness to testify in this matter, that such testimony is material to the prosecution or defense of this action, and the manner in which any such witness would be inconvenienced if called to testify in this matter in New York County (*see e.g., Byrne v Ryder Truck Rental, Inc.*, 292 A.D.2d 326, 741 N.Y.S.2d 18 [1st Dept 2002]; *Sanchez v Project Adventure, Inc.*, 260 A.D.2d 151, 687 N.Y.S.2d 359 [1st Dept 1999] [holding that the grant of the school district's motion for a change of venue was an improvident exercise of discretion where “school district failed to demonstrate that *non-party* witnesses would be inconvenienced since it relied solely on the affidavits of employees whose convenience is entitled to little weight”]).

Therefore, as plaintiff’s motion to change venue pursuant to CPLR 510[3] is denied.

Based on the foregoing, it is hereby

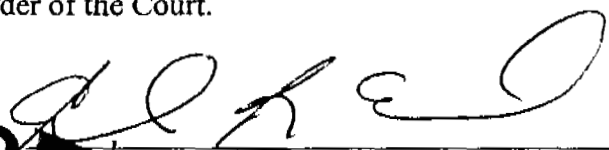
ORDERED that the motion by defendant Hawkeye Construction, LLC., which was joined by defendants Keyspan Gas East Corporation and Keyspan Energy Corporation, is denied; and it is further

ORDERED that the parties shall enter into a preliminary conference forthwith; and it is further

ORDERED that defendant Hawkeye serve a copy of this order and decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 19, 2007

FILED


Carol Robinson Edmead, J.S.C.

FILED
JUN 21 2007
COUNTY CLERK'S OFFICE
NEW YORK