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

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Index Number : 122111/1997

PYANOWSKI, ROBERT

VS.

AC & S INC. (CKEATWELL)

SEQUENCE NUMBER : 001

CHANGE VENUE

INDEX NO. 122111/97

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following 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

FILED

JUL 26 2011

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided as per the memo decision dated 7.22.11

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

Dated: 7.22.11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ROBERT PYANOWSKI,

Plaintiff,

-against-

A.O. SMITH WATER PRODUCTS Co., et al.,

Defendants.

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Index No. 122111/97
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Defendant Treadwell Corporation's ("Treadwell" or "Defendant") motion, pursuant to CPLR 511, to change the venue of this asbestos-related personal injury action from New York County to Erie County, on the ground that New York County is not a proper county for venue of this action is denied.

This action was commenced by filing a summons and complaint in New York County on November 24, 1997. Plaintiff Robert Pyanowski designated New York County as the venue based on the principal place of business of several of the defendants named therein. Plaintiff died on October 14, 2004 before he could be deposed. In or about April of 2010, interrogatory responses were served in this case which indicate that Mr. Pyanowski's exposure occurred entirely outside of New York City. On December 14, 2010, Mr. Pyanowski's co-worker and brother-in-law, Mr. Eugene William Leo, was produced for deposition. He testified that Mr. Pyanowski was exposed to several asbestos-containing products over the course of his career as a steelworker and bricklayer in numerous upstate New York steel plants. Specifically, he testified that Mr. Pyanowski spent a large portion of his career at Bethlehem Steel in Erie County, New York.

Treadwell now moves, pursuant to CPLR 511, to change the venue of this action from New York County to Erie County on the ground that Mr. Pyanowski had no contacts here. Plaintiff's opposition asserts that Treadwell's motion is procedurally defective and without merit.

A motion for change of venue based on a plaintiff's choice of an improper county is premised on the plaintiff's failure to comply with the choice of venue rules set forth in Art. 500 of the CPLR. *See, e.g.* CPLR 510(1), 511. As a prerequisite to such a motion, the defendant must, with or before service of its answer, serve a written demand that venue be transferred to a county it specifies as proper. CPLR 511(a), (b); *see also* Alexander, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C511:1, C511:2, at 251-55. Ordinarily, should a defendant fail to comply in any way with the demand procedure of CPLR 511, that defendant forfeits the right to seek a change in venue. *See, e.g.*, *Singh v Becher*, 249 AD2d 154 [1st Dept 1998]; *see also Terezakis v Goldstein*, 168 Misc.2d 298, 302-03 [Sup. Ct. NY Co. Mar. 27, 1996].

New York City Asbestos Litigation ("NYCAL") defendants, however, are generally unaware of where a plaintiff was exposed until they receive such plaintiff's interrogatory responses. Pursuant to the September 20, 1996 Case Management Order, as amended February 19, 2003 ("CMO")[1], which governs all NYCAL cases, the interrogatory responses in this case were not served upon Treadwell until April of 2010. Treadwell could not have fully anticipated the locations of Mr. Pyanowski's exposure until that time, thus relieving it temporarily from CPLR 511's demand requirement.

Nevertheless, I find that Treadwell's motion is barred by the doctrine of laches. At the very latest, Treadwell was aware in April of 2010, when plaintiff's interrogatory responses were served

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[1] The CMO was most recently amended on May 26, 2011, prior to the filing of this motion.

upon defense counsel, that Mr. Pyanowski had not alleged exposure to asbestos in any of New York City's five boroughs. Defendant's demand was not made, nor was this motion filed, until March of 2011, almost one year later. Treadwell offers no cogent reason why it sat on its rights for so long. *See Lawrence v Williams*, 158 AD2d 369 [1st Dept 1990]; *Boriskin v Long Island Jewish-Hillside Medical Center, South Shore Div.*, 85 AD2d 523 [1st Dept 1981].

In addition, Treadwell's substantive argument against plaintiff's choice of venue in New York City is without merit. Choice of venue does not depend solely upon Mr. Pyanowski's personal contacts with the designated county. CPLR 503(a) provides, in relevant part, that "the place of trial shall be in the county in which one of the parties resided when it was commenced. . . ." Pursuant to CPLR 503(c), "[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. . . ." *See also* CPLR 509. In this regard, all four Appellate Divisions of this state have uniformly interpreted "principal office" to mean the foreign corporation's principal place of business as specified in its certificate of authority to do business filed with the New York Secretary of State. *See Conway v Gateway Assoc.*, 166 AD2d 388, 389 [1st Dept 1990]; *Panco Dev. Corp. v Platek*, 262 AD2d 292, 293 [2d Dept 1999]; *Lombardi Assocs. v Champion Ambulette Serv.*, 270 AD2d 775, 776 [3d Dept 2000]; *Cintas Corp. v Ralph Pontiac-Honda*, 256 AD2d 1094, 1095 [4th Dept 1998].

Significantly, Treadwell has offered no evidence with regard to the residence of any of the defendants in this case. In this respect, Treadwell has failed to establish its entitlement to a change in venue on the merits. In any event, plaintiff's documentary evidence shows that at least one defendant, namely the CBS Corporation, lists New York County as its principal place of business on its certificate of authority to do business. Under CPLR 503(a), this is sufficient to support plaintiff's designation of New York County as the venue of this action.

Treadwell argues, albeit for the first time in reply, that it would be inconvenient for both plaintiff's representatives and Treadwell to appear in New York City given that plaintiff lived and worked in Erie County and Treadwell maintains its principal place of business in Connecticut. However, where a discretionary change of venue is sought based on witness inconvenience[2], the moving party bears the burden of making a detailed evidentiary showing that the convenience of material witnesses would be better served by the change in venue. *See Hernandez v Rodriguez*, 5 AD3d 269, 270 [1st Dept 2004]. This showing must include: (1) the identity of the proposed witnesses; (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced; (3) that the witnesses have been contacted and are available and willing to testify for the movant; and (4) the nature of the anticipated testimony and the manner in which it is material to the issues raised in the case. *Cardona v Aggressive Heating*, 180 AD2d 572 [1st Dept 1992]. Such a detailed showing has not been made here. To the contrary, Treadwell's assertions are conclusory at best.

Accordingly, it is hereby

ORDERED that Treadwell Corporation's motion to change the venue of this action from New York County to Erie County is denied.

This constitutes the decision and order of the court.

DATED: July 22, 2011

SHERRY KLEIN HEITLER
J.S.C.

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[2] In its moving papers, defendant argues only that New York County is an improper venue for this action. Not until the reply brief did defendant request a discretionary change of venue based on the convenience or lack thereof of the material witnesses herein. *See* CPLR 510(3).