

Windhaven Inc. v QBE Ins. Corp.

2012 NY Slip Op 33108(U)

December 7, 2012

Sup Ct, New York County

Docket Number: 105699/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

WINDHAVEN, INC.

INDEX NO. 105699/2010

-v-

MOTION DATE _____

QBE INSURANCE CORP.

MOTION SEQ. NO. 001

The following papers, numbered 1 to 6, were read on this motion to/for change venue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2, 6

Replying Affidavits _____ | No(s). 3-5

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies defendant's motion to change the venue of this action pursuant to the accompanying decision. C.P.L.R. § 503(3). The parties are to appear for a pretrial conference 1/24/13 at 3:30 p.m.

FILED
JAN 08 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/7/12

Lucy Billings, J.S.C.

LUCY BILLINGS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

WINDHAVEN INC. d/b/a WINDHAVEN PUB,
Plaintiff

Index No. 105699/2010

- against -

DECISION AND ORDER

QBE INSURANCE CORPORATION,
Defendant

-----x
-----x

QBE INSURANCE CORPORATION,
Counterclaim Plaintiff

- against -

WINDHAVEN INC. d/b/a WINDHAVEN PUB and
JOHN GANNON, JR.,

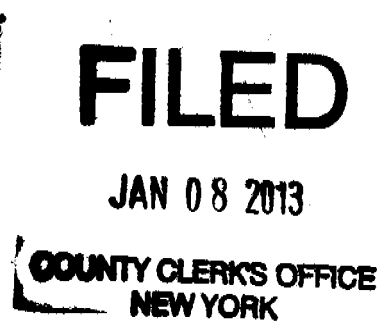
Counterclaim Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Through this action, a pub in Greene County, New York, seeks insurance coverage from its insurer for a fire at the pub June 4, 2008. Defendant insurer disclaimed coverage on the ground that the pub owner or his agent intentionally caused the fire. Acknowledging that New York County is a permissible choice of venue by plaintiff, as this county is defendant's principal place of business, C.P.L.R. § 503(a) and (c), defendant moves to change the venue of this action to Greene County to promote the convenience of material witnesses. C.P.L.R. §§ 510(3), 511.



II. DEFENDANT'S SHOWING REGARDING THE CONVENIENCE OF MATERIAL WITNESSES

The evidentiary basis for a more convenient venue must include the identities, addresses, and occupations of each expected nonparty witness; the detailed facts to which these witnesses will testify, to show they are necessary; and a showing that they are willing to testify, but will be inconvenienced significantly unless the court permits the requested venue.

Rosen v. Uptown Gen. Contr., Inc., 72 A.D.3d 619, 620 (1st Dep't 2010); Krochta v. On Time Delivery Serv., Inc., 62 A.D.3d 579, 580-81 (1st Dep't 2009); Parker v. Ferraro, 61 A.D.3d 470 (1st Dep't 2009); Margolis v. United Parcel Serv., Inc., 57 A.D.3d 371, 372 (1st Dep't 2008). Neither the parties' convenience nor the place of injury is a factor in changing venue. C.P.L.R. §§ 503, 510; Parker v. Ferraro, 61 A.D.3d 470; Addo v. Melnick, 61 A.D.3d 453 (1st Dep't 2009); Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Bakiriddin v. Idi Constr. Co., Inc., 45 A.D.3d 300, 301 (1st Dep't 2007).

Defendant's strongest justification for Greene County is through the evidentiary requisites specific to three witnesses' convenience. Defendant first identifies Investigator Joseph Caputo, of the New York State Police, who is stationed in Greene County. He investigated the fire's origin by interviewing the pub owner and counterclaim defendant John Gannon Jr. and other unidentified persons and by collecting and testing physical evidence from the fire scene. Defendant fails to indicate any basis, however, for the admissibility of the hearsay evidence

gathered from the interviews. Caputo is willing to present his admissible testimony, but claims unspecified disruption to his family and potential disruption to the State Police because he would be unable to investigate any fire while he travelled to and from and testified in New York County. He does not explain why a responsibility to testify in this action would be any more inconvenient for his family than when he is spending time on his job responsibilities, particularly when his testimony is consistent with those job duties.

Second, defendant identifies David Sherman Sr., who resides in Greene County and is Chief of the Hensonville Hose Company that responded to the fire. He directed the firefighting and investigated the fire's origin. He does not specify his investigation methods, however, so the extent to which his testimony may be admissible remains uncertain. Like Caputo, Chief Sherman is willing to present his admissible testimony, but claims unspecified disruption to his family and personal business and potential risk to Greene County because he would be unable to direct the Hensonville Hose Company's response to any fire while he travelled to and from and testified in New York County. He does not explain why a responsibility to testify in this action would be any more inconvenient for his family or personal business than when he is spending time on his responsibilities as Chief of the Hensonville Hose Company.

Third, defendant identifies Police Officer David Sherman Jr., of the Catskill and Windham Police Departments, who resides

in Greene County as well, is a member of the Hensonville Hose Company, assisted in combatting the fire, and observed Gannon at the pub after the fire. Although Officer Sherman is willing to testify in this action, defendant does not specify his anticipated testimony. Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Ford v. Chapman, 25 A.D.3d 339, 340 (1st Dep't 2006); Rodriguez-Lebron v. Sunoco, Inc., 18 A.D.3d 275, 276 (1st Dep't 2005); Davis v. Firman, 53 A.D.3d 1101, 1103 (4th Dep't 2008). If his testimony is in fact necessary, he also claims unspecified disruption to his family and finances and potential risk to Greene County because, while travelling to and from and testifying in New York County, he would be unable to assist if an emergency required his police assistance or a fire required his firefighting assistance with the Hensonville Hose Company. He does not explain why, if his testimony is necessary, a responsibility to testify in this action would be any more disruptive for his family, than when he is spending time on his police or firefighting responsibilities, or for his finances, than when he is not working for reasons other than testifying.

Defendant identifies four additional nonparty witnesses, but offers no showing that any of them is willing to testify or will be inconvenienced significantly unless the court permits the requested venue. Margolis v. United Parcel Serv., Inc., 57 A.D.3d at 372; Timan v. Sayegh, 49 A.D.3d 274, 275 (1st Dep't 2008); Gissen v. Boy Scouts of Am., 26 A.D.3d 289, 291 (1st Dep't 2006); Rodriguez-Lebron v. Sunoco, Inc., 18 A.D.3d at 276. They include

Gannon's son, his longtime employees, his romantic partner, and her sister, however, all of whom likely would testify willingly in an action by Gannon's pub in its chosen venue. Insofar as unidentified witnesses may be necessary to authenticate business records, those witnesses may do so pursuant to C.P.L.R. § 3122-a, without appearing at the trial. Plaintiff points out, moreover, that disclosure has identified another 40 witnesses, each of whom may willingly provide specific necessary testimony in New York County without inconvenience, including the insurance broker, whose office is in Westchester County. See O'Sullivan v. Hahn, 196 A.D.2d 780 (1st Dep't 1993); Professional Veh. Leasing v. Continuing Dev. Servs., 275 A.D.2d 313, 314 (2d Dep't 2000). Other than acknowledging that a third party administrator in New Jersey evaluated and otherwise handled plaintiff's insurance claim, for whom New York County is likely more convenient than Greene County, defendant overlooks those other witnesses.

Unless plaintiff's original choice of venue was without adequate basis, defendant may not now choose an alternative to plaintiff's chosen venue simply based on the place of injury and the assumption that material witnesses will reside and work near that place and suffer hardship travelling to New York County. C.P.L.R. §§ 509, 510(1), 511(a); Rosen v. Uptown Gen. Contr., Inc., 72 A.D.3d at 620; Krochta v. On Time Delivery Serv., Inc., 62 A.D.3d at 580; Parker v. Ferraro, 61 A.D.3d 470; Addo v. Melnick, 61 A.D.3d 453. See Timan v. Sayegh, 49 A.D.3d at 275; Pittman v. Maher, 202 A.D.2d 172, 176-77 (1st Dep't 1994);

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Cavazzini v. Viennas, 82 A.D.3d 1343, 1345 (3d Dep't 2011). New York County, the venue chosen by plaintiff, is the undisputed residence of "one of the parties": defendant. C.P.L.R. § 503(a). Defendant's chosen venue, Greene County, is not the residence of either original party based on its principal place of business. C.P.L.R. §§ 503(a) and (c), 509.

III. CONSIDERATION OF KEY WITNESSES' PUBLIC DUTIES

Insofar as defendant has shown that three, perhaps even the most important, nonparty witnesses may be inconvenienced significantly by testifying in New York County, two are police officers, whose testimony would keep them from their official duties at a location where they could not attend to those duties if needed in an emergency. Henry v. Central Hudson Gas & Elec. Corp., 57 A.D.3d 452 (1st Dep't 2008); Hooqland v. Transport Expressway, Inc., 24 A.D.3d 191, 192 (1st Dep't 2005); Lopez-Viola v. Duell, 78 A.D.3d 907 (2d Dep't 2010); Lafferty v. Eklecco, LLC, 34 A.D.3d 754, 755 (2d Dep't 2006). Defendant's characterization of the need for these witnesses' services and the constraints on their availability, however, does not attribute their unavailability primarily to the New York County venue. Instead, defendant suggests that their public service precludes even one day of leave and that these witnesses would be unavailable to testify for any period, even in Greene County.

In fact, David Sherman Jr. attests simply that, depending on whether he was scheduled to work at one of the Police Departments or the Hose Company, "I would have to use a day which would

create a shift scheduling issue for the supervisors or chief." Aff. of David Sherman, Jr., ¶ 9. Particularly as he is juggling three different jobs, scheduling his shifts is routine and hardly a reason to disturb plaintiff's choice of venue. In fact, David Sherman Jr. spent an entire day away from each of his jobs for his deposition without any issue raised regarding his absence.

Defendant fails to explain why the other police officer or firefighter witnesses similarly could not be scheduled for a day of leave. In fact, Joseph Caputo spent two full days away from his position with the State Police for his deposition without any issue raised regarding his absence. At the trial, these witnesses also may testify on different days, so only one public servant will be absent from his duties on any one day

IV. PROMOTING THE ENDS OF JUSTICE

While these public servants' inconvenience provides the strongest support for a change of venue, an overriding factor tips the balance against a change. Despite plaintiff having raised the issue in opposing the motion, defendant has continued to overlook a requirement of C.P.L.R. § 510(3) that defendant must meet equally with promoting the convenience of material witnesses: that "the ends of justice will be promoted by the change" of venue. Cavazzini v. Viennas, 82 A.D.3d at 1344. See Johanson v. J.B. Hunt Transp., Inc., 15 A.D.3d 268, 270 (1st Dep't 2005); Alvarez v. D&K Constr., Inc., 221 A.D.2d 224, 225 (1st Dep't 1995).

One of the key witnesses on whom defendant relies to support

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its motion also reveals the overriding reason to deny the motion. David Sherman Jr. compellingly testified at his deposition that Greene County natives harbored a resentment and dislike of persons who have come from New York City and developed the local community more like the city, and John Gannon was just such a resented and disliked person whom Greene County natives readily suspected of criminal acts. Defendant has never affirmatively shown that a transfer to Greene County would assure a fair trial or further justice, nor has defendant rebutted or explained the concern that Greene County would not provide an impartial forum, first raised by plaintiff, and now confirmed by the disturbing testimony of defendant's own witness. In this light, requiring the police officers or firefighters each to give up a day to testify in New York County does not pose "such a profound hardship as to justify a change of venue," Cavazzini v. Viennas, 82 A.D.3d at 1345, that in turn may jeopardize a fair trial and undermine "the ends of justice." C.P.L.R. § 510(3); Johanson v. J.B. Hunt Transp., Inc., 15 A.D.3d at 270; Cavazzini v. Viennas, 82 A.D.3d at 1344.

V. CONCLUSION

Given the gaps in defendant's showing of nonparty witnesses' inconvenience, its failure to show that Greene County would promote justice, C.P.L.R. § 510(3), and its residence in New York County, C.P.L.R. §§ 503(a), 510(1), the court denies defendant's motion to change the venue of this action to Greene County. C.P.L.R. § 511(a) and (b). The parties shall appear for a

pretrial conference January 24, 2013, at 3:30 p.m. This decision constitutes the court's order.

DATED: December 7, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
JAN 08 2013
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