

**Great Am. Ins. Co. of N.Y. v CNY Excavating &
Concrete, LLC**

2016 NY Slip Op 31950(U)

October 18, 2016

Supreme Court, New York County

Docket Number: 154703/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GREAT AMERICAN INSURANCE COMPANY
OF NEW YORK,
Plaintiff,
-against-

INDEX NO. 154703/2015
MOTION DATE 09/14/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

CNY EXCAVATING AND CONCRETE, LLC,
Defendant.

The following papers, numbered 1 to 7 were read on this motion to change venue.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 7</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant’s motion to change venue is denied.

Plaintiff is an insurer that issued an insurance policy to Defendant providing for certain property insurance coverage. (Aff. In Opp. Exh. 1). Included in that coverage was Defendant’s dump truck that was damaged in an accident on July 29, 2014. Plaintiff paid Defendant for damage caused by the accident. There remains a dispute as to whether or not certain additional claimed damage was caused by the accident or was merely wear and tear on the dump truck.

Plaintiff commenced this action on May 11, 2015, seeking a declaratory judgment that Defendant breached the Conditions of the Policy and that Plaintiff had provided coverage for all covered causes of loss under the Policy. (Mot. Exh. A). Defendant Answered and Counterclaimed for Breach of Contract. (Mot. Exh. B).

Defendant now moves for change of venue pursuant to CPLR §§510(3) and 511. Plaintiff opposes the motion.

Defendant contends that a review of the pleadings provides that all of the conduct regarding this litigation is alleged to have occurred in Oneida County. That Oneida County is where Defendant is located and where two witnesses reside: the

dump truck driver, and the police officer who investigated the accident and who is expected to testify regarding his accident report. Defendant further contends that Oneida County is also where the damaged dump truck is located, and where any inspection of the dump truck would occur. Located in the surrounding area of Oneida County is the Defendant's appraiser who is expected to testify to the damages, repairs and associated costs of the dump truck. Defendant also claims that the Plaintiff's appraiser has a phone number with an area code that includes Oneida County.

Defendant argues that because it is believed that Plaintiff's underwriting records are located in Syracuse (Onondaga County) and all fact witnesses are believed to reside within or near Oneida County, and because all of Defendants' books and records are located in Oneida County, that venue for this action should be changed to Oneida County because it would promote the convenience of material witnesses and the ends of justice.

CPLR §510(3) allows the court, upon motion, to change the place of trial where the convenience of material witnesses and the ends of justice will be promoted by the change. The decision on whether to grant a change of venue based on the convenience of material witnesses is within the sound discretion of the court (*O'Brien v. Vassar Brothers Hospital*, 207 A.D.2d 169, 622 N.Y.S. 2nd 284 [2nd Dept., 1995]).

In order to demonstrate its entitlement to relief pursuant to CPLR §510(3), the movant must provide an affidavit in support establishing: (1) the names, addresses, and occupations of the prospective witnesses; (2) the facts to which the proposed witnesses will testify at trial, allowing the court to determine whether the proposed witness is necessary and material; (3) that the proposed witnesses are in fact willing to testify; and (4) how the witnesses would in fact be inconvenienced if a change of venue were not granted (*O'Brien v. Vassar Brothers Hospital*, 207 A.D.2d 169, 622 N.Y.S. 2nd 284 [2nd Dept., 1995]).

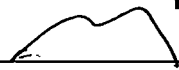
Defendant has not established a basis for change of venue. Defendant fails to set forth how the witnesses would be inconvenienced if venue was not changed. Defendant only provides the conclusory assertion that it is a four hour drive into New York County and that it would necessitate an overnight stay. Further, Defendant has not stated whether the proposed witnesses are in fact willing to testify, and only asserts that the police officer and Defendant's appraiser are "expected" to testify. A failure of the Defendant to show that the witnesses have been contacted, how they would be inconvenienced, and whether they are even willing to testify warrants denial of a change of venue motion. (*Gissen v. Boy Scouts of America*, 26 A.D.3d 289, 811 N.Y.S.2d 20 [1st Dept. 2006]). Lastly, the Defendant's and the dump truck driver's convenience is not a deciding factor as a party or a party's employee's location is not a "weighty factor" in considering a motion for a discretionary change of venue. (*Martinez v. Dutchess Landaq, Inc.*, 301 A.D.2d 424, 754 N.Y.S.2d 5 [1st Dept. 2003]).

ACCORDINGLY, it is ORDERED, Defendant's motion to change venue is denied, and it is further,

ORDERED, that the parties appear for a Compliance Conference at IAS Part 13, 71 Thomas Street, Room 210, New York, New York, on December 14, 2016, at 9:30 A.M.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: October 18, 2016

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE