STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
COMMERCIAL DIVISION

BLAST-ALL, INC.,

Plaintiff,

-against-

DECISION AND ORDER

FIRST FINANCIAL INSURANCE COMPANY,
TORUS SPECIALTY INSURANCE COMPANY,
JOHN M. GLOVER AGENCY,

Defendants.

Index No. 901407-17

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

In this commercial insurance dispute, defendant John M. Glover Agency ("Glover") moves pursuant to CPLR 327 for dismissal of the complaint as against it on the ground of *forum non conveniens*. Plaintiff Blast-All, Inc. ("Blast-All") opposes the motion.

BACKGROUND

According to the complaint, non-party United Eagle Painting Corp. ("United Eagle") entered into a contract ("General Contract") with the New York State Department of Transportation ("State") on March 24, 2009, to perform certain bridge-painting work in Greene County, New York ("Project"). The General Contract required United Eagle to perform the work in accordance with the State's Standard Specifications, which, among other things, obliged the successful bidder to obtain specified insurance coverage for the Project and to name the State as an additional insured on the policy. Non-party Hanover Insurance Company ("Hanover") issued a performance bond on the Project on behalf of United Eagle.

United Eagle ultimately defaulted on the Project and, on March 17, 2011, Hanover entered into an agreement with Blast-All to complete the Project ("Completion Agreement"), contingent on the execution of a takeover agreement between Hanover and the State. The Completion Agreement required Blast-All to provide insurance coverage in accordance with the State's requirements and to name the State as an additional insured. In addition, the Completion Agreement obliged Blast-All to assume all of United Eagle's duties and responsibilities under the General Contract, which was incorporated by reference into the Completion Agreement.

Following Hanover's execution of a takeover agreement with the State on April 11, 2011, Blast-All commenced work on the Project. On or about September 21, 2011, Mark Fabiano, a Blast-All employee, accidently fell from decking to the ground at a Project site.

Fabiano and his wife sued the State in the Court of Claims (*see Fabiano v State of New York*, 123 AD3d 1262 [3d Dept 2014], *lv dismissed* 25 NY3d 957 [2015]) and, by decision dated April 25, 2016, Fabiano was awarded damages in excess of $2.4 million. The Fabiano action remains pending in the Court of Claims.

At the time of the accident, Blast-All had in effect a commercial general liability policy issued by defendant First Financial Insurance Company ("First Financial") and an excess liability policy issued by Torus Specialty Insurance Company ("Torus"). Glover, an insurance brokerage agency, procured these policies for Blast-All.

The complaint alleges that Glover affirmatively represented to both Blast-All and the State that proper insurance had been procured for Blast-All in accordance with the State's requirements, including the requirement that the State be named as an additional insured. The representations to the State allegedly took form of certificates of insurance issued by Glover, which the State reviewed and approved prior to allowing Blast-All to commence work on the Project. After First Financial and Torus denied coverage for the Fabiano claim, the State demanded indemnification from Blast-All pursuant to the Completion Agreement and General Contract.[1]

On February 28, 2017, Blast-All commenced this action, alleging causes of action for declaratory judgment, implied indemnification, breach of contract and negligence. Blast-All seeks, among other things, a declaration that First Financial and Torus are obligated to provide coverage for the Fabiano claim to the State or, in the alternative, that Glover breached its duty to

[1] In addition to the First Financial and Torus policies, Glover procured another insurance policy for Blast-All with nonparty Burlington Insurance Company, which tendered coverage in the amount of $1 million to the State in connection with the Fabiano claim.

procure proper insurance coverage for the Project by failing to name the State as an additional insured.

First Financial and Torus answered the complaint, but Glover moves for dismissal of the action on the sole ground of *forum non conveniens*, arguing that the case has no substantial nexus to New York State.[2] In this regard, Glover points out that it and Blast-All are Connecticut corporations, all actions relevant to the procurement of the insurance policies at issue took place in Connecticut, and the relevant witnesses and documents related to these issues are located in Connecticut. Glover further asserts that there would be no prejudice to Blast-All if this action were to be adjudicated in Connecticut.

Blast-All responds that Glover has failed to carry its heavy burden to obtain dismissal under CPLR 327. According to Blast-All, this action has extensive ties to New York, and Glover has not shown that it would be unduly burdened by litigating this case in New York. In the alternative, Blast-All argues that any dismissal under CPLR 327 should be conditioned on defendants submitting to the jurisdiction of the Connecticut courts, accepting service of process and waiving the defense of the statute of limitations.

DISCUSSION

"The doctrine of *forum non conveniens* permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum'" (*National Bank & Trust Co. of N. Am. v Banco De Vizcaya*, 72 NY2d 1005, 1007 [1988], *cert denied* 489 US 1067 [1989], quoting CPLR 327). In exercising this discretionary authority, the Court must consider various

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[2] Glover's time to serve an answer, move or otherwise respond to the complaint was extended by stipulation to, and including, May 5, 2017. Instead of answering, Glover filed this motion.

factors, including the "sites of the transaction out of which the litigation arose, the residence of the parties, the potential hardship to the defendant, the burden on New York courts, the availability of an alternate forum and the location of a majority of witnesses outside the State" (*Continental Ins. Co. v Polaris Indus. Partners*, 199 AD2d 222, 222-223 [1st Dept 1993] [internal citations omitted]; *see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Gozzo v First Am. Tit. Ins. Co.*, 75 AD3d 953, 954 [3d Dept 2010]). "[U]nless these factors weigh heavily in the defendant's favor, the plaintiff's choice of forum will not be rejected and the action will not be dismissed under this doctrine" (*Markov v Markov*, 274 AD2d 870, 871 [3d Dept 2000]). "[A] defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident" (*Travelers Cas. & Sur. Co. v Honeywell Intl. Inc.*, 48 AD3d 225, 226 [1st Dept 2008], quoting *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [1st Dept 2006]).

As an initial matter, the Court recognizes that an alternative forum may be available to Blast-All in Connecticut. However, "Glover does not agree to waive any statute of limitations defenses it may have" if this case were dismissed as against it (Glover's Reply Brief, at 6 n 2). Given the prospect that Blast-All's claims against Glover may be time barred in a new suit brought in Connecticut, Glover's reliance on the availability of the alternative forum is unavailing (*see McCort v Avis Rent-A-Car Sys., Inc.*, 54 AD2d 976, 976 [2d Dept 1976]; *cf. Highgate Pictures v De Paul*, 153 AD2d 126, 128-129 [1st Dept 1990]).

Next, although Glover stresses that the insurance transactions upon which this action is sued all occurred in Connecticut (*see e.g. Continental*, 199 AD2d at 223), the Court find that the case nonetheless has "substantial connections with New York" (*Price v Brown Group*, 206 AD2d 195, 201 [4th Dept 1994]; *see American Guar. & Liab. Ins. Co. v Xerox Corp.*, 270

AD2d 187, 187 [1st Dept 2000]). The record establishes, among other things: Blast All entered into a contract governed by New York law for the completion of the Project in New York; the locus of the insured risk was a Project site in New York; the case arises from an injury sustained by a Blast-All employee while working on the Project in New York; the injured worker's personal injury action remains pending in the New York courts; the claim against Glover is based on its failure to name the State of New York as an additional insured under Blast-All's policies; and this case may require the joinder of the State.[3] And while this case ultimately may call for the application of Connecticut law, the New York courts are fully capable of applying the laws of other jurisdictions in commercial cases such as this (*see Travelers*, 48 AD3d at 226).

Moreover, Glover has failed to demonstrate that it would be unfairly burdened by litigating this action in New York. Glover is a multi-state insurance broker authorized to sell insurance in New York State by the New York State Department of Financial Services; it conducts significant business operations throughout New York, which includes offices in Westchester County, Oneida County and the Adirondacks (*see* Zaccardelli Aff., Ex. H); and Glover has sufficient resources to defend itself in litigation in New York (*see Van Deventer v CS SCF Mgt. Ltd.*, 37 AD3d 280, 281 [1st Dept 2007] ["ample resources" to litigate in New York]; *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991] ["although defendant is incorporated in the United Kingdom, it is authorized to do business in New York"]).[4]

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[3] Both First Financial and Torus have asserted as an affirmative defense that the State is a necessary or indispensable party to this case.

[4] Indeed, Glover, as well as First Financial and Torus, have all previously litigated cases in New York (*see e.g. First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64 [2003]; *Matter of Insurance Corp. of N.Y. [First Fin. Ins. Co.]*, 127 AD3d 443 [1st Dept 2015], *lv denied* 26 NY3d 918 [2016]; *Milbrandt & Co., Inc.*
(continued...)

Finally, Glover has not identified any material witness located in Connecticut who would have difficulty appearing in this adjacent state, nor does Glover point to any documents that could not be easily transmitted to New York through electronic discovery (*see Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 74 [1984] ["Broad allegations . . . that witnesses and documents are located outside New York are not sufficient"]; *Katz v Lazaroff*, 236 AD2d 257, 257 [1st Dept 1997] ["Defendants did not offer any evidence to demonstrate that any material witnesses would be burdened by proceedings in New York"]; *cf. Metz v Davis Polk & Wardwell*, 133 AD3d 501 [1st Dept 2015] [key witnesses located in Hong Kong and "noted admissibility problems with respect to electronic discovery"], *lv denied* 26 NY3d 919 [2016]).

For all of the foregoing reasons, the Court, in the exercise of discretion, concludes that the interests of substantial justice do not favor dismissal of this action (*see* CPLR 327).

Accordingly, it is

ORDERED that the motion of defendant John M. Glover Agency to dismiss the complaint on the ground of *forum non conveniens* is denied; and it is further

ORDERED that defendant John M. Glover Agency serve an answer and provide responses to plaintiff's discovery demands within twenty (20) days from the date of service of this Decision & Order upon it with notice of entry.

This constitutes the Decision & Order of the Court. The original Decision & Order is being returned to counsel for Blast-All. The signing of this Decision & Order shall not

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[4](...continued)
v Griffin, 19 AD3d 663 [2d Dept 2005], 19 AD3d 662 [2d Dept 2005], 1 AD3d 327 [2d Dept 2003] [including Glover as both an appellant and respondent]; *The Howard Hughes Corp. v Ace American Ins. Co.*, 2015 WL 6437580 [Sup Ct, NY County 2015] [including Torus as a defendant]; *National R.R. Passenger Corp. v Arch Specialty Ins. Co.*, 124 F Supp 3d 264 [SDNY 2015] [including Torus as a defendant]; *Bohling v John M. Glover Agency, Inc.*, No. 6:2014-cv-01478 [NDNY 2014, Dec. 8, 2014]; *First Fin. Ins. Co. v City Wide Window Cleaning Co.*, 253 F Supp 2d 717, 718 [SDNY 2003]).

constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

Dated: Albany, New York
September 13, 2017

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Nos. 15-22, 31-50.