Morales v Keyspan Gas E. Corp.
2020 NY Slip Op 31751(U)
June 1, 2020
Supreme Court, Kings County
Docket Number: 507972/19
Judge: Wavny Toussaint
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At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of June, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT

Justice.

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LUIS A. MORALES,

Plaintiff,

- against - Index No. 507972/19

KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID, NATIONAL GRID SERVICES, INC., AND NATIONAL GRID USA SERVICE COMPANY, INC.,

Defendants.

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The following e-filed papers read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	22-34, 37-42
Opposing Affidavits (Affirmations)	44-49
Reply Affidavits (Affirmations)	50-51

Upon the foregoing papers, defendants KeySpan Gas East Corporation d/b/a National Grid (KeySpan Gas), National Grid Services, Inc., (National Grid Services) and National Grid USA Service Company, Inc. (National Grid USA) (collectively

defendants), move for an order: 1) pursuant to CPLR 3211, dismissing the complaint of plaintiff Luis A. Morales (plaintiff) as against National Grid Services and National Grid USA; 2) or in the alternative, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as against National Grid Services and National Grid USA; and 3) pursuant to CPLR 510, changing the place of trial for the remaining defendant KeySpan Gas from Kings County to Suffolk County. Plaintiff cross-moves for an order, pursuant to CPLR 510 and 511, seeking to retain venue in this action in Kings County.

Background and Procedural History

On June 18, 2018, a construction project involving a gas main was underway at a roadway located in front of 414 Hauppauge Road, Route 111, in the town of Smithtown in Suffolk County, New York. The record reveals that KeySpan Gas contracted with non-party Asplundh Construction Corp. (Asplundh) for the performance of this work. Plaintiff was employed by Asplundh. Plaintiff commenced the instant action by filing a summons and verified complaint on or about April 10, 2019. In his complaint, plaintiff alleges that on June 18, 2018, during the course of his employment, he was caused to sustain serious, severe, and catastrophic personal injuries as a result of defendants' negligence and violations of Labor Law §§ 240 (1), 241 (6) and 200. Plaintiff's complaint alleges that each of the defendants owned, operated or controlled the roadway and property that was the site of the accident and/or served as the general contractor for the project. Plaintiff

contends that Kings County was designated as the proper venue based upon the defendants' residence or principal place of business.

On or about June 14, 2019, defendants interposed a verified answer, and on or about June 28, 2019, defendants interposed an amended verified answer. In their answers, defendants denied that National Grid USA's principal place of business was in Kings County; denied that National Grid USA and National Grid Services owned, controlled or operated the site of the alleged accident or served as general contractors on the project at which plaintiff was working. On or about June 14, 2019, defendants served a demand, pursuant to CPLR 511, for Change of Place of Trial from Kings County to Suffolk County. On that same date, plaintiff served a Response to Demand for Change of Venue rejecting defendants' demand and asserting that Kings County was the proper place for venue as at least one of the defendants had a principal place of business in Kings County.

On or about July 1, 2019, defendants filed the instant motion seeking dismissal and/or summary judgment and a change of venue. On or about November 13, 2019, plaintiff cross-moved for an order seeking to retain venue in Kings County. A Preliminary Conference was held on February 5, 2020, which directed the exchange of a Bill of Particulars by March 25, 2020, and that depositions of plaintiff and defendants be conducted by May 14 and 21, 2020, respectively.[1]

[1] In light of the COVID-19 pandemic, it is unclear whether this discovery has taken place.

Parties' Contentions

Defendants move for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint as against National Grid Services and National Grid USA, arguing that these entities are not proper parties. Defendants contend that inasmuch as plaintiff cannot maintain a cause of action against these entities they cannot serve as a basis for retaining venue in Kings County. Defendants further assert that, in the alternative, summary judgment should be granted dismissing plaintiff's complaint against these two entities. In support of this position, defendants submit the affidavit of James Chicoski, an Assistant Secretary of National Grid Services. He affirms that he is fully familiar with the current and past functions of this entity. He states that National Grid Services is a Delaware corporation and wholly owned subsidiary of KeySpan Corporation, which had been merged into National Grid USA, a Massachusetts corporation. Chicoski affirms that National Grid Services is the "holding company for non-utility subsidiaries which are engaged in providing HVAC, fiber optic, engineering, consulting and energy related services to customers located primarily in the northeastern US" (Chicoski aff at¶ 3).

He further affirms that National Grid Services does not own or maintain any public or private roadways; has never owned, maintained or operated any gas transmission or distribution facilities, has never managed, operated controlled, inspected, maintained or supervised any gas lines or engaged in any gas line repairs or repairs of any kind in front of the premises at issue herein; and has never engaged in or managed, operated,

controlled, inspected, maintained or supervised any construction activities at or in the vicinity of the location wherein plaintiff has alleged to have been injured. Defendants note that the work being performed at the time of plaintiff's accident involved a gas line, which is utility work, and thus is outside the scope of the work of the companies with which National Grid Services is involved.

Similarly, defendants contend that there is no basis for any claims against National Grid USA as this entity was not involved in the project at which plaintiff claims to have been injured. In support of this contention, defendants submit the affidavit of Reshmi Das, an Assistant Secretary of National Grid USA. He affirms he is fully familiar with the current and past functions of this entity and that it is a service company which provides services such as financial, legal and accounting. Moreover, Das affirms that National Grid USA does not own or maintain any public or private roadways; has never owned, maintained or operated any gas transmission or distribution facilities, has never managed, operated controlled, inspected, maintained or supervised any gas lines or engaged in any gas line repairs or repairs of any kind in front of the premises at issue herein; and has never engaged in or managed, operated, controlled, inspected, maintained or supervised any construction activities at or in the vicinity of the location wherein plaintiff has alleged to have been injured. Accordingly, defendants argue that neither of these entities had any connection to the alleged accident site or to the project that was taking place at such site and, thus, are not proper parties to this action.

Therefore, since neither of these entities is an owner or general contractor, defendants maintain that plaintiff has failed to state a cause of action against National Grid Services or National Grid USA. Defendants argue that the affidavits submitted by Chicoski and Das establish, prima facie, that neither of these entities was involved in any way with the work being performed at the time of plaintiff's accident, and that they did not own, control, operate inspect or supervise the location of the accident. As such, they contend plaintiff's claims as asserted against National Grid Services and National Grid USA should be dismissed.

Defendants also move for an order, pursuant to CPLR 510, seeking to change the venue of this action from Kings County to Suffolk County. While defendants admit that the residence of National Grid Services for the purpose of the venue statute is in Kings County, as discussed above, it maintains that it is not a proper party to this action. Defendants argue that National Grid USA and KeySpan Gas do not have their principal place of business in Kings County, and thus their residence cannot form the basis for venue of this action in Kings County.

In this regard, defendants assert that National Grid USA is a corporation incorporated in the Commonwealth of Massachusetts, with its principal place of business in Westborough, Massachusetts, as designated in its Articles of Incorporation, which they have attached in support of their motion. Defendants point out that, as a foreign corporation, National Grid USA had to register with the New York State Division of

Corporations, and attach a copy of National Grid USA's Application for Authority, in which Onondaga County is named as the location of the "office of the corporation" in New York State. Thus, defendants argue that as National Grid USA's principal place of business in New York is in Onondaga County, venue based on its alleged residency in Kings County is improper.

With regard to KeySpan Gas, defendants point out that its Certificate of Incorporation, a copy of which is submitted in support of the motion, states at Article III that its "office of the Corporation" shall be located in the County of Nassau, State of New York." Moreover, defendants submit a New York State Department of State, Division of Corporations search which lists Nassau County as KeySpan Gas' designated county of incorporation. Accordingly, defendants argue that venue based on KeySpan Gas' purported residency in Kings County is improper.

In opposition to defendants' motion, and in support of his cross motion for an order retaining venue in Kings County, plaintiff argues that KeySpan Gas' principal place of business is in Kings County at One MetroTech Center in Brooklyn. In this regard, plaintiff asserts that although KeySpan Gas maintains a place of business in Hicksville, located in Nassau County, it also maintains a place of business in Kings County which is its principal place of business.

Plaintiff contends that KeySpan Gas has consistently represented in public filings that its principal office is at One MetroTech Center in Kings County. In support of this

contention, plaintiff submits a notification of registration statement that he contends KeySpan Gas submitted to the United States Securities and Exchange Commission (the SEC Notification), dated November 8, 2000, which lists the address of KeySpan's "principal executive offices" as One MetroTech Center, Brooklyn, NY. In addition, plaintiff submits a copy of the New York State Public Service Commission's Annual Report of Electric and/or Gas Corporations, for the year ending December 31, 2009 (PSC Report), wherein KeySpan Gas designated One MetroTech Center as its address. Finally, plaintiff submits what he purports is a transcript of a proceeding before the Postal Commission from 2001, in which KeySpan Gas indicated its intent to intervene in a rate hike matter (Postal Commission intervention). In this document, Key Span Gas indicated that it was designating a person located at One MetroTech Center to receive service of any documents related to that proceeding. Additionally, in this document, the principal offices of Key Span were listed as One MetroTech Center and 175 East Old Country Road in Hicksville, New York (Nassau County).

Plaintiff argues that KeySpan Gas has represented to the Federal Government and in public filings, that it maintains a principal place of business at One MetroTech Center in Kings County, and thus should be estopped from asserting otherwise and changing its position for the convenience of defending the instant action. Plaintiff also submits a copy of an examination before trial transcript from a claim, which is currently pending in New York County against the same defendants, in which KeySpan Gas' witness, Anthony Esgro, testified that he is a KeySpan Gas employee and that it maintains its principal

office of business at the MetroTech location in Brooklyn. Finally, plaintiff notes that KeySpan Gas lists the office of its chief executive officer as One MetroTech Center in its New York State Department of Corporations' entity filing.

Plaintiff argues that KeySpan Gas has failed to demonstrate that venue in Kings County is not proper and has failed to demonstrate that having this trial in Kings County would deprive it of a fair trial. Finally, plaintiff argues that there are exceptions to the rule that a corporation's principal office is determined solely by the designation in its certificate of incorporation. In support of this argument, plaintiff points to two decisions. In *Weiss v Saks Fifth Avenue* (157 AD2d 475 [1990]), the First Department reversed the lower court's grant of defendant's motion for a venue change from New York County to Westchester County where, although the Certificate of Incorporation listed Westchester County, a certificate of assumed name listed New York County as its principal office. The court noted that as "principal place of business" and "principal office" have historically been used interchangeably, the defendant was not entitled to a change of venue as of right.

Plaintiff further points to *Yonkers Raceway v National Union Fire Insurance Co.*, (6 AD2d 846 [1958] aff'd 6 NY2d 756 [1959]), wherein the Court of Appeals affirmed the Second Department's decision to deny a defendant's motion to change venue even though its certificate of incorporation designated New York County as its residence, because the certificate of incorporation also included a clause allowing the defendant to

conduct business in Westchester County. Plaintiff notes that KeySpan Gas' Certificate of incorporation contains a similar clause allowing it to conduct business in other counties and points to Article VI of KeySpan Gas' Articles of Incorporation which states: "The Corporation shall be a gas corporation and shall operate in Nassau County, New York, Suffolk County, New York and Queens County, New York."

As to those branches of defendants' motion seeking dismissal of his complaint for failure to state a cause of action or on summary judgment grounds, plaintiff argues that such relief is premature as additional discovery is needed. Plaintiff maintains that there are significant and essential facts that need to be disclosed, including the existence of the relevant contracts governing the project, before these issues can be determined. Plaintiff points out that KeySpan Gas admits that it entered into a written contract/agreement with his employer, Asplundh Construction Corp., and that Chicoski admits that National Grid Services is a wholly owned subsidiary of KeySpan Corporation.

In reply and in opposition to plaintiff's cross motion, defendants reiterate that KeySpan Gas' principal place of business is in Nassau County which, they note, plaintiff himself concedes but asks the court to disregard this fact. Specifically, defendants argue that there is no merit to plaintiff's contention that KeySpan Gas is judicially estopped from asserting that Nassau County is its principal place of business, based on the submission of three documents in an attempt to demonstrate that KeySpan Gas has "consistently represented in public filings that its principal office is located at 1

MetroTech Center, Brooklyn, NY 11201." Specifically, defendants note that the SEC Notification was not prepared by KeySpan Gas, but, rather was filed by KeySpan Corporation, the holding company for KeySpan Gas; and that the only reference to the KeySpan Gas defendant herein was to list it as one of KeySpan Corporation's many subsidiaries, which are located throughout the world. Accordingly, defendants argue that the location of KeySpan Corporation's executive office has no bearing on KeySpan Gas' residence for the purpose of establishing venue.

With regard to the PSC Report, defendants admit that it was prepared by KeySpan Gas and does list an address of One MetroTech, but points out that no where in that document does it state that this location is KeySpan Gas' principal place of business. Defendants further note that the maintenance of an office in another county does not negate the fact that the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation.

Concerning the Intervention document, defendants note that it involved two separate entities: Brooklyn Union Gas and KeySpan Gas, which although referred to collectively as KeySpan Energy, were in fact appearing as separate parties to that proceeding and it is noted that their intervention was "joint and several." Defendants maintain that because Brooklyn Union Gas is first alphabetically, its Kings County address is listed first, followed by KeySpan Gas' Nassau County address. Additionally, with regard to the submission of the deposition testimony of Mr. Esgro, defendants state

that he is a KeySpan Gas field inspector, responsible for supervising the work that contractors perform on gas systems, and is not a corporate representative of KeySpan Gas capable of giving binding testimony regarding its' principal place of business for legal purposes. Defendants argue that plaintiff has failed to demonstrate that KeySpan Gas has secured a judgment or obtained any benefit from asserting that its principal place of business is in Kings County and therefore would be judicially estopped from now claiming that its principal place of business is in Nassau County.

Finally, defendants argue that KeySpan Gas is not subject to an exception to the rule regarding residence for domestic corporations for purposes of venue, and note that the two cases plaintiff cites in support of this proposition are distinguishable. For example, unlike the *Weiss* case, here plaintiff has failed to submit any evidence demonstrating that KeySpan Gas has submitted documentation to New York State demonstrating that its principal office is located in Kings County. Moreover, in the *Yonkers Raceway* case, the court found that venue was proper in Westchester County because the plaintiff's Certificate of Incorporation "expressly fixes the location of its place of business for conducting harness race meetings in Westchester County." Conversely, KeySpan Gas' Certificate of Incorporation fails to reference Kings County at all. In fact, defendants point out that it specifically states that KeySpan Gas shall operate in Nassau, Suffolk and Queens County with no mention of Kings County.

Defendants submit an additional affidavit from Das in support of their reply. Das affirms that KeySpan Gas' Restated Certificate of Incorporation, which was submitted in support of defendants' motion, specifically states that the office of KeySpan Gas shall be in Nassau County. He further affirms that KeySpan Gas' principal place of business is 175 Old Country Road, Hicksville, New York. He notes that Key Span Gas is a regulated utility that is only authorized to provide gas services in Nassau and Suffolk Counties and a portion of Queens County.

Finally, defendants argue that plaintiff fails to demonstrate that its motion to dismiss with regard to National Grid Services and National Grid USA is premature and that additional discovery might reveal something to support his action. They claim that plaintiff merely speculates that defendants might be in possession of a contractual document that might include subrogation/indemnification that would justify keeping National Grid Services in the case.

Defendants' Motion to Dismiss Pursuant to CPLR 3211 & 3212

The court turns to that branch of defendants' motion seeking an order, pursuant to CPLR 3211 or CPLR 3212, dismissing plaintiff's complaint as against National Grid Services and National Grid USA. "In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal

theory'" (*Patel v Gardens at Forest Hills Owners Corp.*, 181 AD3d 611, 612-613 [2d Dept 2020], quoting *Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d at 87-88 [1994]). The pertinent issue is whether the plaintiff has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]; *Doe v Ascend Charter Schs.*, 181 AD3d 648,649 [2d Dept 2020]; *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1234-1235 [2d Dept 2019]).

The court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Sokol v Leade*r, 74 AD3d 1180, 1181 [2d Dept 2010]; CPLR 3211[c]; *Phillips v Taco Bell Corp.*, 152 AD3d 806, 807-808 [2d Dept 2017]). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Sokol*, 74 AD3d at 1182, quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2011], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *Nasca v Sgro*, 130 AD3d 588, 589 [2d Dept 2015]).

As to summary judgment motions, the statutory standard for the supporting proof required on such motions is set forth in CPLR 3212 (b). A summary judgment motion must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof. If the cause of action or the defense to a cause of action is established sufficiently to warrant judgment in favor of a

party as a matter of law, then such judgment must be granted (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731,735 [2017]).

The New York State Legislature imposed, under Labor Law §§ 240 (1) and 241 (6), nondelegable duties upon owners and contractors, to provide reasonable and adequate protection and safety to persons employed in the demolition or construction phases of construction work (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Comes v New York State Elec. and Gas Corp*., 82 NY2d 876, 878 [1993]; *Benavidez-Portillo v G.B. Constr. & Dev., Inc.*, 149 AD3d 681,682 [2d Dept 2017]; *Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009]). Labor Law § 200 represents a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Jock v Fein*, 80 NY2d 962, 967 [1992]; *Rocha v GRT Constr. of N.Y.*, 145 AD3d 926, 927 [2016]; *DeBlase v Herbert Constr. Co.*, 5 AD3d 624 [2d Dept 2004]).

Finally, "[t]he threshold question in any negligence action is . . . [whether the] defendant owe[s] a legally recognized duty of care to [the] plaintiff" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232, [2001]). "If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be

imposed upon the defendant" (*Greenbaum v Bare Meats, Inc.*, 178 AD3d 775, 776 [2d Dept 2019] [citations omitted]). "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is [one] of law for the courts" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], rearg denied 72 NY2d 953 [1988]).

Based upon the foregoing, in order to impose Labor Law liability upon a defendant it must be either an owner of the property that was the site of the occurrence, or a general contractor responsible for performing, supervising or managing a construction related activity. Further, in order to impose liability upon a defendant for a cause of action alleging negligence, the party must owe a duty of care to the plaintiff.

Here, the court finds that National Grid Services and National Grid USA have demonstrated their prima facie entitlement to judgment, as a matter of law, under the standards set forth in both CPLR 3211 (a) (7) and 3212, by submitting the affidavits of their respective Assistant Secretaries, both of whom attest that neither of these entities owned the roadway at which plaintiff was injured, nor engaged in, managed, supervised, or was in any way involved in any construction or construction related activities at the site of plaintiff's accident (*see Suero-Sosa v Cardona*, 112 AD3d 706, 707 [2d Dept 2013]; *Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042 [2d Dept 2010]; *Eldoh v Astoria Generating Co., LP*, 57 AD3d 603, 604 [2d Dept 2008]; *see also Nasca*, 130 AD3d at

589; *White v N.Y. City Transit Auth.*, 308 AD2d 341, 342 [1st Dept 2003]). In the instant case, it is undisputed that KeySpan Gas was the entity that contracted with plaintiff's employer, Asplundh, for the work that was being performed at the time of plaintiff's accident and thus, is a proper defendant. In opposition, the plaintiff fails to raise a triable issue of fact as to whether these entities were owners of the roadway at which plaintiff was injured or that they served in any capacity whatsoever related to the construction project that was underway.

Moreover, plaintiff has failed to demonstrate that defendants' motion is premature and that discovery might reveal the existence of facts within the defendants' control which would warrant the denial of the motion (*see* CPLR 3212 [f]; *Nassau County v Richard Dattner Architect, P.C.*, 57 AD3d 494, 495-496 [2d Dept 2008]; *Serrano v New York Times Co., Inc.*, 19 AD3d 577, 578 [2d Dept 2005][noting that a "parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary" and holding that plaintiff "failed to oppose the prima facie showing by the appellant with sufficient evidence to raise a triable issue of fact as to whether the appellant so controlled the operations of the subsidiary company that it should be held liable for the negligence of an employee of its subsidiary]).

"A summary judgment motion is not premature merely because discovery has not been completed" (*Northfield Ins. Co. v Golob*, 164 AD3d 682, 683-684 [2d Dept 2018];

see Chemical Bank v PIC Motors Corp., 58 NY2d 1023, 1026 [1983]; *Lamore v Panapoulos*, 121 AD3d 863, 864 [2d Dept 2014]). "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] [holding that a plaintiff who relied solely on their attorney's affirmation, failed to set forth either basis]; *see* CPLR 3212 [f]; *Suero-Sosa v Cardona*, 112 AD3d at 708 [2013]; *Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]; *Woodard v Thomas*, 77 AD3d 738, 740 [2d Dept 2010]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Rather, there must be 'some evidentiary basis . . . to suggest that discovery may lead to relevant evidence'" (*see Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329 [2d Dept 2017], quoting *Ruttura & Sons Constr. Co. v Petrocelli Constr.,* 257 AD2d 614, 615 [2d Dept 1999]; *Suero-Sosa*, 112 AD3d at 708 [holding that the plaintiff's argument, supported only by her attorney's affirmation, that a deposition of a witness was necessary since it may lead to evidence was without merit since, based on the record, such discovery was unlikely to lead to relevant evidence]). In opposition to defendants' motion, the plaintiff fails to state what relevant evidence he hopes to possibly uncover if an opportunity for further discovery is afforded so as to justify postponing a

determination dismissing the claims as against National Grid Services and National Grid USA.

Based upon the foregoing, that branch of defendants' motion seeking to dismiss plaintiff's claims as asserted against National Grid Services and National Grid USA is granted and said claims are hereby dismissed as against these two defendants.

Venue

Defendants move, pursuant to CPLR 510, seeking to change the place of trial for the remaining defendant, KeySpan Gas, from Kings County to Suffolk County. Plaintiff cross-moves for an order, pursuant to CPLR 510 and 511, seeking to retain venue in this action in Kings County.

CPLR 510 provides, in pertinent part, that "[t]he court, upon motion, may change the place of trial of an action where the county designated for that purpose is not a proper county . . ." In order to succeed on a motion seeking "a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper" (*Gonzalez v Sun Moon Enters. Corp.*, 53 AD3d 526, 526 [2d Dept 2008]; *see Kidd v 22-11 Realty, LLC*, 142 AD3d 488, 489 [2d Dept 2016]). "The venue of an action is proper in the county in which any of the parties resided at the time of commencement" (*Kidd*, 142 AD3d at 489; *see* CPLR 503 [a]; *Matoszko v Kielmanowicz*, 136 AD3d 762, 763 [2d Dept 2016]; *Hamilton v Corona Ready Mix, Inc.*, 21 AD3d 448, 449 [2d Dept 2005]). 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 . . ." However, by now it is well settled in New York that "the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county" (*Drayer-Arnow v Ambrosio & Co.*, 181 AD3d 651 [2d Dept 2020]; *see* CPLR 503[c]; *O.K. v Y.M. & Y.W.H.A. of Williamsburg, Inc.*, 175 AD3d 540, 540 [2d Dept 2019]; *Kidd*, 142 AD3d at 489; *Matoszko*, 136 AD3d at 763 [2016]; *Graziuso v 2060 Hylan Blvd. Rest. Corp.*, 300 AD2d 627, 627 [2d Dept 2002]; *see also Mulqueen v Live*, 111 AD3d 585, 585 [1st Dept 2013].

Here, defendants must demonstrate that, on the date that this action was commenced, none of the parties resided in Kings County (*see Pomaquiza v 145 WS Owner, LLC*, 172 AD3d 1119, 1120 [2d Dept 2019]; *Campbell v Western Beef*, 123 AD3d 966, 967 [2d Dept 2014]; *Ramos v Cooper Tire & Rubber Co.*, 62 AD3d 773 [2d Dept 2009]). If defendants make such a showing the burden shifts to plaintiff to establish, in opposition, that Kings County is a proper venue for this action (*see Deas v Ahmed*, 120 AD3d 750, 751 [2d Dept 2014]; *Chehab v Roitman*, 120 AD3d 736, 737[2d Dept 2014]).

In support of the motion, defendants have submitted KeySpan Gas' certificate of incorporation, which unequivocally states that its office shall be in Nassau County. Thus, the burden shifted to plaintiff to demonstrate that Kings County is a proper venue for this action. Plaintiff attempts to meet its burden by citing two cases which the court finds do

not compel this result. First, the *Weiss* case is from the First Department, and thus is non-binding on this court. Significantly, the court notes that more recent cases decided by the First Department acknowledge that although "designation of venue in the county in which a corporate defendant's principal place of business is located is proper . . . , for venue purposes, the corporation's designation of a county as the location of its principal office in its certificate of incorporation is controlling (*Mulqueen*, 111 AD3d at 585; *see Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579 [1st Dept 2009]; *Conway v Gateway Assoc.*, 166 AD2d 388 [1st Dept 1990]).

Additionally, the *Yonkers Raceway* case cited by plaintiff was decided in 1958 and involved horse racing and specific statutes that regulated that industry which required a corporation involved in the racing industry to designate a principal business office and to designate which county or counties in which it would be carrying out its business. There is no such requirement present here, and significantly, KeySpan Gas' Certificate of Incorporation specifically states that KeySpan Gas shall operate in Nassau, Suffolk and Queens County with no mention of Kings County.

Moreover, the court finds that the testimony plaintiff submits from a KeySpan employee, in another action, fails to establish that venue is proper in Kings County. Finally, the court finds that the three documents submitted by plaintiff in opposition to the motion, and in support of his cross motion, similarly fail to demonstrate that venue should be placed in Kings County or that KeySpan Gas should be judicially estopped from

claiming it does not maintain its principal place of business in Kings County. First, the SEC Notification was prepared by KeySpan Corporation, an entity that is not a party to the instant litigation, but rather serves as the holding company for KeySpan Gas. That this document lists the address of KeySpan Corporation's principal executive office in Kings County has no bearing on KeySpan Gas as it is a separate entity. Next, the Intervention document involves two separate entities: Brooklyn Union Gas and KeySpan Gas and refers to them collectively as KeySpan Energy. It lists the principal offices of KeySpan Energy as One MetroTech and 175 East Old Country Road in Hicksville, which corresponds to the individual addresses of the two entities with Brooklyn Union Gas located at One MetroTech and KeySpan Gas' principal office at the Hicksville address. Finally, the fact that in 2009, KeySpan Gas listed One MetroTech as its address on a PSC Report fails to establish that it was its principal place of business. Nor does the fact that KeySpan Gas lists the office of its chief executive officer as One MetroTech Center in its New York State Department of Corporations' entity filing. Moreover, a careful reading of the entity filing document reveals that KeySpan Gas lists its principal executive office as the Hicksville address. In this regard, the court notes that corporations often maintain offices in counties other than the county designated in its certificate of incorporation and this does not affect its residence for venue purposes.

Inasmuch as the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, defendants have demonstrated that venue of this matter in Kings County is not proper. In opposition, plaintiff has failed to

demonstrate that venue in this matter should be properly placed in Kings County (*see Whelton v Dayton Beach Park No. 1 Corp.*, 110 AD3d 987, 988 [2d Dept 2013] [holding that it was an improvident exercise of discretion to deny the appellants' motion to transfer venue of the action from Kings County to Nassau County in light of, inter alia, the Supreme Court's determination to award summary judgment dismissing the complaint insofar as asserted against the only party in this action whose presence supported venue in Kings County]; *see* CPLR 503 [a], [c]; *see also Bonilla v Tishman Interiors Corp.*, 100 AD3d 673, 674 [2d Dept 2012]; *Messiha v Staten Is. Univ. Hosp.*, 77 AD3d 894, 895 [2d Dept 2010]; *Canaan v Costco Wholesale Membership, Inc.*, 49 AD3d 583, 585 [2d Dept 2008]; *Clase v Sidoti*, 20 AD3d 330, 331 [1st Dept 2005]; *Xiu Mei Cheng Chow v Long Is. R.R.*, 202 AD2d 154, 155 [1st Dept1994]). Significantly, the court notes that in *Whelton*, as here, KeySpan Gas East was a defendant; and the Second Department reversed the trial court's denial of its' motion for a change of venue holding there was no basis for retaining venue in Kings County. Accordingly, that branch of defendants' motion seeking to transfer this action from Kings County to Suffolk County is granted, and plaintiff's cross motion seeking to retain venue in Kings County is denied.

Accordingly it is,

ORDERED that the branch of defendants' motion seeking to dismiss plaintiff's complaint as against National Grid Services and National Grid USA is granted and the action is dismissed as against said defendants and severed accordingly; and it is further

ORDERED that the caption is amended to read as follows:

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LUIS A. MORALES,

Plaintiff,

- against - Index No. 507972/19

KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID,

Defendant.

----------X

ORDERED that defendants' motion seeking a change of venue is granted and the venue of this action is hereby changed from this Court to the Supreme Court, County of Suffolk, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Suffolk upon service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision, order and judgment of the court.

ENTER

J. S. C