

**Consolidated Rest. Operations, Inc. v Westport Ins.
Corp.**

2020 NY Slip Op 35568(U)

December 11, 2020

Supreme Court, Westchester County

Docket Number: Index No. 58095/2020

Judge: Gretchen Walsh

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
-----X

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff,

Index No. 58095/2020
Motion Seq. No. 2
Motion Date: 11/05/2020

DECISION AND ORDER

-against-

WESTPORT INSURANCE CORPORATION,

Defendant.
-----X

WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 23-33 and 80-87 were read on this motion by Defendant Westport Insurance Corporation (“Defendant” or “Westport”) for an order, pursuant to CPLR 503, 510 and 511 to transfer venue of this matter to New York County. Plaintiff Consolidated Restaurant Operations, Inc. (“Plaintiff” or “CRO”) opposes the motion.

Upon the foregoing papers, and for the reasons stated herein, Defendant’s motion shall be granted.

PLAINTIFF’S ALLEGATIONS

Plaintiff commenced this action on August 5, 2020 for declaratory relief as well as damages for breach of contract arising out of Westport’s alleged repudiation of its contractual duty to pay claims for direct physical loss or damage to property stemming from the COVID-19 pandemic.

Plaintiff alleges that CRO operates more than 27 full-service and 27 franchise restaurants in 12 states and the United Arab Emirates and that CRO employs more than 3,200 full and part-time employees. It contends that “in a region that is home to more than 25 Fortune 500 companies and 6.4 million residents, CRO ranks as the 70th largest privately held company in

Dallas-Fort Worth” serving more than 7 million meals annually (*id.* at ¶ 2). Plaintiff argues that “[t]he very qualities that make CRO a successful global restaurant group made it particularly vulnerable to the virus” and that “[i]n March 2020, all of CRO’s insured locations (the ‘Restaurants’) were forced to close by various stay-at-home orders (the ‘Orders’), which directed all non-essential businesses to cease operations” (*id.* at ¶ 3).

According to Plaintiff, “[t]he Orders explained that these drastic measures were needed because of the unique characteristics of the virus and, of particular relevance here, its propensity to damage property” and the Orders have devastated CRO’s business as “[r]estaurants went from busy, bustling destinations for dining to virtual ghost-towns” (*id.* at ¶¶ 3-4). Plaintiff alleges that CRO has experienced tens of millions of dollars in losses and expects to suffer tens of millions more in future losses from lost revenue, as well as other losses and expenses in connection with the pandemic, but that it had the foresight to purchase \$50 million of per-occurrence business interruption insurance from Westport that covers “all risks” (*id.* at ¶¶ 4-5).

It is Plaintiff’s position that this insurance covers “all risks” and that “all risks” include “the very risk to CRO’s business that materialized during the pandemic” (*id.* at ¶ 5, Ex. A [the “All-Risk Policy”]). Plaintiff argues that “[i]n violation of its duties under the All-Risk Policy, Westport has given every indication it will not cover losses stemming from the pandemic” and Westport’s “principal position . . . that neither the virus nor the attendant disease causes physical loss or damage to property, as that terminology is used in the All-Risk Policy . . . contravenes the plain meaning of the coverage language and case law in New York and across the country interpreting the same or similar language” (*id.* at ¶ 6). Plaintiff argues that as a result of this conduct, “CRO has been forced to bring this breach of contract action through which it seeks damages and a declaratory judgment that Westport’s ‘defenses’ do not bar coverage” (*id.* at ¶ 7).

Plaintiff states that it is a corporation organized under the laws of Texas with its principal place of business at 1200 Stemmons Freeway, Suite 100, Dallas, Texas (*id.* at ¶ 8). It further states that, upon information and belief, Defendant is a corporation organized under the laws of Missouri with its principal place of business at 5200 Metcalf Avenue, Overland Park, Kansas, and with its registered agent located at 120 South Central Avenue, Clayton, Missouri (*id.* at ¶ 9).

Plaintiff argues that because Defendant “has consented to the jurisdiction of the courts of the State of New York through a forum-selection clause, the Court has personal jurisdiction over these claims” (*id.* at ¶ 10, Ex. A at SP 10 564 1117 [“The parties hereto do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction”]). Plaintiff states that, because neither party resides in the State of New York, and because Plaintiff may therefore designate any county for the place of trial, venue in this Court is proper (*id.* at ¶ 11, *citing* CPLR § 503[a]).

**DEFENDANT'S CONTENTIONS IN SUPPORT OF ITS MOTION FOR
TRANSFER OF VENUE TO NEW YORK COUNTY**

In response to Plaintiff's Complaint, Defendant moves for an order pursuant to CPLR 503, 510 and 511 changing the venue of this matter to New York County. In support, Defendant submits: (1) an affidavit of Michael LaRocca, sworn to October 16, 2020, together with exhibits ("LaRocca Aff."); (2) an affirmation of Robert C. Santoro, Esq., dated October 16, 2020, together with exhibits ("Santoro Aff."); and (3) a memorandum of law dated October 16, 2020 ("Def's Mem.").

In its memorandum of law Defendant contends that Plaintiff filed this action in this Court based on its argument that Westport was not a New York resident but that, to the contrary, Westport is indeed a New York resident that has its principal office located in New York County and, therefore, pursuant to CPLR 503, venue is proper in New York County and this action should have been filed in New York County (Def's Mem. at 1).

Defendant states that Westport is a Missouri corporation, but "has a prominent office in New York County" located at 1301 Avenue of the Americas, New York, New York (the "New York County Office"). Defendant further states that the New York County Office "is almost 70,000 square feet and spans the 43rd to 45th floors at 1301 Avenue of the Americas" and is Westport's principal office in the State of New York (*id.* at 1, 10). Based on the averments made in the LaRocca affidavit, Defendant asserts that many Westport business leaders are located in Westport's New York County Office (*id.* at 1, 12-13).

Defendant argues that, as a foreign insurer, Westport is licensed to do business in New York by the New York Department of Financial Services ("NYDFS") and Westport is therefore not required to file an "Application for Authority" to do business in New York as a foreign corporation because its business activities are regulated by the NYDFS (*id.* at 1, 6-10). Defendant contends that "[a]mong other product lines, Westport writes what is called 'Special Risk Insurance' in the State of New York" and that "[t]his specialized insurance is available for large companies where the premium is in excess of \$100,000, the coverage is for a risk or class of risks which is of an unusual nature, a high loss hazard, or difficult to place, and where the company, for example, has a net worth of at least \$7.5 million" (*id.* at 2, 10). According to Defendant, in order to be licensed by the NYDFS to write "Special Risk Insurance," Westport must apply for a license for an exemption from New York State filing requirements with respect to rates and forms and must demonstrate to the NYDFS that the Special Risk Insurance business is "underwritten and transacted from an office within this state" (*id.* at 2, 10-11, *citing* Insurance Law § 6303). Defendant contends that it is licensed to write Special Risk Insurance in the State of New York and identified its "Special Risk Office (NY) Address" to the NYDFS as "1301 Avenue of the Americas, New York, New York 10019" (*id.* at 2, 10-11).

Defendant argues that, pursuant to CPLR 503(a), venue is proper in the county where "one of the parties resided when it was commenced" and there is no dispute that CRO is not a New York resident because CRO alleges it is not (*id.* at 2, 10). Defendant contends, however,

that Westport is a New York resident and that, pursuant to CPLR 503(c), Westport “shall be deemed a resident of the county in which its principal office is located” (*id.* at 2, 5-9).

Defendant asserts that contrary to CRO’s position, residency is not the same as a party’s “principal place of business” in the context of a jurisdictional analysis for purposes of, for example, diversity jurisdiction (*id.* at 2, 5). According to Defendant, the CPLR specifically considers that an individual may be a resident of more than county in New York (*id.*). Defendant contends that, with respect to corporations, the CPLR states that a corporation is deemed to be a resident in the county where its principal office in the State is located (*id.* at 2, 7-9). Defendant argues that Westport’s principal office in the State of New York is its New York County Office and therefore, venue is proper in New York County and this action should be transferred to the Supreme Court, New York County (*id.* at 2, 13).

PLAINTIFF’S CONTENTIONS IN OPPOSITION

In opposition to Defendant’s motion, Plaintiff submits: (1) an affirmation of Alexander M. Sugzda, Esq., dated October 30, 2020, together with exhibit (“Sugzda Aff.”); and (2) a memorandum of law dated October 30, 2020 (“Plf’s Opp. Mem.”).

According to Plaintiff, “[t]his lawsuit concerns denial of insurance coverage for losses arising out of the COVID-19 pandemic,” and “Plaintiff CRO has chosen Westchester County as its venue and Westchester is a proper venue because when, as here, neither party resided in the State when the action was commenced, venue is proper in any county of the plaintiff’s choosing. Westport, which denied CRO coverage, contends otherwise, however, arguing it did reside in the State, specifically at the New York County office of its parent company, Swiss Re” (Plf’s Opp. Mem. at 1). Plaintiff contends that, under New York’s venue statute, when no party “resided” in the State when the action commences, venue may lie wherever the plaintiff prefers (*id.* at 1, 4, *citing* CPLR § 503[a]). It states that a foreign corporation like Westport is deemed to reside in the county of its “principal office” (*id.* at 1, 4-5, *citing* CPLR 503[c]).

Plaintiff states that the “sole legal question presented in this Motion is how a court determines the ‘principal office’ of a foreign insurer” (*id.*). It contends that, for two reasons, Westport cannot meet its burden of proving it maintains its “principal office” in New York County. First, Plaintiff contends that “Westport relies on language that appears nowhere in the Civil Practice Law and Rules: Though the statute refers to a corporation being a resident of the county ‘in which its principal office is located,’ CPLR § 503(c), Westport repeatedly—eighteen times to be exact— references, in some form or another, ‘a principal office in the State of New York’” (*id.* at 1, 5-6). Plaintiff contends that “[t]he clause is clear: The statute expressly states a party need not be a resident of the State, *id.* § 503(a), a fact that is detrimental to Westport’s Motion” and that “[u]nable to proffer a convincing explanation for why Westport itself cannot be a non-resident, Westport impermissibly injects into the venue statute language the legislature could have, but did not, include” (*id.* at 1-2, 5-9).

Second, Plaintiff contends that Defendant “makes no effort to demonstrate that it can satisfy the one way in which the Insurance Law indicates a foreign insurer might prove a ‘principal office’ in the State—that is, by the Superintendent of Insurance causing the insurer’s declaration and charter to be filed and recorded in the office of the clerk of the county in which the insurer maintains its alleged principal office” (*id.* at 2, 6-9).

Plaintiff argues that Defendant’s motion should be denied because “Westport cannot cite a single case or legal authority stating the facts it alleges about Westport’s or Swiss Re’s New York County office qualify that office as a ‘principal office’” (*id.* at 2, 8). Alternatively, Plaintiff requests that it be afforded the opportunity to conduct venue-specific discovery prior to a determination on Defendant’s motion because Defendant shares the New York County Office with its parent company and because Westport has an office in Westchester County, “yet has given no indication about what transpires in that office” (*id.* at 2, 9). Plaintiff argues that Westport’s brief does not discuss Swiss Re or the Westchester County office at all (*id.*). According to Plaintiff, its “argument is straightforward: Westport has failed to prove its New York County office is its statutory ‘principal office’” and “[r]ather than confront that argument . . . Westport sets up straw-man arguments CRO has never made and, therefore, because Westport falls short of its burden of proof, the Court should deny the Motion” (*id.*).

DEFENDANT’S REPLY

In Reply, Defendant submits: (1) an affirmation of Robert C. Santoro, Esq., dated November 5, 2020, together with exhibits (“Santoro Reply Aff.”); and (2) a memorandum of law dated November 5, 2020 (“Def’s Reply Mem.”). Defendant states that it “has demonstrated with a sworn affidavit and documentary evidence that CRO’s selection of Westchester County as the place of trial was improper, and CRO’s convoluted legal arguments in opposition are unavailing” (Def’s Reply Mem. at 1).

Defendant contends that “CRO’s opposition boils down to a paradoxical argument that the CPLR section on venue placing trial in the State of New York can be read to include any county outside the State of New York” and that “CRO also falsely argues that New York Insurance Law § 1102 applying only to domestic insurers requires the Superintendent of Insurance to file a ‘declaration and charter’ for Westport, when it is not a domestic insurer” (*id.* at 1-2, 8-11). Defendant contends that “these twisted arguments are wrong on the law” and that CRO barely addresses the uncontroverted evidence Westport put forth in support of its motion in the form of the affidavit of Michael LaRocca and supporting exhibits all showing that New York County is where Westport’s principal office is in the State (*id.* at 1-2, 11-13). Defendant asserts that CRO’s argument that the fact that the NYSDFS was, due to the ongoing pandemic, not able to provide Westport with a copy of its current, and in force, license for Special Risks Insurance “is a red herring” (*id.*).

Defendant reiterates its argument that Westport has met its evidentiary burden and further that CRO has not countered it and that discovery is not warranted (*id.* at 1, 13). Therefore, it contends, Westport’s motion to transfer venue to New York County should be granted (*id.*).

DISCUSSION

CPLR 503 is the main venue setting provision, which provides that “the place of trial shall be in the county in which one of the parties resided when it was commenced . . . or, if none of the parties then resided in the State, in any county designated by the plaintiff” (CPLR 503[a]). For the purposes of venue, “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 . . .” (CPLR 503[c]). The general rule in New York is that the plaintiff may bring the action in any county in which any party resides or, if no party is a resident, in any county the plaintiff wishes (Siegel’s NY Prac. § 118 [6th ed]). Thus, the choice initially belongs to the plaintiff and is usually based on a number of considerations (*id.*).

However, if plaintiff selects an improper venue in the first instance, plaintiff forfeits the right to select the place of venue (*Saal v Claridge Hotel and Casino*, 152 AD2d 631 [2d Dept 1989]). “To effect 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” (*Drayer-Arnov v Ambrosio & Co., Inc.*, 181 AD3d 651, 652 [2d Dept 2020] [citations omitted]; *see also* CPLR 511[b]; *Bostick v Safa*, 173 AD3d 823, 824 [2d Dept 2019]). Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper (*Vereen v Flood*, 184 AD3d 758 [2d Dept 2020]).

Accordingly, it is Defendant’s burden to provide evidence establishing, *prima facie*, that it resides in New York County to succeed on its motion. To begin with, based on the allegations of the Complaint, Plaintiff concedes it is not a New York resident (Complaint at ¶¶ 8, 11). It is Defendant’s position that it is a New York resident because it maintains a principal office in New York County.

Generally, “[f]or purposes of venue, the sole residence of a foreign corporation is the county in which its principal office is located, as designated in its application for authority to conduct business filed with the State of New York” (*Ashjian v Orion Power Holdings, Inc.*, 9 AD3d 440, 440 [2d Dept 2004], *citing* Business Corporation Law [“BCL”] § 102[a][10]; *Graziuso v 2060 Hylan Blvd. Rest. Corp.*, 300 AD2d 627, 627 [2d Dept 2002] [“It is well settled 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”]). As a foreign insurer, however, Defendant is exempt from the requirement that it file an application for authority to do business in New York pursuant to BCL § 1304 designating its principal place of business within New York (Insurance Law § 108[e] [“The following provisions of the business corporation law . . . do not apply to an incorporated foreign insurer . . . sections thirteen hundred four through thirteen hundred six inclusive . . .”]; *Valley Psychological, P.C. v Government Employees Ins. Co.*, 95 AD3d 1546, 1548 [3d Dept 2012] [foreign insurer not required to file a certificate of incorporation designating its principal office]; *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d 514, 514 [1st Dept 1968] [same]).

Because foreign insurers are not required to designate the county of their principal office in New York under BCL §1304, venue is appropriate in the county where the foreign insurer maintains its principal office in New York (*see, e.g. Valley Psychological, P.C.*, 95 AD3d at 1548 [holding that Defendant was a foreign insurer not required to designate a principal place of business in a certificate of incorporation, but it “maintains its principal place of business in this state” in Nassau County and therefore Defendant was entitled to a change of venue as a matter of right]; *Providence Washington Ins. Co.*, 31 AD2d at 514 [“Since it appears that plaintiff maintains its principal office for the conduct of its business in this State in New York County, plaintiff had the right to designate this county as the place of trial”]).¹

In support of its motion for a change of venue, Defendant submits an affidavit of Michael LaRocca, the Head of Property and Specialty, North America, a member of the Management Body, and an officer for Westport (LaRocca Aff. at ¶ 1). In it, LaRocca avers that Defendant’s principal office in the State of New York is in New York County at 1301 Avenue of the Americas, New York, New York (*id.* at ¶ 2). According to LaRocca, the “New York County Office is almost 70,000 square feet spanning the 43rd to 45th floors” (*id.* at ¶ 9).

LaRocca states that Westport is a licensed insurer in the State of New York by the NYDFS and, therefore, is not required to submit an “Application For Authority” as a foreign corporation to do business in New York (*id.* at ¶¶ 10-11). He avers that Westport writes what is called “Special Risk Insurance” in the State of New York (*id.* at ¶ 12).

According to Defendant, this specialized insurance is available for large companies where the premium is in excess of \$100,000, the coverage is for a risk or class of risks which is of an unusual nature, a high loss hazard, or difficult to place, and where the company, for example, has a net worth of at least \$7.5 million (Def’s Mem. at 10-11, *citing* Insurance Law Article 63). Defendant contends that, in order to be licensed by the NYDFS to write “Special Risk Insurance,” Westport must apply for a license for an exemption from the New York State filing requirements with respect to rates and forms if it wants to write that business. It is Defendant’s position that in connection with this application, Westport must demonstrate to the NYDFS that the Special Risk Insurance business is “underwritten and transacted from an office within this state” (*id.* at 11, *citing* Insurance Law § 6303). LaRocca avers that Westport is

¹ Plaintiff’s argument that, because Westport is a Missouri corporation and has previously alleged that its “principal place of business” is in Kansas, it cannot be a resident of New York for purposes of determining venue in an action filed in New York state court, is unavailing. While CPLR 503 does not specifically use the words “in the State of New York” after the words “county” in the statute, these cases confirm that venue is determined based on the “principal place of business within this state” (*see also Mazzocki v State Farm Fire & Cas. Co.*, 170 Misc 2d 70, 71 [Sup Ct, NY County 1996] [where foreign insurer had its principal office in the State of Illinois and its principal New York office in Saratoga County, court granted defendant’s motion for a change of venue to Saratoga County as a matter of right because as a foreign insurer, State Farm’s principal office – *i.e.*, its principal New York office – defined its residence for the purposes of venue]).

licensed to write Special Risk Insurance in the State of New York and identified its “Special Risk Office (NY) Address” to the NYDFS as “1301 Avenue of the Americas, New York, New York 10019,” the address of its New York County Office (LaRocca Aff. at ¶¶ 12-14, 17-18; Exhibits A [copy of Westport’s Special Risk Insurance license valid until August 31, 2019], B [copy of Westport’s Special Risk Insurance license valid until August 31, 2020], D [email from NYDFS stating that “[t]he free trade zone renewal license applications for . . . Westport Insurance Corporation are approved for the period effective September 1, 2020 - August 31, 2021”]).

LaRocca avers that, on July 28, 2020, Westport applied to the NYDFS to renew its Special Risk Insurance license (*id.* at ¶¶ 15-16; Exhibit C [application listing the New York County Office as the address of its office within New York]). He states that, on October 9, 2020, the NYDFS approved Westport’s application for its Special Risk Insurance license (*id.* at ¶¶ 17-18; Exhibit D). He avers that the NYDFS noted that Westport’s license was approved for the renewed period of September 1, 2020 to August 31, 2021, but due to the COVID-19 pandemic, the NYDFS was not mailing out the licenses until they were back to “normal operations” (*id.* at ¶ 18; Exhibit D). He further avers that, on October 13, 2020, Westport requested a PDF copy of the 2020-2021 license, but the NYDFS stated that it was not sending out “any PDF licenses” (*id.* at ¶ 19; Exhibit D).²

Moreover, according to Defendant, in addition to the fact that Westport’s Special Risk Insurance license designates the New York County Office as Westport’s principal office for writing that business, which is filed with the NYDFS, significant management, direction and control of Westport’s business is conducted out of the New York County Office (Def’s Mem. at 12).

LaRocca avers that seven of the ten members of Westport’s Board of Directors are in the New York County Office (LaRocca Aff. at ¶ 20). He further avers that many Westport “business leaders” are located in the New York County Office, including himself, as well as:

- Westport’s President and Chief Executive Officer, who is also a member of Westport’s Management Body;
- Westport’s Head of Casualty and Financial Products, who is also a member of Westport’s Management Body;

² Defendant also argues that “the Insurance Contract at issue in this matter was underwritten and issued, in part, pursuant to Westport’s Special Risk License (also referred to in the industry and by the NYDFS as the “Free Trade Zone” license)” (Def’s Mem. at 11, *citing* Santoro Aff., Exhibit 2 at 6 (SP 5 423 0318); LaRocca Aff., Exhibit D at p. 2 [“The free trade zone renewal license . . .”]). Defendant argues that the Insurance Contract contains the required wording stating that the forms and rates were exempt from the New York filing requirements pursuant to Regulation Number 86, Section 16.3 (Def’s Mem. at 11-12).

- Westport's Senior Vice President, Head Investment Steering Americas, who is also member of Westport's Management Body;
- Westport's Head of Standard Propositions, North America, who is also a member of Westport's Management Body;
- Westport's Head of Accident and Health, who is also a member of Westport's Management Body (*id.* at ¶¶ 21-26).

LaRocca also avers that two additional officers of Westport are located in the New York County Office: Westport's Head of Sales, North America, and its Vice President, Head Global Cash Management, Treasury (*id.* at ¶ 27).

In sum, Defendant contends that the above provides sufficient *prima facie* evidence supporting its contention that Westport's principal office in the State of New York is its New York County Office and, therefore, Defendant is a resident of New York County. As CRO is not a resident of New York, Defendant contends that, pursuant to CPLR 503(a) and 503(c), venue for this action is only appropriate in New York County and it is entitled to a change of venue as a matter of right.

In opposition to the evidence presented by Defendant, Plaintiff argues that the motion to change venue should be denied, because "Westport fails to produce its declaration and charter, the documents the Insurance Law contemplates *might* establish Westport's 'principal office'" (Plf's Opp. Mem. at 5). However, the provisions relied upon by Plaintiff do not apply to foreign insurers. Insurance Law § 1102 provides that:

(e)(1) Before licensing any such corporation organized under section one thousand two hundred one of this chapter, to do any insurance business, the superintendent shall:

* * *

(C) Upon payment of the appropriate fees by such corporation, cause a copy of its declaration and charter, certified by him, to be filed and recorded in the office of the clerk of the county in which such corporation has its principal office.

Insurance Law § 1201 provides that a "corporation may be organized and licensed to do an insurance business in this state by taking the following successive steps." Because Westport is a foreign insurer, these provisions are inapplicable.

Plaintiff's reliance on *GEICO v Star and Strand Tr., Inc.* (66 Misc 3d 686 [Sup Ct, Albany County 2019]), is similarly unavailing. In *Star and Strand*, the court rejected a reading of CPLR 503(c) in which a foreign insurer could select any county where it has an office as an appropriate place for venue. Plaintiff points to language in the opinion stating that:

[T]here are two alternative conclusions which may flow from the fact that foreign insurers need not register their principal office, neither of which are in conflict with [CPLR 503's] language. First, it could be held that no "principal office" exists in this state, and the plaintiff must therefore select an alternative basis for venue. Indeed, the statute specifically contemplates that there may be a circumstance where none of the parties has a "residence" in the state (see CPLR 503 [a]). The second possibility is that where there is no Business Corporation Law certification, some other understanding of the term "principal office" may be used (*Star and Strand*, 66 Misc 3d at 689).

Plaintiff argues that the first approach "accords with the *Ashjian* rule" (which is inapplicable here) and that for the other, "the Insurance Law might answer this question presented" but that statute requires the Superintendent of Insurance to cause to be filed the insurer's "declaration and charter" in the office of the clerk of the county in which the insurer maintains its "principal office" (Plf's Opp. Mem. at 6-7). As discussed above, the statute relied upon by Plaintiff is inapplicable to Defendant. More fundamentally, Plaintiff misconstrues the holding of *Star and Strand*. With respect to the second possibility proposed by the trial court when there was no BCL certification, the court stated:

Indeed, a number of decisions have specifically identified a "principal office" of a foreign insurance corporation for purposes of placing venue (see *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d 514, 514 [1st Dept 1968] ["Since it appears that plaintiff (foreign insurer) maintains its principal office for the conduct of its business in this State in New York County, plaintiff had the right to designate this county as the place of trial"]; *Mazzoeki v State Farm Fire & Cas. Co.*, 170 Misc 2d 70, 71 [Sup Ct, NY County 1996] ["As a foreign insurer State Farm's principal office defines its residence for the purposes of the venue statutes"]) (*Star and Strand*, 66 Misc 3d at 690).

Replying on these cases (which looked to where the foreign insurer maintained its principal office for purposes of venue), the court concluded that the "fact that the principal office is not certified pursuant to the BCL does not prevent the court from determining whether such an office exists" (*id.*). The court certainly did not conclude that this determination could only be made based on documents filed pursuant to BCL § 1102(e)(1).

Finally, Plaintiff argues that it is entitled to discovery concerning Defendant's offices located in Westchester County and Kansas. In support of its argument, the lone evidence provided by Plaintiff is an affirmation of counsel stating that Plaintiff's counsel appeared on behalf of CRO at a pre-motion conference held by the Court on October 13, 2020. According to Plaintiff's counsel, at the conference, in response to the Court's inquiry as to whether "Westport has ever claimed 1301 Avenue of the Americas, New York 10019, as its 'principal office' for purposes of CPLR § 503(c)," counsel for Defendant "responded that he was unaware of any such instance" (Sugzda Aff. at ¶¶ 4-5). Plaintiff's counsel further affirms that, at the conference, the Court asked counsel for Defendant whether Westport maintains any other offices in New York and that Defendant's counsel responded that "Westport maintains an office in Armonk, New York" (*id.* at ¶ 6). Counsel's statements fall short of justifying Plaintiff's request for discovery because Plaintiff offers nothing to contradict the Defendant's evidence showing that while it may

maintain offices in other counties, its principal office is located in New York County. Under the CPLR, “[a] corporation is deemed a resident of the county in which its principal office is located, despite its maintenance of an office or facility in another county” (*Nixon v Federated Dept. Stores, Inc.*, 170 AD2d 659, 659 [2d Dept 1991]; *Papadakis v Command Bus Co.*, 91 AD2d 657 [2d Dept 1982]). As such, the location of other offices in other counties is irrelevant for purposes of venue (*i.e.*, it is irrelevant that Defendant may have another office and employees located in Armonk given Defendant’s evidence demonstrating that its principal office is located in New York County). Accordingly, Plaintiff’s request for discovery shall be denied.

For all the foregoing reasons, Plaintiff’s selection of venue in Westchester County is improper and, because Defendant has presented evidence that it resides in New York County, a change of venue to New York County is warranted (*Valley Psychological, P.C., supra*; *Providence Washington Ins. Co., supra*; *Mazzoeki, supra*; *see also Dubiac v Travelers Ins. Corp.*, 121 Misc 2d 1090 [Sup Ct, NY County 1983]).

Based on the foregoing, it is hereby

ORDERED that the motion by Defendant Westport Insurance Corporation to transfer the venue of this action from Westchester County to New York County is granted; and it is further

ORDERED that the venue of this action is changed from Supreme Court, Westchester County to Supreme Court, New York County, and it is further

ORDERED that, upon payment of any required fees by Defendant Westport Insurance Corporation, the Clerk of the Supreme Court, Westchester County shall transfer the file and all papers in this action to the Clerk of the Supreme Court, New York County.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 11, 2020

ENTER:


HON. GRETCHEN WALSH, J.S.C.

TO:

MCKOOL SMITH PC
By: Robin Lynne Cohen, Esq.
Alexander M. Sugzda, Esq.
Attorneys for Plaintiff
One Manhattan West
395 9th Avenue 50th Fl
New York, NY 10001

DLA PIPER LLP (US)
By: Aidan M. McCormick, Esq.
Robert Carey Santoro, Esq.
Attorneys for Defendant
1251 Avenue of The Americas
New York, NY 10020