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Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.
2017 NY Slip Op 51941(U)
Decided on November 6, 2017
Supreme Court, Albany County
Platkin, J.
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Decided on November 6, 2017

Supreme Court, Albany County

Belair Care Center, Inc., et al., Plaintiffs,

against

Cool Insuring Agency, Inc., et al., Defendants.

901476-14

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Richard M. Platkin, J.

Pending before the Court are the motions of defendants Hirsch Wolf & Company, Inc. ("Hirsch Wolf"), Marshall & Sterling, Inc. ("Marshall & Sterling"), The Treiber Group, LLC ("Treiber"), Vanner Insurance Agency ("Vanner"), The Reis Group ("Reis"), Shel-Bern Associates ("Shel-Bern"), Spain Agency, Inc. ("Spain") and Rampart Brokerage Corp. ("Rampart") (collectively "Broker Defendants") for an order: (a) changing the place of trial of this action, pursuant to CPLR 510 (1); and (b) severing the various plaintiffs' claims, pursuant to CPLR 603. Plaintiffs oppose the motions.

BACKGROUND

The lengthy factual and procedural background to this action is set forth in the prior decisions of this Court and will be repeated here only to the extent necessary to dispose of the pending motions (*see* Decision & Order dated May 4, 2017; Decision & Order dated September 23, 2016).

Plaintiffs are healthcare providers that conducted business in New York State and were required to provide workers' compensation insurance to their employees. To fulfill this obligation, plaintiffs became members of the Healthcare Industry Trust of New York ("HITNY" or "Trust"), a group self-insured trust ("GSIT") formed pursuant to Workers' Compensation Law § 50 (3-a).

On December 31, 2007, the New York State Workers' Compensation Board ("WCB" or "Board") assumed administration of the Trust after finding it to be insolvent. Thereafter, the WCB issued letters to plaintiffs (and other Trust members) advising them that they were jointly and severally liable for the Trust's accumulated deficit. Each plaintiff was informed of its *pro rata* share of the deficit and advised that collection actions would be initiated if the assessments were not paid.

On July 10, 2009, certain plaintiffs in this action, along with certain other Trust members, commenced an action in this Court seeking to recover the amount of the accumulated deficit from other individuals and entities involved with the Trust, including: (a) Compensation Risk Managers, LLC ("CRM"), which served as group administrator to the Trust; (b) certain entities and individuals associated with CRM; and (c) the HITNY trustees (*HITNY v CRM*, Index No. 5966-09 ["*HITNY* Action" or "Member Action"]). On March 31, 2010, CRM applied for an order from the New York State Litigation Coordinating Panel ("LCP") coordinating certain pending actions, including the Member Action. The LCP ultimately issued an order granting the request for coordination on February 23, 2011 ("Coordination Order"), and the coordinated cases were transferred to the undersigned.

The plaintiffs in the *HITNY* Action ("*HITNY* Plaintiffs") eventually amended their complaint to add as defendants the insurance brokers who placed them into the Trust. The *HITNY* Plaintiffs sought to hold their insurance brokers liable for the additional assessments imposed by the Board on the ground that the brokers induced them to join and/or remain members of the Trust through fraud, misrepresentations and other wrongful conduct.

The *HITNY* Plaintiffs later assigned all of their claims in the Member Action to the Board, except for the claims alleged against the Broker Defendants. In an Order dated March 3, 2014 ("Assignment Order"), the Court gave effect to this stipulation by directing the *HITNY* [*2]Plaintiffs to circulate a "complaint to be filed under a separate index number (the 'Broker Action') setting forth only the claims the former plaintiffs in the HITNY Action did not assign to the Board pursuant to the HITNY Stipulation, which claims shall only be asserted against the insurance broker defendants in the new Broker Action" (Cost Aff., Ex. A, pp. 2-3). The same order directed the Board to "serve upon counsel to all parties in the Coordinated Cases a stipulation to sever the claims assigned to the Board in the *HITNY* Action from the claims asserted by

the plaintiffs in the Broker Action, which shall remain coordinated and joined for purposes of discovery unless and until further ordered by the Court" (*id*., pp. 3-4).

On March 17, 2014, plaintiffs commenced this action against the Broker Defendants ("Broker Action") under a new index number, and on April 15, 2014, the Board circulated a proposed stipulation by which the claims against the Broker Defendants would be severed ("Severance Stipulation"). As is pertinent here, the parties to the Severance Stipulation recited as follows:

The plaintiffs' claims against the Broker Defendants shall proceed in a separate action filed in the Supreme Court, Albany County, captioned *Belair Care Center, Inc., et al. v. Cool Insuring Agency, Inc., et al.*, Index No. 1476-14 (the 'Broker Action'). The Broker Action shall be coordinated with the [Member A]ction, as well as [with other related actions commenced by the WCB against CRM and SGRisk, LLC], for purposes of discovery and all other pretrial matters, until further order of the Court (*id.*, Ex. B, ¶ 2).

Plaintiffs were granted leave to amend their complaint by Decision & Order dated September 23, 2016, and they filed and served an Amended Complaint on or about October 24, 2016. The Broker Defendants then moved to dismiss the Amended Complaint, and those motions were granted in part and denied in part by Decision & Order dated May 4, 2017 ("MTD Decision").

Immediately prior to, or in conjunction with, service of an answer to the Amended Complaint, each of the Broker Defendants served demands upon plaintiffs pursuant to CPLR 511 (a) to change the place of trial of this action. The Broker Defendants asserted that Albany County was not a proper county, and they demanded that the case be transferred to counties of their choosing where at least one of the parties resided.[FN1]

On May 24, 2017, plaintiffs filed an affirmation of counsel in support of their designation of Albany County as a proper venue, asserting: (1) the February 2011 Coordination Order and/or the March 2014 Assignment Order required the Broker Action to be filed in Albany County, thus rendering this a case where venue has been prescribed by law;[FN2] and (2) Albany

County is the county where the material events took place and where the Board is headquartered, rendering venue proper under CPLR 506 (b). This motion practice ensued.[FN3]

DISCUSSION

The Broker Defendants argue that Albany County is not a proper venue for this action because none of the parties are residents of the county. Relatedly, the Broker Defendants seek an order of severance pursuant to CPLR 603, directing that each particular plaintiff's claims against a particular Broker Defendant be severed and heard in the county of the Broker Defendant's choosing. In the event that the Court declines to sever plaintiffs' claims, the Broker Defendants request that this action be transferred in its entirety to Supreme Court, Nassau County.

Plaintiffs oppose the motions, arguing that their commencement of this action in Albany County was proper. In addition to the grounds previously asserted in the affirmation of their counsel, plaintiffs argue that venue is proper here because: (1) one or more of the HITNY Plaintiffs is a resident of Albany County; and (2) the Broker Defendants previously stipulated to venue in Albany County. In opposing severance, plaintiffs rely upon the common issues of fact and law raised by the Amended Complaint and further argue that the Broker Defendants have failed to show that severance would further convenience or avoid prejudice.

A.Venue

CPLR 509 provides that "the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511." A party may move for an order changing the place of trial where "the county designated for that purpose [by plaintiff] is not a proper county" (CPLR 510 [1]). Thus, where the plaintiff sues in an improper county, it "forfeit[s] its right to designate the place of trial," and as long as the moving defendant has taken the correct procedural steps and selected a proper venue, the case

should be transferred to defendant's proposed place of trial (*Lombardi Assoc. v Champion Ambulette Serv.*, 270 AD2d 775, 776 [3d [*3]Dept 2000]; *see Fisher v Finnegan-Curtis*, 8 AD3d 527, 528 [2d Dept 2004]; *Llorca v Manzo*, 254 AD2d 396, 397 [2d Dept 1998]; *Nixon v Federated Dept. Stores*, 170 AD2d 659, 660 [2d Dept 1991]; *Kelson v Nedicks Stores*, 104 AD2d 315, 316 [1st Dept 1984]; *see also* Siegel, NY Prac § 123 [5th ed 2017]).

With respect to a domestic corporation or a foreign corporation authorized to conduct business in New York, venue properly is laid in "the county in which its principal office is located" (CPLR 503 [c]). Appellate authority consistently has interpreted "principal office" to mean the corporation's principal place of business, as specified in its certificate of incorporation (domestic corporation) or certificate of authority (authorized foreign corporation) (*see Valley Psychological, P.C. v Government Empls. Ins. Co.*, 95 AD3d 1546, 1547-1548 [3d Dept 2012]; *Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 229 AD2d 988, 989 [4th Dept 1996]). Limited liability companies are treated as a functional equivalent of a corporation for venue purposes (*see Graziuso v 2060 Hylan Blvd. Rest. Corp.*, 300 AD2d 627, 627-268 [2d Dept 2002]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C503:4).

The Broker Defendants submit evidence, in the form of the Amended Complaint and their corporate certificates, establishing that no party to this action is a resident of Albany County (*see* Cunningham Aff., ¶¶ 16-18; *see id.*, Exs. A & G). The Broker Defendants also submit evidence and argument demonstrating that the grounds for venue stated in plaintiffs' CPLR 511 (b) affirmation are without merit.

Specifically, the Broker Defendants observe that there is nothing in the Coordination Order that requires this action or any subsequently filed case to be venued in Albany County. Rather, the Coordination Order issued by the LCP states that certain then-pending cases, including the Member Action, as well as "related matters subsequently filed" (Cost Aff., Ex. C, p. 2), were to be coordinated before the undersigned pursuant to 22 NYCRR 202.69, which provides for the coordination of related cases for purposes of "pretrial proceedings, including dispositive motions" (*id.* [a]). Upon the termination of coordination, however, "the actions shall be remanded to their counties of origin for trial unless the parties to an action consent to trial of that action before the Coordinating Justice" (*id.* [d]). Thus, the Coordination Order does not — and could not — require this action to be venued in Albany County for trial.

Moreover, the Coordination Order is predicated upon the relationship among cases "seeking damages alleged to have arisen from CRM's administration of GSITs that provided workers' compensation coverage to [GSIT] members" (Cost Aff., Ex. C, p. 3). Here, plaintiffs' damages are claimed to have arisen through the independently wrongful conduct of the Broker Defendants in connection with the rendition of insurance brokerage services to plaintiffs.

The submissions of the Broker Defendants further establish that the Assignment Order did not prescribe the venue of this action. By its terms, the order obliged the *HITNY* Plaintiffs to circulate a complaint against the Broker Defendants "to be filed under a separate index number" (Cost Aff., Ex. A, pp. 2-3), but there was no requirement that the new action be commenced in Albany County. Similarly, while the Assignment Order directed the Board to circulate a stipulation to sever the claims assigned to the Board from the claims alleged herein and provided that the Broker Action "shall remain coordinated and joined for purposes of discovery unless and until further ordered by the Court," there is nothing in the Assignment Order that precludes the [*4]Broker Defendants from seeking a "further order[]" transferring this case to a proper venue (*id*., pp. 3-4; *see also* 22 NYCRR 202.69 [c] [2], [d] [authority to remand coordinated case or terminate coordination]). Simply put, the Assignment Order did not require plaintiffs to file this action in Albany County.[FN4]

Plaintiffs' reliance on CPLR 506 (b) similarly is unavailing, as that statute, by its terms, pertains to venue in a special proceeding "against a body or officer" (*see Matter of Hurst v Board of Educ. for Ithaca City School Dist.*, 242 AD2d 130, 132 [3d Dept 1998], *appeal and lv dismissed, lv denied* 92 NY2d 914 [1998]; *Arthur Young & Co. v Keith*, 63 AD2d 878, 879 [1st Dept 1978] [venue improperly changed to Albany County even though cases could later become CPLR article 78 proceedings]; *cf. City of New York v State Bd. of Equalization & Assessment of State of NY*, 60 AD2d 932, 933 [3d Dept 1978]). As this is a commercial action for damages against insurance brokers and not a special proceeding brought against a body or officer, any connections that this case may have to Albany County or the WCB are of no moment.[FN5]

In their opposition, plaintiffs effectively concede that no party to this action was a resident of Albany County at the time of commencement.[FN6] Instead, plaintiffs make two additional arguments in support of their contention that Albany County

is a proper venue: (1) that one or more plaintiffs in the Member Action was a resident of Albany County at the time of commencement (*see* CPLR 503); and (2) the Broker Defendants stipulated to venue in this county (*see* CPLR 501).

As a threshold matter, the Broker Defendants argue that the Court should not entertain these arguments because they were not set forth in plaintiffs' CPLR 511 (b) affirmation and plaintiffs did not cross-move for a discretionary transfer of venue. While there appears to be some appellate authority to support this position, despite the absence of any obvious textual basis within CPLR 511 (b) (*see Fisher*, 8 AD3d at 528; *Lynch v Cyprus Sash & Door Co.*, 272 AD2d 260, 261 [1st Dept 2000]; *Nixon*, 170 AD2d at 660; *Pitegoff v Lucia*, 97 AD2d 896, 896-897 [3d Dept 1983]; *but see* Siegel, NY Prac § 123), [FN7] the Court need not delve into this issue because the [*5]grounds for Albany County venue raised for the first time in opposition to the Broker Defendants' motion are lacking in merit.

Specifically, plaintiffs cannot establish venue under CPLR 503 by relying upon the residence of those *HITNY* Plaintiffs who are not, and never were, parties to the Broker Action. As discussed previously, this action is separate and distinct from the Member Action, which continues to be prosecuted under a different index number. Thus, plaintiffs have failed to substantiate their contention that Albany County is a proper venue for the case based upon the residence of the parties at the time of commencement (*see* CPLR 503 [a]).

And with respect to plaintiffs' claim that the Broker Defendants stipulated to venue in Albany County, the Court disagrees. The stipulation cited by plaintiffs, the Severance Stipulation, does provide that the Broker Action would be commenced as a single action in Albany County and subject to coordination "until further order of the Court" (Cost Aff., Ex. B, ¶ 2), but this stipulation was not intended to foreclose the Broker Defendants from seeking to transfer venue or move for severance. In fact, at a January 10, 2014 court appearance at which the stipulation was discussed, counsel for several of the Broker Defendants stated in open court and on the record the intention of their clients to seek a change of venue and severance at the appropriate time (*see* Cunningham Reply Aff., Ex. H, pp. 36-37). Accordingly, the Severance Stipulation is not a written agreement fixing the place of trial under CPLR 501.

Based on the foregoing, the Court concludes that "plaintiffs' choice of venue was improper and they have accordingly forfeited their right to select the venue to this action" (*Cottone v Real Estate Indus.*, 246 AD2d 572, 573 [2d Dept 1998]; *see Valley Psychological*, 95 AD3d at 1548; *Lombardi Assoc.*, 270 AD2d at 776). Accordingly, the branch of the Broker Defendants' motions seeking to transfer venue must be granted.

B.Severance

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). The determination as to whether to order severance is a matter of judicial discretion (*see Miller v Howard*, 137 AD3d 1698, 1699 [4th Dept 2016]; *Global Imports Outlet, Inc. v Signature Group, LLC*, 85 AD3d 662, 662 [1st Dept 2011]; *Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844, 844 [3d Dept 2001]). Discretion to order a severance should be exercised "sparingly," particularly in cases "[w]here complex issues are intertwined" (*Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]). Still, "[e]ven where a plaintiff will to some extent rely on the same evidence, severance is appropriate where individual issues predominate, concerning particular circumstances applicable to each defendant, and there is the possibility of confusion for the jury" (*Miller*, 137 AD3d at 1699 [internal quotation marks, citations and alterations omitted]).

In support of their motion, the Broker Defendants argue that severance of plaintiffs' claims is appropriate because their "liability to plaintiffs, if any, will necessarily turn on the highly fact-specific insurance procurement relationships between specific individual plaintiffs and the insurance broker defendants that procured insurance for them" (Cunningham Aff., ¶ 45; *[*6]see generally* MTD Decision, pp. 26-27, 37-38). As the Broker Defendants observe, such claims are "'governed by the particular relationship between the parties and [are] best determined on a case-by-case basis'" (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 [2014], quoting *Murphy v Kuhn*, 90 NY2d 266, 272 [1997]; *see also* Amended Compl., ¶ 166 [plaintiffs' causes of action are "specific . . . claims against specific broker defendants"]).

On the other hand, plaintiffs identify legitimate factors that counsel against severance.

The claims of plaintiffs and the defenses of the Broker Defendants do raise some common issues of law and fact, including allegations that the Broker Defendants were influenced to place clients into the Trust, which plaintiffs allege to be "a product that was essentially a high-risk self-insurance scheme that was not the equivalent of traditional insurance" (Amended Compl., ¶ 132), through CRM's payment of inflated, excessive and/or undisclosed fees (*see id.*, ¶¶ 102, 118, 137, 156-158). [FN8] Further, as plaintiffs observe, the Broker Defendants offer only limited proof that severance is warranted "[i]n furtherance of convenience or to avoid prejudice" (CPLR 603). And the Court is mindful of the interests of judicial economy that ordinarily are best served by avoiding the fragmentation of complex matters and instead facilitating a complete and comprehensive resolution of the dispute in a single forum (*see County of Chenango Indus. Dev. Agency v Lockwood Greene Engrs.*, 111 AD2d 508, 510 [3d Dept 1985]).

Ultimately, the decision whether or not to grant severance is a discretionary case management decision. Having determined that Albany County is not a proper county for the trial of his action, the Court believes that the better course is to deny the motions to sever, but to do so without prejudice to renewal before the Assigned Justice of the Commercial Division of Supreme Court, Nassau County, the county for trial jointly requested by the Broker Defendants (*see Earth Is. Inst. v Quinn*, 56 F Supp 3d 1110, 1120 [ND Cal 2014] ["Having concluded that this action should, and will, be heard by (another court), this Court will not make discretionary case management decisions on behalf of that court."]; *see also Allen v General Elec. Co.*, 11 AD3d 993, 994 [4th Dept 2004] [upholding denial of severance motion without prejudice to renewal]).

CONCLUSION

Accordingly,[FN9] it is

ORDERED that the motion of the Broker Defendants to transfer venue is granted; and it is further

ORDERED that the place of trial of this action is changed to Supreme Court, Nassau County (Commercial Division); and it is further

ORDERED that the motion for severance is denied, without prejudice to renewal at such time and in such manner as the Assigned Justice of the Commercial Division of Supreme Court, Nassau County may direct; and finally it is

ORDERED that the Albany County Clerk shall, upon service of a copy of this order and

upon payment of the requisite fee, if any, transmit all papers on file in this action to the

Nassau County Clerk.

This constitutes the Decision & Order of the Court. The original Decision & Order is being transmitted to counsel for Vanner Insurance Agency, The Reis Group, Shel-Bern Associates and Spain Agency. All other papers are being transmitted to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York

November 6, 2017

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

Papers Considered:

NYSCEF Nos. 67-76, 90-91, 109-117, 124-140.

Footnotes

Footnote 1: Hirsch Wolf demanded that plaintiffs change venue to Kings County on the ground that it resided there; Marshall & Sterling demanded that venue be changed to Dutchess County, which was its county of residence; Treiber demanded that venue be changed to Nassau County on the ground that plaintiff Nassau Extended Care Center Corp. resided there; Vanner demanded that venue be changed to Chautauqua County on the ground that all plaintiffs with a claim against Vanner resided there; Reis demanded that venue be changed to Putnam County on the ground that plaintiff NYMED Putnam, Inc., d/b/a Putnam Ridge Nursing Home resided in that county; Shel-Bern demanded that venue be changed to Richmond County on the ground that the sole plaintiff with a claim against Shel-Bern, New Vanderbilt Rehabilitation & Care Center, Inc., resided there; Spain demanded that venue be changed to Westchester County on the ground that plaintiff Hudson Valley Hospital Center resided there; and Rampart demanded that venue be changed to (a) Suffolk County as to plaintiffs Nesconset Nursing Center LLC and PALJR, LLC, d/b/a East Neck Nursing and Rehabilitation Center on the basis that they resided in Suffolk County and (b) Westchester County as to plaintiff RWB Corp., d/b/a Port Chester Nursing and Rehabilitation Center, which resided there.

Footnote 2: This is the sole ground for venue asserted in the Amended Complaint (*see* ¶ 9).

Footnote 3: The Broker Defendants' motions are timely, as they served demands for a change of venue prior to or simultaneously with, service of their answers, and they promptly moved to change venue after receiving plaintiffs' affirmation in support of maintaining venue in Albany County (*see* CPLR 510 [1]; 511 [a], [b]; *see Corea v Browne*, 45 AD3d 623, 624 [2d Dept 2007]). In fact, plaintiffs state in their opposing papers that, "to the extent the motions seek relief *other than on grounds that Albany County is not a proper venue*, the motions are untimely," effectively conceding that these motions are timely (Plaintiffs' Brief, p. 10 [emphasis added]).

Footnote 4: The Court is unaware of any authority by which it could deny defendants the right to have the case against them litigated in a proper county.

Footnote 5: The Legislature recently amended CPLR 503 (a) to allow cases to be venued in "the county in which a substantial part of the events or omissions giving rise to the claim occurred" (L 2017, ch. 366, § 1 [effective Oct. 23, 2017]), but this amendment applies only "to actions commenced on or after [its effective] date" (*id*., § 2).

Footnote 6: In a footnote, plaintiffs assert that Reis maintains an office in Albany County (*see* Plaintiffs' Brief, p. 6 n 2), but this does not controvert the proof submitted by the Broker Defendants showing that Reis's principal office and office of incorporation is located in New York City (*see* Cunningham Aff., Ex. G).

Footnote 7: In particular, Professor Siegel says the following: "P's failure (to respond within five days to D's demand to change venue with an affidavit showing propriety of the chosen venue or impropriety of D's choice of venue) does not automatically entitle D to the venue change; it merely gives D a broader option on where to move for it. Nor does P, by omitting to respond, forfeit the right to resist the motion. Wherever D moves, P may still oppose the motion and show that (its) chosen county is proper (or that D's is not)."

Footnote 8: Notably, the Amended Complaint does not allege that the Broker Defendants colluded with one another.

Footnote 9: The Court has considered the parties' remaining arguments and contentions, but finds them unavailing and/or unnecessary to reach in view of the disposition ordered herein.

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