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| Country-Wide Ins. Co. v Dejean |
| 2017 NY Slip Op 30752(U) |
| April 13, 2017 |
| Supreme Court, New York County |
| Docket Number: 157921/2016 |
| Judge: Gerald Lebovits |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

JEAN NIXON DEJEAN,
NEW YORK CITY HEALTH AND HOSPITALS
CORP. d/b/a-KINGS COUNTY HOSPITAL CENTER,
OMEGA DIAGNOSTIC IMAGING, P.C., STAND-UP
MRI OF BROOKLYN, PC., LVOV ACUPUNCTURE
P.C., JAMAICA WELLNESS MEDICAL, P.C., UNITED
WELLNESS CHIROPRACTIC PC, LIDA'S MEDICAL
SUPPLY INC.,

Defendants.

Index No.: 157921/2016
DECISION/ORDER
Motion Sequence No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Kings Country Hospital Center's (City defendant) motion to change venue and plaintiff's cross-motion to retain venue.

| Papers | Numbered |
|----------------------------------------------------------------------------|-----------------|
| City defendant's Notice of Motion | 1 |
| Plaintiff's Notice of Cross-Motion | 2 |
| Plaintiff's Affirmation in Opposition and in Support of Cross-Motion | 3 |

Jaffe & Koumourdas, LLP, New York City (R. Diego Velazquez of counsel), for plaintiff.
Zachary W. Carter, Corporation Counsel, New York (Inga Van Eysden, Senior Corporation Counsel), for City defendant.

Gerald Lebovits, J.

City defendant moves to change venue to Kings County under CPLR 510, 511, and 504 (3), New York City Health and Hospitals Corporation Act § 20 (3), and Unconsolidated Laws of New York State §§ 7401 (3) and 7405. Plaintiff cross-moves to retain venue in New York County.

Plaintiff filed its complaint on September 21, 2016, for a declaration that plaintiff owes no duty to defendants to pay no-fault claims with respect to an October 29, 2015, motor vehicle accident. (City defendant's Notice of Motion, Verified Complaint, Exhibit A.) As alleged in plaintiff's complaint, plaintiff properly notified defendant Jean Nixon Dejean, the eligible injured party, to attend examinations under oath (EUOs) scheduled on March 1, 2016, and March 23, 2016; Dejean failed to attend the EUOs. (Plaintiff's Affirmation in Opposition and in Support

of Cross-Motion, at ¶ 5.) Because Dejean failed to attend the EUOs — breaching a condition precedent to coverage — plaintiff denied coverage. (City defendant’s Notice of Motion, Verified Complaint, at Exhibit A; Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion, at ¶ 10.)

City defendant alleges that it served plaintiff’s counsel with an answer, a demand to change venue, and a proposed stipulation to change venue on or about October 20, 2016. (City defendant’s Notice of Motion, Affirmation of Inga Van Eysden, at ¶ 2; Demand Change Venue, Stipulation to Change Venue, Answer to Declaratory Judgement Complaint, at Exhibit B). In support of its motion, City defendant also provides an Affidavit of Service that the answer and demand were served by mail to plaintiff’s counsel, Jaffe & Koumourdas, LLP, at 40 Wall Street, 12th Floor, New York, NY 10005-2301, on October 20, 2016. (City defendant’s Notice of Motion, Affidavit of Service, Exhibit B). City defendant further argues that because plaintiff failed to serve a written consent to change venue, it moved to change venue on November 2, 2016 — within 15 days after City defendant served its demand on October 20, 2016. (City defendant’s Notice of Motion, Affirmation of Inga Van Eysden, at ¶ 12.)

Plaintiff’s counsel affirms that it never received City defendant’s answer, demand to change venue, and proposed stipulation to change venue by mail or through the New York State Courts Electronic Filing system (NYSCEF).¹ (Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion, at ¶ 3.)

City defendant argues that the proper venue is Kings County — “where the incident forming the basis of plaintiff’s claims against the City defendant occurred.” (City defendant’s Notice of Motion, Affirmation of Inga Van Eysden, at ¶ 3.) City defendant further specifies that the services provided — which forms the basis for plaintiff declaratory judgement — were rendered in Kings County. (City defendant’s Notice of Motion, Affirmation of Inga Van Eysden, at ¶ 10.)

Plaintiff argues that the cause of action arose in New York County: Dejean failed to attend two EUOs, therefore breaching the insurance policy in New York County. (Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion, at ¶ 10.) Plaintiff argues that the breach occurred in New York County, where plaintiff is headquartered and the policy exists. (Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion, at ¶ 9.)

City defendant’s motion to change venue from New York County to Kings County is denied, and plaintiff’s cross-motion to retain venue in New York County is granted. New York County is the proper venue.

CPLR 504 (3) provides that

“the place of trial of all actions against counties, cities, towns, villages, school districts and district corporations or any of their

¹ The court reviewed the documents filed on NYSCEF. City defendant never filed its demand, answer, and proposed stipulation to change venue.

officers, boards or departments shall be, for: . . . the city of New York, in the county within the city in which the cause of action arose, or if it arose outside of the city, in the county of New York.”

Under CPLR 503 (a), “the place of trial shall be in the county in which one of the parties resided when it was commenced. . . .”

CPLR 510 provides that “[t]he court, upon motion, may change the place of trial of an action where: 1. the county designated for that purpose is not a proper county. . . .”

CPLR 511 provides that

“(a) Time for motion or demand. A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. . . .

(b) Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. . . .”

City defendant provides an Affidavit of Service that it properly served the demand to change venue on plaintiff’s counsel, Jaffe & Koumourdas, LLP. City defendant served the demand at the correct address. This court, therefore, finds that the City defendant complied with CPLR 511. City defendant timely filed this motion to change venue on November 2, 2016.

This court also finds that the cause of action arose in New York County. (See CPLR 504 [3].) The proper venue is New York County. In *Country-Wide Ins. Co. v Tyson* (2015 NY Slip Op 31219 [U], *2, 2015 WL 4273112, at *2 [Sup Ct NY County 2015]), the court held that

“[a]lthough the underlying motor vehicle accident occurred in Queens County, the instant action is for a declaratory judgement that plaintiff is not obliged to provide no-fault benefits to defendants based on Tyson’s breach of the insurance policy by failing to appear for IMEs scheduled in New York County and such action arose in the county in which plaintiff [insurance company] resides.”

Similarly, in *Country-Wide Ins. Co. v Blenman* (2015 NY Slip Op 31781 [U], *3, 2015 WL 5545381, at *3 [Sup Ct NY County 2015]), the court held that

“[p]laintiff’s complaint seeks a declaration of non-coverage based on [the eligible injured party defendant’s] alleged failure to comply with a contractual condition precedent to coverage under the Policy. Plaintiff’s complaint therefore arises out of [eligible injured party defendant’s] breach of the Policy.”

In this action, plaintiff seeks a declaratory judgment of non-coverage on the ground that Dejean, the eligible injured party, failed to attend two EUOs scheduled for March 1, 2016, and March 23, 2016, and that Dejean breached a condition precedent to coverage. According to R. Diego Velazquez, plaintiff’s counsel, the declaratory-judgment action “ar[ose] from a breach of the policy of insurance in New York County”; Velazquez also states that plaintiff’s principal place of business is New York County. (Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion, Exhibit E, R. Diego Velazquez Affirmation, Nov. 11, 2016, at ¶ 3.) Because this action arose from a breach in New York County and because plaintiff’s principal business is in New York County, the proper venue for this action is New York County.

Accordingly, it is


ORDERED that defendant Kings County Hospital Center’s motion is denied; and it is further

ORDERED that plaintiff’s cross-motion is granted and venue shall remain in New York County; and it is further

ORDERED that plaintiff serve a copy of this decision and order on defendants with notice of entry; and it is further

ORDERED that defendant Kings County Hospital Center shall file its answer dated October 20, 2016, within 20 days from the date of this order with notice of entry.

Dated: April 13, 2017


J.S.C.
HON. GERALD LBOVITS
J.S.C.