

<b>Merrimack Mut. Fire Ins. Co. v Millennium Dev.</b>
2013 NY Slip Op 32020(U)
August 20, 2013
Supreme Court, New York County
Docket Number: 155454/2012
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: Hon. Joav A. M. Clark  
Justice

PART II

Index Number : 155454/2012

MERRIMACK MUTUAL FIRE

vs

MILLENIUM DEVELOPMENT

Sequence Number : 002

DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_

MOTION DATE 8-15-13

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to for change venue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

| No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

| No(s). \_\_\_\_\_

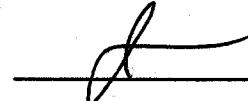
Replying Affidavits \_\_\_\_\_

| No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the Amended Memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: August 20, 2013



, J.S.C.

- |                                     |  |   |
|-------------------------------------|--|---|
| 1. CHECK ONE: .....                 | <input checked="" type="checkbox"/> CASE DISPOSED                | <input type="checkbox"/> NON-FINAL DISPOSITION                          |
| 2. CHECK AS APPROPRIATE: MOTION IS: | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE: .....      | <input type="checkbox"/> SETTLE ORDER                            | <input type="checkbox"/> SUBMIT ORDER                                   |
|                                     | <input type="checkbox"/> DO NOT POST                             | <input type="checkbox"/> FIDUCIARY APPOINTMENT                          |
|                                     |  | <input type="checkbox"/> REFERENCE                                      |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

MERRIMACK MUTUAL FIRE INSURANCE  
COMPANY a/s/o 243 WEST 14<sup>TH</sup> STREET LLC,

Index No: 155454/2012

Plaintiff,

-against-

MILLENNIUM DEVELOPMENT, ARCADE  
CONTRACTING, MRC2, ROCKLEDGE SCAFFOLD  
CORPORATION, M.B.I. and CAVALIER  
CONTRACTING,

Defendant

-----X

**Joan A. Madden, J.**

Defendant Marine Bulkhead, Inc. (“MBI”) moves, pursuant to CPLR 510 and 511 to change the venue of this action as a matter of right from this court to the Supreme Court, Nassau County. Plaintiff Merrimack Fire Insurance Company (“Merrimack”) opposes the motion, which is granted for the reasons below.

Background

This subrogation action arises out of damages sustained by Merrimack’s insured 243 West 14<sup>th</sup> Street, LLC (“Insured”). Merrimack alleges that ongoing construction at an adjacent lot, located on 245 West 14<sup>th</sup> Street (hereinafter “the adjacent property”), caused damage to the premises owned by its Insured. In this action, Merrimack alleges that defendants’ negligence in connection with the construction work caused damage to its Insured’s property. The summons indicates that the basis for venue in New York as the “loss location.”

Defendant Millennium Development (“Millennium”) owns the adjacent property, and hired defendant Arcade Contracting, Inc. (“Arcade”) as the general contractor for the work. Arcade retained defendant MRC2 to perform excavation and concrete work, defendant

Rockledge Scaffold Corporation to perform demolition work, and defendant MBI to perform piles work. Cavalier Contracting (“Cavalier”)

MBI now moves to change venue as a matter of right, asserting that plaintiff improperly chose the venue in this court based on the location of the loss, while CPLR 503 (a) requires that venue be based on the residence of the parties. MBI also notes that under CPLR 503 (e), the residence of Merrimack for venue purposes is that of its assignor/subrogor, which is the Insured, and that the Insured’s residence for venue purposes is Suffolk County. MBI also submits its certificate of incorporation, showing that its principal place of business is in Nassau County. MBI also argues that none of the other defendants reside in New York County and therefore venue must be changed to Nassau County. In fact, In opposition, Merrimack argues that MBI has not submitted proof that its Insured’s principal place of business in Suffolk County. In addition, Merrimack argues that this action should not be venued in Nassau County as the other defendants listed in the summons do not reside in Nassau County, and that although Merrimack performs business throughout the state of New York, it has no specific interest in Nassau County. Notably, however, Merrimack does not argue that it, the Insured or any of the defendants resides in New York County. Instead, Merrimack argues that as this is a transitory action it should be tried in the county where the action arose, and that the ends of justice will be promoted by a trial in New York County.

In reply, MBI submits a copy of the Articles of Organization for 243 West 14<sup>th</sup> Street, LLC, showing that its principal place of business is Suffolk County. In addition, MBI notes that if the court were to consider the residence of Merrimack as opposed to that of its Insured, for venue purposes, there is no evidence that Merrimack’s principal place of business is New York

county, and submits Merrimack's annual report indicating that its principal place of business is located in Andover, MA.

Additionally, MBI argues that since Merrimack failed to submit an affidavit in response to MBI's demand for a change in venue, venue has defaulted to that of MBI's choice. MBI also argues that insofar as Merrimack argues that Nassau County would be inconvenient for non-party witnesses expected to be called at trial, it has failed to identify such witnesses or specified that the nature of their testimony and the manner in which they would be inconvenienced.

#### Discussion

In general, under the CPLR, venue is based on the residence of the parties at the time of the commencement of an action, and not on the place where the underlying events occurred. See CPLR 503(a) (providing that “[e]xcept where otherwise prescribed by law, 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 plaintiff”); Kaplinsky v. Associated YM-YWHA's of Greater N.Y., 154 A.D.2d 576 (2d Dep't 1989) (plaintiff improperly commenced action in Queens County based on allegation that cause of action arose there). .

CPLR 503(c) provides that “[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....” It is well-established that ““for venue purposes a foreign corporation’s designation of the location of its office in its statement filed with the Secretary of State constitutes a designation of its residence for venue purposes.” Nadle v L.O. Realty Corp., 286 A.D.2d 130, 132 (1<sup>st</sup> Dept 2001)(internal quotations and citations omitted); See, also, Marko v Culinary Institute of America, 245 A.D.2d 212 (1<sup>st</sup> Dept 1997)(same). Similarly, in the case of a limited liability company, it is considered “a resident of the county where the LLC’s principal

office is located" as listed with the Secretary of State. Johanson v. J.B. Hunt Transp., Inc., 15 A.D.3d 268, 269 (1<sup>st</sup> Dept 2005).

Here, MBI has adequately shown that none of the parties resides in New York County so that venue is improper here. In particular, MBI provides proof that its principal place of business is in Nassau County, that the Insured's principal office is in Suffolk County, and that Merrimack is a Massachusetts corporation without a principal office in New York County.<sup>1</sup> As for the remaining defendants, the complaint alleges that Arcade and MRC2 each of a principal place of business is in Kings County; while the location of Cavalier's principal place of business is identified as West Islip, New York and Rockledge's principal place of business is alleged to be in Yonkers, New York. As for Millennium Development, which is not alleged to have a principal place of business in the complaint, a business entity search through the New York Secretary of State's website reveals that its principal place of business is in Kings County. A business entity search of the other defendants reveals that they are either not registered with the Secretary of State or have principal places of business consistent with those alleged in the complaint.

Next, MBI has complied with the procedure for changing venue as a matter of right, by serving a demand before it served its answer (CPLR 511(a)) and moving to change venue "within fifteen days of the demand." CPLR 511 (b). Specifically, MBI's demand is dated December 14, 2012 and the Answer is dated February 6, 2013. In addition, this motion is dated December 29, 2012, which is 15 days from the date of the demand.

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<sup>1</sup> A business entity search also reveals that it is not registered with the New York Secretary of State.

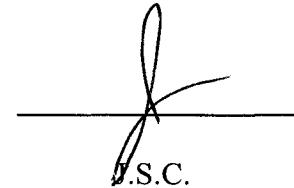
Finally, Merrimack provides no case law supporting its position that the venue of this action is properly based on accident location, and it also fails to provide an evidentiary basis for a discretionary change of venue to this court under CPLR 510(3). See O'Brien v. Vassar Brothers Hospital, 207 A.D.2d 169 (2nd Dept. 1995)(holding that to demonstrate entitlement to a change of venue under 510(3), a defendant must submit affidavits from material witnesses which satisfy a four-part test); Heinemann v. Grunfeld, 224 A.D.2d 204 (1<sup>st</sup> Dept 1996)(same).

In view of the above, it is

ORDERED that defendant Marine Bulkhead, Inc.'s motion to change venue from this court to Nassau County is granted; and it is further

ORDERED that the venue of this action is changed from this court to the Supreme Court County of Nassau, and upon service by the movant of a copy of this order with notice of entry and payment of appropriate fees, if any, 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 Nassau.

DATED: August 20, 2013

  
\_\_\_\_\_  
J.S.C.