Tri-State Consumers Ins. Co. v Hepco Heating & Plumbing, Inc.
2018 NY Slip Op 30654(U)
April 11, 2018
Supreme Court, New York County
Docket Number: 157941/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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TRI-STATE CONSUMERS INSURANCE COMPANY, as subrogee of SHARON HOWELL-GIBSON and RALSTON GIBSON,

Plaintiff,

- v -

HEPCO HEATING & PLUMBING, INC.,

Defendant.

INDEX NO. 157941/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for CHANGE VENUE

In this subrogation action to recover for property damage occurring in October 2016, defendant moves to change the venue of this action to Queens County. Plaintiff opposes and cross-moves to change venue to Kings County.

Initially, defendant's papers, as supplemented in its reply, indicate that a demand to change venue to Queens County was served with the answer on November 13, 2017 (Doc. No. 19), and that the motion to change venue was properly made within 15 days thereafter, on November 28, 2017 (Doc. Nos. 5-10). (*See* CPLR 511.) Thus, defendant may demand a change of venue as of right.

To succeed on a motion to change venue as of right, the defendant must establish both that the plaintiff's initial choice was improper and the defendant's choice is proper. (*See* CPLR 510 [1]; *Bikel v Bakertown Realty Group, Inc.*, 157 AD3d 924, 926 [2d Dept 2018]; *Pomerantsev v Kodinsky*, 156 AD3d 655, 656 [2d Dept 2017]; *Agway v Kervin*, 188 AD2d 1076

[4th Dept 1992]; Siegel, NY Prac § 123 at 252 [6th ed 2018].) Defendant argues that plaintiff's designation of New York County was improper, since no party resides here. Plaintiff asserts that defendant failed to support its contention that New York County was improper with proof, but it does not respond to the argument that plaintiff's own complaint specifies that its principal place of business is in Nassau County.[1] Since none of the parties reside in New York County, defendant established that it was improper in the first instance. (*See* CPLR 503.)

Turning to defendant's choice of Queens County, defendant cannot rely on the subrogors' residence to establish a proper venue. (*See United Community Ins. Co. v Triboro Signal Sta.*, 160 AD2d 1206, 1206-1207 [3d Dept 1990]; *Pacific Indem. Co. AS v Rama Interiors, Inc.*, 2017 WL 2210483, index No. 158832/2016 [Sup Ct, NY County 2017, Cohen, J.].) In this regard, while the recent amendment to the venue statute – which now unequivocally allows for venue in "the county in which a substantial part of the events or omissions giving rise to the claim occurred" (L. 2017, c. 366, § 1, effective October 23, 2017) – would permit venue in Queens County as of right, this action was commenced before the effective date of the amendment. Thus, defendant can only avail itself of discretionary arguments in favor of venue in Queens County.

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[1] Despite plaintiff's assertion in its complaint that it is a corporation organized and existing in this state, an independent search of the Department of State's database does not reveal any entity by plaintiff's name. Instead, the only corporate entity that seems to be associated with plaintiff is called "The Tri-State Consumer, Inc." In any event, the Tri-State Consumer, Inc. lists its principal place of business as Nassau County. This Court also notes that it lacks the power to raise the issue of plaintiff's capacity to sue sua sponte, and lack of capacity was not raised as an affirmative defense in defendant's answer. (*See generally* Business Corporation Law § 1301; CPLR 3018 [b]; *Great White Whale Advertising, Inc. v First Festival Productions*, 81 AD2d 704 [3d Dept 1981].)

To that end, defendant had to show "(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case." (*Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 [1st Dept 1992]; *see Brown v New York City Health & Hosp. Corp.*, ___ AD3d ___, 2018 NY Slip Op 02262 [1st Dept 2018].) Defendant's papers, however, do not name a single person who would be prejudiced by trial of the action in a county other than Queens or explain how such person would be so prejudiced.

In a situation such as this, where the plaintiff's initial choice has been shown to be improper, but the defendant fails to come forward with a proper alternative, the court is generally without power to transfer the case, and it must remain in the county initially designated despite the fact that it is technically improper. (*See* CPLR 502; *Agway v Kervin*, 188 AD2d 1076 [4th Dept 1992].) What distinguishes this case, however, is that plaintiff has cross-moved to change venue to Kings County, not on discretionary grounds, but on the ground that it would have been proper had plaintiff chosen it initially.

It is well settled that a plaintiff "forfeit[s] [his or her] right to select the place of venue" upon a failure to designate a proper county in the first instance. (*Llorca v Manzo*, 254 AD2d 396 [2d Dept 1998]; *see Fisher v Finnegan-Curtis*, 8 AD3d 527, 528 [2d Dept 2004].) Generally speaking, after the initial designation of venue, a plaintiff is only entitled to cross-move to retain venue, or move to change venue, based on the discretionary grounds in CPLR 510 – namely that an impartial trial cannot be had in the designated county or that the convenience of material witnesses and the ends of justice will be promoted by the change – neither of which is applicable

here. (*See generally Goercke v Kim Yong Kyun*, 273 AD2d 110, 110 [1st Dept 2000].) Courts have held that a plaintiff may move to fix an initially-mistaken choice of venue, however, if he or she makes a showing that the initial designation was made in reasonable and good-faith reliance on the information then in the plaintiff's possession. (*See Astillero v Abramov*, 92 AD3d 436 [1st Dept 2012]; *Vasquez v Sonin*, 259 AD2d 340, 340 [1st Dept 1999].) Here, however, plaintiff has not given any valid reason why it initially designated New York County. Hence, although perhaps somewhat counterintuitive, under these circumstances, plaintiff's failure to explain why it improperly chose this county in the first instance means that the action must remain here.

Accordingly, it is hereby

ORDERED that the motion and cross motion are both denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 2, at 80 Centre Street, Room 280, on May 29, 2018 at 2:15 p.m.

4/11/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED	[X]	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE