[*1]

New York State Workers' Compensation Bd. v Episcopal Church Home & Affiliates, Inc.
2019 NY Slip Op 29117
Decided on April 17, 2019
Supreme Court, Albany County
Platkin, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on April 17, 2019

Supreme Court, Albany County

New York State Workers' Compensation Board, in its capacity as the governmental agency charged with the administration of the Workers' Compensation Law and attendant regulations, and in its capacity as successor in interest to the Long Term Care Risk Management Group, Plaintiff,

against

Episcopal Church Home and Affiliates, Inc., et al., Defendants.

723-18

New York State Workers' Compensation Board

(Michael Papa and Todd C. Roberts, of counsel)

328 State Street

Schenectady, New York 12305

Phillips Lytle LLP

Attorneys for Fairport Baptist Home, Inc., Fairport Baptist Homes, Genesee Valley Presbyterian Nursing Center d/b/a Kirkhaven Nursing Home, Genesee Valley Presbyterian Nursing Center Inc. d/b/a Kirkhaven Presbyterian Homes & Services of Genesee Valley, Inc., Seasons Child Care Center, Allegany Associates d/b/a Gowanda Nursing Home, T & S Enterprises d/b/a Wellsville Manor Nursing Home and Janet A. Warren

(Craig R. Bucki and Todd A. Ritschdorff, of counsel)

One Canalside, 125 Main Street

Buffalo, New York 14203-2887

Richard M. Platkin, J.

This is a collection action brought by plaintiff New York State Workers' Compensation Board ("Board") in its capacities as successor to the Long Term Care Risk Management Group ("Trust") and as the governmental agency charged with the administration of the Workers' [*2]Compensation Law ("WCL") and attendant regulations. Defendants are alleged to be former members of the Trust.

Of the 22 named defendants, 10 appeared in response to the Board's summons with notice. Eight of the appearing defendants are represented by the law firm of Phillips Lytle, LLP: Fairport Baptist Home, Inc.; Fairport Baptist Homes; Genesee Valley Presbyterian Nursing Center d/b/a Kirkhaven Nursing Home; Genesee Valley Presbyterian Nursing Center

Inc. d/b/a Kirkhaven Presbyterian Homes & Services of Genesee Valley, Inc.; Seasons Child Care Center; Allegany Associates d/b/a Gowanda Nursing Home; T & S Enterprises d/b/a Wellsville Manor Nursing Home; and Janet A. Warren. Pending before the Court is a motion by these defendants ("Moving Defendants") for an order pursuant to CPLR 501 and 511 (b), changing the place of trial of this action to Erie County based on a forum selection clause that some, but not all, of the Moving Defendants are entitled to invoke. The Board opposes the motion.

BACKGROUND

The Trust is a group self-insured trust ("GSIT") formed pursuant to WCL § 50 and attendant regulations. Members of the Trust were employers engaged in the business of providing long-term care services, and the Trust was in active operation from approximately October 1, 1992 until December 31, 2009.

On or about April 14, 2011, the Board assumed administration of the Trust (*see* 12 NYCRR 317.20), and it commissioned the accounting firm of Lumsden & McCormick, LLP ("L & M") to conduct a forensic audit of the Trust's finances. L & M ultimately determined that the Trust had an accumulated deficit of approximately $28 million as of December 31, 2012. On the basis of this accounting, the Board levied a deficit assessment on the Trust's former members on or about December 16, 2013.

The Board commenced this collection action on February 1, 2018 against the nonsettling members by filing a summons with notice.[FN1] Upon the Moving Defendants' demand, the Board served a verified complaint on or about August 2, 2018 (*see* Bucki Aff., Ex. B ["Complaint"]). The Complaint seeks recovery of the outstanding cumulative deficit of the Trust on a joint and several basis, together with interest and collection costs under State Finance Law § 18.

On or about September 10, 2018, the Moving Defendants served a demand to change venue to Erie County pursuant to CPLR 501 and 511 (b),[FN2] based on a forum selection clause included in certain "participation agreements" with the Trust. Pursuant to the forum selection clause, "'any litigation arising under the terms [of the participation agreements], including any lawsuits filed for the purpose of collecting premiums owed, shall be filed, and

venue shall be [*3]established, only in Erie County, New York'" (Bucki Aff., Ex. D). The Board refused the demand on the ground that this collection action does not "'aris[e] under'" the participation agreements (*id*., Ex. E).

In support of their motion, the Moving Defendants argue that this action clearly "aris[es] under the terms" of the participation agreements, inasmuch as the Board's claimed entitlement to recovery of the Trust's cumulative deficit on a joint and several basis is premised on "the provisions of . . . the Trust foundational documents, including . . . the member Participation Agreements" (Complaint, ¶ 94). The Board disagrees, asserting that the Trust members' joint and several liability is a product of statute (*see* WCL § 50 [3-a]), as well as the foundational documents of the Trust, including the Trust agreement.

The Board further argues that enforcement of the forum selection clause here would contravene public policy. In this regard, the Board asserts that only a small number of the Moving Defendants signed a participation agreement that included the forum selection clause, and the venue application is a transparent attempt by the Moving Defendants to avoid the decisional law of this Court and, instead, gain the benefit of inconsistent "home field" rulings in Western New York.

Oral argument on the motion was held on March 29, 2019, and this Decision & Order follows.

DISCUSSION

CPLR 501 provides that a "written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial."

"A contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015] [internal quotation marks and citations omitted]; *see Tatko Stone Prods., Inc. v Davis-Giovinzazzo Constr. Co., Inc.*, 65 AD3d 778, 779 [3d Dept 2009]). "Absent a strong showing that it should be set aside, a forum selection agreement will control" (*Horton*

v Concerns of Police Survivors, Inc., 62 AD3d 836, 836 [2d Dept 2009] [internal quotation marks and citation omitted], *lv denied* 13 NY3d 706 [2009]).

A. "Arising Under"

As an initial matter, the Court must determine whether the forum selection clause was intended to cover the claims sued upon by the Board herein. It is the Board's contention that this collection action does not fall within the scope of the forum selection clause, which governs "'any litigation *arising under* the terms [of the participation agreements], including any lawsuits filed for the purpose of collecting premiums owed'" (Bucki Aff., Ex. D [emphasis added]). More particularly, the Board argues that defendants' joint and several liability for the accumulated deficit of the Trust "is multi-faceted and exists independent of any participation agreement" (Papa Aff., ¶ 45).

Even so, the fact remains that the defendants who executed participation agreements with forum selection clauses ("FSC Defendants") bound themselves to the foundational documents of the Trust and the provisions of the WCL and attendant regulations through the execution of such [*4]participation agreements, and, in so doing, promised "to assume all of the obligations set forth [in the Trust's foundational documents], including . . . joint and several liabilit[y]" (Poelma Aff., Ex. A [b], [c]; Papa Aff., Ex. H [b], [c]).

In this regard, the Moving Defendants assert, without contradiction, that the participation agreements were the only contracts they signed relative to membership in the Trust. Moreover, the Board's Complaint is replete with references to the participation agreements in articulating the legal basis for defendants' alleged joint and several liability (*see* ¶¶ 36 [e], 59, 61, 63, 94). Thus, to the extent that joint and several liability is a product of contract, as consistently argued by the Board in GSIT litigation (*see generally New York State Workers' Compensation Bd. v Any-Time Home Care Inc.*, 156 AD3d 1043, 1044-1046 [3d Dept 2017]), the participation agreements represent the Trust members' express agreement and assent to such contractual liability.

Given the role of the participation agreements in the "multi-faceted" legal relationship existing between the Trust and its members, the Court is satisfied that this collection action sufficiently "arises under" the participation agreements so as to trigger the mandatory forum selection clause.[FN3]

B. Movants With Forum Selection Clauses

The next issue is identification of the Moving Defendants who executed participation agreements with the forum selection clause. As the Board observes, not all of the Trust's participation agreements included the clause.[FN4] The Moving Defendants submit four distinct participation agreements in support of their motion.

The participation agreement attached to the affidavit of Craig R. Bucki, Esq. ("Bucki Affidavit") relates to defendant Episcopal Church Home and Affiliates, Inc. ("Episcopal"), a former Trust member represented in this action by Phillips Lytle (*see* Bucki Aff., Ex. C). However, Episcopal is not a movant here, inasmuch as it "has elected to default, rather than appear in or litigate this action" (Bucki Aff., ¶ 5).

The affidavit of James E. DeVoe ("DeVoe Affidavit") does not include an executed participation agreement, but James DeVoe ("DeVoe") avers that he served as the president and CEO of "Kirkhaven Transitional & Long Term Care," formerly known as "Kirkhaven Nursing Home," from 1999 to 2016 (DeVoe Aff., ¶ 1). The Board could not locate "any record of any organized entity that ever went by the name of 'Kirkhaven Transitional & Long Term Care'" [*5](Papa Aff., ¶ 19). Rather, it appears that "Kirkhaven Nursing Home" refers to defendant Genesee Valley Presbyterian Nursing Center Inc. d/b/a Kirkhaven Presbyterian Homes & Services of Genesee Valley, Inc. ("Kirkhaven") (*id.*). The Board acknowledges, however, that DeVoe signed a participation agreement on behalf of Kirkhaven on June 12, 1997 that included the forum selection clause (*see id.* & Ex. H [h]).[FN5]

Annexed to the affidavit of Thomas H. Poelma ("Poelma Affidavit") is a participation agreement that relates to Fairport Baptist Homes ("Fairport"),[FN6] which, like the Kirkhaven participation agreement, includes the forum selection clause (*see* Poelma Aff., Ex. A [h]).

The participation agreement attached to the affidavit of defendant Janet A. Warren ("Warren Affidavit") pertains to Joseph J. Tripodi ("Tripodi"), a former Trust member (*see* Warren Aff., Ex. A). However, Janet Warren ("Warren") is sued herein solely in her capacity as the alleged general partner of defendant T & S Enterprises d/b/a Wellsville Manor Nursing Home ("Wellsville") (*see* Complaint, ¶¶ 22-24), which was a Trust member from December 31, 1994 through June 5, 2001 (*see* Warren Aff., ¶ 6). Neither Warren nor Wellsville have

produced a participation agreement executed by Wellsville that includes the forum selection clause.[FN7]

In reply, the Moving Defendants argue that Wellsville, Warren and Allegany Associates d/b/a Gowanda Nursing Home ("Gowanda") are entitled to enforce the forum selection clause contained in the Tripodi participation agreement because: (1) Tripodi signed the agreement as a general partner in Gowanda and Wellsville (*see* Warren Aff., ¶¶ 8, 10-11); and (2) as executrix of Tripodi's estate (*see id*., ¶ 2), Warren is subject to contracts that Tripodi made during his lifetime (*see* Reply Brief, p. 2).

As executrix, Warren certainly is subject to the contracts executed by Tripodi during his lifetime (*see Chamberlain v Dunlop*, 126 NY 45, 52 [1891]; *Maddalena v Pandolfo*, 208 AD2d 907, 907-908 [2d Dept 1994]). Thus, she may enforce the Tripodi participation agreement, including the forum selection clause, in her capacity as executrix to the extent that the participation agreement was signed by Tripodi in his individual capacity and has not been [*6]superseded by subsequent agreements (*see* Papa Aff., ¶ 17).[FN8] But even if both of these conditions were satisfied, the fact remains that Warren is sued herein solely in her capacity as a general partner of Wellsville. Thus, Warren cannot enforce the forum selection clause as executrix.

The merits of the Moving Defendants' contention that Tripodi executed the participation agreement in his capacity as the general partner of Gowanda and/or Wellsville are less clear. There is nothing in the four corners of the participation agreement indicating the capacity in which Tripodi signed it (*see* Warren Aff., Ex. A; *see also id*., Exs. B-C; Papa Aff., ¶ 17; *cf. Quebecor World [USA], Inc. v Harsha Assoc., L.L.C.*, 455 F Supp 2d 236, 238-239 [WD NY 2006]), and Warren is unable to say whether the participation agreement, which was signed by her late father more than two decades ago, was intended to cover Wellsville, Gowanda or both entities (*see* Warren Aff., ¶ 8). On the other hand, the correspondence annexed to Warren's affidavit is consistent with her averment that Tripodi signed the participation agreement in a representative capacity (*see id*., Exs. B-C).[FN9] Ultimately, the present record is inadequate to determine the capacity in which Tripodi executed the participation agreement, and further proceedings would be required to make a factual finding on this issue.

Finally, it is undisputed that defendant Seasons Child Care Center does not have a participation agreement with the forum selection clause (*see* Papa Aff., ¶ 20; *see also* Reply

Brief, p. 2).

Based on the foregoing, it is clear that three of the Moving Defendants have participation agreements with forum selection clauses; one does not; and the status of the other four Moving Defendants cannot be ascertained as a matter of law from the present record.

C. Severance/Public Policy

Having concluded that some, but not all, of the Moving Defendants, are entitled to the benefit of the forum selection clause making Erie County the exclusive venue for the Trust's collection litigation, the Court must determine the proper course of action.

It is the position of the Moving Defendants that honoring the forum selection clause requires the transfer of this entire action to Erie County. On the other hand, the Board will not consent to such a transfer (*see* Papa Aff., ¶ 67), and it argues that to the extent that the forum selection clause is to be enforced, the claims against the FSC Defendants should be severed and transferred. At the same time, however, the Board argues that, given the inefficiencies, ineconomies and inconsistencies attendant to litigating this matter in two counties, considerations of public policy compel the outright denial of the Moving Defendants' motion to enforce the forum selection clause.

The Board has not moved for severance, but the Court has the authority to order severance under CPLR 603 even in the absence of a motion (*see Marine Midland Bank v [*7]Cafferty*, 174 AD2d 932, 935 [3d Dept 1991]). The severance of claims may be ordered " [i]n furtherance of convenience or to avoid prejudice" (CPLR 603), and the decision whether or not to sever is a matter of judicial discretion (*see Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844, 844 [3d Dept 2001]).

Neither side has briefed the issue of severance in the context in which it is presented here,[FN10] and the Court's research did not disclose any similar cases from the New York courts in which some, but not all, defendants were entitled to the benefit of a forum selection clause. In recent years, however, the federal courts have developed a fairly robust body of law on the issue, albeit under different rules of civil procedure (*see In re Howmedica Osteonics Corp.*, 867 F3d 390, 405 [3d Cir 2017], *cert denied* — US &mdash, 138 S Ct 1288 [2018]; *In re Rolls Royce Corp.*, 775 F3d 671, 680 [5th Cir 2014], *cert denied* — US &mdash, 136 S Ct

45 [2015]; *see also Atlantic Marine Constr. Co., Inc. v United States Dist. Ct. for W. Dist. of Texas*, 571 US 49, 67 [2013]).

Under the four-step approach adopted in 2017 by the United States Court of Appeals for the Third Circuit, which built on the Fifth Circuit's earlier decision in *Rolls Royce*, a court first must recognize the forum selection clause and acknowledge that, "[i]n all but the most unusual cases, claims concerning those parties [subject to the forum-selection clause] should be litigated in the fora designated by the clauses" (*Howmedica*, 867 F3d at 404 [internal quotation marks and citation omitted]).

"Second, the court performs an independent analysis of private and public interests relevant to non-contracting parties . . ." (*id*.).

If the results in Steps 1 and 2 point to the same forum, then the court should "allow the case to proceed in that forum" (*id*.). If not, the Court should go on to consider whether there are any jurisdictional or procedural defects affecting the severance calculus (*see id*. at 404-405).

Finally, as the fourth step, the Court should exercise its discretion to choose the "most appropriate course of action," considering (1) the "efficiency interests in avoiding duplicative litigation . . . as well as any other public interests that may weigh against enforcing a forum-selection clause"; and (2) "the non-contracting parties' private interests and any prejudice that a particular transfer decision would cause with respect to those interests" (*id*. at 405 [internal citations omitted]). In performing this analysis, "the court considers the nature of any interests weighing against enforcement of any forum-selection clause; the relative number of non-contracting parties to contracting parties; and the non-contracting parties' relative resources" (*id*.). "Only if it determines that the strong public interest in upholding the contracting parties' settled expectations is 'overwhelmingly' outweighed by the countervailing interests can the court, at this fourth step, decline to enforce a valid forum-selection clause" (*id*., quoting *Atlantic Marine*, 571 US at 67).

There are, of course, significant procedural differences between the statutes and rules at issue in the federal cases and the corresponding provisions of the CPLR. Nonetheless, the New York courts are vested with broad discretion to further convenience and avoid prejudice through [*8]severance, and this Court chooses to apply the federal framework as a vehicle to

inform its discretion under CPLR 603 in the absence of any pertinent New York authorities. **[FN11]**

Thus, the Court begins with the Step 1 assumption that the FSC Defendants are entitled to defend against the Board's claims in Erie County. Further, the Step 2 analysis is simplified here, since the Moving Defendants comprise eight of the 10 active defendants; one of the remaining two active defendants, Westgate Nursing Home, Inc., has a participation agreement with a forum selection clause; and the tenth active defendant, Wellsville Manor LLC, is located in Western New York. Thus, under the Third Circuit's approach, the entire case should be litigated in Erie County.

And even if the Step 1 and Step 2 analyses were to point in different directions, the conclusion that severance is unwarranted would remain the same. There are no Step 3 issues of jurisdiction or procedure, so the Court must exercise its discretion under Step 4, considering "efficiency interests in avoiding duplicative litigation," "any other public interests that may weigh against enforcing a forum-selection clause" and "the non-contracting parties' private interests and any prejudice that a particular transfer decision would cause with respect to those interests" (*Howmedica*, 867 F3d at 405).

As the Board observes, it would be inefficient and uneconomical to litigate against some of the defendants in Albany County while litigating the same claims against other defendants in Erie County. Further, the Board's claims against defendants in this case "involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single [place of] trial" (*New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 [2d Dept 2011]; *see Barrett v New York City Health & Hosps. Corp.*, 150 AD3d 949, 951 [2d Dept 2017]; *cf. Belair*, 2017 NY Slip Op 51941[U], *6). In addition, at least three of the eight Moving Defendants (and one active, non-Moving Defendant) can claim the benefit of the forum selection clause, and further proceedings in this Court, including a possible evidentiary hearing, would be required to determine whether the four other Moving Defendants can enforce the forum selection clause.

On the other hand, the Board identifies a countervailing interest that is said to outweigh the strong public interest in honoring the forum selection clause. Specifically, the Board argues that enforcement of the forum selection clause is designed to exploit what the Moving Defendants believe to be outcome-determinative precedent in *Matter of Riccelli Enters., Inc. v State of NY Workers' Compensation Bd.* (117 AD3d 1438, 1440 [4th Dept 2014]), a decision

in which the Appellate Division, Fourth Department sustained the grant of a preliminary injunction enjoining enforcement of a GSIT deficit assessment on the ground that the Board had failed to satisfy the 120-day time limit of WCL § 50 (3-a) (7) (b) ("120-day rule").

The Moving Defendants acknowledge that the courts within the Third Judicial Department have declined to follow *Riccelli* and its interpretation of the 120-day rule (*see* Reply Brief, pp. 11-12; *New York State Workers' Compensation Bd. v 21st Century Constr. Corp.*, 58 Misc 3d 1211[A], 2018 NY Slip Op 50050[U], *7-8, n 15 [Sup Ct, Albany County 2018]; *New York State Workers' Compensation Bd. v 1 & 3 On Fifth Corp.*, Sup Ct, Albany County, Mar. [*9]30, 2016, Zwack, J., Index No. 2900-13 at 13 [collecting cases]; *see also Matter of West Central Envtl. Corp. v New York State Workers' Compensation Bd.*, Sup Ct, Albany County, Feb. 28, 2017, McNally, Jr., J., Index No. 6398-14 at 4-5 [Papa Aff., Ex. J]; *Matter of L.H.V. Precast, Inc. v State of NY Workers' Compensation Bd.*, Sup Ct, Albany County, Oct. 15, 2013, Lynch, J., Index No. 6780-08 at 7 [Papa Aff., Ex. K]).

Thus, the Board argues that the Moving Defendants should not be permitted to "wast[e] judicial resources in an attempt to game a 'homefield' ruling that would create inconsistent decisions on identical factual and legal issues" (Papa Aff., ¶ 70).[FN12] According to the Board, this "is the veritable definition of 'in contravention of public policy'" (*id.*).

While the Board's arguments are not without some force, the Court is mindful that the policy of the New York State is to enforce forum selection clauses (*see* CPLR 501) "because they provide certainty and predictability in the resolution of disputes" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). Further, a desire to avoid inconsistency does not, standing alone, render a forum selection clause unreasonable or violative of public policy (*see e.g. Greater New York Auto. Dealers Assn. v Environmental Sys. Testing, Inc.*, 211 FRD 71, 85 [ED NY 2002] ["This Court does not find it unjust or unreasonable that different parties could have different results in different courts."]).

The Board responds by observing that this is not a case where enforcement of the forum selection clause merely would create a *risk* of inconsistent results. Rather, the Moving Defendants seek to transfer venue to Erie County for the very *purpose* of forcing inconsistent results among similarly-situated GSIT members.[FN13]

Nonetheless, the conflicting authorities noted by the parties concerning the 120-day rule already exist. Moreover, the public policy of the State allows conflicts to exist among the

Departments comprising the Appellate Division, pending final word from the Court of Appeals in a proper case (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984] [Titone, J.]).[FN14] And to the extent that the determinations reached in Erie County may be inconsistent with the determinations of this Court in other collection actions brought by the Trust, the issue is one of legal inconsistency, rather than factual inconsistency, which can be addressed on appeal.[FN15] Indeed, further GSIT litigation in Erie County ultimately may well [*10]facilitate a reconciliation of the apparently conflicting case authorities concerning the 120-day rule.

At oral argument, the Board also emphasized that this collection action has little or no nexus to Erie County. However, at least one of the named defendants (Episcopal) is a resident of Erie County; the Trust's long-time administrator was located in Erie County; and many of the Trust members were located in Western New York. In any event, although there is some "older authority that the [forum selection] agreement need not be upheld if 'public policy' is violated, as where the county selected is the residence of neither party nor otherwise connected with the subject of the suit" (Siegel & Connors, NY Prac § 117 at 247 & n 2 [6th ed 2018], citing *Syracuse Plaster Co., Inc. v Agostini Bros. Bldg. Corp.*, 169 Misc 564 [Sup Ct, Onondaga County 1938]; *see also Matter of Lynzee Transp. Co. v Board of Educ. of City of NY*, 102 Misc 2d 497, 499-500 [Sup Ct, NY County 1979] [relying on *Syracuse Plaster* and its progeny]), this older authority now is of "questionable" value (Siegel & Connors, NY Prac § 117 at 247 & n 2).

Further, while Albany County may be a more convenient forum for the Board, which is headquartered in an adjacent county, there has been no showing that "a trial in the contractual forum would be so gravely difficult and inconvenient that the [Board] would, for all practical purposes, be deprived of [its] day in court" (*Harry Casper, Inc. v Pines Assoc., L.P.*, 53 AD3d 764, 764-765 [3d Dept 2008] [internal quotation marks and citations omitted]; *see Greater New York Auto. Dealers Assn.*, 211 FRD at 85; *see also VOR Assoc. v Ontario Aircraft Sales & Leasing*, 198 AD2d 638, 639 [3d Dept 1993]). Indeed, the Board maintains and staffs an office in Erie County (*see* Bucki Aff., ¶¶ 10-11 & Ex. F).

Finally, while the Court is mindful of the Board's role as the governmental agency charged with administration of the WCL, the Court is not persuaded that this provides a basis for avoiding the forum selection clause in an action commenced by the Board at least partly in its capacity as the successor to the Trust.

Based on the foregoing, the Court concludes, in the exercise of discretion, that the Board has failed to meet its heavy burden of demonstrating that enforcement of the forum selection clause would violate an established public policy of this State or is otherwise unreasonable or unjust, and the interests of the parties and judicial economy will best be served by transferring this entire action to Erie County (*see Puleo*, 132 AD3d at 652-653; *Bhonlay v Raquette Lake Camps, Inc.*, 120 AD3d 1015, 1016 [1st Dept 2014]; *Molino v Sagamore*, 105 AD3d 922, 923 [2d Dept 2013]; *Tatko Stone Prods.*, 65 AD3d at 779; *Callanan Indus. v Sovereign Constr. Co.*, 44 AD2d 292, 295-296 [3d Dept 1974]; *see also* Siegel & Connors, NY Prac § 117 at 247).

CONCLUSION

Accordingly, it is

ORDERED that the motion of the Moving Defendants to change venue is granted, and the place of trial of this action is hereby changed to Supreme Court, Erie County (Commercial Division); and it is further

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

Erie County Clerk.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Moving Defendants' counsel. All other papers are being delivered 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: April 17, 2019

Albany, New York

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

1. Stipulated Order to Show Cause (Ryba, J.), dated September 25, 2018; Affidavit of Craig R. Bucki, Esq., sworn to September 21, 2018, with annexed exhibits; Affidavit of Janet A. Warren, sworn to September 18, 2018, with annexed exhibits; Affidavit of Thomas H. Poelma, sworn to September 17, 2018, with annexed exhibit; Affidavit of James E. DeVoe, sworn to September 7, 2018, with annexed exhibits; Memorandum of Law in Support of the Phillips Lytle Litigating Defendants' Motion to Change this Action's Venue from Albany County, New York, to Erie County, New York, dated September 24, 2018;

2. Affirmation of Michael Papa, Esq. in Opposition to Defendants' Change of Venue Motion, dated November 26, 2018, with annexed exhibits;

3. Reply Memorandum of Law in Further Support of the Phillips Lytle Litigating Defendants' Motion to Change this Action's Venue from Albany County, New York, to Erie County, New York, dated December 14, 2018;

4. Letter from Michael Papa, Esq., dated March 22, 2019, with attachments;

5. Letter from Michael Papa, Esq., dated March 28, 2019, with attachments; and

6. Letter from Craig R. Bucki, Esq., dated March 28, 2019, with attachments.

Footnotes

Footnote 1: Prior to commencement, the Board offered former Trust members the opportunity to obtain a release by paying their respective *pro rata* share of the Trust's accumulated deficit. Some former Trust members accepted the proposal; other former members, including the defendants named in this action, did not.

Footnote 2: According to the Board, it has provided two other appearing defendants, Westgate Nursing Home, Inc. and Wellsville Manor LLC, with an extension of time to answer the Complaint pending resolution of the instant motion practice. The remaining defendant, Charles Glessing, is deceased.

Footnote 3: Further support for this conclusion is found in the proviso that litigation "arising under" the participation agreements shall include "any lawsuits for the purpose of collecting premiums owed" (Poelma Aff., Ex. A [h]; Papa Aff., Ex. H [h]). The Court does not see any meaningful distinction between the collection of premiums and the collection of deficit assessments for purposes of "arising under."

Footnote 4: Of the 47 participation agreements located by the Board, 25 agreements included the forum selection clause and 22 did not (*see* Papa Aff., ¶ 18 n 4; *compare* Papa Aff., Ex. H, *with id*., Ex. G). The Board explains that agency regulations did not require the execution of participation agreements until 2001 (*see* Papa Aff., ¶ 30 & Ex. I; 12 NYCRR 317.4 [a] [5] [ii] [adopted in 2001]; *see also* Reply Brief, p. 6).

Footnote 5: The Board further acknowledges that Genesee Valley Presbyterian Nursing Center d/b/a Kirkhaven Nursing Home and Genesee Valley Presbyterian Nursing Center Inc., d/b/a Kirkhaven Presbyterian Homes and Services of Genesee Valley "may fall under the Kirkhaven participation agreement" (Papa Aff., ¶ 20 n 6). In a letter dated March 28, 2019, however, the Board took the position that the two entities are separate and distinct.

Footnote 6: The Board concedes that defendants Fairport Baptist Home Inc. and Fairport Baptist Homes have a participation agreement with the forum selection clause (*see* Papa Aff., ¶ 20).

Footnote 7: The Board represents that it was unable to locate a participation agreement for either Gowanda or Wellsville containing a forum selection clause (*see* Papa Aff., ¶ 20), and it is undisputed that no such agreements have been produced by the Moving Defendants. Notably, these members joined the Trust before

participation agreements became mandatory (*see* Warren Aff., ¶¶ 5-6; n 4, *supra*).

Footnote 8: The Board has submitted a participation agreement signed by Warren on behalf of the Estate of Tripodi in 2006 that *does not* include the forum selection clause (*see* Papa Aff.,

Ex. G).

Footnote 9: And insofar as Tripodi signed the participation agreement on behalf of Wellsville, Warren may be entitled to enforce the forum selection clause based upon the "close relationship" between the enterprise and its general partner (*see generally Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401, 402 [1st Dept 2012]).

Footnote 10: The parties did cite this Court's decision in *Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.* (58 Misc 3d 1207[A], 2017 NY Slip Op 51941[U] [Sup Ct, Albany County 2017]), but that decision concerned the transfer of an action commenced in an improper county, and this Court did not reach the severance issue (*see id*. at *5-6).

Footnote 11: The Court would, in any event, reach the same conclusion, even without consideration of the federal framework.

Footnote 12: In this regard, the Board also points to the concentration of GSIT collection cases in Albany County, and the well-developed body of decisional law from this Court and the Appellate Division, Third Department concerning such matters (*see supra*).

Footnote 13: This assumes, of course, that Supreme Court, Erie County will find *Riccelli* controlling. It further assumes that affirmance of the preliminary injunction in *Riccelli* constitutes the Fourth Department's final word on the 120-day rule.

Footnote 14: As Judge Titone explained, "[t]he Appellate Division is a single statewide court divided into departments for administrative convenience" (*id*.).

Footnote 15: In other words, while the disposition of the claims against different Trust members may differ (at least in the short-term) due to conflicting interpretations of the 120-day rule, the issue is a pure question of law. In contrast, factual inconsistency — where different triers of fact may provide different answers to the same factual disputes (*e.g.*, which party is responsible for the happening of an accident) — would pose far more serious concerns.

Return to Decision List