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Meritage Hospitality Group, Inc. v North Am. Elite Ins. Co.
2021 NY Slip Op 50700(U)
Decided on July 26, 2021
Supreme Court, Albany County
Platkin, J.
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Decided on July 26, 2021

Supreme Court, Albany County

Meritage Hospitality Group, Inc., Plaintiff,

against

North American Elite Insurance Company, Defendant.

Index No. 902308-21

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Richard M. Platkin, J.

Plaintiff Meritage Hospitality Group, Inc. ("Meritage") commenced this commercial action seeking a ruling that its chain restaurants are covered under an all-risk commercial insurance policy issued by defendant North American Elite Insurance Company ("NAE") for "millions of dollars of [lost] business income" and "extra expenses" resulting from governmental [*2]orders issued in response to the COVID-19 pandemic (NYSCEF Doc No. 1 ["Complaint"], ¶ 1).

NAE moves to transfer venue to New York County under CPLR 503, 510 and 511. Meritage opposes the motion.

BACKGROUND

Meritage is a Michigan corporation with its corporate headquarters in Grand Rapids, Michigan (*see* Complaint, ¶ 5). It owns and/or operates 346 restaurants in 16 states, but none of its restaurants are in New York (*see id.*, ¶¶ 2, 5).

NAE is a New Hampshire insurer with its principal place of business in New York County, and it transacts business throughout the United States (*see id.*, ¶ 6; *see also* NYSCEF Doc No. 14 ["LaRocca Aff."], ¶¶ 3-5).

Meritage purchased from NAE an all-risk commercial insurance policy in effect from December 31, 2019 to December 31, 2020 (*see* Complaint, ¶¶ 10-11; *see also* NYSCEF Doc No. 2 ["Policy"]). The Policy insured Meritage against "all risks of direct physical loss or damage" to covered properties (Policy, p. 1), and for "Actual Loss Sustained" from "the necessary interruption of the Insured's business during the 'Period of Liability'" (*id.*, p. 30). The Policy also provided coverage relating to "Communicable Disease Response" and the "Protection and Preservation of Property — Property Damage" (*id.*, pp. 19, 26, 40).

The Policy states that New York law "shall govern [its] construction and interpretation," and that the parties "irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction" (*id*., p. 56, § IX, ¶ F [1] -[2]).

On March 24, 2020, Meritage submitted a claim to NAE for business interruption coverage, citing the loss of income at its restaurants due to "unprecedented state and local Closure Orders" and "restrictive Reopening Orders" (Complaint, ¶¶ 1, 3, 58; *see also id*., ¶¶ 25-48). In its response, NAE "not[ed] the 'continuing nature of [its] investigation' into Meritage's claims" (*id*., ¶ 59).

On October 13, 2020, NAE "issued a letter to Meritage indicating that, with the possible exception of the Communicable Disease Response and Interruption by Communicable Disease coverages . . . , the Policy does not provide coverage for other aspects of Meritage's claim," and "indicated that its evaluation with respect to the Communicable Disease Response and Interruption by Communicable Disease coverages continued" (*id*., ¶ 62).

NAE declined Meritage's request to engage in the optional dispute-resolution procedures set forth in the Policy, and Meritage continued to supply information requested by NAE regarding coverage for Communicable Disease Response and Interruption by Communicable Disease (*see id*., ¶¶ 65-66). Meritage maintains, however, that NAE "expressly and constructively denied Meritage's claim in its entirety" by allowing almost one year to pass without determining its claim (*id*., ¶ 66).

Meritage commenced this action on March 12, 2021, seeking a declaration that the governmental shutdown and reopening orders issued in response to the COVID-19 pandemic caused "direct physical loss or damage" to its covered restaurants (Complaint, ¶¶ 71-76). Meritage also alleges causes of action for breach of the Policy and unjust enrichment (*see id*., ¶¶ 77-89).

As to venue, the Complaint relies upon a "forum selection clause . . . , which provides . . . that the parties 'do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York'" (*id*., ¶ 8, quoting Policy, p. 56, § IX, ¶ F [2]). "As

Albany County, New York is a [*3]Court of the State of New York, the contractual forum selection clause in the [P]olicy is satisfied and venue is proper" (Complaint, ¶ 8). Meritage further asserts that venue "is also proper as NAE[] is currently a named defendant in litigation pending in Albany County . . . styled *Mac Parent, LLC v. North American Elite Insurance Company*, bearing Index No. 906489-20," which "arises out of [NAE's] denial of an insurance claim substantially similar to that made by Meritage involving the same insurance policy provisions" (*id.*, ¶ 9).

NAE responded to the Complaint by demanding that venue be transferred to New York County under CPLR 511,[FN1] alleging that: (i) Albany County is an improper venue because neither party resides here; (ii) New York County is a proper venue because NAE maintains its principal office there; and (iii) this Court's dismissal of the *Mac Parent* case in favor of an earlier-filed New York County action was based on, among other things, a determination that "'New York County is a proper and logical forum'" for an insurance coverage dispute involving NAE because the insurer "'maintains its principal place of business and a substantial physical presence'" there (NYSCEF Doc No. 11, quoting *Mac Parent LLC v North Am. Elite Ins. Co.*, 71 Misc 3d 1203[A], 2021 NY Slip Op 50268[U], *4 [Sup Ct, Albany County 2021]).

Meritage refused the demand, contending that venue is proper in Albany County based on the Policy's forum selection clause (*see* NYSCEF Doc No. 12).

NAE now moves for an order transferring venue to New York County, arguing that the Policy language relied upon by Meritage concerns jurisdiction, not venue. According to NAE, the parties' agreement to submit to the exclusive "jurisdiction" of the New York courts does not fix or otherwise concern venue, and the venue requirements of CPLR 503 must be satisfied. And given that Meritage does not reside in New York and NAE is a resident of New York County for purposes of CPLR 503 (a) and (c), New York County is the only proper venue.

ANALYSIS

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 is not a proper county" (CPLR 510 [1]; *see Harvard Steel Sales, LLC v Bain*, 188 AD3d 79, 81 [4th Dept 2020]).

Where the plaintiff sues in an improper county, it "forfeit[s] its right to designate the place of trial," and so long as the moving defendant has taken the correct procedural steps and selected a proper county, the case should be transferred to defendant's proposed place of trial (*Lombardi Assoc. v Champion Ambulette Serv.*, 270 AD2d 775, 776 [3d Dept 2000]; *see Campbell v New Way Life, Inc.*, 190 AD3d 928, 930-931 [2d Dept 2021]; *Kelson v Nedicks Stores*, 104 AD2d 315, 316 [1st Dept 1984]; Siegel & Connors, NY Prac § 123 [6th ed 2020]).

As is relevant here, CPLR 503 provides that "the place of trial shall be in the county in which one of the parties resided when [the action] was commenced," and "[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" (CPLR 503 [a], [c]).

Meritage acknowledges that it is not a resident of New York (*see* Complaint, ¶ 5), whereas NAE submits persuasive evidence showing that it is a resident of New York County, [*4]where its principal office is located (*see* LaRocca Aff., ¶¶ 4-29). Indeed, Meritage "concedes" that New York County would be the appropriate venue for this action absent the forum selection clause (NYSCEF Doc No. 33 ["Opp Mem"], p. 4). Thus, determination of the motion turns on whether the Policy language relied upon by Meritage is a forum selection clause authorizing venue to be placed in Albany County.

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." "Forum selection clauses are *prima facie* valid and will not be set aside unless the party opposing the clause demonstrates that the enforcement of such would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her 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 Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015]).

The clause relied upon by Meritage states that the parties "irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction" (Policy, p. 56, § IX, ¶ F [2]). While Meritage contends that venue is proper in Albany County because this Court is one of "the Courts of the State of New York," the quoted language speaks only to "jurisdiction" and says nothing about "venue" or "the place of trial."

Jurisdiction and venue are separate and distinct concepts (*see CV Holdings, LLC v Bernard Tech., Inc.*, 14 AD3d 854, 855 [3d Dept 2005]; *see also* Opp Mem, p. 6 ["Venue is different than jurisdiction."]). Jurisdiction concerns a court's authority "to hear and determine" a dispute, whereas venue pertains to "the proper situs" (i.e., place of trial) of an action or proceeding within the court system (*Weingarten v Board of Educ. of City School Dist. of City of NY*, 3 Misc 3d 418, 420 [Sup Ct, Bronx County 2004]; *see Matter of Fister*, 19 Misc 3d 1145[A], 2008 NY Slip Op 51169[U], *1 [Sup Ct, Queens County 2008]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 509; *see also Lowenbraun v McKeon*, 98 AD3d 655, 656 [2d Dept 2012]; *Callanan Indus. v Sovereign Constr. Co.*, 44 AD2d 292, 295 [3d Dept 1974]).

The Policy language relied upon by Meritage establishes the exclusive jurisdiction of the New York courts and constitutes a waiver of the parties' right to challenge such jurisdiction, but it does not speak to venue. As such, the clause is not a "written agreement fixing *place of trial*" (CPLR 501 [emphasis added]). And absent such an agreement, venue must be determined under CPLR 503, which, among other things, allows for suit in a county where "one of the parties resided when [the action] was commenced" (CPLR 503 [a]).

While the Court is unaware of any appellate authority speaking directly to this issue (*see* Opp Mem, p. 11), a line of cases from Supreme Court, Nassau County is instructive.

In *Merchant Cash & Capital, LLC v Laulainen* (55 Misc 3d 349 [Sup Ct, Nassau County 2017] [Diamond, J.] ["*Merchant I*"]), the parties similarly "agreed that either the

state or federal courts in New York shall have jurisdiction over any dispute arising from the agreement" without "specify[ing] that venue will be placed in [any particular] county" (*id*. at 351). Because the agreement fixed jurisdiction but not venue, Supreme Court held that "the parties ha[d] not by agreement done away with the requirements of CPLR 503 entirely" (*id*. at 351).

Similarly, in *LG Funding, LLC v Advanced Pharma CR, LLC* (58 Misc 3d 231 [Sup Ct, [*5]Nassau County 2017] [Steinman, J.]), the Court held that "[a]n intent to deviate from the statutory protections contained in CPLR 503 should be set forth clearly and unambiguously" (*id*. at 233). Such intent is "not manifest from the contractual language" merely providing that the parties "submit to the jurisdiction" of New York court (*id*. at 232-233).

Meritage recognizes this adverse precedent but relies on two other decisions of the same court that are said to have "reached the opposite conclusion and held that CPLR [] 503 doesn't apply in these circumstances" (Opp Mem, pp. 11-12, citing *Merchant Cash & Capital, LLC v Portland Wholesale Jewelry, LLC*, 2017 NY Slip Op 31651[U] [Sup Ct, Nassau County 2017] [McCormack, J.] ["*Merchant II*"] and *Merchant Cash & Capital, LLC v Beachside Home Care, LLC*, 2017 NY Slip Op 31817[U] [Sup Ct, Suffolk County 2017] ["*Merchant III*"]).

The decisions cited by Meritage, however, turned on the presence of contractual language waiving any claim that venue is improper (*see Merchant III*, 2017 NY Slip Op 31817[U], *1; *Merchant II*, 2017 NY Slip Op 31651[U], *1-2). The meaning and effect of such a venue waiver was the point of contention between *Merchant II* and *III*, on the one hand, and *LG Funding* on the other, but none of these decisions called into question the holding or reasoning of *Merchant I* (*see Merchant II*, 2017 NY Slip Op 31651[U], *1 [distinguishing *Merchant I* because it did not involve "a provision, like the one herein, where Defendant specifically waives venue. . . . In the current case, the parties clearly chose New York as the forum, and just as clearly waived any objections to venue"]).

As in *Merchant I*, the Policy language here fixes exclusive jurisdiction and provides for a waiver of any challenge to jurisdiction but does not designate venue or waive defendant's right to challenge venue (*see* 55 Misc 3d at 351; *see also Frequency Elecs., Inc. v Bloch*, 68 Misc 3d 1221[A], 2020 NY Slip Op 51036[U], *3-5 [Sup Ct, NY County

2020] [also involving contracts that did not contain either "a provision specifying" venue or a "waiver of any objection to venue"]; *cf. Merchant III*, 2017 NY Slip Op 31817[U], *1; *Merchant II*, 2017 NY Slip Op 31651[U], *1).[FN2]

Because the Policy language relied upon by Meritage pertains only to jurisdiction and does not designate a proper venue for suit or waive defendant's right to challenge venue (*cf.* CPLR 501), the venue requirements of CPLR 503 must be met. And given that Meritage does not reside in New York and NAE resides in New York County, where its principal office is located (*see* CPLR 503 [a], [c]; *Mac Parent*, 2021 NY Slip Op 50268 [U], *4; LaRocca Aff., ¶¶ 4-29; NYSCEF Doc Nos. 15-17; Complaint, ¶¶ 5-6; Opp Mem, p. 4),[FN3] venue must be transferred [*6]to New York County (*see Frequency Elecs.*, 2020 NY Slip Op 51036[U], *4-5; *Merchant I*, 55 Misc 3d at 351; *see also LG Funding*, 58 Misc 3d at 233; *see generally Lowenbraun*, 98 AD3d at 656-657; *cf. Merchant III*, 2017 NY Slip Op 31817[U], *1; *Merchant II*, 2017 NY Slip Op 31651[U], *1-2).

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant's motion to transfer venue is granted; and it is further

ORDERED that the place of trial of this action is changed to Supreme Court, New York County; and it is further

ORDERED that the Albany County Clerk shall, upon service of a copy of this order and payment of the requisite fee, if any, transmit all papers on file in this action to the New York County Clerk; and finally it is

ORDERED that NAE's time to respond to the Complaint is hereby extended until twenty (20) days after service of this Decision & Order with notice of entry (or such other time as the parties may agree by written stipulation).

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry,

counsel for defendant shall promptly serve notice of entry on all parties entitled thereto (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: Albany, New York
July 26, 2021

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

Papers Considered:

NYSCEF Doc Nos. 1-2, 6-17, 21, 32-33, 35.

Footnotes

Footnote 1: The Court extended NAE's time to answer or move against the Complaint pending determination of the instant venue motion (*see* NYSCEF Doc Nos. 6, 21).

Footnote 2: In the absence of a contractual waiver of NAE's right to challenge venue, the Court need not address the conflicting authorities cited by the parties concerning the interpretation and enforcement of such a provision.

Footnote 3: Unlike foreign corporations (*see* Business Corporation Law § 1304), foreign insurance companies do not have to file an Application for Authority to do business and, as such, do not designate the county of their principal office when seeking to do business in the State (*see* Insurance Law §§ 108 [e]; 1102 [d]; *Valley Psychological, P.C. v Government Empls. Ins. Co.*, 95 AD3d 1546, 1548 [3d Dept 2012]). Thus, a foreign insurer is permitted to demonstrate that it maintains a principal office by other means (*see Valley Psychological*, 95 AD3d at 1548; *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d 514, 514 [1st Dept 1968]; *cf. GEICO v Star & Strand Transp., Inc.*, 66 Misc 3d 686, 690 [Sup Ct, Albany County 2019]), including the uncontroverted affidavit of its representative (*see e.g. Consolidated Restaurant Operations, Inc. v Westport Insurance Corp.*, Sup Ct, Westchester County, Dec. 11, 2020, Walsh, J., index No. 58095/2020 [available at NYSCEF Doc No. 13]).

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