IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

MORROW EQUIPMENT COMPANY, L.L.C. Plaintiff,	: APRIL TERM, 2003
	: No 0824
v.	:
LEXINGTON INSURANCE COMPANY and BLUE RIDGE ERECTORS, INC., Defendants.	: Commerce Program
	: Control Numbers 062186 and 071938

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O P I N I O N

Albert W. Sheppard, Jr., J. ……..…… January 13, 2004

Presently before the court are the Preliminary Objections of defendant, Lexington Insurance Company ("Lexington") pursuant to Pa. R. Civ. P. 1028 (a) (1)[1]and the Preliminary Objections of Blue Ridge Erectors, Inc. ("Blue Ridge") pursuant to Pa. R. Civ. P. 1028 (a)(1) improper venue and Pa. R. Civ. P. 1028 (a)(5) misjoinder of a cause of action. For the reasons discussed, both defendants' Preliminary Objections on improper venue are sustained.

[1] In the original papers filed with the court, Defendant Lexington Insurance Company also asserted preliminary objections pursuant to Pa. R. Civ. P. 1028 (a) (6) pendency of a prior action. On September 15, 2003, the court entered an order overruling Lexington's objection.

BACKGROUND

The operative facts, as pled in the Complaint, can be summarized. Plaintiff, Morrow Equipment Company, is a Delaware limited liability company, having its principal place of business in Salem, Oregon. (Complaint ¶ 1). Defendant Lexington Insurance Company is a Delaware corporation with a principal place of business in Boston, Massachusetts. (Complaint ¶ 2). Defendant Blue Ridge Erectors, Inc. is a Pennsylvania corporation with its principal place of business in Mt. Bethel, Pennsylvania. (Complaint ¶3).

On August 28, 2001, Morrow Equipment Company, L.L.C. ("Plaintiff") entered into two Equipment Lease Agreements and corresponding Maintenance Agreements with Blue Ridge for two cranes. (Complaint ¶ 5). Pursuant to the Lease Agreements, Blue Ridge was to insure the cranes for damage and liability. (Complaint ¶ 5).

On or about October 12, 2001, Lexington issued to Blue Ridge an insurance policy covering "all risk of direct physical loss or damage except as specifically excluded." (Complaint ¶ 6). Plaintiff alleges that under the terms of the policy of insurance Lexington was liable for damage to the cranes in the aggregate amount of $2.6 million, with plaintiff designated as both an additional insured and a loss payee. (Complaint ¶ 12).

On or about September 2, 2001, plaintiff shipped the cranes to Blue Ridge at the job site of the erection in New Jersey and the cranes were put in service and used by Blue Ridge. (Complaint ¶ 7-8). Plaintiff alleges that Blue Ridge did not pay the agreed lease payments despite proper demand. (Complaint ¶ 9).

On or about January 16, 2002, while Blue Ridge was operating one of the cranes, it suffered damage. (Complaint ¶ 9). Plaintiff and Blue Ridge each submitted a claim for this damage to Lexington. (Complaint ¶ 13-14). Plaintiff alleges that Lexington paid or advanced to Blue Ridge the sum of $500,000.00 under the policy. Plaintiff was not included on the draft. (Complaint ¶ 15). Lexington has since advised Plaintiff that it is unable to pay the aggregate claim submitted by plaintiff and Blue Ridge as they exceed the policy limit. (Complaint ¶ 16).

In April 2003, Plaintiff instituted this action against Lexington and Blue Ridge. The Complaint alleges claims against Blue Ridge for indemnification for failure to the pay the damage claim on the cranes (Count I), breach of contract for failing to make payments on the lease agreements (Count II) and failure to provide an "All Risk" insurance policy as required by the lease agreements (Count III). The Complaint also alleges claim against Lexington for an insurance contract claim (Count IV) and an insurance bad faith claim (Count V).

Thereafter, defendants filed these preliminary objections. Lexington raised preliminary objections asserting a prior pending action and improper venue. On September 15, 2003, the court overruled Lexington's preliminary objections asserting prior pending action and ordered the parties to conduct limited discovery on the issue of venue and submit supplemental memoranda. Blue Ridge also filed preliminary objections asserting both improper venue and misjoinder of claims. Here too, the court ordered the parties to conduct discovery limited to whether Blue Ridge regularly conducts business in Philadelphia and to submit supplemental memoranda on the venue issue.

The parties have conducted discovery pursuant to this court's orders and have filed supplemental memoranda pertinent to the venue issue.

DISCUSSION

"A plaintiff's choice of forum is given great weight and a defendant has the burden in asserting a challenge to the plaintiff's choice of venue." Feltoon v. Nolen, 2002 WL 31474535 * 1 (Pa. Com. Pl. 2002)(Sheppard)(quoting Gilfor ex. rel. Gilfor v. Altman, 770 A.2d 341, 343 (Pa. Super. 2001)). Nonetheless, the trial court has discretion in deciding whether to transfer venue. Id. Additionally, "a plaintiff's choice of forum is accorded less deference when the plaintiff does not live in the forum district and none of the operative events occurred there." Id (quoting International Mills Services, Inc. v. Allegheny Ludlum Corp., 2002 WL 748896, *2 (C.P. Phila. April 11, 2002)(Herron)).

Pa. R. Civ. P. 2179 provides, in relevant part:

> (a) except as otherwise provided by the an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in
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> (1) the county where its registered office or principal place of business is located;
> (2) a county where it regularly conducts business;
> (3) the county where the cause of action arose; or
> (4) a county where a transaction or occurrence took place out of which the cause of action arose.

Pa. R. Civ. P. 2179.

In view of the facts adduced in discovery, the court concludes that the only possible provision for finding that venue properly lies in Philadelphia County is the "regularly conducts business" provision. In determining whether a corporation regularly conducts business, the court must focus on the nature of the acts the corporation allegedly performs in that county; those acts must be assessed both as to quantity and quality.

Masel v. Glassman, 456 Pa. Super. 41, 46, 689 A.2d 314, 317 (Pa. Super. 1997). Our Supreme Court has instructed that the

> "[q]uality of acts" means "those directly, furthering or essential to, corporate objects; they do not include incidental acts." Quantity means those acts which are "so continuous and sufficient to be general or habitual". …[T]he acts of the corporation must be distinguished: those in "aid of a main purpose" are collateral and incidental, while "those necessary to its existence" are "direct."

Purcell v. Bryn Mawr Hosp., 525 Pa. 237, 243-45, 579 A.2d 1282, 1285 (1990) (quoting Shambe v. Delaware & H.R. Co., 288 Pa. 240, 248, 135 A. 755 (Pa. 1927)). Under the regularly conducts business tests of Rule 2179(a) (2), the contacts need not be related to the cause of action. Id.

Application of this test to these facts, leads to the conclusion that venue in Philadelphia County is not appropriate.

I. Lexington's Contacts in Philadelphia County Do Not Meet the Criteria Set Forth In Pa. R. Civ. P. 2179.

Lexington argues that venue is not proper in Philadelphia since it does not regularly conduct business in Philadelphia. It argues that since it is a surplus lines insurer,[2] it is prohibited from writing policies directly for potential insureds and, therefore, has not availed itself of venue in Philadelphia. (Lexington brief p. 4, 6). Lexington contends that authorized brokers are principally responsible for issuing and delivering the insurance policies. The brokers maintain primary responsibility for the issuance of Lexington policies in Philadelphia. Id. In support of these statements,

[2] An eligible surplus lines insurer is defined by statute as a nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance. 40 P.S.A. § 1602. A non admitted insurer is an insurer not authorized and not licensed to maintain an insurance business in this Commonwealth. Id. A surplus lines licensee is an individual, partnership or corporation licensed under section 1615 to place surplus lines insurance with nonadmitted insurer eligible to accept such insurance. Id.

Lexington relies upon the deposition testimony of Brad Zaparesky, a property claims manager for the company.

Plaintiff, on the other hand, maintains that venue is appropriate in Philadelphia County arguing that Lexington regularly conducts business in Philadelphia. In support, plaintiff maintains that Lexington has stipulated that it has thousands of policies in Philadelphia, that it has filed suit in Philadelphia and that it has been sued in Philadelphia. Plaintiff further relies upon an alleged agreement between the parties that Lexington has eight surplus lines brokers in Philadelphia.[3] Plaintiff also relies upon the testimony of Zaparesky that Lexington markets its products to the general public, writes policies countrywide and that Lexington is a subsidiary of AGI.

The court finds that the "regularly conducts business" test of Rule 2179 has not been met. To meet the quality prong of the test, a defendant's contacts with the county must be essential to or in direct furtherance of corporate objects, rather than being incidental acts. Purcell, 579 A.2d at 1285. "Those acts in 'aid of a main purpose' are collateral and incidental, while 'those necessary to its existence' are direct." Masel v. Glassman, 689 A.2d 314, 317, 317 (Pa. Super. 1997). Mere advertisement or solicitation of business within the county generally is not sufficient to satisfy the quality test, because advertisement is generally incidental to the corporate objective. Id. Rather, the defendant must have had physical presence in the county, for example, by operating a branch office in the county, Gale v. Mercy Catholic Med. Center Eastwick, Inc., 698 A.2d 647, 652 (Pa. Super. 1997), or by entering the county to make sales, Canter v. American Honda Motor Corp., 426 Pa. 38, 231 A.2d 140, 143 (Pa. 1967).

[3] Other than plaintiff's representations within its brief the court has not been provided with any evidence that Lexington issues thousands of policies in Philadelphia or that Lexington has eight surplus lines brokers in Philadelphia. Lexington, however, has not refuted plaintiff's statements.

Here, Lexington does not have a physical presence in Philadelphia County. They do not own property or operate a branch here. However, according to plaintiff, Lexington uses eight Philadelphia brokers to sell insurance in Philadelphia which furthers the corporate purpose. Thus, the quality requirement arguably is satisfied.

To meet the quantity requirement, the contacts must be "so continuous and sufficient to be general or habitual." Purcell, 579 A.2d at 1285. Where the defendant is physically present in the county, courts have generally accepted any amount of business as satisfying the quantity prong. See Canter, 231 A.2d at 143. On the other hand, where the defendant never entered the county in furtherance of the corporate object, the mere fact that the defendant conducted some of its business with county residents was not sufficient to confer venue. Masel, 689 A.2d at 317. (holding that venue was improper in Philadelphia county where physician services company received 20% of gross revenues from Philadelphia third party payers and 3% from Philadelphia residents, but conducted no operations in Philadelphia). Here, although there are eight Philadelphia brokers available to provide Lexington policies, there is no evidence as to the amount of surplus insurance policies issued in Philadelphia per year and the amount of revenues grossed from those policies. Thus, there is no evidence that Lexington surplus insurance policies are issued by Philadelphia brokers regularly. Accordingly, since Lexington does not regularly conduct business in Philadelphia, this court sustains Lexington's preliminary objections to venue.

II. Blue Ridge's Contacts in Philadelphia County Do Not Meet the Criteria Set Forth in Pa. R. Civ. P. 2179.

Blue Ridge argues that venue is improper in Philadelphia since it does not maintain a registered office or principal place of business in Philadelphia or regularly conduct business in Philadelphia. In support, Blue Ridge relies upon the affidavit of Frank Impeciati, the President of Blue Ridge. Mr. Impeciati states that Blue Ridge has its principal place of business in Mt. Bethel, Pa. in Northampton County, Pennsylvania. He also states that in the last five years, Blue Ridge has not conducted any business in Philadelphia County. Additionally, Mr. Impeciati states that the lease agreements, which are the subject matter of the instant lawsuit, have no connection with Philadelphia.

Plaintiff on the other hand argues that Blue Ridge has asserted a claim under the same policy and all parties agree that a resolution of the Morrow claim without a concurrent resolution of the Blue Ridge claim could prejudice Blue Ridge and/or Lexington. Plaintiff offered no evidence to rebut Mr. Impeciati's affidavit.

Based upon this record, this court finds that venue is improper as it pertains to Blue Ridge. Parenthetically, the court finds that Pa. R. Civ. P. 1006 (c)[4] is inapplicable. Even assuming that venue was proper as to Lexington, Pa. R. Civ. P. 1006 (c) is inapplicable because the Complaint does not seek to enforce joint or joint and several

[4] Pa. R. Civ. P. 1006 (c) provides that an action to enforce a joint or joint and several liability against two or more defendants, except an action in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules.

liability against Lexington and Blue Ridge. Accordingly, Blue Ridge's preliminary objections to venue are sustained.[5]

CONCLUSION

For the reasons discussed this court finds that:

1. Lexington's Preliminary Objection asserting improper venue is **Sustained;** and

2. Blue Ridge's Preliminary Objection asserting improper venue is **Sustained**.

Plaintiff's Complaint is dismissed. This court will issue a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[5] Since the preliminary objection asserting improper venue is sustained, the court need not address Blue Ridge's preliminary objection of misjoinder under Pa. R. Civ. P. 1028 (a) (5).

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O R D E R

AND NOW, this 13th day of January 2004, upon consideration of the Preliminary Objections by defendants, Lexington Insurance Company and Blue Ridge Erectors, Inc., the responses in opposition, the respective memoranda, all supplemental submissions, all matters of record and in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** that:

1. Defendant, Lexington Insurance Company's Preliminary Objection to venue is **SUSTAINED** and the Complaint is dismissed against it.

2. Defendant Blue Ridge Erectors, Inc.'s Preliminary Objection to venue is **SUSTAINED** and the Complaint is dismissed against it.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.