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

PRESENT: HON. CAROL EDMEAD

Justice

PART 35

Jonathan Taylor

INDEX NO. 104374/07

MOTION DATE 8/8/07

- v -

MOTION SEQ. NO. 001

Rochester Institute of Technology

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant Rochester Institute of Technology for an order, pursuant to CPLR 5103(3), changing venue in this action from New York County to Monroe County for the convenience of the witnesses, is denied. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry, on counsel for plaintiff.

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

Dated: 8/10/07

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

JONATHAN TAYLOR,

Plaintiff,

-against-

ROCHESTER INSTITUTE OF TECHNOLOGY,

Defendant.

EDMEAD, J.S.C.

Index No. 104374/07

DECISION/ORDER

MEMORANDUM DECISION

Defendant Rochester Institute of Technology ("defendant" or "RIT") moves for an order, pursuant to CPLR 510(3), changing venue in this action from New York County to Monroe County for the convenience of the non-party witnesses. Plaintiff, Jonathan Taylor ("plaintiff") opposes the instant motion.

This action arises out of the plaintiff's alleged slip and fall in the Kate Gleason College of Engineering at the RIT on July 18, 2006. This accident was witnessed by many people as it happened while class was in session.

Defendant's Contentions

Simply put, the accident occurred in Monroe County where the plaintiff was a student and most witnesses reside.

The affidavits of four non-party eyewitnesses to the plaintiff's accident (Filip Ambrosio, David Grymin, Kevin Smith and Jennifer Mallory) each demonstrates that each of these witnesses will be greatly inconvenienced by a New York County trial because of the three hundred mile drive between the RIT, located in Rochester, where each is still a student, to the

New York County courthouse. Furthermore, each student also resides in either Monroe County or Erie County.

In contrast, the Monroe County courthouse is less than seven miles from the RIT campus. This would allow the witnesses to appear at trial on short notice without causing a significant disruption to their class work or personal lives.

These witnesses would have to travel hundreds of miles and the resulting inconvenience is great for many non-party witnesses. They would likely have to take at least two days off for any trial and at a significant cost in time and expense.

And, plaintiff's contact with Rochester - county seat for Monroe County - is substantial. He attends school in Rochester and voluntarily chose to live there during the school year.

Further, a discretionary change of venue to a rural county where calendars are not congested is preferred to urban counties where conditions are otherwise.

Plaintiff's Contentions

In order to make this motion, defendant has stated facts which are palpably untrue with regard to the willingness of eyewitnesses to testify in New York County. Three of the witnesses defendant relies on to establish a basis for discretionary change of venue, (David Grymin, Kevin Smith and Jennifer Mallory) in fact have stated that they are welling to testify in New York County.

According to defense counsel, the fourth affiant in support of defendant's motion may in fact be an interim employee of defendant. Thus, plaintiff did not try to secure an affidavit from him.

Upon receipt of the motion papers, plaintiff's counsel's investigators contacted the "eye

witnesses" whose affidavits were attached to the moving papers. They indicated that they had been contacted by defendant and were advised that they would have to pay their own travel expenses to New York County. When they were advised that plaintiff would defer their expenses to come to New York County, they were more than willing to come here for trial.

And, these witnesses are currently students at RIT but, by the time this case is tried, will in all probability no longer be students at that institution and will be residing elsewhere, thus making New York County a more convenient forum than Rochester.

Further, plaintiff does not reside in Monroe County. Plaintiff is and always has been a permanent resident in New York County whose only purpose for residing in Monroe County was to attend school. As a result of this accident, he has been on medical leave from RIT since the date of the accident. Since the accident, plaintiff has moved back to his permanent residence, his parents' home in New York County, and has transferred from RIT to a local school, Stevens Institute of Technology.

Defendant's Reply

While the plaintiff has attached competing affidavits from the same witnesses, those affidavits were signed after the plaintiff admittedly offered to defer the costs of travel to New York County. The witness affidavits attached to the defendant's papers which were fully executed without offering any incentive to the witnesses, speak for themselves.

And, it is very possible that these students, upon graduation, may live and work in Monroe County, making Monroe County the venue that will be more convenient for these eyewitnesses.

Finally, the depositions of the witnesses identified in the defendant's affidavits must be

held in the county where the non-party witnesses reside or the county where they are regularly employed. Therefore, the deposition of these witnesses will be held in Monroe County or Erie County. And, should any issues arise at the depositions that require court intervention, the parties will be unable to personally address the trial court to resolve these issues should venue remain in New York County.

At the time of trial, we may be unable to secure these witnesses for live testimony because they reside hundreds of miles from New York County, thus potentially depriving the jury of gauging the credibility of these witnesses through live courtroom testimony.

Analysis

Change of Venue

For the Supreme Court of the State of New York, the prescribed venue of an action is codified at and statutorily authorized by Article 5 of the CPLR. The statutory scheme provides that "notwithstanding the provisions of this article, 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 of the court upon motion or by consent...." As such, unless the parties have by prior written agreement fixed the venue of an action, CPLR Article 5 permits the plaintiff the right to make the initial selection of an appropriate venue (*See*, CPLR 501, 503, 509; *Medicorp v. Avis Corp.*, 122 Misc.2d 813 [1984]). However, in a plenary action, as distinguished from a special proceeding, the general venue rule set forth in CPLR 503 permits a plaintiff to bring an action in any county in which a party (plaintiff or defendant, individual or corporate) has a residence. Venue based on proper residence is not the basis of defendant's motion herein.

Likewise, it is settled that upon a motion by defendant to change said venue defendant

bears the burden to establish that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed (*Islamic Republic v. Pahlavi*, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, 467 N.E.2d 245, cert. denied 469 U.S. 1108, 105 S.Ct. 783 [1984]; *Clark v. Michael Ahem Production Service, Inc.* 181 A.D.2d 514, 580 N.Y.S.2d 360 [1st Dept.1993]; *Bradley v. Plaisted*, 277 A.D. 620, 102 N.Y.S.2d 295 [3rd Dept.1951], leave denied, 278 A.D. 127, 103 N.Y.S.2d 661). In addition, it is settled that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (see, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 [1947]; *Waterways Limited v. Barclays Bank, PLC*, 174 A.D.2d 324 327, 571 N.Y.S.2d 208 [1st Dept.1991];*Temple v. Temple*, 97 A.D.2d 757, 468 N.Y.S.2d 388 [2d Dept.1983]).

A party seeking a discretionary change of venue pursuant to CPLR 510(3) bears the burden of demonstrating that a change is appropriate and, generally, must support the application with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change (*see Stainbrook v. Colleges of the Senecas*, 237 A.D.2d 865, 656 N.Y.S.2d 946 [1997]; *O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 622 N.Y.S.2d 284 [1995]; *Andros v. Roderick*, 162 A.D.2d 813, 557 N.Y.S.2d 722 [1990]). To obtain a discretionary change of venue under CPLR 510(3), "the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the initial venue" (*Rodriguez v. Port Auth.*, 293 A.D.2d 325, 326, 740 N.Y.S.2d 323, *citing Cardona v. Aggressive Heating*, 180 A.D.2d 572, 580 N.Y.S.2d 285). Defendant herein has failed to meet this burden.

Here, the parties do not contest that the incident occurred outside of New York County in Monroe County. The record reveals potential nonparty witnesses from, in or near Monroe County.

Initially the eyewitnesses expressed willingness and availability to testify at trial. And, defendant established that their testimony as eyewitnesses to the plaintiff's accident, is not only material, but also critical to the defense of this matter. It is likely that these witnesses have first hand knowledge of the plaintiff's accident. And, they each attested that he/she "[w]ould be inconvenienced if the venue of this case remained in New York County. The lengthy travel to and from New York County would require [the witness] to miss class and it would disrupt [his/her] study schedule."

However, three of the four eyewitnesses now indicate their willingness to attend trial in New York County, and will, apparently, no longer be greatly inconvenienced to travel to New York County. And, plaintiff, too, now claims that the eyewitness testimony will support plaintiff's case. When these eyewitnesses withdrew their objection to appearing and testifying in New York, the defendant's basis for discretionary change of venue evaporated.

The "recanting affidavits" from the non-party witnesses take the wind out of the sails of defendant's argument in support of change of venue.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Rochester Institute of Technology for an order, pursuant to CPLR 510(3), changing venue in this action from New York County to Monroe County for the convenience of the witnesses, is denied. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry, on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: August 10, 2007

Carol Robinson Edmead, J.S.C.