

**Barnabo v Fleetwood Ct. Apts., Inc.**

2007 NY Slip Op 33540(U)

October 26, 2007

Supreme Court, New York County

Docket Number: 0106822/2005

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK  
*Justice*

PART 12

Index Number : 106822/2005  
BARNABO, KATHLEEN J.  
vs  
FLEETWOOD COURT APARTMENTS  
Sequence Number : 007  
VACATE NOTE OF ISSUE/READINESS

INDEX NO. 106822/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007  
MOTION CAL. NO. \_\_\_\_\_

his 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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 10/26/07

  
**BARBARA R. KAPNICK** J.S.C.

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: IAS PART 12

-----X

KATHLEEN J. BARNABO,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 106822/05  
Motion Seq. No. 007

FLEETWOOD COURT APARTMENTS, INC. and  
THE ARGO CORPORATION, and the following  
corporations: CHESTER REGO PARK, LLC,  
CHESTER FLEETWOOD, LLC, CHESTER  
WESTOWER, LLC, CHESTER 505 CENTRAL,  
LLC, CHESTER 45 E. HARTSDALE, LLC;  
CHESTER 120 E. HARTSDALE, LLC, CHESTER  
111-119 E. HARTSDALE, LLC, CHESTER  
WINDSOR III, LLC, CHESTER 281 GARTH  
RD., LLC, CHESTER WESTCHESTER III, LLC,  
CHESTER TUDOR WOODS III, LLC, each of  
whom make up CHESTER APARTMENT INVESTORS,  
III, and WRG MANAGEMENT CORP., s/k/a  
RWG REALTY, INC. and STILLMAN MANAGEMENT,  
INC.,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiff Kathleen J. Barnabo seeks to recover damages for personal injuries she sustained on December 25, 2004 when she was allegedly caused to fall on an exterior stairway at the building located at 840 Bronx River Road, Bronxville, New York.

Although the accident occurred in Westchester County, where plaintiff resides, venue was designated in New York County based on the "place of business" of defendant The Argo Corporation.

However, defendants The Argo Corporation, and the following corporations: Chester Rego Park LLC, Chester Fleetwood, LLC,

Chester Westtower, LLC, Chester 505 Central LLC, Chester 45 E. Hartsdale, LLC; Chester 120 E. Hartsdale, LLC, Chester 111-119 E. Hartsdale, LLC, Chester Windsor III, LLC, Chester 281 Garth Rd., LLC, Chester Westchester III, LLC, Chester Tudor Woods III, LLC, each of whom make up Chester Apartment Investors, III, previously moved (under motion sequence number 006) for summary judgment dismissing plaintiff's Complaint against them on the grounds they did not own or control the stairway in question.

By Decision/Order of this Court dated July 31, 2007, the motion was granted on default and plaintiff's claims against defendants Fleetwood Court Apartments, Inc., WRG Management Corp. s/k/a RWG Realty Inc. and Stillman Management Inc. were severed and continued.

Defendant Fleetwood Court Apartments, Inc. now moves for an order:

(1) vacating the Note of Issue and Certificate of Readiness and striking this action from the trial calendar on the ground that discovery is not complete as plaintiff has failed to provide authorizations and a response to defendants' Notice for Discovery and Inspection, or alternatively, reserving its rights to complete all necessary or proper discovery proceedings; and

(2) changing the venue of this action from New York County to Westchester County on the ground that none of the parties remaining in this action "reside" in New York County.

The Appellate Division, First Department, has repeatedly held that "where venue is [initially] placed on the basis of the principal place of business of an improper party, a motion to change venue should be granted after the action is dismissed against the improper party." See, Clase v. Sidoti, 20 A.D.3d 330, 331 (1st Dep't 2005), Crew v. St. Joseph's Medical Center, 19 A.D.3d 205 (1st Dep't 2005); Chow v. Long Island Railroad, 202 A.D.2d 154 (1st Dep't 1994); Caplin v. Ranhofer, 167 A.D.2d 155 (1st Dep't 1990).

Plaintiff argues that venue should nonetheless be retained in New York County on the ground that defendant Stillman Management, Inc.'s county of registration is New York County.

However, the print-out from the New York Department of State's records which is annexed to plaintiff's Affirmation in Opposition indicates that the principal executive office of the Corporation is, in fact, located in Westchester County.

Plaintiff also argues that venue should be retained in New York County on the ground that Penn-Star Insurance Company has commenced a declaratory judgment in New York County against defendants Fleetwood Court Apartments, Inc., Stillman Management, Inc. and Kathleen J. Barnabo, under Index No. 106436/07.

However, as plaintiff acknowledges, the Appellate Division, First Department, has previously rejected the notion that an insurance coverage claim should necessarily be tried in the same County as the underlying personal injury action, notwithstanding the practicality and expedience of that concept. See, Paramount Insur. Co. v. Rosedale Gardens, Inc., 293 A.D.2d 235, 242 (1st Dep't 2002).

Finally, plaintiff argues that venue should be retained in New York County on discretionary grounds pursuant to CPLR § 510(3) for the convenience of plaintiff's engineering expert, a resident of Suffolk County, and defendant's medical expert, who maintains an office in New York County.

However, "the convenience of expert witnesses is not ordinarily to be considered (citation omitted)" in determining a motion to change venue. Katz v. Goodyear Tire and Rubber Co., 116 A.D.2d 506, 507 (1st Dep't 1986). See also, McAdoo v. Levinson, 143 A.D.2d 819 (2nd Dep't 1988).

Moreover, plaintiff has not made "a detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief (O'Brien v. Vassar Bros. Hosp., 207 A.D.2d 169, 622 N.Y.S.2d 284; Kraft v. Kamalian, 290 A.D.2d 264, 735 N.Y.S.2d 540)." Jacobs v. Banks Shapiro Gettinger

Waldinger & Brennan, 9 A.D.3d 299 (1st Dep't 2004). See also, Rodriguez-Lebron v. Sunoco, Inc., 18 A.D.3d 275 (1st Dep't 2005).

Accordingly, that portion of the motion seeking to change the venue of this action to Westchester County is granted.

That portion of the motion seeking to vacate plaintiff's Note of Issue is granted only to the extent of directing plaintiff to provide HIPAA-Compliant authorizations to obtain plaintiff's records from White Plains Hospital and Lawrence Hospital and to obtain health care records relating to treatment following a recent fall, within 30 days of service of a copy of this order with notice of entry.

Defendant also seeks to compel plaintiff to provide an authorization to obtain plaintiff's records from Dr. Doyle, plaintiff's treating psychiatrist, on the ground that said records may contain information relating to plaintiff's history of dizzy spells and fainting. Defendant further argues that said records should be produced because plaintiff testified that she spoke to Dr. Doyle about the breaking of her hip as a result of this accident.

Plaintiff, on the other hand, contends that these records, which contain highly personal information, are irrelevant because she never sought treatment from Dr. Doyle, either before or after this incident, for dizzy spells or for the injuries claimed herein.

It appears that an in-camera inspection is required to determine whether or not Dr. Doyle's records are subject to disclosure in this action. Defendant is, therefore, directed to move before the Judge to be assigned the case in Westchester County for said relief.

The action, may, however, remain on the trial calendar since it appears that all other discovery has been completed.

The Clerk of this Court is directed to transfer the papers on file in this action (Index No. 106822/05) to the Clerk of the Supreme Court, Westchester County, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the decision and order of this Court.

Dated: October 2007



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERKS OFFICE