SHORT FORM ORDER **INDEX NO. 10594/2008**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

NEW YORK MARINE AND GENERAL INSURANCE COMPANY, AS SUBROGEE OF MACARTHUR REALTY LLC,

Plaintiff(s),

-against-

M. RONDON CONSTRUCTION CORP. A/K/A M. RONDON CONSTRUCTION,

Defendant(s).

ORIG. RETURN DATE: June 2, 2008
FINAL RETURN DATE: July 23, 2008
MTN. SEQ. #: 001-MD
002-MD
003-MotD

PLTF'S ATTORNEY:
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DEFT'S ATTORNEY:
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Upon the following papers numbered 1 to 50 read on this motion, cross motion and second motion: Notice of Motion and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7 - 16; Affirmation in Opposition 17 - 25; Reply Affirmation 26 - 29; Second Notice of Motion and supporting papers 30 - 40; Affirmation in Opposition and supporting papers 41 - 45; Reply Affirmation 46 - 50; it is

ORDERED that these motions (001 and 003) and cross motion (002) are combined for consideration in this one decision and order for the sake of judicial economy and expediency; and it is further

ORDERED that the motion (001) by the defendant pursuant to CPLR 510 and 511 for a change of venue to Queens County is denied; and it is further

ORDERED that the cross motion (002) by the plaintiff for leave to amend the caption, summons and complaint to reflect the addition of another party plaintiff, to wit: MacArthur Realty, LLC is denied as moot, and it is further

ORDERED the motion (003) by the plaintiff for summary judgment on the issue of liability is decided to that the extent that the court finds that the defendant is liable for causing the fire which damaged the premises in question but as to damages and the culpability of the plaintiffs with regard to the extent of the damages, those are issues for the trier of fact to decide; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on March 26, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.; said date allowing for the defendant to answer the amended complaint.

This is a subrogation action in which the subrogee, New York Marine and General Insurance Company (hereinafter New York Marine), is seeking to recover monies paid to the subrogor, MacArthur Realty, LLC (hereinafter MacArthur), for damages resulting from a fire allegedly caused by the defendant M. Rondon Construction Corp. a/k/a M. Rondon Contruction (hereinafter Rondon).

The following facts are not at issue: MacArthur is the owner of a residential motel in Bohemia, New York, which contracted orally with Rondon to perform certain plumbing repairs. On January 5, 2006, while a Rondon employee was performing plumbing work, a fire ignited due to the open flame of a torch being used. The fire spread to other parts of the premises causing damages for which New York Marine paid over $1,000,000.00 to MacArthur.

Rondon has filed a motion (001) seeking to change the venue of this action to Queens County (where its principal place of business is located). The main ground for this relief is that none of the parties to this action resides in Suffolk County (New York Marine's principal place of business is in New York City) and since this action was improperly placed in Suffolk County, New York Marine has forfeited its right to choose a venue.

New York Marine opposes this motion, primarily based upon the convenience of witnesses and cross moves (002), in the event that the court grants the change of venue, to add MacArthur as a party/plaintiff.

New York Marine then brought a subsequent motion (003) for summary judgment on the issue of liability.

The court will address the motions and cross motion in the order they were brought.

This motion (001) was brought in accordance with CPLR 511 based upon Suffolk County not being a proper county for trial (*see* CPLR 510[1]). In support of this motion (001) to change venue to Queens County, Rondon makes a number of valid arguments. Rondon points out that the plaintiff based venue in Suffolk County on the basis of "place where action arose" which is inappropriate. Indeed, venue in a transitory action such as this, as a matter of law, is to be based only upon the residence of any of the parties (*see* CPLR 503[a] and [c]); not upon where the action arose. In this action, none of the parties resides in Suffolk County. Accordingly, venue in Suffolk County was improper.

New York Marine opposes this motion and cross-moves (002), in the alternative (in the event the defendant's motion to change venue is granted), for leave to amend the complaint to add the subrogor, MacArthur, as a party/plaintiff. New York Marine's main argument against changing venue, in addition to the fact that the action accrued in Suffolk County, is that there are numerous material witnesses who are Suffolk based including witnesses from the Town of Islip, the County of Suffolk and the fire department which responded to the fire. New York Marine also contends that even if venue were place in Queens, there are sufficient grounds and proof to transfer the action to Suffolk County for the convenience of witnesses (*see* CPLR 510[3]).

Rondon says that in the absence of an actual cross motion for keeping venue in Suffolk County for the convenience of witnesses, such an argument is not otherwise permitted in opposition to a motion to change venue based upon "improper" venue.

In considering the application to change venue in this action, one question which is raised is whether New York Marine, as the subrogee, stands in the shoes of its subrogor which, if it were an original party, would have provided a Suffolk residence upon which to base venue in Suffolk County. The answer to this question is no. Although an assignee's residence shall be deemed the same as the assignor (*see* CPLR 503[e]), a subrogation is not the same as an assignment for venue purposes (*see United Community Ins. Co. v Triboro Signal Station, Inc.*, 160 AD2d 1206, 555 NYS2d 210 [3d Dept 1990]). Therefore, New York Marine cannot avail itself of the residence of its subrogor for venue purposes.

Nevertheless, New York Marine makes a strong case for the convenience of witnesses justifying venue remaining in Suffolk County. Although some departments of the appellate division have held that a cross motion for venue based upon the convenience of witnesses is necessary and mere "convenience" arguments will not be considered in lieu of such a cross motion (*see e.g. Pitegoff v Lucia,* 97 AD2d 896, 470 NYS2d 461 [3d Dept 1983]), the second judicial department is more accepting of such arguments (*see Bittner v I. V. Chanchalashvili,* 155 AD2d 403, 547 NYS2d 79 [2d Dept 1989]).

In order to establish that the convenience of witnesses supports venue in a particular county, the party making that argument must make 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 AD2d 169, 170, 622 NYS2d 284, 285 [2d Dept 1995]).

Moreover, to meet this requirement the moving party must: (1) list the names, addresses and occupations of the prospective witnesses; (2) disclose the facts to which these witnesses will testify so that the court may determine if said testimony is necessary and material; (3) show that the witnesses are willing to testify; and, (4) show that the witnesses would in fact be inconvenienced if venue is not changed (*see Id.,* at 172-173, 286-287; *Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908, 859 NYS2d 233 [2d Dept 2008]).

In addition, there is ample authority that such information may be supplied to the court in an attorney's affirmation or affidavit (*see Walsh v Mystic Tank Lines Corp.,* 51 AD3d 908, 859 NYS2d 233 [2d Dept 2008]; *Frankel v Stavsky,* 40 AD3d 918, 838 NYS2d 90 [2d Dept 2007]; *Giaimo v Hastings,* 19 AD3d 365, 795 NYS2d 909 [2d Dept 2005]; *O'Brien v Vassar Bros. Hosp.,* 207 AD2d 169, 622 NYS2d 284 [2d Dept 1995]; *Aviles v CYO Whitestone Swimming Pool,* 168 AD2d 405, 562 NYS2d 531 [2d Dept 1990]; *Shavaknbeyn v Starrett City, Inc.,* 161 AD2d 626, 627, 555 NYS2d 405, 406-407 [2d Dept 1990]; *Williamsburg Steel Products Co. v Shevlin-Manning, Inc.,* 90 AD2d 550, 455 NYS2d 127 [2d Dept 1982]).

In opposition to the motion to change venue to Queens County, counsel for New York Marine submits an affirmation in which she notes that Rondon has raised issues regarding possible violations of building code provisions regarding fire retardation measures which Rondon claims were not complied with and the lack of which greatly contributed to the damages. Significantly, Rondon raises no issue as to the fire being started by an open flame torch being used by one of its employees.

New York Marine's counsel goes on to state that numerous prospective material witnesses working for the county, the Town of Islip and the Bohemia Fire Department will be asked to testify in this regard. Specific individuals are named for the county (2 individuals) and the town (three individuals), descriptions of what they will testify to are provided and letters from the County Attorney's Office and the Islip Town Attorney's office are submitted which indicate the significant inconvenience to the county and town, respectively, if its employees will have to leave Suffolk County to testify in Queens. As to the Bohemia Fire Department, no specific individuals are identified but a letter regarding the inconvenience of any of its members having to go to Queens to testify and the effect that would have on the department's effectiveness is supplied.

The court notes that the convenience of local government officials, including police officers and fire fighters, is a particularly salient consideration on venue motions where the convenience of witnesses is a factor (*see e.g. Lefferty v Eklecco, LLC,* 34 AD3d 754, 826 NYS2d 617 [2d Dept 2006]). Indeed, in the *Lefferty* case, the court said such a consideration "is of paramount importance" (*Id.* at 755; *also Kennedy v C.F. Galleria at White Plains, L.P.,* 2 AD3d 222, 223, 769 NYS2d 526 [1st Dept 2003]).

Based upon the submissions on behalf of New York Marine, the court is satisfied that sufficient prospective material witnesses have been identified who will be testifying in their occupational statuses as employees of local governmental bodies and departments, what they will be testifying to, that they are willing to testify and the inconvenience which would be caused to the local governmental bodies and departments if such employees had to travel to Queens to testify (*see O'Brien v Vassar Bros. Hosp.,* 207 AD2d 169, 170, 622 NYS2d 284, 285 [2d Dept]).

The question for the court then turns on whether, where the action was brought in an improper venue to begin with, as here, may the court, nevertheless, consider the convenience of witnesses as a factor in deciding a motion to change venue. Moreover, must the issue of convenience of witnesses be raised only in a cross motion as opposed to mere opposition.

As a general rule, when a plaintiff commences an action in an improper county, the plaintiff forfeits the right to designate venue (*see Mei Ying Wu v Waldbaum, Inc.,* 284 AD2d 434, 435, 726 NYS2d 448 [2d Dept 2001]. In such an instance, however, the court may entertain a motion or cross motion to change venue for the convenience of witnesses as a matter of discretion (*id.*). Indeed, there is precedent for allowing a transitory action to be kept in the county where the action arose, the witnesses are municipal officials and the trial calendar in that county is not more congested than the alternate county (*see McComb v Hilton Heights Apts., Inc.,* 43 AD2d 972, 352 NYS2d 226 [2d Dept 1973]).

Accordingly, if the plaintiff had made a cross motion for a change of venue in this action, it could have been considered by the court. On the other hand, with venue already in Suffolk pending the determination of the defendant's motion, there is no sense to the plaintiff making a motion for a "change" of venue since venue is already in Suffolk as of the bringing of these motions. Furthermore and in any event, where entitlement to relief is "warranted by facts plainly appearing on the papers on both sides," where such relief is "not dramatically different" from the relief sought and there is no prejudice from granting said relief, then such relief may be considered and granted (*see Frankel v Stavsky,* 40 AD3d 918, 918-919, 838 NYS2d 90 [2d Dept 2007]).

In this case, the issue before the court on the defendant's motion (001) is venue. In opposing this application, the plaintiff is obviously asking that venue remain in Suffolk. Thus, the relief sought by the plaintiff is not "dramatically different" and, indeed, is clearly part of the same issue. Moreover, the evidence submitted by the plaintiff in opposing the request for a change of venue makes a strong argument for keeping the action in Suffolk County for the convenience of material witnesses in their capacities as government employees and volunteer fire fighters. Lastly, the defendant cannot raise a convincing argument of being prejudiced by having to appear in Suffolk since the defendant was obviously willing to come to Suffolk County in the first instance to perform the work resulting in the fire to the Suffolk premises.

As a practical matter, even if venue had been in Queens County to begin with or if this motion (001) to change venue to Queens were granted without considering the convenience of witnesses, it is apparent that a prospective motion to change venue back to Suffolk County would be granted based upon the facts and circumstances of this case.

In any event, in view of the strong showing based upon the convenience of witnesses for this action to remain in Suffolk County, the defendant's motion (001) for a change of venue from Suffolk County to Queens County is denied. The plaintiff's cross motion (002) for leave to add a party/plaintiff in the event the change of venue is granted is denied as moot since the request for a change of venue is denied.

Turning now to the motion (003) by the plaintiff for summary judgment on the matter of liability, on a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.,* 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion (003), the plaintiff submits, inter alia, affidavits from Anthony Marino, a member of the subrogor MacArthur, which managed the residential motel where the fire occurred; and, from Thomas McGuire, a fire investigator for Guardian Investigation Group, Inc., who investigated the fire's cause and origin.

Mr. Marino states that the defendant was retained by way of an oral contract to perform certain plumbing work on the premises in question and that on January 5, 2006 a fire was started in the area where the defendant was working which spread to other parts of the premises.

According to Mr. McGuire, who has experience investigating about 750 fires in his former capacity as a New York City Fire Marshall and is a Cerified Fire and Explosion Investigator, he inspected the premises five days after the fire. Mr. McGuire states that the fire originated in an interior wall void due to the heat from the open flame of a torch. Mr. McGuire also noted that an employee of the defendant's was working in that area with a lit torch at the time of the fire's origination and further observed that the use of such a torch was common to heat copper pipe to facilitate the joining of separate lengths of pipe.

Mr. McGuire also ruled out as causes of the fire the heating system, circuit breakers, electrical service, appliances, lamps, light fixtures as well as concluding that the were no other viable ignition sources.

These submissions support a prima facie showing that the fire was caused by the negligence of the defendant's employee. It now becomes the burden of the defendant to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In opposition, the defendant does not refute that its employee was responsible for starting the fire. Instead, the defendant - by way of an affidavit from a consulting engineer with American Standards Testing Bureau Inc. - contends that the extent of the damages due to the fire was due to the subrogor's failure to have fire stops and incombustible material in place to retard the spreading of the fire and which were required by law. The lack of these required items, according to this engineer, "greatly increased the speed of propagation and intensity of the fire to the point where the workmen could not extinguish it."

While this submission does not refute the plaintiff's contention that the defendant was responsible for the origin of the fire, it does raise issues as to whether the plaintiff's subrogor was responsible, either in whole or in part, for the extent of the damages.

Accordingly, summary judgment is granted insofar as the court finds that the defendant was negligently liable for the occurrence of the fire but as to extent of the damages caused by the fire and whether the plaintiff's subrogor was responsible to any degree for the extent of the damages, those issues are left for trial.

This constitutes the decision and order of the court.

Dated: Feb 18, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.