STATE OF NEW YORK
SUPREME COURT **COUNTY OF TOMPKINS**

DALLAS M. GROVE,

Plaintiff,

vs. **Index No. 2007-0963**

CORNELL UNIVERSITY and
SKANSKA USA BUILDING, INC.,

Defendants.

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ERIE**

DALLAS M. GROVE,

Plaintiff,

vs. **Index No. 2009-14718**

SKYWORKS EQUIPMENT LEASING LLC,
SKYWORKS, L.L.C.; and
JLG INDUSTRIES, INC.,

Defendants.

BEFORE: **HON. ROBERT C. MULVEY**
Supreme Court Justice

APPEARANCES: **John A. Collins, Esq.**
Attorney for Plaintiff

Sarah E. Nuffer, Esq.
Attorney for Defendants Cornell & Skanska

Marybeth Priore, Esq.
Attorney for Defendant JLG Industries, Inc.

Dennis R. McCoy, Esq.
Attorney for Defendant Skyworks

D E C I S I O N & O R D E R

Mulvey, Robert C., J.

The defendants Cornell University and Skanska USA Building, Inc. have brought this motion seeking reargument in connection with this Court's prior Decision and Order dated September 4, 2012, which determined that the above captioned actions should be consolidated and that venue of the consolidated action should be placed in Erie County. The moving defendants request that such venue be retained in Tompkins County. The plaintiff has submitted papers in opposition to the defendants' motion to reargue.

First, the Court finds that the moving defendants have made a sufficient demonstration that leave to reargue should be granted on the issue of venue in the consolidated action, since they have pointed out that the Court incorrectly stated in its Decisions and Order of September 4, 2012, that the plaintiff resided in Erie County, New York. (see CPLR 2221 [d]). The record reflects that the plaintiff resides in Lycoming County, Pennsylvania and not in Erie County, New York.

Upon such reargument, the moving defendants contend that the Court based its prior decision to place venue in the consolidated action in Erie County upon incorrect information concerning the plaintiff's residence and that the Court cited other factors which carry little weight, including the location of various parties and their attorneys. Further, the moving defendants assert that witnesses that will be necessary at the time of trial are located in Tompkins County or reside in locations that are closer to Tompkins County than Erie County. The moving defendants also point to the facts that the plaintiff's accident occurred in Tompkins County and that the plaintiff's action against the moving defendants in Tompkins County was commenced first.

In opposition to the defendants' motion to reargue, the plaintiff contends that the consolidated action should be venued in Erie County where the plaintiff's products liability/negligence claims against the manufacturer and lessor of the boom lift from which the plaintiff fell are being litigated and discovery is still ongoing. The plaintiff further asserts that the only material witnesses specifically identified by the moving defendants are the plaintiff's co-workers and those witnesses do not reside in either Tompkins County or Erie County. However, the plaintiff's employer and the defendants' expert witness are located in Erie County.

Upon review and consideration of the papers submitted, the Court has determined that the moving defendants' request that venue for the consolidated action be retained in Tompkins County shall be denied and that the Court shall adhere to its prior decision that venue in the consolidated actions shall be placed in Erie County.

When actions initiated in differing counties are consolidated, venue should ordinarily be placed in the county where the first action was commenced, unless special circumstances warrant placement of the consolidated action in the second venue.

Messina v. Upper Hudson Primary Care Consortium, Inc., 26 A.D.3d 698, 699; Government Employees Insurance Company v. Uniroyal Goodrich Tire Co., 242 A.D.2d 765, 766. The final decision with respect to venue, however, rests in the discretion of the court and any circumstances may be considered which negate placing venue in the county where the first action was commenced. Magee v. Hutcher, 174 A.D.2d 941; Public Service Truck Renting, Inc. v. Ambassador Insurance Co., 136 A.D.2d 911, 912; Perinton Associates v. Heicklen Farms, 67 A.D.2d 832.

Although the first action was commenced in Tompkins County and the plaintiff's fall occurred there, none of the material witnesses that have been specifically identified by the parties, including the plaintiff's co-workers and individuals who gave depositions on behalf of the parties and/or investigated the accident, have been shown to be located or reside in Tompkins County. Also, the record indicates that none of the plaintiff's health care providers are located in Tompkins County. Nor is there any evidence in the record which suggests that the trial calendar in Erie County is congested or that the consolidated action would be reached for trial sooner in Tompkins County.

The record does indicate, however, that the plaintiff's employer, Clayton B. Obersheimer, Inc., is located in Erie County and that the individual who investigated the accident on its behalf, Raymond Powers, resides in Erie County. Also, the moving defendants' expert is from Erie County. Further, since Skyworks, the owner of the boom lift from which the plaintiff fell and a defendant in the products liability action, is based and located in Erie County, it appears that material witnesses relative to the products liability claims will be from Erie County and/or nearby Monroe County, where Skyworks has another facility. Moreover, the record reveals that discovery in connection with the products liability claims is only at its initial stages and that a large majority of the players in the second action are from Erie County.

Upon consideration of the factors set forth above, the Court finds that there are valid reasons on both sides of the venue issue and that the factors are roughly equal in favor of both counties. Given such circumstances, this Court believes that its initial decision to place the venue in Erie County should stand. (see Israel v. Hirsh, 81 A.D.2d 964; Palmer v. Chrysler Leasing Corp., 24 A.D.2d 820).

Accordingly, for the reasons set forth above, it is

ORDERED that the moving defendants' motion seeking leave to reargue is granted to the extent that reargument is permitted, and, upon such reargument, the moving defendants' request that the venue in the consolidated action be retained in Tompkins County is hereby denied, and it is further

ORDERED that this Court's Decision and Order dated September 4, 2012 which consolidated the above captions actions and directed that venue be placed in Erie County

shall stand without modification or adjustment.

This shall constitute the Decision and Order of the Court. No costs are awarded on the motion.

Signed this 15th day of January, 2013 at Ithaca, New York.

Hon. Robert C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
DN: cn=Hon. Robert C. Mulvey, o=New York State Supreme Court, ou=Justice, email=tpkmulvey_chambers@nycourts.gov, c=US
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