

**Hager v Barshov**

2018 NY Slip Op 31894(U)

August 8, 2018

Supreme Court, Rockland County

Docket Number: 030696/2016

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ISRAEL HAGER,

*Plaintiff,*

*-against-*

STEVEN BARSHOV ad SUZANNE L. JOYCE,

*Defendants.*

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*Thomas E. Walsh, II, A.J.S.C.*

**DECISION & ORDER**

Index No.: 030696/2016

(Motions # 1 and #2)

08/08/2016

The following papers, numbered 1 to 4, were considered in connection with the Notice of Motion filed by Defendants for an Order, pursuant to Civil Practice Law and Rules §§ 510 and 511,<sup>1</sup> changing the place of trial of this action from the County of Kings to the County of Rockland, plus the costs and disbursements of this action, together with such other and further relief as to the Court seems just and proper; also considered Plaintiff's cross-motion seeking a denial of Defendant's motion pursuant to Civil Practice Law and Rules §§ 510 and 511 seeking a change of venue, an Order pursuant to Civil Practice Law and Rules § 510(3) retaining venue in Kings County, amending the summons *nunc pro tunc* ad for such other and further relief the Court deems just, proper and equitable:

08/08/2016

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF ROLAND T. KOKE, ESQ. DATED MARCH 3, 2016/EXHIBITS (A-E)	1
NOTICE OF CROSS MOTION AND OPPOSITION OF BROOKE LOMBARDI, ESQ. DATED APRIL 12, 2016/EXHIBITS (A-I)	2
REPLY AFFIRMATION OF ROLAND T. KOKE, ESQ. DATED MAY 12, 2016	3

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<sup>1</sup> The Defendants do not specify the subsections of he sections upon they are seeking relief. However, based on a review of the motion it appears the application is pursuant to Civil Practice Law and Rules §§

PLAINTIFF'S REPLY TO DEFENDANT'S REPLY AND/OR RESPONSIVE PAPERS  
TO PLAINTIFF'S CROSS-MOTION AND AFFIDAVIT IN FURTHER SUPPORT  
OF PLAINTIFF'S CROSS-MOTION AND IN FURTHER OPPOSITION TO  
DEFENDANT'S MOTION BY BROOKE LOMBARDI, ESQ. DATED  
MAY 17, 2016/EXHIBIT A

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After a careful and detailed review of the foregoing papers, the Court now rules as follows:

On January 11, 2016 in Kings County, Plaintiff commenced the instant action, relating to a pedestrian/motor vehicle collision, which took place on September 22, 2014 in Ramapo, New York. Defendants Barshov and Joyce are both Rockland County residents, and the accident occurred in Rockland County.

Defendants' counsel served Plaintiff with a demand for change of venue at the same time they served an Answer, and in the absence of consent, filed the instant motion to change venue to Rockland County. Defendant's motion is made pursuant to Civil Practice Law and Rules § 510 and 511,<sup>2</sup> indicating first that the venue should be changed as a right since the defendant is not a resident of Kings County, second that this is a transitory action and the proper venue based on the location of the accident is Rockland County, and third the witnesses including the defendants, and two (2) responding officers would be inconvenienced by the need to travel to Kings County for a trial. In support of these arguments Defendant has included an uncertified no fault insurance application purported to be completed by the Plaintiff listing his address in 2014 in Monsey, Rockland County, New York along with an uncertified police report which also lists the Plaintiffs address in 2014 as the same address in Monsey, New York. Defendant fails to provide any documentation other than the Summons and Complaint that address Plaintiffs address at the time of commencement of the instant action in 2016. As to

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<sup>2</sup> Defendants' motion fails to delineate the section of Civil Practice Law and Rules § 510 they are moving. However, the Court notes that based on the arguments advanced it appears that Defendants are seeking relief pursuant to both § 510(1) and (3).

the inconvenience of the two police officers, Defendant indicates in his attorney affirmation that he has spoken with both of them, that they both are willing to testify, the scope of their experience and proposed testimony and a conclusory statement that it would be inconvenient for both of them to travel to Kings County.

In opposition, Plaintiff submitted a cross-motion pursuant to Civil Practice Law and Rules § 510(3) seeking to retain venue in Kings County, and amending he summons nunc pro tunc. The voluminous cross-motion argues that venue is proper in Kings County, as the Plaintiff was a resident of Kings County at the time of commencement of the instant action and additionally for the convenience of the witnesses, specifically Plaintiff's treating doctors whom are both located in Kings County.

In support of the argument that Defendant's change of venue as a right pursuant to Civil Practice Law and Rules § 511 should be denied Plaintiff submitted an affidavit in which he indicates that he is currently residing in and was at he time of commencement of the action in Brooklyn, New York, along with a copy of his New York State driver's license listing his address as 1126 52<sup>nd</sup> Street, Brooklyn, New York. Additionally, Plaintiff states in his affidavit that his parents reside at 145 Route 306, Monsey, New York, that he has not lived here since 2009 and that he was visiting his parents on September 22, 2014 when he was struck as a pedestrian by Defendant's car. Further, in the Affidavit Plaintiff states that he suffered head trauma which made him non-communicative at the accident scene and as a result his mother provided his pedigree information to the responding police officers. As to the no-fault insurance application, Plaintiff indicates that due to his physical and mental limitations his father completed the form and included the address in Monsey, New York so that they could receive and assist with he completion of insurance paperwork.

As to Defendant's argument that venue should be changed to Rockland County pursuant to Civil Practice Law and Rules § 510, Plaintiff avers that Defendant's motion as to any section of the statute must fail. Plaintiff again argues that based on his residence in Brooklyn,

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New York at the time of commencement of the instant action, and in the absence of any written agreement fixing venue, Kings County is the proper venue. Much of the argument provided by Plaintiff is repetitive of the information provided as to his argument in opposition to Defendant's application pursuant to Civil Practice Law and Rules § 511.<sup>3</sup> Plaintiff' opposes Defendants' application for change of venue pursuant to Civil Practice Law and Rules § 510(3) arguing that the evidence proffered by Defendants regarding the responding officers is insufficient as it fails to be in admissible form and also due to vague nature of the explanation of inconvenience that would result from retaining the venue in Kings County. Further, Plaintiff argues since the police department for which the two officers are employed is not a named defendant any argument that the two officers are public officials whose public duties would be compromised by the need to travel to Kings County to testify lacks merit.

In the cross-motion Plaintiff avers that he resides in Brooklyn, New York and his two (2) treating physicians, which he indicates are material witnesses, both maintain practices in Brooklyn. Plaintiff has included affidavits from both physicians as to the treatment that they have provided Plaintiff since the accident in 2014, the location of heir medical practices, their willingness to testify on behalf of Plaintiff at trial and the inconvenience to themselves, their patients and their medical practices.

Pursuant to Civil Practice Law and Rules § 503(a), the venue of an action is properly placed in the county in which any of the parties resided at the time of commencement. [Gonzalez v. Sun Moon Enterprises Corp., 53 AD3d 526 (2d Dept 2008)]. A defendant moving for a change of venue based on improper venue must show that the plaintiff's choice of venue is improper and that its choice of venue is proper. [Gonzalez v. Sun Moon Enterprises Corp., 53 AD3d 526 (2d Dept 2008)]. Where a plaintiff's initial choice of venue is improper, the

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<sup>3</sup> While the Court appreciates citations and quotations from pertinent case law, it is unnecessary to include large sections from a case in support of an argument. A synopsis of the legal premise for which the case is used by the party is sufficient.

plaintiff forfeits its right to select the venue in an action. [*Agostino Antiques, Ltd. v. CGU-American Employers' Ins. Co.*, 6 AD3d 469 (2d Dept 2004); *Galan v. Delacruz*, 4 AD3d 449 (2d Dept 2004)].

When the venue chosen by a plaintiff is improper, and the defendant properly serves with its answer a demand for change of venue pursuant to *Civil Practice Law and Rules* § 511(b) followed by a motion to change venue to a proper county pursuant to *Civil Practice Law and Rules* § 503(a), 510, and 511, the defendant is entitled as of right to a change of venue. [*Thomas v. Guttikonda*, 68 AD3d 853 (2d Dept 2009); *Obas v. Grappell*, 43 AD3d 431 (2d Dept 2007); *Agostino Antiques, Ltd. v. CGU-American Employers' Ins. Co.*, 6 AD3d 469 (2d Dept 2004)]. Such a motion made by a defendant should be granted particularly where the plaintiff fails to show that the county specified by the defendant is improper, or the county specified by plaintiff is proper. [*Agostino Antiques, Ltd. v. CGU-American Employers' Ins. Co.*, 6 AD3d 469 (2d Dept 2004)]. Where the movant establishes that the venue selected was improper, and the opposition submitted lacks any evidence demonstrating residence of one of the parties in the county selected, the motion to change venue should be granted. [*Neu v. St. John's Episcopal Hosp.*, 27 AD3d 538 (2d Dept 2006); *La Cara Mia Bar Lounge, Inc. v. Great Locations, Inc.*, 875 NYS2d 821 (Sup Ct Bronx Cty 2009)].

In a motion made pursuant to *Civil Practice Law and Rules* § 510 (3) the movant must supply the names, addresses and occupations of witnesses whose convenience will be affected, indicate that the prospective witnesses have been contacted and are willing to testify and specify the substance of each witnesses testimony. [*Shavaknbeyn v. Starrett City, Inc.*, 161 AD2d 626, 627 (2d Dept. 1990); *Culhane v. Jensen*, 179 AD2d 582(1st Dept 1992); *Levenstein v. Parks*, 163 AD2d 367 (2d Dept 1990)]. The decision whether to grant a change of venue based on the convenience of the witnesses is at the discretion of the court. [*Pittman v. Maher*, 202 AD2d 172 (1st Dept 1994); *O'Brien v. Vassar*, 207 AD2d 169, 171 (2d Dept 1995)].

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In the instant action, Defendant has failed to provide proof in admissible form

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or otherwise, that the Plaintiff resided in Rockland County at the time of commencement of the instant action in 2016. Specifically, Defendant has provided uncertified no-fault paperwork with no affidavit from the insurance company as to it being admissible under the business records exception Civil Practice Law and Rules § 4518(a), or any proof that the Plaintiff was the person who completed the form. Additionally, the form was completed in 2014, which demonstrates a possible address for the Plaintiff at that time, but is irrelevant to the Plaintiff's address at the time of commencement of the action in 2016. Defendant has additionally provided an uncertified police report, which is again not accompanied by any certification which results in its admissibility, no proof as to how the address for the Plaintiff written on the police report was obtained, and merely addresses Plaintiff's possible address in 2014 at the time of the accident, and not at the time of commencement of the action in 2016.

Civil Practice Law and Rules § 503 indicates that "except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when the action commenced. The defendant has the burden to show on a motion to change venue pursuant to Civil Procedure Law and Rules § 510 (1) that none of the parties resided in the chosen venue on the day the action was commenced. [Civil Practice Law and Rules § 510(1); Deas v. Ahmed, 120 Ad3d 750 (2d Dept 2014)]. Only once the defendant has met their burden is the Plaintiff then required to establish in opposition that the venue selected was proper. [Chehab v. Roitman, 120 Ad3d 736 (2d Dept 2014)].

Defendant has failed to meet their burden in demonstrating that Plaintiff did not reside in Brooklyn, Kings County, New York when the instant action was commenced there in 2016. Therefore, Plaintiff need not establish in their opposition that the venue of Kings County was proper. Nonetheless, Plaintiff has provided both an affidavit of Plaintiff stating he has resided in Kings County since 2009 and has provided a copy of his New York State Driver's License supporting such statement. Therefore, Defendants' application to change venue pursuant to Civil Practice Law and Rules §§ 510 (1) and 511 is denied.

Turning now to Defendant's application to change venue to Rockland County from Kings County pursuant to Civil Practice Law and Rules § 510 (3), the statements made by counsel are insufficient to demonstrate the inconvenience of Defendants' witnesses. Defendants' counsel has made bald conclusory statements within his attorney affirmation stating that the two responding police officers from the Ramapo Police Department would be inconvenienced by having to travel to Kings County to testify. Specifically, Defendant states "traveling to Kings County Supreme Court to testify would inconvenience him," as to both of the officers. Defendants have failed to demonstrate a "particularized inconvenience" as to Officers Bakker and Morris. Further, Defendants have failed to argue the inconvenience to the Defendants' witnesses based on their positions as public officials and their need to be available for their public duties. The Court notes that Plaintiff argues in opposition to Defendants' generalized motion that the two (2) police officers are not public officials. It goes without saying that a police officer, who works for a municipality and is appointed at the discretion of the police chief of that municipality is a "public official." Therefore, despite Defendants' insufficient statements regarding the two officers inconvenience, the Court will consider those witnesses role as public officials and the inconvenience that occurs when a public official is not available for their public duties, when balancing the inconveniences of the witnesses from each party.

Plaintiff has provided sufficient admissible evidence in support of his cross-motion to retain venue in Kings County based on the inconvenience to Plaintiff's two (2) treating physicians. The treating physicians would be material witnesses as to a trial in the instant action. Additionally, each physician has indicated within their affidavits a particularized reason as to the inconvenience they will suffer if called to testify and if this action is transferred to Rockland County. Specifically, each has indicated that their practices are located in Brooklyn, Kings County, New York and that if called to testify each doctor would be relegated to close their practice and inconvenience their patients as a result of having to travel from Brooklyn to

Rockland County Supreme Court. Based on the Affidavits provided from the two witnesses, Plaintiff has provided the name, addresses, occupations and that the witness is willing to testify and the substance of their testimony. Therefore, Plaintiff has met their burden in demonstrating an inconvenience of witnesses if the venue in the instant action is transferred to Rockland County, New York.

In balancing the inconvenience of the witnesses for each party it is apparent that forcing two practicing medical professionals to close their offices for the purpose of testifying on behalf of one patient, requiring them to drive several counties away and leave numerous patient's appointments to be rescheduled outweighs the possibility of an effect of having to cover for one or two police officers by substituting other officers in their place for those tour of duties. In general unless the balance of inconvenience strongly favors the defendant, the Plaintiff's choice of forum should not be disturbed. Plaintiff has demonstrated that the instant action was properly brought in Kings County based on Plaintiff's residence in that county at the time of commencement. The Court has balanced the inconvenience of the witnesses of the parties and has found that the balance does not strongly lean toward the Defendant and therefore in the Court's discretion the venue of the instant action should be retained in Kings County.

Therefore, Defendants' motion is denied in its entirety and Plaintiff's cross-motion to retain the venue in Kings County, New York is granted in its entirety.

Accordingly, it is hereby

**ORDERED** that the Notice of Motion filed by Defendants is denied in its entirety; and it is further

**ORDERED** that the Cross-Motion filed by Plaintiffs is granted in its entirety; and it is further

**ORDERED** that the place of trial of this action remains in Kings County, New

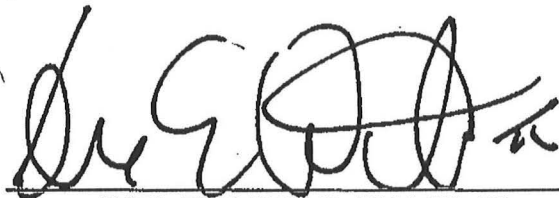
York, the proper county; and it is further

ORDERED that Plaintiff's Summons is amended *nunc pro tunc* to include the words "Brooklyn, NY 11219" under Plaintiff's street address; and it is further

**ORDERED** that Plaintiffs are awarded the statutory costs of the instant motion and said costs shall be payable by Defendant.

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and #2.

Dated: New City, New York  
August 8 2016



HON. THOMAS E. WALSH, II  
Acting Justice of the Supreme Court

To:

**by e-filing -**

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