SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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MIGUEL A. FANEITE,

Plaintiff,

- against -

THEODORE MATTHEW, GERARDO PEREZ-FERMIN and FERMIN TRUCKING, INC.,

Defendants.

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DECISION AND ORDER

Index No. 303425/2016

John R. Higgitt, J.

Upon the September 12, 2018 notice of motion of defendants Gerardo Perez-Fermin and Fermin Trucking, Inc. (Trucking) and the affirmation and exhibits submitted in support thereof; the October 3, 2018 affirmation in support of defendant Theodore Matthew; the October 31, 2018 notice of cross-motion of plaintiff and the affirmation submitted in support thereof; the moving defendants' November 5, 2018 affirmation in reply; and due deliberation; the moving defendants' motion to join this action with the action pending in New York County entitled *Perez-Fermin v. Matthew*, Index No. 160368/2016, for discovery and trial in New York County is granted in part and plaintiff's cross motion to join this action with the action pending in New York County entitled *Perez-Fermin v. Matthew*, Index No. 160368/2016, for discovery and trial in Bronx County is granted.

These actions emanate from a two-vehicle accident occurring in New York County. The *Faneite* action was commenced in Bronx County in October 2016, based upon defendant Matthew's residence; the *Perez-Fermin* action was commenced in New York County in December 2016, based upon the location of the accident. Plaintiffs and defendant Trucking are residents of New Jersey. Defendant Matthew is a resident of Bronx County.

The parties agree that joinder for discovery and trial is appropriate and acknowledge that the appropriate venue of joined actions is generally the venue of the first-commenced action (here,

Bronx County). The moving defendants assert that special circumstances -- the location of the accident and the assignment of the responding police officer being in New York County and the plaintiffs' residence and location of medical records and treating physicians being outside New York -- permit placing venue in New York County. Plaintiff asserts that these factors do not constitute sufficient special circumstances to warrant departure from the general rule.

A particular county's significant contacts with the actions may constitute a "special circumstance" permitting deviation from the general rule that the venue upon joinder should be that of the first-commenced action *(see Ferolito v Vultaggio*, 115 AD3d 541 [1st Dept 2014]; *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]). The court may also consider the location of the majority of the medical records and witnesses (*see Vered v Wittenberg*, 138 AD3d 646 [1st Dept 2016]; *Ryan-Avizienis v JBEW Bar Corp.*, 121 AD3d 579 [1st Dept 2014]; *Gentry v Finnigan*, 110 AD3d 568 [1st Dept 2013]). Witness inconvenience is only one factor to consider when determining where to place venue of consolidated or joined actions, as fixing venue upon consolidation invariably involves subordinating the venue designation in at least one of the actions, even where such designations were proper (s*ee Pittman v Maher*, 202 AD2d 172 [1st Dept 1994]; *Siegel v Greenberg*, 85 AD2d 516 [1st Dept 1981]). Implicit in the motion and cross motion is a recognition that the initial designations of venue were proper (*see Wickman v Pyramid Crossgates Co.*, 127 AD3d 530 [1st Dept 2015]). The motion and cross motion are thus subject to the court's discretion.

CPLR 510(3) permits a transfer of venue where "the convenience of material witnesses and the ends of justice will be promoted by the change." The party seeking such a transfer of venue must set forth "the names and addresses of witnesses who would be willing to testify, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by a trial in [Bronx] County" (*Thomas v Kane Constr. Grp. Inc.*, 153 AD3d 1189, 1189 [1st Dept

2017]). Movant must also show that the witnesses have been contacted and are available and willing to testify (*see Cardona v Aggressive Heating, Inc.*, 180 AD2d 572 [1st Dept 1992]). The witnesses' inconvenience must be "convincingly established" (*Thomas*, 153 AD3d at 1189).

The convenience to be considered is that of non-parties (*see Forteau v Westchester County*, 196 AD2d 440 [1st Dept 1993]; *Johnson v Cherry Grove Is. Mgt., Inc.*, 190 AD2d 598 [1st Dept 1993]), not the parties themselves (*see Brooks v Lefrak*, 188 AD2d 360 [1st Dept 1992]). The convenience of liability witnesses takes precedence over that of damages witnesses (*see Edney v Raymond Corp.*, 303 AD2d 336 [1st Dept 2003]; *Stonestreet v General Motors Corp.*, 201 AD2d 350 [1st Dept 1994]). The convenience of public employees should be given "more than ordinary" consideration (*Kennedy v C.F. Galleria at White Plains, L.P.*, 2 AD3d 222 [1st Dept 2003]).

Where the inconvenience of the public employee, however, is the need to travel between contiguous boroughs of New York City, the court will not be easily persuaded that the employee would be inconvenienced (*see Morales v Wells Fargo Alarm Servs.*, 268 AD2d 257 [1st Dept 2000]). The courts are not generally moved by claimed inconvenience arising from the distances between Richmond and Bronx counties (*see Moumouni v Tappen Park Assoc., Inc.*, 118 AD3d 427 [1st Dept 2014]), Nassau and New York counties (*see Gersten v Lemke*, 68 AD3d 681 [1st Dept 2009]), Queens and Bronx counties (*see Brooks*, *supra*), or Westchester and Bronx counties (*see Heinemann v Grunfeld*, 224 AD2d 204 [1st Dept 1996]).

The proof required on a motion fixing venue based on the convenience of material witnesses in the context of a consolidation motion is less stringent than that required on a motion made solely pursuant to CPLR 510 (*see Graev v Graev*, 219 AD2d 535 [1st Dept 1995]; *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495 [1st Dept 1968]). The proof need not necessarily include affidavits of the proposed witnesses but may be based upon the affirmation of counsel (*see Torres v Larsen*, 195 AD2d 285 [1st Dept 1993]). Counsel, however, should at least endeavor to identify the witnesses,

the nature and relevance of their testimony, the manner in which they would be inconvenienced by trial in the originally-designated venue and that they have been contacted and are willing to testify (*see Heinemann, supra*). The proof will be deemed sufficient if counsel can so affirm (*see Ryan-Avizienis v JBEW Bar Corp.*, 121 AD3d 579 [1st Dept 2014]). The failure to make such a showing warrants denial of the application (*see Rodriguez v Port Auth. of N.Y. & N.J.*, 293 AD2d 325 [1st Dept 2002]), even where connection to the chosen venue is tenuous at best (*see Martinez v Tsung*, 14 AD3d 399 [1st Dept 2005]).

The moving defendants have not demonstrated any reason to depart from the general rule. They have not demonstrated with any specificity that the majority of witnesses would be inconvenienced by venue in Bronx County (*cf. Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]). Nor have they demonstrated that they will be substantially prejudiced by venue in Bronx County (*see Ferolito, supra*). Nor have they demonstrated that New York County's contacts so predominate as to constitute a special circumstance.

Accordingly, it is

ORDERED, that the aspects of the motion of defendants Gerardo Perez-Fermin and Fermin Trucking, Inc. to join this action with the action pending in New York County entitled *Perez-Fermin v. Matthew*, Index No. 160368/2016, for discovery and trial and for a protective order holding depositions in abeyance pending such joinder is granted; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that plaintiff's cross motion to join this action with the action pending in New York County entitled *Perez-Fermin v. Matthew*, Index No. 160368/2016, for discovery and trial in Bronx County is granted; and it is further

ORDERED, that upon receipt of a copy of this order with written notice of its entry, the Clerk of New York County shall transfer the file and all papers in *Perez-Fermin v. Matthew*, Index

No. 160368/2016, to the Clerk of Bronx County and shall mark the Clerk's records to reflect such transfer; and it is further

ORDERED, that upon receipt by the Clerk of Bronx County of a copy of this order with notice of entry, and upon receipt of the file and papers of the aforementioned action from the Clerk of New York County, the Clerk of the Court of Bronx County shall join this action with the aforementioned action for discovery and trial and shall assign the aforementioned action to the undersigned; and it is further

ORDERED, that upon receipt by the Clerk of the Court of Bronx County of a copy of this order with written notice of its entry and proof of receipt by the Clerk of Bronx County of the file and papers from the Clerk of New York County, the Clerk of the Court of Bronx County shall calendar the joined actions for compliance conference before the undersigned in Part 14, courtroom 709, at 9:30 a.m. on **January 11, 2019**; and it is further

ORDERED, that no appearance shall be required on November 30, 2018; and is further

ORDERED, that the aforementioned protective order with respect to depositions shall expire 30 days after service of a copy of this order with written notice of its entry.

This constitutes the decision and order of the court.

Dated: November 13, 2018

John R. Higgitt, A.J.S.C.