

Buehler v New York Co.
2019 NY Slip Op 32965(U)
October 2, 2019
Supreme Court, New York County
Docket Number: 150181/2019
Judge: Doris Ling-Cohan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DORIS LING-COHAN PART IAS MOTION 36

Justice

-----X

INDEX NO. 150181/2019

JEANETTE BUEHLER

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27

were read on this motion to/for CHANGE VENUE

Upon the foregoing documents, it is

ORDERED that this motion by defendant New York Company (NY Co.) for an order changing the venue of this personal injury action from New York County, to Suffolk County, pursuant to CPLR §§510 and 511, based upon “an inconvenient forum” is denied for the reasons stated below.¹

This personal injury action was commenced on or about January 8, 2019, based upon injuries plaintiff allegedly sustained on September 18, 2018, when she slipped and fell on tile flooring directly in front of a store located at 835 West Montauk Highway, Babylon (Suffolk County), New York. The premises where plaintiff is alleged to have fallen is owned by defendant MLO Great South Bay LLC and leased, occupied, managed, and controlled by tenant defendant NY Co.

¹ The court notes that the Notice of Motion indicates that a change of venue is sought based upon an inconvenient forum, however, the moving affirmation indicates that a change of venue is warranted based upon the convenience of the witnesses.

In support of its motion to change the venue of this case from New York County to Suffolk County, movant NY Co. argues that the venue should be changed because: (1) the accident occurred in Suffolk County; (2) plaintiff resides in Suffolk County; (3) the witnesses either work or reside in Suffolk County; (4) the responding police officers worked in Suffolk County; and (5) plaintiff presumably sought medical treatment in Suffolk County.

In opposition, plaintiff maintains that this case should remain in New York County because moving defendant has failed to carry its burden of proof, pursuant to CPLR § 510(3), that a trial in New York County (the venue chosen by plaintiff based on defendant NY Co.'s principal place of business), would be more inconvenient than a trial in Suffolk County. Plaintiff relies upon CPLR § 509, which provides that, "...the place of trial of an action shall be in the county *designated by the plaintiff*, unless the place of trial is changed to another county by order upon motion, or by consent" (emphasis supplied). Plaintiff asserts that the venue she has chosen is proper because it is where NY Co.'s principal place of business is located and that it should not be disturbed.

Plaintiff further argues that moving defendant has failed to make the detailed evidentiary showing necessary to justify a discretionary change of venue based on the inconvenience of witnesses, which requires: "(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case" (*Cardona v. Aggressive Heating, Inc.*, 180 AD2d 572, 572 [1st Dept 1992]).

Plaintiff also argues that the convenience of the three liability witnesses (Danielle Larson, Maripat Zdrojeski, and Jo Ann Notaro) should be given little, if any, weight because the focus of a motion to change venue under CPLR § 510(3) must be on the convenience of material non-party witnesses and each of these witnesses was an employee of the defendant movant at the time of the accident, citing *Lapidus v. 1050 Tenants Corp.* (94 AD3d 950, 951 [2nd Dept 2012][since “[t]he ...prospective witnesses identified by the defendant are its employees or agents, whose convenience is not a factor in considering a motion for a change of venue pursuant to CPLR 510 [3]...”). Plaintiff further argues that moving defendant failed to provide the names and addresses of the individual police and medical witnesses who will supposedly testify and, thus, movant’s suggestion that venue be transferred to Suffolk County for the convenience of Suffolk County Police and Suffolk County treating medical providers is unavailing.

Further, plaintiff argues that movant has not provided the names and addresses of individual non-party witnesses and, therefore, has not demonstrated how a trial in New York County would inconvenience these unidentified non-party witnesses. Plaintiff maintains that movant cannot demonstrate that a trial in New York County would inconvenience any potential witnesses because movant failed to indicate that the witnesses listed in the accident report are willing to testify.

Lastly, plaintiff argues that, movant failed to satisfy its burden on a motion for a change of venue, under CPLR § 510(3), because it did not include any affidavits from any employee witnesses, Suffolk County police or medical provider witnesses setting forth “the nature of the anticipated testimony” and “the manner in which the anticipated testimony is material to the issues raised in

the case.” Plaintiff asserts that without detailed affidavits from potential witnesses, it is impossible to know whether the substance of the expected testimony is germane to the case.

CPLR 510 provides that a court has discretion to change venue when: (1) the county designated is not proper; (2) an impartial trial is unlikely in the designated county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change. A party moving to change venue based on the convenience of witnesses must provide evidentiary proof, including affidavits, indicating: (1) the names, addresses and occupations of the witnesses; (2) the facts to which the witnesses would testify; (3) the witnesses’ willingness to testify; and (4) how the witnesses would be inconvenienced. (*see Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299 [1st Dept 2004]; *Cardona v Aggressive Heating Inc.*, 180 AD2d 572 [1st Dept 1992]).

Applying such principles herein, the motion by defendant NY Co. is denied. Under CPLR § 509, venue is presumptively proper where the plaintiff has selected. Here, plaintiff’s chosen venue of New York County, movant’s principal place of business, is proper. Additionally, movant failed to show that a trial in New York County would inconvenience the current and former employee witnesses, unnamed Suffolk County Police witnesses, and unnamed Suffolk County medical provider witnesses. Significantly, movant did not provide the names and addresses of prospective non-party witnesses and failed to demonstrate that these witnesses had been contacted, that they were willing to testify on the Defendant’s behalf, and how a trial in New York County would inconvenience them. Therefore, venue should remain in New York County.

Accordingly, it is

ORDERED that the within motion by defendant NY Co. to change the venue of this action to Suffolk County is denied and this action shall remain in New York County; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry; and it is further

ORDERED that discovery shall proceed in this case expeditiously (by separate order, a Preliminary Conference has been issued).

10/2/2019
DATE


DORIS LING-COHAN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE		

APPLICATION: _____

CHECK IF APPROPRIATE: _____