SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **22M**

Justice

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STACEY BERTIN, REMY BERTIN

Plaintiff,

- v -

MICHAEL GEORGE, MIKE GEORGE PLUMBING & HEATING, LLC.,

Defendant.

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INDEX NO. 156735/2020

MOTION DATE 03/29/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 24, 25

were read on this motion to/for CHANGE VENUE.

Plaintiff Stacey B. Bertin (plaintiff) alleges that on July 30, 2020, while jogging against traffic on the northbound shoulder of Route 82 at or near the intersection with Briarcliff Lane in Dutchess County, New York, she was hit on her right shoulder and upper chest by the tow mirrors of the truck driven by defendant Michael F. George (defendant) and owned by defendant Mike George Plumbing & Heating, LLC (Mike George Plumbing) (together "defendants") (*see* NYSCEF Doc No 19, memorandum in opposition and cross motion at 10-11; Doc No. 17, supp aff of plaintiff, ¶ 3). Plaintiff was taken to MidHudson Regional Hospital in Dutchess County and was treated for a "comminuted, displaced right shoulder fracture and a comminuted, displaced right scapular fracture" (NYSCEF Doc No. 18, Westchester Medical Center, Emergency Room Report at 1).[1] Plaintiff argues that based on her fractures, she sustained a serious injury as defined under *Insurance Law § 5102 (d)*.

Motion and Cross Motion

Defendants, whose answer includes nine affirmative defenses, move pursuant to the doctrine of *forum non conveniens* (*CPLR 327 [b]*), to change the venue of this action from New York County to Dutchess County. They base their argument on the facts that the accident occurred in Dutchess County and was "presumably investigated" by local police; plaintiff received medical treatment at MidHudson Hospital in Dutchess County, and the police officers, witnesses and medical professionals, "would be unduly burdened and face an undue hardship in having to travel to New York County" to testify or defend at trial (NYSCEF Doc No. 7, affirmation of defendants' counsel, ¶¶ 7-10).[2] They point out that the doctrine of *forum non conveniens* provides for changes of forum

[1] Counsel explains that a "comminuted" fracture is where there is splintering or crushing of a bone, with three or more fragments (*see* NYSCEF Doc No. 19, memorandum in opposition at 14 n 9).

[2] Defendant resides in Dutchess County and Mike George Plumbing is incorporated and maintains its principal place of business in that county (*see* NYSCEF Doc No. 7, affirmation of defendants' counsel in support, ¶¶ 6, 10).

based on an analysis of the hardship faced by a defendant in defending in an improper venue; the availability of an alternate forum; the residence of the parties; and the jurisdiction wherein the transaction occurred, with no one factor controlling (*see* NYSCEF Doc No. 7, ¶¶ 2, 4, citing *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]). They conclude that Supreme Court, Dutchess County is an available forum, and that the trial of this action should occur in that county (*see* NYSCEF Doc No. 7, ¶¶ 12-13).

Plaintiffs argue in their cross motion and opposition that defendants have brought their motion under the wrong statutory provision and should properly move pursuant to article 5 of the CPLR, and that in any event, plaintiffs' choice of venue should be affirmed by the court and defendants' motion denied (*see* NYSCEF Doc. 19, memorandum in opposition at 2, 6-10). *Forum non conveniens*, codified under CPLR 327, is intended to allow New York courts to divest themselves of actions that could be heard in other more appropriate state or international fora and has nothing to do with intra-state venue disputes (*see* NYSCEF Doc No. 19 at 4, 5). Venue is based on where "one of the parties resided when [the action] was commenced," and as there is no dispute plaintiffs reside in New York County, venue is properly located in New York County (*see* NYSCEF Doc No. 19 at 6, quoting CPLR 503 [a]). Plaintiffs note that while a defendant may be permitted to change venue where "the convenience of material witnesses and the ends of justice will be promoted by the change," defendants here have not shown that they have reason to seek the change (NYSCEF Doc No. 19 at 6, quoting CPLR 510 [3]). Specifically, they have not provided the identities of the police officers, witnesses or medical providers, indicated that the witnesses have material evidence to offer in good faith and are willing to testify, nor have they explained the manner in which they and the witnesses would be inconvenienced from traveling to New York County Supreme Court, given that both Amtrak and Metro-North commuter rail provide service between New York County and Poughkeepsie (*see* NYSCEF Doc No. 19 at 8-9 and n 6; Doc No. 14 [information and schedule for Amtrak]).

Plaintiffs also seek an order granting them summary judgment on meeting the serious injury threshold and on liability as well as a declaration that plaintiff was not at fault nor in any way responsible for the accident (*see* NYSCEF Doc 12, notice of cross motion at 1-2). Plaintiff avers that Route 82, on which she was jogging, had no sidewalk, and that she was jogging on the shoulder, "as far away from the roadside as possible" (NYSCEF Doc No. 17, supp aff of plaintiff, ¶ 3). Plaintiff further avers that defendant's truck "was driving so close to the edge of the lane that its mirror extended out onto the shoulder where [she] was jogging," and struck her without warning (NYSCEF Doc No. 16, aff of plaintiff, ¶¶ 3, 4). Plaintiff points to the police accident report indicating that defendant told the officer that he had "looked to his left to observe an uninvolved vehicle come down the driveway" of an adjacent property and "failed to observe" plaintiff on the western shoulder of the road (*see* NYSCEF Doc No. 19, memorandum in opposition, at 10-12, citing Doc No. 15, police accident report [accident report] at 1-2). Plaintiff also submits an affidavit describing the impact of the truck's mirror with her upper shoulder area, which "functionally detached [her arm] from [her] shoulder and [she] could feel pieces of bone moving against each other" (NYSCEF Doc No. 16, aff of plaintiff, ¶ 7).

Plaintiffs argue that defendant's admissions in the accident report establish a violation of Vehicle & Traffic Law § 1146 (a), which requires drivers to exercise due care to avoid collisions with pedestrians, and that a violation of the Vehicle & Traffic Law constitutes negligence as a matter of law, creating a *prima facie* case for summary judgment (*see* NYSCEF Doc No. 19, memorandum in opposition at 12, citing *McCants v Franchi*, 192 AD3d 406 [1st Dept 2021]). Plaintiffs contend they are entitled to pursue a personal injury action involving the operation or

use of a motor vehicle, because plaintiff, who suffered two comminuted fractures, meets the "serious injury" threshold requirement set forth in Insurance Law § 5102 (d), which defines the term to include the fracture of a bone (*see* NYSCEF Doc No. 19 at 13-15).

They also argue that the accident report shows that plaintiff bears no liability for the accident. It indicates, by a series of checked boxes on the form, that the accident occurred on the roadway in a no-passing zone, that plaintiff was jogging "along highway against traffic," and the parties were traveling in opposite directions, and concludes that "apparent contributing factors" to the accident were defendant's "improper" "passing or lane usage" and "driver inattention/distraction" (NYSCEF Doc No. 13, affirmation of plaintiffs' counsel, ¶ 6, citing Doc No. 15, accident report at 1[Box No. 19, Box No. 20], at 3 [overlay explaining coding]).[3] The accident report makes no indication that there were "contributing factors" by plaintiff (*see* NYSCEF Doc No. 13, affirmation of plaintiffs' counsel, ¶ 6, citing Doc No. 15, accident report at 1 [Box No. 21; Box No. 22]). Plaintiffs further argue that the accident report establishes that plaintiff was entirely free of any liability and the court should find, as a matter of law, that she was in no way at fault for the accident that injured her (*see* NYSCEF Doc No. 19, memorandum of law at 13-14).

also seek dismissal of all of defendants' affirmative defenses except the fourth affirmative defense, which seeks a collateral source reduction pursuant to CPLR 4545 (a), should any of plaintiff's costs or expenses be replaced by indemnified funds. Defendants have offered no opposition to the cross motion or a reply to plaintiffs in their motion.

Discussion

Venue

As an initial matter, defendants' motion seeking to remove the matter from New York County to Dutchess County, is improperly brought under CPLR 327. The doctrine of *forum non conveniens*, codified in CPLR 327, pertains to actions brought in New York State by nonresidents; it allows a court upon motion, to consider and balance the various competing factors of the action and to determine, in its sound discretion, whether an action should be retained by New York, or stayed or dismissed, even if jurisdictionally sound, because it "would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Under the liberal pleading standards followed in New York (*see* CPLR 3026), the court will address defendants' motion as one seeking a change of venue, governed by CPLR 503 which states in relevant part:

> "Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff"
> (CPLR 503 [a])

The place of trial is normally that county designated by the plaintiff, "unless the place of trial is changed to another county by order upon motion, or by consent" (CPLR 509). There is no dispute that plaintiffs are residents of New York County, and therefore their choice to bring suit in their

[3] See also Boxes 2 and 6 in the accident report (NYSCEF Doc No. 15).

county of residence is entirely proper. Defendants' motion argues, in essence, that the litigation should take place in the county "in which a substantial part of the events or omissions giving rise to the claim occurred" (CPLR 503 [a]).

Generally, "venue [is] in the county where the cause of action arose" (*Iassinski v Vassiliev*, 220 AD2d 372, 372 [1st Dept 1995], citing *Chimarios v Duhl,* 152 AD2d 508, 509 [1st Dept 1989]; *see also Slavin v Whispell,* 5 AD2d 296, 297-298 [1st Dept 1958] ["other things being equal, [a transitory action] should be tried in the county in which the cause of action arose"]). This rule is meant to address the convenience of the witnesses who will be present at trial (*see Chimarios v Duhl,* 152 AD2d at 509). The CPLR venue statute provides, therefore, that venue may be changed where "the convenience of material witnesses and the ends of justice will be promoted by the change" (CPLR 510 [3]). The burden of demonstrating that the witnesses would be better served by a change of venue rests with the movant (*see Dores v New York Med. Group, P.C.*, 259 AD2d 297, 297 [1st Dept 1999]). The movant must provide:

> "(1) the identity of the proposed witnesses,[4] (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 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"

(*Iassinski v Vassiliev,* 220 AD2d at 373, quoting *Cardona v Aggressive Heating,* 180 AD2d 572, 572 [1st Dept 1992]).

Here, defendants have identified their proposed witnesses as unnamed police officers, witnesses and medical personnel. They have not indicated that the witnesses are willing to testify nor described the nature of their testimony. Moreover, there is no indication how the witnesses are inconvenienced by venue placed in New York County. Defendants' motion is thus insufficiently argued to establish entitlement to a change in venue to Dutchess County, and the court is unwilling to "assume" or make findings based on what has been proffered (*see Nolan v Mount Vernon Hosp.*, 172 AD2d 368, 369 [1st Dept 1991] [although the cause of action, the hospital and medical records, and the place of work or residence of the witnesses was in Westchester County, the court upheld plaintiff's choice to commence the action in Bronx County, where the plaintiff decedent had resided; defendants did not provide the names and addresses of the witnesses nor the substance of their intended testimony, and the Court found it "impossible to discern" how the witnesses would be inconvenienced by traveling from Westchester to a contiguous county; moreover, the pertinent medical records could be mailed to the court, showing no "real inconvenience"]). In comparison, in *Schwartz v Walter* (141 AD3d 641, 641-642 [2d Dept 2016]), the Appellate Division reversed the motion court's denial of a change of venue from Kings County to Rockland County, the location of the accident, where the defendant established that all the identified nonparty witnesses resided in or near Rockland County, including the two nonparty eyewitnesses; the seven police officers who responded to the scene of the accident all resided either in Rockland County or in Orange County, and the police reports of the accident showed that their testimony would be material at trial (*see Schwartz*, 141 AD3d at 642). In *Schwartz,* the Appellate Division further noted that the defendant also established that it would be a burden for the police officers and

[4] Some courts have held that the names, addresses, and occupations of the prospective witnesses must be provided (*see Hurlbut v Whalen,* 58 AD2d 311, 316 [4th Dept 1977]).

treating physicians to be required to travel from Rockland County to Kings County during their normal business hours for depositions and trial (*id.*, citing *Lafferty v Eklecco, LLC*, 34 AD3d 754, 755 [2d Dept 2006] ["the convenience of local government officials, such as police officers, is of paramount importance because they should not be kept from their duties unnecessarily [and the] convenience of the treating physicians is also a strong factor in retaining venue" in the designated county]).

For these reasons, defendants' motion to change venue is denied.

Cross motion for summary judgment and declarative relief

Plaintiffs seek summary judgment on their claims that plaintiff was seriously injured as a matter of law, and that she bears no liability for the accident. As the cross-movants, they bear the initial burden of making a *prima facie* showing of entitlement to summary judgment through the submission of sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). If they are successful, the burden then shifts to defendants opposing the motion to submit admissible evidence demonstrating that there are material issues of fact requiring a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562; *Ostrov v Rozbruch*, 91 AD3d at 152).

There is no question that plaintiff has established that she sustained a "serious injury" pursuant to Insurance Law § 5102 (d), as seen in the certified records from the Westchester Medical Center. Defendants have offered nothing to show the existence of a factual issue concerning the plaintiff's claim of a serious injury. Plaintiffs are therefore entitled to bring an action against defendants under New York's No-Fault law.

Turning to the issue of liability, plaintiff's affidavits describing the day's clear and dry conditions and that she was jogging opposite traffic as far away from Route 82's roadside as possible, as well as the contents of the police accident report, in particular the admissions made by defendant as recorded by the responding police officer, establish her *prima facie* entitlement to summary judgment on the issue of liability. Defendants have proffered no opposition to the cross motion.

"Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 609 [1st Dept 2012], *quoting Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). By failing to oppose plaintiff's cross motion, defendants are "deemed to have admitted the facts in the moving papers, and, in effect, made a concession that no question of fact exists" concerning the cause of the accident and plaintiff's lack of liability (*Esponda v Ramos-Ciprian*, 179 AD3d 424, 426 [1st Dept 2020] [internal punctuation, quotation marks and citation omitted]). Because defendants have not attempted to show that there are material questions of fact, and plaintiffs established *prima facie* entitlement, plaintiffs' motion for summary judgment is granted on the question of liability.

Plaintiffs also seek dismissal of eight of defendants' nine affirmative defenses, arguing that they are factually baseless and/or invalid as a matter of law (*see* NYSCEF Doc No. 19 at 15-17). For brevity, the court analyzes them in groups.

The first, fifth and ninth affirmative defenses all assert in somewhat different manner, that plaintiff was negligent, contributorily negligent, careless and culpable, and claim that damages should be mitigated accordingly (*see* NYSCEF Doc No. 2, ¶¶ 9, 13, 17). None of these remain

viable defenses given defendants' failure to oppose the cross motion and this court's ruling holding that plaintiff established she had no liability.

The third defense alleges that plaintiff cannot recover sums for basic economic loss under the Insurance Law article 51 (NYSCEF Doc No. 2, ¶ 11), which is inaccurate as a matter of law, based on the court's finding that plaintiffs have met the serious injury threshold and may pursue their lawsuit and establish the financial losses. The eighth affirmative defense, claiming that defendants have only limited liability under CPLR article 16, is legally incorrect; CPLR 1602 (6) explicitly states that the statutory limitations do not apply to liability arising from the "use, operation, or ownership of a motor vehicle" (CPLR 1602 [2]).

The sixth and seventh affirmative defenses allege, respectively, that the complaint fails to establish a cause of action and does not allege facts sufficient to constitute a cause of action under article 51 of the Insurance Law (*see* NYSCEF Doc No. 2, ¶¶ 14, 15). Neither defense is valid.

The second affirmative defense is that plaintiff assumed the risk. As an initial matter, the law states:

> "Where sidewalks are not provided any pedestrian walking along and upon highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction. Upon the approach of any vehicle from the opposite direction, such pedestrian shall move as far to the left as is practicable"

(Vehicle and Traffic Law § 1156 [b]). There is no question that plaintiff was obeying the law at the time of the accident.

The Court of Appeals has explained that the doctrine of assumption of risk is generally applied only to "personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*Custodi v Town of Amherst,* 20 NY3d 83, 89 [2012]). The organizer of a sports activity must exercise ordinary reasonable case to protect those participating in the athletics from "unassumed, concealed, or enhanced risks" (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356 [2012]). However, where "the risks of the activity are fully comprehended or perfectly obvious," it will be held that the plaintiff consented to them and the defendant performed its duty (*Bukowski v Clarkson Univ.*, 19 NY3d at 356 [internal quotation marks and citation omitted]). Such risks are those "commonly encountered or "inherent" in a sport, "such as being struck by a ball or bat in baseball," and are the kind of risk for which various participants are legally deemed to have accepted personal responsibility (*Bukowski* at 356).

Plaintiff was not taking part in a sporting activity sponsored by defendant or in a designated venue. She was jogging against traffic on a roadway with no abutting sidewalk. The facts are closer to those in *Pacheco v Snellenburg* (283 AD2d 361 [1st Dept 2001]), where the Court held that the plaintiff, jogging in a park, had not assumed the risk of being struck by the defendant bicyclist. That the plaintiff jogged on the park roadway immediately alongside runners in an organized foot race who occupied the two inner lanes, did not mean she had assumed the risk of being struck by the defendant bicyclist, and held that such a collision was "not an ordinary risk inherent in the activity of jogging in the park" (283 AD2d at 361). Also, of relevance is *Ashbourne v City of New York* (82 AD3d 461 [1st Dept 2011]), where the plaintiff, roller-blading on a public sidewalk, fell and was injured because of a rise or bump in the sidewalk (82 AD3d at 462). The Court reasoned that although roller-blading is "an activity one could consider to be recreational and risky," the plaintiff's "leisurely roller-blading on a public sidewalk does not constitute a sponsored sporting event or recreational activity for the purpose of applying the assumption of

risk doctrine *any more than jogging on the sidewalk would*" (82 AD3d at 463, emphasis added). Tellingly, the *Ashbourne* Court concluded, "We simply cannot say, as a matter of law, that by engaging in a form of exercise, such as roller-blading or jogging on a public sidewalk, a plaintiff consents to the negligent maintenance of that sidewalk" (82 AD3d at 463). So, too, here, where plaintiff was lawfully jogging on the shoulder of a roadway with the traffic flowing against her, it simply cannot be found that she assumed the risk of being hit by defendant or any vehicle.

Defendants' affirmative defenses are all dismissed, except the fourth affirmative defense.

Accordingly, it is

ORDERED that defendants' motion to change venue is denied; and it is further

ORDERED that plaintiff's cross motion is granted in its entirety, and plaintiff is granted summary judgment on her claim that plaintiff was seriously injured as a matter of law, and that plaintiff bears no liability for the accident; and it is further

ORDERED that defendants' first, second, third, fifth, sixth, seventh, eighth and ninth affirmative defenses are all dismissed; and it is further

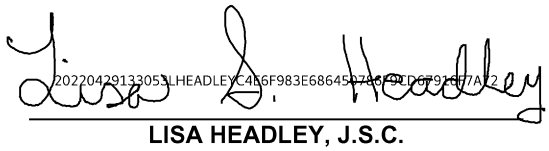
ORDERED that plaintiffs request to dismiss defendants' fourth affirmative defense, seeking a collateral source reduction pursuant to *CPLR § 4545(a),* is denied; and it is further

ORDERED that after filing of the Note of Issue, this matter shall proceed to trial on the issues of damages only; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiffs with notice of entry.

This constitutes the Decision/Order of the Court.



4/29/2022
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE