# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JOHN J. KELLEY** **PART** **56M**

***Justice***

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EMILY LESZYK, as Administratrix of the Estate of KIM M. LESZYK, and EMILY LESZYK, Individually,

Plaintiff,

- v -

GUTHRIE CORNING HOSPITAL, GUTHRIE HEALTHCARE SYSTEM, JAMES PERLE, M.D., JOHN OLMSTEAD, M.D., KIMBERLY KAFFENBARGER, M.D., LISA ESOLEN, M.D., LINDSEY HALL, M.D., AMY JONES, RN; BOSCO SSEMANDA, RN, and WATERFRONT OPERATIONS ASSOCIATES, LLC, doing business as ELLICOTT CENTER FOR REHABILITATION AND NURSING,

Defendants.

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**INDEX NO.** 805340/2024

**MOTION DATE** 05/19/2025
05/19/2025

**MOTION SEQ. NO.** 003, 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 103, 104, 105, 106

were read on this motion to/for CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for CHANGE VENUE.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, nursing home negligence pursuant to Public Health Law §§ 2801-d and 2803-c, common-law negligence, gross negligence, negligent hiring, training, supervision, and retention of health-care personnel, and wrongful death, the defendants Guthrie Corning Hospital, John Olmstead, M.D., Lisa Esolen, M.D., Lindsay Hall, M.D., and Amy Jones, RN (collectively the Corning defendants), move pursuant to CPLR 503, 510, 511(a), and 511(b) to transfer venue of this action from New York County to Steuben County (SEQ 003). The defendant James Perle, M.D., also moves for the same relief (SEQ 004). The plaintiff opposes both motions. The motions are denied.

The Corning defendants previously had moved to transfer venue from New York County to Steuben County on the ground that New York County was an "improper" county in which to place venue because the plaintiff did not actually reside in New York County (SEQ 002). In an order dated April 25, 2025, this court denied the motion upon concluding that the plaintiff did, in fact, reside in New York County as of the date that she commenced this action, did, in fact, reside in New York County for a significant period of time prior to that date, and still resides in New York County. The Corning defendants now seek to transfer venue on the alternative ground that "the convenience of material witnesses and the ends of justice will be promoted by the change" (CPLR 510[3]),[1] while Perle premises his motion on the same ground.

Initially, the court concludes that, inasmuch as both the Corning defendants and Perle made the instant motions less than six months after the commencement of this action, and prior to the issuance of any case management order, they have done so within a reasonable time after the initiation of the lawsuit (see CPLR 511[a]; *Gissen v Boy Scouts of Am.*, 26 AD3d 289, 290 [1st Dept 2006] [motion to transfer venue based on alleged convenience of witnesses made more than 2½ years after action was commenced, but before discovery had begun, was made within a reasonable time]). Hence, the court may consider the merits of the motions. Nonetheless, upon consideration of the merits, the court further concludes that the movants have failed to make the showing necessary to transfer venue on the ground that witnesses will be inconvenienced if the trial of the action were to be conducted in New York County.

[1] Although the plaintiff argues that the Corning defendants' motion constitutes an improper successive motion to transfer venue, she has cited, and research has revealed, no authority for the proposition that a party is barred from making such a successive motion, as would be the case with respect to successive motions for summary judgment or to dismiss the complaint (*cf. Izmirligil v Steven J. Baum, P.C.*, 2016 NY Slip Op 32323[U], *3, 6, 2016 NY Misc LEXIS 4371, 6-7, 14 [Sup Ct, Suffolk County, Nov. 18, 2016] [after making unsuccessful, albeit properly noticed motions to transfer venue, the plaintiff made improper collateral attacks, as well as repetitious and frivolous serial motions for leave to implead justices sitting in another judicial district, so that the justice hearing the case might be compelled to transfer venue out of the district that the plaintiff initially had elected]; *Bank of N.Y. Mellon v Izmirligil,* 2016 NY Slip Op 32311[U], *7, 2016 NY Misc LEXIS 4349, *15 [Sup Ct, Suffolk County, Nov. 18, 2016] [same]).

The "mere fact that the courthouse is in a different county" than the one in which a witness resides or works "does not give rise to a presumption that a witness will be inconvenienced" (*Pollack v St. Francis Hosp*., 202 AD3d 453, 453 [1st Dept 2022]; *see Gersten v Lemke*, 68 AD3d 681, 681 [1st Dept 2009]).

It has long been the rule that,

> "[a] party moving for a discretionary change of venue pursuant to CPLR 510(3) has the burden of demonstrating that the convenience of material witnesses and the ends of justice will be promoted by the change. In so doing, the moving party must set forth (1) the names, addresses, and occupations of the prospective witnesses, (2) the facts to which the witnesses will testify at trial, so that the court may judge whether the proposed evidence is necessary and material, (3) a statement that the witnesses are willing to testify, and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed"

(*Ambroise v United Parcel Serv. of Am., Inc*., 143 AD3d 927, 928 [2d Dept 2016] [citations omitted]; *see Nir v Wakeford,* _____AD3d_____, 2025 NY Slip Op 02012, *1 [1st Dept, Apr. 3, 2025] [movant failed to show how potential witnesses would be inconvenienced by having to testify in New York County]; *Gissen v Boy Scouts of Am*., 26 AD3d at 290-291 [movant must show the manner in which the witnesses will be inconvenienced, that the witnesses have been contacted and are available to testify, and 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] [same]; *see also Ryan-Avizienis v JBEW Bar Corp*., 121 AD3d 579, 580 [1st Dept 2014] [enumerating several of the relevant factors that must be considered]; *Weisemann v Davison*, 162 AD2d 448 [2d Dept 1990]; *Stavredes v United Skates of America*, 87 AD2d 502 [1st Dept 1982]).

It is well settled that "the convenience of 'defendants themselves, or their employees, . . . is not a factor in considering a change of venue based on CPLR 510(3)'" (*McManmon v York Hill Hous., Inc*., 73 AD3d 1137, 1138 [2d Dept 2010], quoting *Cilmi v Greenberg, Trager, Toplitz & Herbst*, 273 AD2d 266, 267 [2d Dept 2000]; *see Moshin v Port Auth. of N.Y. & N.J*., 83 AD3d 536, 536 [1st Dept 2011] [convenience of party witnesses is not a factor in determining a venue

transfer motion based on CPLR 510[3]; *Martinez v Dutchess Landaq, Inc*., 301 AD2d 424, 425-426 [1st Dept 2003] [convenience of a party's employee is "not a 'weighty factor'" in considering a motion for a discretionary change of venue]). Moreover, the placement of venue for the convenience of attorneys is manifestly improper (*see Naples v Daubert Chemical Co*., 93 AD2d 745, 745 [1st Dept 1983]).

The movants together have identified five named party defendants who work at the defendant Guthrie Corning Hospital in Steuben County, and live either in Steuben County or Chemung County, who allegedly will be inconvenienced if the venue of this action remains in New York County. They further identified four employees of the defendant Guthrie Corning Hospital who work at that hospital in Steuben County who also purportedly would be inconvenienced. The movants, however, identified no nonparty witnesses whatsoever who might be inconvenienced. Hence, for that reason alone, the movants have failed to show any entitlement to a discretionary change of venue pursuant to CPLR 510(3).

In any event, although the movants generally described how these nine prospective witnesses were involved in the care and treatment of the plaintiff's decedent at Guthrie Corning Hospital, they did not specify the facts to which these witnesses are anticipated to testify at trial, so that the court may judge whether the proposed evidence is necessary and material in the first instance. Although they articulated vague and general explanations that these potential witnesses would be inconvenienced by having to travel from Corning, New York, to Manhattan at some time in the future if the case proceeds to trial, they did not specify *how* they might be inconvenienced by an approximately five-hour drive to the City and by remaining in the City, at most, for a period of several days (see *Gissen v Boy Scouts of Am*., 26 AD3d at 290-291).

Nonetheless, to mitigate the inconvenience that might be experienced by those nine prospective witnesses during the discovery phase of this action, the court directs that their depositions either shall be taken remotely, as the court usually directs depositions to be conducted in its case management orders or, if the parties agree upon taking their depositions

in person, that the depositions of those defendants and witnesses shall be conducted in the county of their choosing. This directive, of course, does not apply to the plaintiff's deposition or the deposition of any nonparty witness she agrees to produce voluntarily, which shall be conducted either remotely or in person in New York County, unless the parties stipulate otherwise.

Accordingly, it is,

ORDERED that the motion of the defendants Guthrie Corning Hospital, John Olmstead, M.D., Lisa Esolen, M.D., Lindsay Hall, M.D., and Amy Jones, RN, to transfer venue of this action from New York County to Steuben County (MOT SEQ 003) is denied; and it is further,

ORDERED that the motion of the defendant James Perle, M.D., to transfer venue of this action from New York County to Steuben County (MOT SEQ 004) is denied.

This constitutes the Decision and Order of the court.

**5/19/2025**
**DATE**

**JOHN J. KELLEY, J.S.C.**

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| **MOTION 003:** | | **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** |
| **MOTION 004:** | | **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** |