SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ANN MARIE DOUGHERTY and ROBERT DOUGHERTY,

Plaintiffs,

-against-

BROOKFIELD FINANCIAL PROPERTIES, L.P., BROOKFIELD PROPERTIES CORPORATION, BROOKFIELD PROPERTIES OLF CO.,LLC., COLLECTIVELY KNOWN AS BROOKFIELD PROPERTIES, and JOHN DOE #1 THROUGH JOHN DOE #10, the last ten names being fictitious and intended to be the person(s) and/or entities owning and/or maintaining the premises surrounding One Liberty Plaza, NY, NY and/or which person(s) or entities are partners of BROOKFIELD PROPERTIES,

Defendants.

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BROOKFIELD FINANCIAL PROPERTIES, L.P., BROOKFIELD PROPERTIES CORPORATION AND BROOKFIELD PROPERTIES OLF CO., LLC.

Third-Party Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY and THE CITY OF NEW YORK,

Third-Party Defendants.

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Part C2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 102673/10

Motion No. 3904-001

Index No. A102673/10

The following papers numbered 1 to 4 were marked fully submitted on the 14th day of December, 2011:

	Papers Numbered
Notice of Motion by Third-Party Defendants Metropolitan Transportation Authority and New York City Transit Authority, with Affirmation in Support and Exhibits (dated October 21, 2011).....	1
Affirmation in Opposition by Plaintiffs Anne Marie Dougherty and Robert Dougherty (dated November 9, 2011).....	2
Affirmation in Opposition by Defendants Brookfield Financial Properties, *et al* (dated November 14, 2011).....	3
Reply Affirmation by Third-Party Defendants Metropolitan Transportation Authority and New York City Transit Authority, with Exhibits (dated December 12, 2011).....	4

Upon the foregoing papers, the motion by third-party defendants Metropolitan Transportation Authority and New York City Transit Authority (hereinafter "MTA" and "NYCTA") to change the venue of this action from the County of Richmond to the County of New York, is denied.

The incident underlying this matter occurred on May 21, 2009, at approximately 8:30 AM., when plaintiff Ann Dougherty (hereinafter "plaintiff") claims that she was caused to fall due to a defect in front of One Liberty Plaza in Manhattan. This action was commenced by the service of a summons and complaint upon defendants Brookfield Financial Properties, L.P., Brookfield Properties Corporation and Brookfield Properties OLF Co., LLC (hereinafter "defendants") on or

about November 9, 2010, with venue placed in the county of plaintiffs' residence, i.e., Staten Island. Subsequently, defendants commenced a third-party action against two public authorities, the MTA and NYCTA, on or about August 16, 2011. The answer to the third-party complaint was served on or about September 15, 2011, contemporaneously with the service of a demand for a change of venue to New York County. This demand was rejected by plaintiff's counsel in a letter dated October 3, 2011 and received by the above third-party defendants on October 6, 2011. The instant motion for a change of venue was served on October 21, 2011, and is therefore timely pursuant to CPLR 511 (b).

In support of the motion, the MTA and NYCTA argue that the change is mandated by CPLR 505, which requires that any claim against a public authority (subd [a]) and, specifically, the New York City Transit Authority (subd [b]) shall be brought in the county where the cause of action arose, here, the County of New York. Alternatively, they argue that under CPLR 510 such a change is warranted for the convenience of material witnesses; that plaintiff can demonstrate no prejudice as a result of this proposed change of venue; and that, in the absence of prejudice, any delay in bringing this motion should be excused.

In opposition, plaintiffs argue that venue was properly placed in the first instance based on the county of plaintiffs' residence, and that this otherwise proper choice of venue can not be rendered improper simply because the above-named governmental authorities have been impleaded as third-party defendants in the Richmond County action. Consequently, they contend that the venue at this point can only be changed if the movants can demonstrate that the present venue constitutes an inconvenient forum under CPLR 510(3), i.e., that the convenience of material witnesses and the

ends of justice require it. Thus, in the absence of any such evidence of inconvenience, plaintiffs argue that trial should remain in Richmond County. The defendants in the main action concur.

In reply, the third-party defendants have provided the affidavit of one Vincent Moschello, Jr., who states that he is a "Structure Manager for the New York City Transit Authority". According to Mr. Moschello, his duties include the filing, preparing and retrieving of station maintenance and related records for the New York City Transit Authority; that he has been contacted to retrieve records regarding "vent bays" which existed in the area where plaintiff claims to have fallen; and that he may be called to testify at any ensuing trial. Since his office is located on W. 4th St. in Manhattan, Moschello claims that it would be inconvenient for him to travel to Richmond County since he is " called upon regularly to testify regarding my duties in New York and Bronx Counties regarding New York City Transit Authority property"(Moscello Affidavit, para 9).

CPLR 505, entitled "Actions involving public authorities" states:

> a) Generally. The place of trial of an action by or against a public authority constituted under the laws of the state shall be in the county in which the authority has its principal office or where it has facilities involved in the action.
>
> (b) Against New York city transit authority**.** The place of trial of an action against the New York city transit authority shall be in the county within the city of New York in which the cause of action arose, or, if it arose outside of the city, in the county of New York.

While the above statute is mandatory in form and specifies where such a cause of action should be brought in the first instance, in this matter the movants are not the named defendants, but have been impleaded as third-party defendants. In the opinion of this Court, an impleader brought against a public authority is akin to the joinder of a third-party defendant in an action properly

commenced in a county other than that specified in CPLR 504[1] against a municipality, and in such cases it is well established that the special venue provisions set forth in CPLR 504 are no longer controlling(see Sanchez v. Project Adventure, 260 AD2d 151[1st Dept 1999];Ortiz v. Broadway Mgt Co., 188 AD2d 401 [1st Dept 1992]; Vigliotti v Executive Land Corp., 183 AD2d 710 [2d Dept 1992]; Holmes v Greenlife Landscaping, 171 AD2d 916 [3d Dept 1991]). Rather, the municipality's sole recourse is to seek a discretionary change of venue under CPLR 510 (2) or (3). (see Murphy v. Long Is. R.R., 239 A.D.2d 472 [2d Dept 1997]). Like circumstances should bear like results. Hence, movants are only entitled to a discretionary change of venue if warranted pursuant to CPLR 510 (2), (3).

> CPLR 510, entitled "Grounds for change of place of trial", states:
> The court, upon motion, may change the place of trial of an action where:
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> 1. the county designated for that purpose is not a proper county; or
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.

Here, the venue designated by plaintiffs in their personal injury action against the non-governmental defendants was properly based in the first instance on their county of residence (see CPLR §503[a]), and no argument has been made that an impartial trial cannot be had in this venue. Therefore, the only ground upon which a change of venue would be warranted is if the third-party defendants can demonstrate that a change is necessary for the convenience of material witnesses. As stated in O'Brien v. Vassar Bros. Hosp., (207 AD2d 169, 172-173 [2d Dept 1995]), four criteria have

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[1] Which is similar in form to CPLR 505.

generally been established as necessary in order for a party to demonstrate that a discretionary change of venue is warranted under this theory:

> First, '[t]he affidavit in support of a motion under this section must contain . . . the names, addresses and occupations of the prospective witnesses'...[citations omitted]
> Second, a party seeking a change of venue for the convenience of witnesses is also required to disclose the facts to which the proposed witnesses will testify at the trial, so that the court may judge whether the proposed evidence of the witnesses is necessary and material...[citations omitted]
> Third, the moving party must show that the witnesses for whose convenience a change of venue is sought are in fact willing to testify...[citations omitted]
> Fourth, there must be a showing as to how the witnesses in question would in fact be inconvenienced in the event a change of venue were not granted...[citations omitted].

(See also McManmon v. York Hills Hous., Inc., 73 AD3d 1137 [2d Dept 2010]; Biaggi & Biaggi v. 175 Medical Vision Props,LLC., 70 AD3d 880 [2d Dept. 2010]).

At bar, the affidavit of Vincent Moschello, Jr., the lone example supplied by the movant, specifies his identity, the areas about which he would be expected to testify, and his willingness to do so. However, other than a mere assertion of inconvenience, he fails to specify *how* he would be inconvenienced in traveling to Richmond County.[2] This is particularly noteworthy in light of the fact that he admits to traveling to court in the Bronx as part of his normal duties, thereby establishing that his role in testifying on behalf of the New York City Transit Authority is not limited to a single county.

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[2] Indeed, as an employee of the New York City Transit Authority, he would be considered to be a person under their control and, accordingly, his convenience is not a "weighty factor" to be considered (Martinez v. Dutchess Landaq, Inc. ,301 AD2d 424, 425 [1st Dept 2003]; Said v. Strong Memorial Hosp, 255 AD2d 953 [4th Dept 1998]).

Accordingly, the motion for a change of venue is denied.

E N T E R,

/S/

Hon. Thomas P. Aliotta,

J.S.C.

Dated: February 7, 2012