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| Soc v Verizon N.Y. Inc. |
| 2017 NY Slip Op 31315(U) |
| June 15, 2017 |
| Supreme Court, New York County |
| Docket Number: 151389/2016 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

PETER SOC and KATARINA SOC
Plaintiff,

INDEX NO. 151389/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

VERIZON NEW YORK INC.,
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this application to/for Change Venue

Upon the foregoing documents, it is ordered that the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on May 30, 2015 in which plaintiff Peter Soc was allegedly injured when he tripped and fell on electrical wires which had been installed at his home in Westchester County by defendant Verizon New York Inc. Plaintiff Katarina Soc alleges a claim for loss of consortium.

The captioned action was commenced by the filing of a summons and verified complaint on February 19, 2016. Ex. A. Defendant joined issue by service of its answer on or about April

4, 2016. Ex. B. The parties subsequently exchanged discovery, both prior to and after the preliminary conference held on July 19, 2016. Exs. B and C to Pltf.'s Aff. In Opp.

On September 19, 2016, defendant filed the instant motion, pursuant to CPLR 510(3), seeking to change venue from New York County to Westchester County. In support of the motion, defendant submits an affidavit of Thomas J. DeMarzo, Area Manager of Northern Westchester for Verizon New York. Ex. C. Defendant's attorney represents that "DeMarzo is the witness who will appear at a deposition and trial of this matter on behalf of the defendant." Def.'s Aff. In Supp., at par. 11. Defendant's attorney further states that "[d]ue to the fact that this action has only recently been commenced,¹ we do not yet know the identity of any eyewitnesses or responding officers." Id., at par. 14.

In his affidavit, DeMarzo states, inter alia, that he learned that plaintiffs commenced a lawsuit stemming from personal injuries allegedly sustained on May 30, 2015 at 1870 Baldwin Road, Yorktown Heights, New York; that he investigated the matter by visiting the site, with which he was familiar because he oversaw the installation of cables at that location; that it would be "extremely inconvenient" and a "hardship" for him to appear at a trial or deposition in New York County since such a drive would take him approximately 1 hour and 45 minutes; and that

¹ Despite counsel's representation that discovery was in its nascent stage, the motion was filed seven months after the action was commenced, while the exchange of discovery was in progress (Ex. B), and after the preliminary conference of July 19, 2016 (Ex. C). It was not until defense counsel's reply affirmation that he set forth a purported excuse for this delay, which was that "shortly after" the preliminary conference, DeMarzo advised him that it would be inconvenient for him (DeMarzo) to travel to Manhattan for a deposition or for a trial. Def.'s Reply Aff., at par. 4. Such a delay can be considered by this Court in exercising its discretion as to whether to grant a motion pursuant to CPLR 510(3). See *Montero v Elrac, Inc.*, 16 AD3d 284 (1st Dept 2005). Aside from improperly raising this excuse for the first time in his reply (see *Ginarte v Ouhenia*, 46 Misc3d 151[A] [App Term 1st Dept 2015]), counsel fails to explain why he did not contact DeMarzo sooner. Moreover, since the instant motion was filed in September of 2016, some two months after the preliminary conference, it clearly was not made "shortly after" the said conference. Thus, this Court finds that, under the circumstances of this case, the motion was not filed within a reasonable time after the commencement of the action. See CPLR 511(a).

having to attend a deposition or trial in Manhattan would “take [him] away from [his unspecified] duties and responsibilities at work and at home.” Ex. C.

LEGAL CONCLUSIONS

The proponent of a motion to transfer venue pursuant to CPLR 510 (3) must demonstrate “that the convenience of material witnesses would be served by the change” (*Cardona v Aggressive Heating*, 180 AD2d 572, 572, 580 NYS2d 285 [1st Dept 1992]). In doing so, the moving party must set forth: “(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” (*id.*).

Rodriguez-Lebron v Sunoco, Inc., 18 AD3d 275, 276 (1st Dept 2005).

Here, defendant clearly set forth its intention to call DeMarzo as a witness on its behalf at a deposition and trial. Def.’s Aff. In Supp., at par. 11. Additionally, in his affidavit, DeMarzo states that it will be inconvenient for him to travel to a deposition or trial in Manhattan, where this action was commenced. Ex. C. However, defendant’s counsel also conceded that he did not know the identity of any eyewitnesses or responding officers who might also testify at trial. *Id.*, at par. 14. The possibility thus exists that these witnesses would not be inconvenienced by the fact that this case is venued in New York County and it is difficult, if not impossible, for this Court to determine whether a change of venue should be granted in its discretion (*see Vered v Wittenberg*, 138 AD3d 646, 646-647 [1st Dept 2016]) without being able to weigh any inconvenience claimed by those additional individuals.

Although defendant’s attorney and DeMarzo suggest that DeMarzo is available and willing to testify for defendant, neither of those individuals affirmatively states such fact in the

moving papers.² Additionally, although they allude to the possible nature of testimony to be given by DeMarzo, as well as to the fact that it may be relevant, they do not specifically delineate the nature of the testimony and how it will be related to the issues in this matter. Thus, while the facts of this case may appear to support a change of venue, defendant's failure to meet the requirements set forth in *Rodriguez-Lebron* and *Cardona* require that the action remain in New York County, where it was properly venued in the first instance. See CPLR 503(a).

Further, CPLR 3110 militates against the requested change of venue. An employee of a party, such as DeMarzo, must be deposed in the county where he resides (Westchester), the county where he has "an office for the regular transaction of business" (which is not specified in his affidavit), or the county where the action is pending (New York). CPLR 3110(1). Since the statute requires that DeMarzo be deposed either in Westchester or New York County, this Court finds defendant's claim that venue must be changed so that DeMarzo does not have to appear for deposition in New York County fails for this reason as well.

Finally, since defendant has failed to establish its relief to dismissal of the complaint on *forum non conveniens* grounds, this Court, in its discretion, declines to grant such relief. See *Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431 (1st Dept 2015). Specifically, defendant failed to establish that "although jurisdictionally sound," the case "would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), *cert denied* 469 US 1108 (1985). In so holding, this Court notes that the alleged accident occurred in Westchester County and that plaintiff's residence, here Westchester County, is generally "the most significant factor in the equation" in determining whether to dismiss on *forum non conveniens* grounds. *Thor*, 131 AD3d, at 432.

² This Court notes that, since the note of issue was filed on April 25, 2017 (NYSCEF Doc. 25), the issue of whether DeMarzo would be inconvenienced by having to appear at a deposition in Manhattan may have been rendered moot.

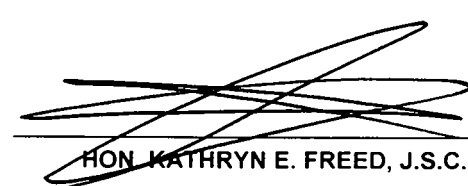
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the court.

6/15/2017

DATE


HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE