STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MARGARET E. TOTH, Individually and by her Attorney-In-Fact, NELSON B. TOTH,

Plaintiffs,

-against-

KENMORE MERCY HOSPITAL, CATHOLIC HEATH SYSTEM, INC., CATHOLIC HEALTH EAST

Defendants.

DECISION and ORDER
INDEX NO. 3726-11
RJI NO. 01-12-106568

Supreme Court Albany County All Purpose Term, November 23, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Nonagenarian Maragaret Toth (hereinafter "Ms. Toth") was a patient at Kenmore Mercy Hospital in January 2009. While admitted she allegedly slipped, fell and was injured.

Ms. Toth commenced this negligence / malpractice action, both individually and by Nelson Toth (hereinafter "Mr. Toth") her son acting pursuant to a power of attorney, to recover the damages she sustained. Issue has been joined and discovery is ongoing.

Defendants[1], for the second time, move to change venue.[2] Plaintiffs oppose the motion. Because Defendants failed to demonstrate their entitlement to change the venue of this action, their motion is denied.

CPLR §509 explicitly states that "[n]otwithstanding any provision of [Article 5 - Venue], 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 as provided in subdivision (b) of rule 511." With such provision, even when a plaintiff selects an improper venue, such venue is presumptively valid. Venue cannot be changed unless and until the defendant affirmatively establishes one of the exceptions. (Agway, Inc. v Kervin, 188 AD2d 1076 [4th Dept 1992]; Carpenter v N.Y. Advance Elec., Inc., 77 AD3d 1344 [4th Dept 2010]).

Here, as no consent has been established, Defendants move for an order changing venue based upon two distinct grounds, CPLR §510(1) and CPLR §510(3), each of which will be addressed separately below .

First, Defendants failed to demonstrate their entitlement to change venue, pursuant to CPLR §510(1), because Albany County "is not a proper county."

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[1] All of the named Defendants answered the complaint jointly, by their attorneys' Answer, and the same attorneys have now made this motion. However, the motion papers have inexplicably left off Catholic Health East from the caption, as a party making the motion or as being represented. With no explanation for such discrepancy it appears to be a mere typographical error and will be disregarded. As such, all of the Defendants will be treated and referred to as one in this Decision and Order.

[2] Although Defendants also seek to dismiss Mr. Toth's causes of action, from a plain reading of the complaint and as conceded by Plaintiffs' counsel, Mr. Toth has set forth no cause of action. Rather, he is acting only in his capacity as Ms. Toth's attorney in fact, pursuant to a power of attorney. On such concession, Defendants' motion to dismiss Mr. Toth's cause of action is denied as moot and will not be further addressed.

Procedurally, a motion pursuant to CPLR §510(1) must comply with the demand requirements of CPLR §511(a) and (b). "CPLR 511(b) provides that a demand to change venue shall be served before or with the answer, and a motion incorporating that demand must be made within 15 days after the demand has been served." (Val. Psychological, P.C. v Govt. Employees Ins. Co., 95 AD3d 1546, 1547 [3d Dept 2012]). Here, Defendants made no showing that they demanded a change of venue "before or with the answer" or made this motion within fifteen days after such nonexistent demand was served. Rather, it is uncontested that Defendants answered the complaint over a year before they made this motion. Moreover, contrary to Defendants' implied claim, no discovery was necessary to ascertain Mr. Toth's role and residence in this proceeding. It was plainly pled and explicitly stated in the caption. Defendants were simply not delayed by the need for discovery to bring this change of venue motion, and they offer no explanation for withdrawing their earlier motion to change venue. As such, Defendants' failure to comply with the strict statutory mandates of CPLR §511 requires denial of their CPLR §510(1) motion to change venue. (Baez v. Marcus, 58 AD3d 585 [2d Dept 2009]; Joyner-Pack v Sykes, 30 AD3d 469 [2d Dept 2006]; Callanan Indus. v Sovereign Constr. Co., 44 AD2d 292 [3d Dept 1974]).

Defendants similarly failed to establish their entitlement to change venue, pursuant to CPLR §510(3), for "the convenience of material witnesses and [to promote] the ends of justice."

The movant on a CPLR §510(3) discretionary change of venue motion "bears the burden of demonstrating that a change is appropriate and, generally, must support the application with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change." (Singh v Catamount Dev. Corp., 306 AD2d 738 [3d Dept 2003]).

Specifically, such motion "must include the names and addresses of each witness, a specific fact-based summary of the proposed testimony... how that testimony is relevant to the issues to be resolved at trial... an assertion attributed to the witness that he or she is willing to testify, and [a description of] the difficulties that will necessarily be encountered by the witness if venue is not changed." (Cavazzini v Viennas, 82 AD3d 1343, 1344 [3d Dept 2011]).

On this record, Defendants failed to meet their initial burden. While they list twelve potential witnesses, they admit that only six of those witnesses are non-parties. It is well established that the "convenience of parties [and] their employees... are excluded from consideration in determinating a motion under CPLR 510(3)." (Ithaca Peripherals, Inc. v Sequoia Pac. Sys. Corp., 141 AD2d 909, 910 [3d Dept 1988]; State v Quintal, Inc., 79 AD3d 1357 [3d Dept 2010]; Cavazzini v Viennas, supra).

Considering the six remaining non-party witnesses, Defendants candidly admitted that they have not contacted any of them. Defendants purported excuse for such deficiency, that they have no "speaking authorization" from Plaintiffs, was not reasonably supported. They did not allege what efforts they made to obtain such authorization nor Plaintiffs' refusal. Moreover, this action has been pending for well over a year, no motion to compel authorizations has been made and the Preliminary Conference Stipulation and Order's time to obtain such authorizations has long since past. As such, Defendants' excuse is unavailing. Because Defendants have, admittedly, not contacted any of the non-party witnesses their allegations relative to such individuals are wholly speculative and fail to provide the necessary detailed and relevant information. Moreover, contrary to Defendants' contention, "the mere fact that witnesses must travel a significant distance does not establish, without more, that requiring their testimony

would impose an undue burden." (State v Quintal, Inc., supra 1358).

Accordingly, Defendants' motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 7, 2012
Albany, New York

Joseph C. Teresi, J.S.C

PAPERS CONSIDERED:

1. Notice of Motion, dated September 28, 2012; Affidavit of James Marra, dated September 28, 2012, with attached Exhibits A-G.
2. Affirmation of Peter Scagnelli, dated November 15, 2012; Affidavit of Nelson Toth, dated November 15, 2012, with attached Exhibits A-F.
3. Affidavit of James Balcarczyk, dated November 20, 2012.