

Hamkalo v V.H.

2019 NY Slip Op 30652(U)

February 20, 2019

Supreme Court, Kings County

Docket Number: 522161/2016

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of February, 2019.

P R E S E N T:

HON. CARL J. LANDICINO, JSC

-----X
HALYNA HAMKALO, as p/n/g of N.H.,

Plaintiff,

Index No.: 522161/2016

- against -

DECISION AND ORDER

V.H., by his p/n/g, OLEKSANDR HUNKO,
OLEKSANDR HUNKO, ALEX GUZ a/k/a
OLEKSANDR ABRAMOVICH and VITO
CUSUMANO,

Motion Seq.: #7

Defendants(s).

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

After a review of the papers, and oral argument, the Court finds as follows:

The Plaintiff has placed this matter in Kings County as it is the residence of movant, Defendant Vito Cusamano (hereinafter “Defendant Cusamano” or “movant”). As such Kings County is an appropriate venue for this action. See CPLR §503. Apparently, the movant maintains a residence in both Kings and Chenango County, Chenango County being the County in which the purported accident occurred. Defendant Cusumano moves pursuant to CPLR §510(3) to change the place of trial for this action from Kings County to Chenango County. Plaintiff opposes, and the remaining parties take no position. The Court denied a prior motion for the same relief holding that “[a]fter depositions the Court will have a clearer indication of who

the material and necessary witnesses are and whether a change of venue is appropriate. See *O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 622 N.Y.S.2d 284 [2nd Dept, 1995].” Decision and Order dated October 17, 2017.

Generally “a motion for a change of venue pursuant to CPLR 510(3) based upon the convenience of witnesses must (1) set forth the names, addresses, and occupations of the prospective witnesses, (2) disclose the facts as to which the proposed witnesses will testify, (3) state whether the witnesses are willing to testify, and (4) explain how these witnesses would be inconvenienced in the event a change of venue were to be denied.” *McGarry v. Columbia Greene Med. Ctr.*, 260 A.D.2d 451 (2d Dept. 1999). “The convenience of...a party to this action, is not a factor in considering a change of venue based on CPLR 510(3).” *Palermo v. White*, 133 A.D.3d 834 (2d Dept. 2015) Additionally, “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 A.D.3d 1137 (2d Dept. 2010) quoting *Cilmi v. Greenberg, Trager, Toplitz & Herbst*, 273 A.D.2d 266 (2d Dept. 2000). “The convenience of a party’s employee is not a ‘weighty factor’ in considering a motion for a discretionary change of venue.” *Martinez v. Dutchess Landaq, Inc.*, 301 A.D.2d 424 (1st Dept. 2003) quoting *Rollinson v. Pergament Acquisition Corp.*, 228 A.D.2d 186 (1st Dept. 1996). Further, and more specifically, “the convenience of local government officials, such as police officers, is of paramount importance because they should not be kept from their duties unnecessarily.” *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006). See, *Professional Veh. Leasing v. Continuing Dev. Servs.*, 275 A.D.2d 313 (2d Dept. 2000). Additionally, “[t]he convenience of the treating physicians is also a strong factor in favor of retaining venue in...” the area where said physicians practice. *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006). See, *Mavrakis v. Waldbaums, Inc.*, 302 A.D.2d 501 (2d Dept. 2003).

In the instant action, the alleged accident occurred in Chenango County, New York on September 4, 2016. The alleged injury of Plaintiff was purportedly caused by an all-terrain vehicle (“ATV”) which flipped over onto the Plaintiff while he was a passenger on the ATV.

The Movant contends that a local investigating officer of the Chenango County Sheriff’s Department, Deputy Sheriff Kelly Hayner¹ “...has knowledge of numerous issues relevant and material to liability and damages...”. Movant contends that Deputy Hayner, “...would be inconvenienced and burdened if required to travel from Chenango County to Kings County for trial.” The movant further contends that two non-party witnesses, Howard Camp and James Harrington, “...witnessed the Plaintiff and co-defendants riding the ATV in question on the [Defendant] Cusumano property immediately prior to the accident, and that Mr. Camp is an eye witness to the accident itself.” (Defendant’s Motion, Memorandum of Law, Pg. 5)

Plaintiff opposes the motion. Plaintiff contends initially that venue is proper in that Defendants Cusumano and Guz both reside in Kings County and that Guz witnessed the incident. Plaintiff contends that Deputy Hayner “...responded to the incident and filed a police report after the incident occurred, Howard Camp, a Chenango County resident...” “...claims to have witnessed the children riding the aforementioned ATV prior to the incident, and James Harrington, a Chenango County resident” “...was contacted after the incident took place.” (Plaintiff’s Affirmation in Opposition, ¶9) The Plaintiff further indicates that non-party witness, S.K., a minor, “...was actually riding the ATV with Plaintiff, N.H. and Defendant V.H. when it flipped over.” The Plaintiff represents that S.K. resides on Long Island, New York, “...which is significantly closer to Kings County than it is to Chenango County.” Plaintiff argues that S.K.’s testimony is more relevant than that of Deputy Hayner, Mr. Camp and Mr. Harrington. Finally,

¹ The Deputy Sheriff’s surname was incorrectly spelled (“Hayney”) in this Court’s prior Decision and Order, dated October 27, 2017.

Plaintiff argues that all the treating physicians who will be called to testify as experts at trial reside in the “tri-state area.” (Plaintiff’s Affirmation in Opposition, ¶¶12-13).

The movants have failed to meet the requirements necessary for the Court to change the place of trial of this action to Chenango County. Deputy Sherriff Hayner was not present at the time of the accident. The Deputy arrived at the scene approximately thirty (30) minutes after it occurred and left the scene after her investigation, some thirty (30) minutes after her arrival. (See Deputy Hayner’s Deposition Testimony, Movant’s Exhibit D, at Pg. 9) At the time of her arrival, the Plaintiff had already been placed in the ambulance. “I didn’t see any of them being pinned or anything, I just - - that’s what the witnesses told me when I was there investigating the scene.” (Movant’s Exhibit D at Pg. 10) The Officer did indicate that she spoke to several witnesses, including the Plaintiff, the driver of the ATV at the time of the accident and Defendants Hunko and Guz. The Officer stated that her report was prepared some days after the accident and that other than her report she was unaware of any further documentation. The Officer also indicated that travel to Brooklyn for trial would be an inconvenience due to expense and that she “...would have to take off of work and everything.” (Movant’s Exhibit D at Pg. 25)

Defendant movant also contends that non-party witness Howard Camp witnessed the accident. Although Mr. Camp did purportedly witness the accident, and he is arguably a material witness, he did not indicate that his appearance at trial in Kings County would be an inconvenience. “I would have to find a way. And I would have to get a couple of weeks’ notice. That way I could get a way down there. But I mean, I could make it, if I get a couple of weeks’ notice.” (Movant’s Exhibit “F” Camp’s Deposition at Pg. 29).

As to non-party witness James Harrington, he acknowledges that he did not observe the accident, and he did not obtain much information about it. This serves to question the material

nature of his testimony. In any event when asked whether an appearance in Kings County would be an inconvenience, he stated, “[n]o I could do that.” Further as to whether he would have to miss work, he stated, “[i]t don’t matter. I can go there, yes.” Clearly the issues of materiality and inconvenience have not been established by movant, in relation to non-party witnesses Camp and Harrington. “The mere fact that the witnesses would be required to travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden on them.” *Ambrose v. United Parcel Serv. of Am. Inc.*, 143 A.D.3d 927 (2d Dept. 2016)

The same is true for Deputy Sherriff Hayner. She did not witness the accident. She arrived after the Plaintiff was already in the ambulance. She prepared a report fairly soon after the accident. The Court is aware that the convenience in relation to local police officers is “...of paramount importance because they should not be kept from their duties unnecessarily.” *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006) Officer Hayner, did not, with any specificity, indicate whether she would be unduly inconvenienced, if called to testify. Officer Hayner did not indicate her residence address and there is no showing that her appearance would result in a negative impact upon the Sheriff’s Office. Her statements are “...only conclusory statements, without any details...” and as such did not establish undue inconvenience upon her, if called to testify. See, *Gorodetsky v. Bridgewater Wholesalers, Inc.*, 161 A.D.3d 722 (2d Dept. 2018).

Additionally, the Plaintiff contends that non-party, infant S.K., resides in Long Island and for the purpose of testimony would be closer to Kings County than Chenango County. Plaintiff also argues that treating physicians are located in the tri-state area. (See Plaintiff’s Opposition Papers, Exhibit C, Bill of Particulars) “The convenience of the treating physicians is also a strong factor in favor of retaining venue in...” the area where said physicians practice.” *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006). See, *Mavrakis v. Waldbaums, Inc.*, 302 A.D.2d


501 (2d Dept. 2003). Although these factors would support Plaintiff's position, there is no indication by S.K. or any of the treating physicians that they would testify or that travel to either Kings or Chenango County would be inconvenient. Nonetheless, as stated above, the movant has not made a sufficient showing to warrant a change of venue pursuant to CPLR §501(3).

Accordingly, it is hereby Ordered as follows:

The motion is denied, and the place of trial shall remain in Kings County.

This constitutes the Decision and Order of this Court.

ENTER:


Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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