

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

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MARISSA DEODAT,  
  
Plaintiff,  
  
-against-  
  
MOUNTAIN GLEN AT WARWICK CORP., et  
al.,  
  
Defendants.  
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ACTION NO. 1  
Index No. 14755/07  
  
Motion  
Date October 7, 2008  
  
Motion  
Cal. No. 17  
  
Motion  
Sequence No. 2

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TORI SMALLS,  
  
Plaintiff,  
  
BIJITH L. DAS, et al.,  
  
Defendants.  
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ACTION NO. 2  
Index No. 4344/08

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Support.....	5-9
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Opposition.....	16-20
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendants Mountain Glen at Warwick Corp. and Issac Nuewirth move to join Action No. 1 (Index No. 14755/07) and Action No. 2 (Index No. 4344/08) for the purposes of discovery and trial. Defendants assert that all matters involve common questions of law and fact, in that they involve common parties and arise out

of the same automobile accident taking place on the Triborough Bridge.

Defendants Triborough Bridge and Tunnel Authority and Metropolitan Transportation Authority ("Authorities") support defendants Mountain Glen at Warwick Corp. and Issac Nuewirth motion to join Actions No. 1 and 2 for purposes of discovery and trial, but cross-moves to have the venue of the joined actions changed to New York County. Defendant Authorities argue that CPLR 505(a) dictates the appropriate venue for an action against a public authority.

CPLR 505(a) states:

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.

Defendant Authorities argue that since the Triborough Bridge roadway, which is the facility involved in the action, is located in New York County and the cause of action arose in New York County, the proper venue under the statute is in New York County.

Defendant Mountain Glen and plaintiff Marissa Deodat oppose the cross motion asserting that defendant Authorities failed to serve the demand with or before its Answer pursuant to CPLR §511(a), and the demand made later in May 2008 was untimely pursuant to CPLR 511(b).

### **Motion for joint discovery and trial**

It is well settled that "[w]here common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Mas-Edwards v. Ultimate Services, Inc.*, 845 NYS2d 414, 415 [2d Dept 2007][internal citations omitted]).

Defendants Mountain Glenn and Issac Nuewirth have demonstrated that all matters involve common questions of law and fact, in that they involve common parties and arise out of the same automobile accident.

Accordingly, defendants Mountain Glenn and Issac Nuewirth's motion for an order pursuant to CPLR 602(a) directing that Action

No. 1 and Action No. 2 be joined for discovery and trial is granted.

It is

ORDERED that separate Index Numbers, Requests for Judicial Intervention (RJI) and Notes of Issue shall be filed for each action, and it is further

ORDERED that the title of the actions combined for joint trial shall be:

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

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MARISSA DEODAT,

Plaintiffs,

Action No. 1

Queens County  
Index No.  
14755/07

- against-

MOUNTAIN GLEN AT WARWICK CORP., ISSAC  
NUEWIRTH, A.K. LINDO WILLIAMS, DANIELLE  
TORI SMALLS, BIJITH L. DAS, MOHAMMED A.  
HABIB, TRIBOROUGH BRIDGE AND TUNNEL  
AUTHORITY and METROPOLITAN TRANSPORTATION  
AUTHORITY,

Defendants.

New York County  
Index No. To Be  
Assigned

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TORI SMALLS,

Plaintiff,

Action No. 2

Queens County  
Index No.  
4344/08

- against-

BIJITH L. DAS, MOHAMMED A. HABIB, ISSAC  
NUEWIRTH, and MOUNTAIN GLEN AT WARWICK  
CORP.,

Defendants.

New York County  
Index No. To Be  
Assigned

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and it is further

ORDERED that a copy of this order with notice of entry be served on all parties to the actions combined, the Clerk of Queens County, and, at the time of filing Notes of Issue, on the clerk of Trial Term, Room 140.

### **Cross Motion to Change Venue**

The law is clear that "when a party fails to make a timely statutory demand for a change of venue it is thus foreclosed from obtaining a change of venue pursuant to CPLR 505(a)..., and the issue is committed to the court's discretion." (*Campos v. New York City Health & Hosp. Corp.*, 163 AD2d 49 [1st Dept 1990]; see, *Callanan Industries, Inc. v. Sovereign Constr. Co.*, 44 AD2d 292 [3d Dept 1974][held that having failed to make a motion within the 15-day requirement of CPLR 511(b), defendants were not entitled to a change of venue as a matter of right and their motion thus became one addressed to the court's discretion]). A motion to change venue addressed to the discretion of the court must be considered on the grounds specified in CPLR 510(2) and (3) (see, *Matter of D.M.C. Construction Corp v. A. Leo Nash Steel Corp.*, 416 NYS2d 649, 653 [2d Dept 1979]; *Burch v. Phillips*, 88 AD2d 896 [2d Dept 1982]), which are that "the county designated for that purpose is not a proper county" or "there is reason to believe that an impartial trial cannot be had in the proper county" or "the convenience of material witnesses and the ends of justice will be promoted by the change" (see, CPLR 510[2] and [3]).

It is undisputed here that defendant Authorities failed to make a timely demand for a change of venue pursuant to CPLR 511. CPLR 505(a) requires that the proper venue would be where the facilities involved in the action are located; however, defendant Authorities' untimely demand, and thereby forfeiture of a change of venue as of right, leaves the transferring of venue in the sole discretion of the Court. Considering CPLR 510(1), the proper venue for this action would have been in New York County pursuant to CPLR 505(a), and in light of the legislative determination that such actions against public authorities should be governed by CPLR 505(a), defendants Mountain Glenn and Issac Nuewirth have not shown "any other countervailing circumstances justifying nonfulfillment of the policy objectives..." (*Tesfaye v. Swett*, 227 AD2d 150 [1st Dept 1996]). Additionally, defendant Mountain Glen has not asserted and has not put forward any evidence that an impartial trial cannot be had in New York County (see, *Matter of Michiel*, 43 AD3d 687 [2d Dept 2008]). Neither defendants have put forward any information with respect to potential witnesses and their location. The Court here should also consider that the action involves two public authorities as

defendants and the cause of action occurred in New York County (*Jacobo v. A.H.A. Gen. Constr.*, 220 AD2d 300 [1st Dept 1995]) (see, *Hes v. New York City Tr. Auth.*, 811 NYS2d 408 [2d Dept 2006] [held transfer of venue to New York County was proper where New York City Transit Authority was defendant and where the cause of action arose in New York County]). Also, "the fact that the accident occurred in New York County, provide[s] ample basis for a discretionary change of venue to New York County" (*Tesfaye v. Swett*, 227 AD2d 150 [1st Dept 1996]).

In view of the foregoing defendant Authorities motion to transfer venue to New York County should be granted. CPLR 505(a) has made a policy determination that actions involving public authorities should take place in the county where the facilities involved are located, which in this case is New York County; defendants Mountain Glenn and Issac Nuewirth have not put forth a showing that an impartial trial cannot be had in New York County; and the cause of action arose in New York County.

Accordingly, defendants' cross motion is granted, and as a joint trial is being ordered herein,

It is

ORDERED that upon service of a copy of this order with notice of entry and payment of the appropriate fee, if any, the Clerk of the Supreme Court, Queens County, is directed to transfer the files, all papers and pleadings in Actions No. 1 and 2 to the Clerk of the Supreme Court, New York County.

Plaintiff shall annex a copy of this order with any notice of trial submitted.

The foregoing constitutes the decision and order of this court.

Dated: December 23, 2008

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**Howard G. Lane, J.S.C.**