To be argued by: MAEVE O'CONNOR
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2021-00525

New York Supreme Civil Index No. 655987/2020

New York Supreme Court

Appellate Division—First Department

MEREDITH BUSHER and ELLEN BUSHER as Co-Personal Representatives of the Estate of EUGENE L. BUSHER, NANCY TUMPOSKY, and JEROME CORTELLESI,

Plaintiffs-Appellants,

-against -

DESMOND T. BARRY, JR., THOMAS T. EGAN, JOHN P. HEANUE, WILLIAM M. KELLY, FRANCIS P. BARRON, and WINGED FOOT GOLF CLUB, INC.,

Defendants-Respondents.

WINGED FOOT HOLDING CORPORATION,

Nominal Defendant-Respondent.

Appellate Case No.: 2021-00525

BRIEF FOR DEFENDANTS-RESPONDENTS

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Defendants-Respondents Desmond T. Barry, Jr., Thomas F. Egan, John P. Heanue, William M. Kelly, Francis P. Barron, and Winged Foot Golf Club, Inc. (the "Golf Club," and collectively, "Defendants") respectfully submit this memorandum of law in opposition to Plaintiffs-Appellants' ("Plaintiffs") appeal of Justice Jennifer G. Schecter's February 3, 2021 order transferring this case from New York to Westchester County.

QUESTIONS PRESENTED

Did the Supreme Court correctly grant Defendants' motion to change venue from New York County to Westchester County pursuant to CPLR § 507's mandatory venue provision because a judgment in this action would affect title to real property in Westchester County?

Yes, Justice Schecter properly held that this action must be venued in Westchester County pursuant to CPLR § 507's mandatory language because there is no dispute that a judgment in this action would affect title to, possession of, or enjoyment of real property situated in Westchester County.

Did the Supreme Court correctly deny Plaintiffs' cross-motion to retain venue in New York County pursuant to CPLR § 510(3) because the purported "convenience" to Plaintiffs of retaining venue in New York County did not overcome the mandatory venue provision of CPLR § 507?

Yes, Justice Schecter properly recognized that the discretionary determination of venue pursuant to CPLR § 510(3) must yield to the mandatory venue provision of CPLR § 507 and that, even if the Supreme Court had discretion to consider the convenience of the witnesses pursuant to CPLR § 510(3), Plaintiffs had not met their burden of persuading the Supreme Court that venue should be retained in New York County.

PRELIMINARY STATEMENT

Plaintiffs ask this Court to override a mandatory statutory venue provision requiring that this case be brought in Westchester County based on their theory that, due to the pandemic, Westchester will somehow be less safe for witnesses than New York County at the time of a hypothetical future trial. This is nonsense, and Justice Schecter's well-reasoned decision to transfer the case to Westchester should be affirmed.

It is black letter law that disputes affecting the "title to, or the possession, use or enjoyment of, real property shall" be heard in the county in which the property is located. *See* CPLR § 507; *see also Acker v. Leland*, 96 N.Y. 383, 386 (1884) (describing the centuries-old rule that "[t]he location of the real estate . . . controls the place of trial"). As Plaintiffs acknowledge in the opening sentence of their brief, the Winged Foot Holding Corporation (the "WFHC") has owned the Westchester County land on which the Golf Club is located for the past century

and has always leased the land to the Golf Club. In the dissolution action from which this venue appeal arises, Plaintiffs seek to disrupt this lease arrangement and to force the sale of Winged Foot's Westchester County property.

Plaintiffs do not dispute that this case affects the "title to, or the possession, use or enjoyment of" the Winged Foot property in Westchester. CPLR § 507. Instead, they essentially argue that the mandatory venue provision of CPLR § 507 is not actually mandatory and that travel between New York County or other states and Westchester County for a hypothetical in-person trial would create a health risk for elderly witnesses—notwithstanding that Plaintiffs previously litigated for six years in Westchester County in a predecessor case based on the same facts at issue here. Of course, there is no legitimate question that CPLR § 507 trumps discretionary venue provisions as there is a strong presumption under New York law in favor of mandatory venue provisions. *See GAM Prop. Corp. v. Sorrento Lactalis, Inc.*, 41 A.D.3d 645, 646 (2d Dep't 2007) (recognizing that "the discretionary determination of venue based upon the convenience of witnesses . . . must yield to the mandatory venue provision of CPLR 507") (internal citations omitted). Furthermore, no trial date has been set, Defendants filed a motion to dismiss that may obviate any need for a trial, daily travel between Westchester and New York Counties is routine for many New Yorkers, and courts continue to take appropriate measures to protect public health in the wake of the pandemic. Thus,

even if Plaintiffs were correct that discretionary consideration of the convenience of witnesses under CPLR § 510(3) outweighs CPLR § 507's determination of venue based on the location of real property, which they are not, Plaintiffs' pandemic-based arguments for venue in New York County are unavailing.

For these reasons and those set forth below, Justice Schecter did not abuse her discretion in granting Defendants' motion to change venue from New York County to Westchester County and that order should be affirmed.[1]

ARGUMENT

I. Justice Schecter Correctly Found that CPLR § 507 is Mandatory and Supplants Discretionary Venue Provisions.

Justice Schecter correctly determined that this action must be venued in Westchester County because it "affects title to real property in Westchester County." R. 7. CPLR § 507 dictates:

> The place of trial of an action in which the judgment demanded would affect the title to, or possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.

CPLR § 507. CPLR § 510(3), on which Plaintiffs rely, states that a court "may change the place of trial of an action where . . . the convenience of material

[1] The correct standard of review for venue transfers based upon mandatory venue provisions is abuse of discretion. *See, e.g.*, *Avis Rent-A-Car Sys., Inc. v. Edmin Realty Corp.*, 209 A.D.2d 656, 657–58 (2d Dep't 1994) (applying abuse of discretion standard in appeal of transfer pursuant to CPLR § 507).

witnesses and the ends of justice will be promoted by the change." CPLR § 510(3). Thus a plain reading of the statutory language alone is enough to determine that the mandatory language of CPLR § 507 overcomes discretionary consideration of witness convenience under CPLR § 510(3).

New York case law reinforces this rule. In a case seeking the exact relief requested here—common-law dissolution of a corporation that owned land leased by a private golf club—the court explicitly held that venue was properly transferred from New York County to the county "where the property is located." *Shapiro v. Rockville Country Club, Inc.*, 22 A.D.3d 657, 660 (2d Dep't 2005) (relying upon CPLR § 507 since the action affected the "possession, use or enjoyment" of the land); *see also Metro. N.Y. Synod of Evangelical Lutheran Church in Am. v. ICS Found., Inc.*, 66 Misc.3d 1201 (A) (Sup. Ct. N.Y. Cty. 2019) (action seeking declaration of lease agreements as void was required to be brought in county where property was "undisputedly located" since adjudication of validity of leases would "affect the possession or use and enjoyment of real property"); *Arnold Constable Corp. v. Staten Is. Mall*, 61 A.D.2d 826, 827 (2d Dep't 1978) (explaining that compared to the mandatory provision of CPLR § 507, "[t]he convenience of anticipated witnesses who are nonresidents of the State, or employees of a party to the action, is entitled to subordinate consideration only").

The cases discussed by Plaintiffs are not to the contrary. First, *GAM Prop. Corp.* only underscores the rule that the discretionary venue provision of CPLR § 510(3) must give way to the mandatory dictate of CPLR § 507:

> While both parties demonstrated that their respective nonparty witnesses would be inconvenienced by litigation in the other county, the discretionary determination of venue based upon the convenience of witnesses . . . must yield to the mandatory venue provision of CPLR 507.

GAM Prop. Corp., 41 A.D.3d at 646 (internal citations omitted). Plaintiffs' effort to argue otherwise boils down to an argument that the court did not mean what it said. *See* Appellant Br. at 7 ("The correct interpretation of the ruling in *GAM* is that because both parties demonstrated that non-party witnesses would be inconvenienced in the other county—*i.e.*, because there was parity in the parties' showings pursuant to CPLR 510(3)—no exercise of discretion was warranted, and venue consequently remained subject to 'the mandatory venue provision of CPLR 507.'"). There is no basis in *GAM* for this purported interpretation. "While" does not mean "because." It means "although." *See While*, MERRIAM-WEBSTER, *https://www.merriam-webster.com/dictionary/while* (last visited Mar. 23, 2021) (defining it to mean "in spite of the fact that: although"). The court in *GAM* held that "although" both parties made arguments about the convenience of the witnesses, the mandatory provision of CPLR § 507 controlled venue. *GAM Prop. Corp.*, 41 A.D.3d at 646.

Second, *O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169 (2d Dep't 1995), which Plaintiffs cite to support the assertion that "actions subject to CPLR 507 may still be transferred pursuant to CPLR 510(3) if the parties' showings warrant doing so," does not say this at all. *See* Appellant Br. at 8. *O'Brien* involved a "motion for discretionary change of venue" in a medical malpractice case, *see O'Brien*, 207 A.D.2d 169 at 175, not a motion pursuant to the mandatory rule of CPLR 507 in a case affecting title to property. The *O'Brien* court correctly noted that "[t]he CPLR provides that the venue of actions affecting title to, or the possession, use or enjoyment of, real property, must be placed in the county where the property is located (*see,* CPLR 507)," *id.* at 174, then drew a contrast to discretionary motions such as the one at issue in *O'Brien* where "transitory or local nature of the plaintiff's cause of action" is not controlling, *id.* at 174–75. The court's analysis, like that in *GAM*, only affirms the mandatory rule that governs here.

Finally, in *Diamond v. Papreka*, 7 Misc. 3d 1006(A) (Sup. Ct. Kings Cty. 2005), cited by Plaintiffs for the same assertion, the court looked to discretionary venue factors after first determining that venue would be proper in multiple counties under CPLR § 507. *Diamond v. Papreka*, 7 Misc. 3d 1006(A) at *2. The court explained that "when, as here . . ., venue is equally appropriate pursuant to CPLR 507 in separate counties (because the action affects title or interest in real

property located in each county), the court may choose either or any proper county for trial." *Id.* at *3. Here, by contrast, there is only one Winged Foot, and it is in Mamaroneck.

Justice Schecter's holding that this case must be venued in Westchester County where the Winged Foot land is located was therefore correct and not an abuse of her discretion.

II. Justice Schecter also Correctly Found that CPLR § 510(3)'s Discretionary Factors Did Not Militate in Favor of Retaining Venue.

Justice Schecter was likewise correct in holding that even if she had the discretion to consider witness convenience in determining the proper venue, "there is no credible basis to contend that it would be more convenient to litigate in New York County." R. 7. Plaintiffs have already litigated for six years in Westchester County. *See id.* There is no reason to assume, as Plaintiffs do in their brief, that Westchester County courts will be less prudent than Manhattan courts in resuming in-person civil trials while the pandemic still poses a high risk for vulnerable witnesses. Appellant Br. at 13. Moreover, while Plaintiffs argue that venue in New York will prevent unnecessary travel for witnesses, the reality is that there is no material difference between the two venues for witnesses traveling from out of state or for witnesses based in New York County. *See* R. 141 ¶ 6.

As Justice Schecter recognized, if a trial ultimately occurs in this case and the pandemic is still ongoing, the trial can be conducted remotely or with

appropriate safety measures. R. 7. Even if the trial were to be conducted in person, it is speculative to determine at this stage, as Plaintiffs demand, that a trial in Westchester County would pose a greater risk to elderly witnesses than a trial in New York County. Both New York City and Westchester have experienced surges of COVID-19 cases and it is impossible to know what the rate of infection will be at the time any future in-person trial takes place. *See Westchester County COVID-19 Dashboard*, WESTCHESTERGOV.COM, https://wcgis.maps.arcgis.com/apps/opsdashboard/index.html#/280339d96db14efd9cc304dba0f3a71d (last visited March 23, 2021); *COVID Newsletters*, GALE BREWER: MANHATTAN BOROUGH PRESIDENT, https://www.manhattanbp.nyc.gov/covid-weekly-newsletter-3-22/(last visited March 23, 2021).

Moreover, the cases cited by Plaintiffs regarding COVID-19 are inapposite and address transfers between courts in different states, not adjacent counties. Holding a trial in New York County will do nothing to avoid the air travel for out-of-state witnesses that Florida and Delaware courts, as described by Plaintiffs, have found so risky due to the pandemic. *See* Appellant Br. at 11-12. Once Plaintiffs' out-of-state witnesses have landed at a New York-area airport, there is no plausible reason that it would be safer for them to drive to New York County instead of Westchester County. *See* R. 141 ¶ 6. Similarly, it is simply not plausible to argue

that a drive to the Westchester County courthouse would be meaningfully riskier for New York County-based witnesses than a drive to the New York County courthouse. *Id*.

As to Plaintiffs' argument that Defendants somehow waived their request for a venue transfer under CPLR § 507 by not, in Plaintiffs' view, making a sufficient showing under CPLR § 510(3), it is completely without merit. The cases on which Plaintiffs focus, *Pittman v. Maher*, 202 A.D.2d 172 (1st Dep't 1994) and *Ryan-Avizienis v. JBEW Bar Corp.*, 121 A.D.3d 579 (1st Dep't 2014), do not even address motions brought pursuant to a mandatory venue provision like CPLR § 507. Where, as here, a defendant seeks to transfer venue based on a mandatory venue provision, they are not required to make any showing under CPLR § 510(3) concerning the inconvenience of witnesses. *Bray v. Town of Yorkshire*, 65 Misc. 3d 1228(A) at *2 (Sup. Ct. Erie Cty. 2019) ("The defendants in this case have not made a CPLR § 510(3) 'convenience of witnesses' motion. Consequently, they need not submit affidavits attesting to the materiality, availability or inconvenience of witnesses. Nor do they bear the burden of persuading the court that the convenience of the material witnesses and the ends of justice would be promoted by a change to Cattaraugus County."). Though not required to do so, Defendants in fact submitted an affirmation in support of their reply brief that stated that seven of Defendants' fact and expert witnesses live and work in Westchester or

Connecticut. *See* R. 462 ¶¶ 3-9. While Plaintiffs argue otherwise, they cannot avoid transfer under a mandatory venue provision by entirely ignoring the dictates of that statute and instead alleging that Defendants have failed to make an adequate showing under a different, discretionary venue statute.

CONCLUSION

For the foregoing reasons, Justice Schecter's Order transferring venue from New York to Westchester County should be affirmed.

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New York, New York

Respectfully submitted,

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