Suliman Perkins	:	Court of Common Pleas
	:	County of Philadelphia
	:	
Plaintiff	:	August TERM, 2018
	:	No.: 00974
v.	:	
	:	
International Paper Company	:	
	:	
Defendant	:	

ORDER

AND NOW, this ____ day of _____, 2018, upon consideration of Defendant International Paper Company's Preliminary Objections to Plaintiff's Complaint, and Plaintiff's Response in Opposition thereto, it is hereby ORDERED and DECREED that said Preliminary Objections are DENIED. Alternatively, the parties shall have thirty (30) days to engage in limited discovery on the issue of venue, with supplemental pleadings due ten (10) days thereafter. It is further ORDERED and DECREED that upon consideration of Defendant's Preliminary Objections to Plaintiff's Complaint on the issue of lack of specificity of the pleading and Plaintiff's Response in Opposition thereto said Preliminary Objections are DENIED.

BY THE COURT

_____
J.

Stuart A. Carpey, Esquire
Attorney I.D. No.: 49490
Kreithen, Baron & Carpey, P.C.
100 W. Elm Street, Suite 310
Conshohocken, PA 19428
(610) 834-6030
(610) 834-6035 (fax)
scarpey@carpeylaw.com

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PLAINTIFF'S RESPONSE TO DEFENDANT INTERNATIONAL PAPER COMPANY'S PRELIMINARY OBJECTIONS

1. Admitted.

2. Admitted.

3. Admitted.

4.-8. Denied as stated. It is admitted the Defendant has a presence in many locations around the United States, including Hazleton, Pennsylvania and Harrisburg, Pennsylvania. But it is denied to the extent it is averred or implied that it did not also regularly transact or conduct business to any extent in Philadelphia County at all times relevant hereto.

9. Admitted.

10. Admitted.

11.-14. Denied. These allegations are specifically denied. Pa. R. Civ. P. § 2179 states the following:

> (a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

Case ID: 180800974
Control No.: 18090822

(1) the county where its registered office or principal place of business is located;
(2) **a county where it regularly conducts business;**
(3) the county where the cause of action arose; or
(4) a county where a transaction or occurrence took place out of which the cause of action arose.

As such, venue is appropriate in Philadelphia County.

This is particularly so in light of the fact that at this stage of the case without the plaintiff having the benefit of discovery on the issue of venue, plaintiff's assertions of defendant's Philadelphia County contacts in the nature of its business operations must surmount defendant's self-serving counter assertions. As such, Defendant's Preliminary Objections are completely without merit.

15.-18. Admitted.

19.-21. Denied. These allegations are specifically denied in that Plaintiff's Complaint clearly meets the required standard of pleading pursuant to long-established Pennsylvania Law. It is Defendant who has thrown boilerplate Preliminary Objections against the proverbial wall, riddled with legal conclusions, in an effort to see what sticks. This court need not and should not be taken in by Defendant's meritless arguments.

WHEREFORE, Plaintiff respectfully requests that the Preliminary Objections of Defendant International Paper Company be denied and dismissed with prejudice.

Respectfully submitted,

CARPEY LAW, PC

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff

Stuart A. Carpey, Esquire
Attorney I.D. No.: 49490
Kreithen, Baron & Carpey, P.C.
100 W. Elm Street, Suite 310
Conshohocken, PA 19428
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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S PRELIMINARY OBJECTIONS

I. FACTUAL BACKGROUND

By way of background, this is an action in which plaintiff seeks to recover compensation for injuries sustained in a slip and fall accident that occurred on January 11, 2017 at approximately 6:45 a.m. Plaintiff was a business invitee at Defendant International Paper Company's premises and was delivering rolls of paper. There had been inclement weather for several days prior to the accident including the day of the accident. At the time of the accident, the temperature was well below freezing. At that time, Plaintiff was walking on Defendant's property when he slipped and fell on a set of exterior steps covered with ice. He sustained various severe personal injuries. Plaintiff commenced suit against Defendant in negligence for failure to keep its property safe, for failure to keep the steps free from ice, and for failure to warn plaintiff of the dangerous condition.

II. STATEMENT OF QUESTION INVOLVED

A. Should this Honorable Court transfer Plaintiff's action to Luzerne County at the preliminary objection state of litigation on the basis of improper venue based on a unsubstantiated allegation submitted by moving Defendant without further proofs by moving Defendant, particularly when the Plaintiff has not been afforded the opportunity to conduct discovery?

SUGGESTED ANSWER: NO.

B. Is Plaintiff's complaint plead with sufficient specificity?

SUGGESTED ANSWER: YES.

III. LEGAL ARGUMENT

In the instant preliminary objections filed by Defendant International Paper Company, said moving Defendant raises two issues. First, Defendant proposes that venue in Philadelphia County is improper. Moving Defendant asserts that venue of this action is proper in Luzerne County because the accident occurred in Luzerne County. Second, Defendant proposes that Plaintiff's complaint lacks sufficient specificity.

Rule 1006 of the Pennsylvania Rules of Civil Procedure, in conjunction with Rule 2179, governs venue in actions involving corporations. Any one of the five (5) enumerated bases under Rule 2179 suffices to establish proper venue. Here, Plaintiff relies on 2179(a)(1)(2) - a county where the corporation regularly conducts business- to establish her choice of forum to institute suit. Plaintiff submits that the threshold burden is relatively light and easy to surpass. For example it is clear from simple internet searches that moving defendant's marketing efforts in Philadelphia will support venue.

The statutory language of rule 2179 is as follows, in pertinent part:

Rule 2179. Venue

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(a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

(1) the county where its registered office or principal place of business is located;

(2) a county where it regularly conducts business;

(3) the county where the cause of action arose; or

(4) a county where a transaction or occurrence took place out of which the cause of action arose.

Plaintiff unequivocally contends at paragraph 2 of his complaint that Defendant regularly conducts business in Philadelphia County. This is important, because the language of the Complaint fits squarely within the confines of rule 2179(a)(2).

The Plaintiff's choice of forum is given great weight. Singley v. Flier, 851 A.2d 200 (Pa. Super. 2004). Thus, the party seeking a change of venue "bears the burden of proving that a change of venue is necessary, while a Plaintiff generally is given the choice of forum so long as the requirements of personal and subject matter jurisdiction are satisfied." Purcell v. Bryn Mawr Hospital, 525 Pa. 237, 579 A.2d 1282 (Pa. Super. 2004).

A business entity must perform acts in a county where suit is filed. Clearly under the rules, and Purcel, supra., it is movant's role to prove it is a corporation that does **not** regularly conduct business in Philadelphia County. Bald, self-serving, unsubstantiated allegations are insufficient to allow for change of venue.

Plaintiff further submits that limited discovery on the issue of whether moving Defendant regularly conducts business in Philadelphia County would be appropriate. Zampana Barry v. Donaghue, 921 A.2d 500 (Pa. Super. 2007).

Although not bound by case law from the Third Circuit, this court may find such case law persuasive on the issue of venue discovery. The Third Circuit has held that courts are to assist the Plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is "clearly frivolous." Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.2d 1026, 1042 (3d

Cir. 1997). Moreover, if a Plaintiff presents factual allegations that suggest "with reasonable particularity" the possible existence of the requisite "contacts between [the party] and the forum state," Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992), the plaintiff's right to conduct jurisdictional discovery should be sustained. Toys "R" Us, Inc. v. Step Two, S.A., 318 F.2d 446 (3rd Cir. 2003). The Third Circuit specifically held in Toys "R" Us, Inc., that it was **error to deny jurisdictional discovery**, even when the only alleged contact averred by the Plaintiffs was a potential website directed to U.S. residents:

> We are persuaded that the District Court erred when it denied Toys' request for jurisdictional discovery. The court's unwavering focus on the web site precluded consideration of other Internet and non-Internet contacts – indicated in various parts of the record – which, if explored, might provide the "something more" needed to bring Step 'two within our jurisdiction. request for jurisdictional discovery. The court's unwavering focus on the web site precluded consideration of other Internet and non-Internet contacts – indicated in various parts of the record – which, if explored, might provide the "something more" needed to bring Step 'two within our jurisdiction. Cybersell, Inc., 130 F.3d at 418; Desktop Technologies, Inc., 1999 U.S. Dist. LEXIS 1934, 1999 WL 98572, at 3. Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction, Pinker, 292 F.2d at 368, courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is "clearly frivolous." Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997). If a plaintiff presents factual allegations that suggest "with reasonable particularity" the possible existence of the requisite "contacts between [the party] and the forum state," Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992), the plaintiff's right to conduct jurisdictional discovery should be sustained.
>
> Where the plaintiff has made this required threshold showing, courts within this Circuit have sustained the right to conduct discovery before the district court dismisses for lack of personal jurisdiction. *See, e.g.,* In re Auto. Refinishing Paint Antitrust Litig., 2002 U.S. Dist. LEXIS 15099, 2002 WL 31261330, at *9 (E.D. Pa. July 31, 2002) (denying motion to dismiss and permitting jurisdictional discovery where plaintiff made a "threshold prima facie showing of personal jurisdiction over Defendants"); W. Africa Trading & Shipping Co., et al. v. London Int'l Group, et al. 968 F. Supp. 996, 1001 (D.N.J. 1997) (denying defendant's motion to dismiss where the plaintiffs' "request for jurisdictional discovery is critical to the determination of whether [the court can] exercise personal jurisdiction over the defendant."); Centralized Health Systems, Inc. v. Cambridge Medical Instruments, Inc., 1989 U.S. Dist. LEXIS 13605, 1989 WL 136277, at *1 (E.D. Pa. Nov. 8, 1989) (holding motion to dismiss in abeyance to permit party to take discovery on jurisdiction

> where distribution arrangement might satisfy minimum contacts). Here, instead of adopting a deferential approach to Toys' request for discovery, the District Court appears to have focused entirely on the web site, thereby preventing further inquiry into non-Internet contacts. ..Toys' request for jurisdictional discovery was specific, non-frivolous, and a logical follow-up based on the information known to Toys. The District Court erred by denying this reasonable request. Toys should be allowed jurisdictional discovery, on the limited issue of Step Two's business activities in the United States, including business plans, marketing strategies, sales, and other commercial interactions. Although Step Two does not appear to have widespread contacts with the United States, this limited discovery will also help determine whether jurisdiction exists under the federal long-arm statute. Accordingly, on remand, the District Court should consider whether any newly discovered facts will support jurisdiction under traditional jurisdictional analysis, or under Rule 4(k)(2). I.d.

Here, Plaintiff has clearly not made a frivolous request for discovery on the issue to clarify venue. Accordingly, it is respectfully requested that, at a minimum, this Honorable Court grant the parties leave to conduct limited venue discovery for the next thirty (30) days, and the opportunity to present supplemental memorandums within ten (10) days thereafter.

In addition, this very court (the Honorable Leon Tucker) recently observed that as little as 1% of overall business transactions is sufficient to cause venue to lay in a the county chosen by the Plaintiff.

> Venue may be proper even where the defendant's corporate acts in the county constitute a small percentage of its business as long as those acts are regular. *Canot v. Am. Honda Motor Corp.*, 231 A.2d 140 (Pa. 1965) (Montgomery County cab company which was prohibited from picking up passengers in Philadelphia County but which was permitted to take them to that county and which collected five to ten percent of its fares in that county at the end of rides did "regularly conduct business" in Philadelphia county for venue purposes). "Regularly" does not mean "principally" or that the acts must be "performed on a fixed schedule". *Monaco,* 208 A.2d at 256. Canter held that Delaware corporation with a principal place of business in Delaware County, Pennsylvania was subject to suit in Philadelphia where the defendant regularly made demonstrations and sales in Philadelphia even though sales from Philadelphia only constituted **one to two percent** of is business. Id.

Agosto v. Seaworld Parks & Entm't, 2014 Phila. Ct. Com. Pl. LEXIS 598 * (Phila. CCP 2014) (emphasis supplied) (Tucker, J.).

"It must be remembered that it is the word "regularly" which we are construing and not "principally." A corporation may perform acts "regularly" even though these acts make up a small part of its local activities. See Smerk v.Philadelphia Suburban Transportation Company, 13 D. & C. 2d. 454 (1958). Nor does "regularly: necessarily mean, as defendant contends, that the acts must be performed on a fixed schedule or, when driving is involved, over a fixed route. The questions is whether the acts are being "regularly" performed within the context of the particular business." Monaco v. Montgomery Cab Co., 208 A.2d 252 **, 417 Pa. 135, LEXIS 396 (Pa. 1965).

"Combining "quality" and "quantity", "acts of the corporation must be distinguished: those in "aid of a main purpose" are collateral and Incidental, while "those necessary to its existence" are "direct." Purcell v. Bryn Mawr Hosp., 579 A.2d 1282, 1285 (Pa. 1990).

Applying the above law to the facts of this case, it becomes clear that there is no venue litmus test other than perhaps that at least 1% of the corporation's business must have been regularly conducted in the chosen forum for a case that remains there. The aspect of its business which is so conducted is irrelevant, other than that it must be a core function and not collateral.

Plaintiff has a low burden to meet as to the amount of the business activity which the Defendant conducts in the forum chosen by Plaintiff, for the case to remain in that forum. She should be given the opportunity to meet it, by allowing for a brief period by discovery limited to venue issues. In the alternative, it may be proper that this case should be transferred to the Eastern District of Pennsylvania, or the middle District of Pennsylvania since diversity jurisdiction may be there in light of the fact that Defendant's offices are in Pennsylvania and Tennessee. But venue discovery would reveal that.

As to Defendant's second basis for preliminarily objecting to Plaintiff's complaint, Plaintiff submits that Defendant's objections are baseless. Plaintiff's complaint states sufficient averments to state a claim in negligence against the Defendant. In ruling on preliminary objections, the court

must determine whether the facts averred are sufficient to establish a legal cause of action. Monti v. Pittsburgh, 26 Pa. Commonwealth Court 490, 364 A.2d 764 (1976).

Rule 1019 (a) of the Pennsylvania Rules of Civil Procedure requires that the material facts on which a cause of action is based must be stated in a concise and summary form. A complaint is sufficiently specific if it reasonable informs the Defendant of that which he must be prepared to meet at trial. Commonwealth v. City of Jeanette, 9 Pa. Commonwealth Court 306, 305 A.2d 775 (1973). IN addition, as was stated in Hock v. L.B. Smith, Inc., 69 D & C 2d 420, 423 (Columbia County 1973),

> "In determining whether the complaint is sufficiently specific, all averments must be considered together and appraised in light of the nature of the case. It is enough that, considering the complaint as a whole, it contains sufficient material facts to show the existence of a cause of action."
> Hock at 423.

The right to strike any portion of a complaint under Pa. R.C.P. 1017(b)(2) should be sparingly exercised, and only when a party can affirmatively show prejudice. Commonwealth Department of Environmental Resources v. Hartford Accident and Indemnity Company, 40 Pa. Commonwealth Court 133, 396 A.2d 885 (1979). Because Defendant has failed to show how it will be prejudiced by any particular paragraph of Plaintiff's complaint or the combination of paragraphs of the complaint, the complaint should not be stricken. Any doubt as to whether preliminary objections would be appropriate must be resolved in favor of overruling the preliminary objections. Zelik v. Daily News Publishing Company, 288 Pa. Super 277, 431 A.2d 1046 (1981).

Plaintiff is not obligated to identify a particular theory of liability in his complaint. Weiss v. Equibank, 313 Pa. Super 446, 460 A.2d 271 (1983). "Negligence" is a legal conclusion and need not be specifically averred, so long as the facts that are set forth allow negligence to be clearly inferred. Pennsylvania Rail Co. v. City of Pittsburgh, 335 Pa. 449, 6 A.2d 907 (1939). Adequacy of a complaint must be judged by examination of the facts plead, not by the conclusions of law which

accompany them. Bloom v. Dubois, 409 Pa. Super 83, 95, 597 A.2d 671, 677 note 7. (1991). In construing the complaint, the trial court maintains broad discretion in determining the adequacy of the pleadings. United Refrigerator Co. v. Applebaum, 410 Pa. 210, 189 A.2d 253 (1963).

The pertinent question under Rule 1028(a)(3) is "whether the complaint is sufficiently clear to enable the Defendant to prepare his defense," or "whether the Plaintiff's complaint informs the Defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Ammlung v. City of Chester, 224 Pa. Super 47, 302 A.2d 491, 498 n. 36 (1973) (quoting 1 Goodrich-Amram § 1017(b)-9).

It cannot possibly be gainsaid Defendant is unable to determine the basis upon which Plaintiff seeks recovery and upon what grounds to make its defense. The complaint clearly raises claims in negligence. See Plaintiff's Complaint at paragraphs 5, 6, 7 and 8. It is without question that the pleading was sufficiently specific as to the existence of the alleged defect on the property, and Plaintiff's injuries sustained therefrom.

WHEREFORE, Plaintiff requests that the relief he has requested is granted and that Defendant's preliminary objections be denied and dismissed with prejudice, or that limited discovery on the issue of venue is permitted.

Respectfully submitted,

CARPEY LAW, PC

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff

Stuart A. Carpey, Esquire
Attorney I.D. No.: 49490
Carpey Law, P.C.
100 W. Elm Street, Suite 310
Conshohocken, PA 19428
(610) 834-6030
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CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of the within Response to Defendant's Preliminary Objections was made on this 10th day of September, 2018 to the counsel named below electronically in accordance with Pa. R.C.P. 205.4(g).

Gretchen L. Peterson, Esq.
Fitzpatrick Lents & Bubba, P.C.
4001 Schoolhouse Lane
P.O. Box 219
Center Valley, PA 18034

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff