

**Payne v Jumeirah Hospitality & Leisure (USA) Inc.**

2009 NY Slip Op 32514(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 112319/08

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **LOUIS B. YORK**

PART 2

Index Number : 112319/2008  
**PAYNE, LINCOLN**  
 vs.  
**JUMEIRAH HOSPITALITY & LEISURE (USA)**  
 SEQUENCE NUMBER : # 001  
 DISMISS COMPLAINT

J.B.Y. Justice

INDEX NO. 112319-08  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. #001  
 MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
 OCT 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 10/15/09

LOY  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 2

----- X

LINCOLN PAYNE,

Plaintiff,

INDEX NO.  
112319/08

-against-

JUMEIRAH HOSPITALITY & LEISURE (USA) INC.;  
JEIRAH GROUP; JUMEIRAH BEACH RESORT, LLC;  
DUBAI HOLDINGS; W.S. ATKINS CONSULTANTS,  
LTD; and JOHN DOES 1-10,

Defendants.

----- X

**FILED**  
OCT 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**LOUIS B. YORK, J.:**

Motions seq. nos. 001 and 002 are consolidated herein for disposition.

In motion seq. no. 001, defendant W.S. Atkins Consultants, Ltd. ("Atkins") moves to dismiss the complaint (which it does not submit) pursuant to CPLR 3211 (lack of jurisdiction) and CPLR 327 (*forum non conveniens*).

Plaintiff cross-moves to amend the complaint pursuant to CPLR 3025 so as to add various Atkins affiliates as defendants.

In motion seq. no. 002, defendants Jumeirah Hospitality & Leisure (USA), Inc. ("Jumeirah Hospitality"), Jumeirah Beach Resort, LLC ("Jumeirah Beach"), Dubai Holding LLC, s/h/a Dubai Holdings ("Dubai Holding"), and Jumeirah Group LLC ("Jumeirah Group") (collectively, the "Jumeirah defendants") move to dismiss the complaint pursuant to CPLR 3211(a)[8] for lack of personal jurisdiction and CPLR 327 on the ground of *forum non*

*conveniens* and for such other and further relief that the court deems just and proper.

Plaintiff brought this action to recover damages for personal injuries he allegedly sustained on May 11, 2008, while he was visiting Wild Wadi Water Park ("Wild Wadi"), an aquatic amusement park in Dubai. According to plaintiff, he was injured while on a ride called "Falcon Fury" although it is unclear precisely how. The complaint alleges the ride was defective "[b]y way of example and without limitation" because it "caus[ed] patrons using the aquatic ride in a foreseeable and permitted manner to strike parts of their body(s) against a portion or portions of the ride in a manner and at a rate of speed sufficient to cause serious bodily injury" (complaint, ¶ 112). Based on these allegations plaintiff asserts three causes of action, respectively labelled negligence, strict product liability defective design, and failure to warn. The complaint is comprised of 119 numbered paragraphs of boilerplate (183 in plaintiff's proposed amended complaint), which essentially allege every element of those three causes of action against each and every defendant including the John Does.

### Parties

Plaintiff, who neither in the complaint nor in his affidavit states his nationality, residence or domicile, or the purpose of his sojourn in Dubai, describes himself only as "an international businessman [who] closely work[s] with attorneys who have international practices" (plaintiff's 4/1/09 affidavit, ¶ 1). According to the summons, the "basis of venue is Defendants' principle[sic] place of business" (although only one defendant, Jumeirah Hospitality, has its principal place of business in New York). Given plaintiff's silence, for purposes of these motions the court will assume that he is not a New York citizen or resident.

Defendant Jumeirah Hospitality is a Delaware corporation authorized to do business in New York which has offices in New York and manages the Essex House Hotel in Manhattan. Defendants Jumeirah Beach, Dubai Holding, and Jumeirah Group are Dubai limited liability companies based in Dubai. The Jumeirah defendants are being sued here as owners and operators of Wild Wadi.

Atkins, a United Kingdom corporation dissolved in September 2007, allegedly "designed, constructed and inspected" Falcon Fury and Wild Wadi.

John Does 1-10 allegedly "designed, constructed, owned, managed, and/or operated Falcon Fury and Wild Wadi" (complaint, ¶ 21).

### Personal Jurisdiction

Plaintiff contends that New York has jurisdiction over defendants because both Atkins and the Jeumeirah defendants are giant international conglomerates that regularly do business in New York through their various agents and affiliates, particularly the subsidiary each has based in New York.

"The parent-subsiary relationship is enough to give rise to a strong inference of a broad agency relationship.... Where ... the subsidiaries are created by the parent, for tax or corporate finance purposes, to carry on business on its behalf, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries. In such circumstances, '[t]here is a presumption, in effect, that the parent is sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction'" (*Airtran New York, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 219 [1st Dept 2007], citing *Frummer v Hilton Hotels International*, 19 NY2d 533, 538 [1967], cert den 389 US 923 [1967]; *Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 430 [1972]). "In order to have personal jurisdiction over the parent, [plaintiff] must show that the subsidiary 'does all the business which the parent corporation could do were it in New York by its own officials', i.e., that the subsidiary is acting as an agent or mere department of the parent corporation" (*New World Sourcing Group, Inc. v SGS SA*, n.o.r., 2006 WL 5110767 [Sup Ct, NY Co, Goodman, J, 2006], citations omitted). "[A]s a general rule, the presence of a local corporation does not create jurisdiction over a related, but independently managed, foreign corporation.... And, mere ownership by a foreign corporation of the stock of a subsidiary doing business in New York still does not subject the foreign corporation to the

jurisdiction of New York.... However, it is well-established that the relationship between a foreign corporation and an affiliated domestic corporation may provide a basis for exercise of jurisdiction over the foreign corporation under two theories: (1) if the domestic corporation acts as an 'agent' on behalf of the foreign corporation..., or (2) if the two companies are so closely related that one is a 'mere department' of the other, so that they may be treated as one for jurisdictional purposes" (*Goldsmith v Sotheby's, Inc.*, 14 Misc 3d 1223(A), \*6 [Sup Ct, NY Co, Edmead, J, 2007], citations omitted).

### *I. Atkins*

In support of its motion to dismiss for lack of jurisdiction (seq. no. 001) Atkins has submitted an affidavit of the financial director of WS Atkins PLC ("Atkins PLC"), Robert James MacLeod ("MacLeod"). According to MacLeod, Atkins PLC "is a leading multinational engineering consultancy employing 18,000 people with offices worldwide" (12/3/08 MacLeod supporting affidavit, ¶ 2) and a complex corporate structure. Atkins, a United Kingdom corporation which did no business in New York, was a former sub-subsubsidiary of Atkins PLC that was struck from the register of companies and dissolved in September 2007 (*id.*, ¶¶ 3-4). According to MacLeod, all the events alleged in the complaint related to Atkins occurred in the United Kingdom or Dubai (*id.*, ¶ 10) and all services rendered by Atkins PLC and its subsidiaries in connection with Wild Wadi "were provided solely in the United Kingdom and Dubai" (*id.*, ¶ 11). In a subsequent affidavit, MacLeod identifies another Atkins PLC affiliate, W.S. Atkins & Partners Overseas ("Atkins Overseas"), a Gibraltar company which "performs engineering consultancy services in the Middle East," and avers that all "services rendered with respect to Wild Wadi Park were rendered by Atkins Overseas, not by ... any other subsidiary of ... Atkins [PLC and] ... were provided solely in the United Kingdom and Dubai" (3/4/09 MacLeod affidavit, ¶¶ 2-3, 8-9). Atkins' counsel, amplifying on MacLeod's first affidavit, affirms that Atkins was struck off the register of companies and dissolved in February 2005 (see Simes affirmation, exhibits A, B and C), restored to active status in December 2006 by two of Atkins'

creditors, Lyte Industries (Wales) Limited and P Lewis (see *id.*, exhibit D), and again dissolved in September 2007 (see *id.*, exhibit E).

Plaintiff avers that Atkins "was and remains directly involved in the site safety at Wild Wadi, from establishing height restrictions, to appropriate signage, lifeguard training and the training of supervisors to ensure that the park's safety regulations are observed at all times" (plaintiff's opposing affidavit, ¶ 7). With respect to Atkins' contacts with New York, plaintiff alleges "that Atkins is the world's 5th largest international design firm, with member offices in New York City from which it transacts significant business in New York City, including 'Project management and cost estimating for the construction of the World Trade Center Memorial and Visitor Center,' that Atkins prominently holds out to the public" (*id.*, ¶ 10).

Atkins has also submitted the affidavit of Thomas Jaske ("Jaske"), the New York based regional vice president of Atkins PLC's sub-subsidiary Faithful + Gould ("F&G"), which has offices at 11 East 26th Street in Manhattan. According to Jaske, F&G's New York office played no role in Atkins' operations or in any aspect of Wild Wadi, and has no documents relevant "to the allegations made in the Complaint" (Jaske supporting affidavit, ¶ 8).

## ***II. Jumeirah Defendants***

Jeremiah Hospitality admits it is subject to New York's jurisdiction, but claims to have no contacts with Dubai or Wild Wadi. All other defendants move to dismiss the complaint on the ground that the court lacks personal jurisdiction over them.

Plaintiff contends that based on research done by him personally, including perusing the Jumeirah defendants' websites, all the Jumeirah defendants, including Jeremiah Hospitality, are alter egos of each other and "members" of Dubai Holding and thus liable as owners, designers, creators, operators and managers of Wild Wadi and its various rides including Falcon Fury. There appears to be some basis for this. The court notes that Dubai Holding's website lists Jumeirah Group as one of Dubai Holding's "seven member companies [which] manage and run subsidiaries, projects and investments" (<http://dubaiholding.com/en/about-dubai-holding>). Jumeirah Group's website also touts the variety of its commercial projects and the many "strings" to its

"portfolio" including Wild Wadi ([www.jumeirah.com/en/Jumeirah-Group/About-Jumeirah-Group](http://www.jumeirah.com/en/Jumeirah-Group/About-Jumeirah-Group)), New York's Jumeirah Essex House Hotel (<http://www.jumeirah.com/en/Jumeirah-Group/Hotels-And-Resorts>), and Dubai's World Trade Center (<http://www.jumeirah.com/en/Jumeirah-Living/World-Trade-Centre-Residence>). The Wild Wadi site advertises a special promotion in conjunction with the Jumeirah Beach Hotel (<http://www.jumeirah.com/en/Hotels-and-Resorts/Wild-Wadi/Promotions/#>), where plaintiff purchased his admission ticket to Wild Wali (see plaintiff's opposing affidavit, ¶ 5). According to plaintiff, the Jumeirah defendants "actively conduct business in New York, including the solicitation of customers and the public..., to [their] properties in Dubai, including the Wild Wadi (*id.*, ¶ 3).

In response to defendants' submissions, plaintiff counters that the Atkins PLC entities – as well as the Jumeirah defendants – rely on their interconnections to solicit business in New York through their websites and local affiliates, and then shield themselves with distinct corporate structures when it suits them, and that there should at the very least be some discovery on the jurisdictional issue.

There is some merit to plaintiff's argument. A foreign corporation that boastfully advertises its presence in New York even though in reality it has only a subsidiary or affiliate in the state may be held subject to New York jurisdiction (see *Adelaide Productions, Inc. v BKN Intern. AG*, 39 AD3d 254, 255 [1st Dept 2007]; see also *Lodge v Western New York Dance Studios, Inc.*, 53 Misc 2d 803 [Sup Ct, Erie Co, 1967]). Misleading the public in such a manner in effect creates an agency by estoppel (cf. *Hannon v Siegel-Cooper Co.*, 5 Bedell 244, 60 N.E. 597 [1901]; *Van Damme v Gelber, Nahum & Gasiunasen Gallery of Palm Beach, Inc.*, n.o.r., 18 Misc 3d 1120(A) [Sup Ct, NY Co, Fried, J, 2008]).

Plaintiff, as the party seeking to assert personal jurisdiction, bears the burden of proof on the issue, but "[t]hat burden, however, does not entail making a *prima facie* showing of personal jurisdiction; rather, [he] need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" (*Ying Jun Chen v Lei Shi*, 19 AD3d 407, 407-408 [2d Dept

2005]). The court finds that plaintiff has met this minimal burden (see *Peterson v. Spartan Industries*, 33 NY2d 463, 467 [1974]). Discovery pursuant to CPLR 3211(d) on the limited issue of the extent of defendants' conduct of business in New York (see *National Union Fire Insurance Company of Pittsburgh, Pa. v Ideal Mutual Insurance Co.*, 122 AD2d 630, 633 [1st Dept 1986], undertaken in the context of a hearing before a special referee, must take place before the court can determine if it has jurisdiction over defendants (see *Jacobson v Princess Hotels International, Inc.*, 101 AD2d 757 [1st Dept 1984]), "especially since the corporate relationships are complex and the relevant facts are exclusively within the control of the part[ies] seeking dismissal" (*Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 [1st Dept 2001]).

### *Forum Non Conveniens*

All defendants argue that even if personal jurisdiction were obtained, dismissal is warranted pursuant to CPLR 327 because New York is an inconvenient forum.

In this branch of defendants' motions, they have the burden of proof. "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation," among which are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit.... The court may also consider that both parties to the action are nonresidents ... and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction,"... although a defendant's "heavy burden" remains despite the plaintiff's status as a nonresident" (*Travelers Casualty and Surety Co. v Honeywell Intern. Inc.*, 48 AD3d 225, 225-226 [1st Dept 2008]; *K.T. v Dash*, 37 AD3d 107 [1st Dept 2006]). "It is well established law that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

It appears from plaintiff's submissions that plaintiff's primary reason for bringing this

action in New York instead of Dubai, where the accident occurred and all defendants reside, is his conviction that because of overwhelming prejudice against non-arabs, he will not be able to have a fair trial of his claims against the defendants. Particularly moving are the two newspaper articles submitted by plaintiff ("Laid-Off Foreigners Flee as Dubai Spirals Down," *New York Times*, Feb 12, 2009 [exhibit A to plaintiff's opposing affidavit] and "The Dark Side of Dubai," *The Independent*, April 7, 2009 [<http://www.independent.co.uk/opinion/commentators/johann-hari/the-dark-side-of-dubai-1664368.html>]) chronicling the horrors faced by foreigners in Dubai, where after being lured with promises of high-paying jobs in a resort-like setting they find themselves forced to do hazardous work 17 hours a day, six or seven days a week, for a pittance while living under horrible conditions, or unemployed and owing enormous debts to their employers and the state, as a result of which they are either prevented from leaving Dubai or thrown into a Dickensian debtor's prison.

Plaintiff argues that since Dubai is not an option for him, New York is the next best forum because all the parties have some presence here. He claims to "have significant contacts" with New York state and New York City, but mentions only that he underwent surgery and received medical treatment here for the injuries he sustained at Wild Wadi, and his doctor and medical records are in New York (plaintiff's 4/1/09 affidavit, ¶ 2).

Atkins has submitted the unsworn "declaration" of Yasser Omar, an Egyptian attorney licensed to practice law in Dubai, who states that the courts in Dubai have jurisdiction over plaintiff's claims and will offer him "the proper and due process" to obtain "compensation for the personal injury [which] will cover the direct and indirect harm inflicted upon" plaintiff even if he is not a Dubai resident.

The Jumeirah defendants have submitted the affidavit (included in exhibit B to moving papers) of Christopher John Mills ("Mills"), a solicitor of the Supreme Court of England and Wales and a legal consultant in the United Arab Emirates who practices law in Dubai as a partner in the Middle East dispute resolution group of an international law firm. Mills acknowledges that the judicial system in Dubai has different rules for arabs and non-arabs, but opines that a

non-resident, non-citizen individual is able to bring suit for personal injury against culpable parties and obtain compensation for those injuries (Mills affidavit, ¶¶ 9-10, 13).

In opposition, plaintiff dismisses these opinions as "absolute nonsense" and avers that "it is well known in the international business community that the courts of Dubai are prejudiced against 'outsiders,' especially when their own nationals are sued by foreigners" (plaintiff's opposing affidavit, ¶¶ 11-12). "[N]on-Dubai citizens can not[sic] expect fair treatment in the courts of Dubai, which are not independent and which are controlled and are under the influence of the government of Dubai. That is why foreigners are fleeing Dubai in their[sic] thousands, abandoning homes and property, during the current financial crisis rather than face debtor's prison and the treatment of the Dubai courts" (*id.*, ¶ 13).

In short, in bringing this action in New York, plaintiff is admittedly forum shopping – or more accurately, forum avoiding. In deciding whether to keep this case, which has at best minimal contact with this state, this court must be guided by the pursuit of justice.

"The common-law doctrine of *forum non conveniens*, codified in CPLR 327, permits a court to dismiss an action when it finds that 'in the interest of substantial justice the action should be heard in another forum' (CPLR 327[a]). The doctrine is based upon the equitable principles of justice, fairness and convenience ..., and should be applied flexibly by the court, in its sound discretion, based upon the facts and circumstances of each particular case" (*Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294-295 [1st Dept 2005], lv den 6 NY3d 703 [2006], citations omitted). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring suit. The court 'may also' consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling" (*Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [1st Dept 2006]).

"[T]he unavailability elsewhere of a forum in which the plaintiff may obtain effective

redress and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State ... where 'there are special and unusual circumstances' favoring acceptance of a suit between nonresident parties based on an out-of-state tort" is a factor to which this court has given great weight in balancing the competing interests at bar (*Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense (Varig)*, 22 NY2d 333, 338 [1968]). Nonetheless, even if plaintiff is correct that Dubai is not a viable forum for his claims, that one factor is not determinative. The court may dismiss on grounds of *forum non conveniens* even when plaintiff has no alternative forum available (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984]). On the other hand, the court is bound to exercise "a great[] degree of forbearance in accepting suits which have but minimal contact with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 362 [1972]). "The doctrine [of *forum non conveniens*] rests, in large part, on considerations of public policy and ... our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Nasser v Nasser*, 52 AD3d 306, 308 [1st Dept 2008], citations omitted).

### Conclusion

In view of the foregoing, this court cannot justify burdening the New York courts with a suit about an accident that happened in Dubai without involving any New York residents, particularly since at no point has plaintiff clearly stated that he is not a citizen or resident of Dubai, and as discussed above the court must proceed on the assumption that plaintiff is not a citizen or resident of New York (see *Sweeney v Hertz Corp.*, 250 AD2d 385, 386 [1st Dept 1998]).

Plaintiff has succeeded in showing a colorable claim of personal jurisdiction over all defendants so as to warrant a hearing and discovery on the issue. However, defendants met their heavier burden – showing that even assuming New York had jurisdiction over them the case should be dismissed pursuant to CPLR 327 on the ground of *forum non conveniens*.

Given this determination, it is not necessary to reach the adequacy of plaintiff's service of process on defendants, or the merits of plaintiff's cross-motion to amend the complaint so as to

add more party defendants.

Accordingly, the motions by Atkins (seq. no. 001) and the Jureimah defendants (seq. no. 002) are granted only to the extent they seek to dismiss the complaint on the ground of *forum non conveniens*.

Plaintiff's cross-motion to amend the complaint is denied as moot.

This decision constitutes the order of the court.

DATED: 10/15, 2009

  
\_\_\_\_\_  
J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
OCT 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK