Kalish v HEI Hospitality, LLC
2010 NY Slip Op 30844(U)
April 12, 2010
Supreme Court, New York County
Docket Number: 102657/09
Judge: Joan A. Madden
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SCANNED ON 4/14/2010

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4-14-10

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

PRESENT: Hon Joan A. Madden   PART 11

Index Number : 102657/2009

KALISH,MICHAEL

vs

HEI HOSPITALITY

Sequence Number : 001

DISMISS

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

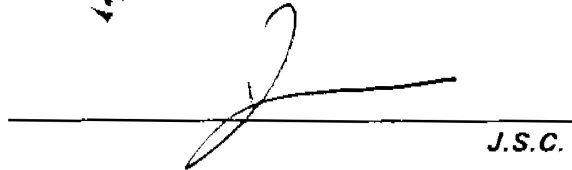
Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed Memorandum Decision and Order.

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

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 12, 2010



J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MICHAEL KALISH,

Plaintiff,

-against-

Index № 102657/09

HEI HOSPITALITY, LLC A/K/A HEI HOTELS & RESORTS, LE MERIDIEN SAN FRANCISCO HOTEL, MERRITT HOSPITALITY AND STARWOOD HOTELS AND RESORTS WORLDWIDE, INC.,

Defendants.

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FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN MADDEN, J.:

Defendants HEI Hospitality, LLC a/k/a HEI Hotels & Resorts, Le Meridien San Francisco Hotel, and Merritt Hospitality move for an order, pursuant to CPLR 327, dismissing the complaint on grounds of forum non conveniens. Plaintiff Michael Kalish (Kalish) opposes the motion and cross-moves for an order precluding defendants from offering any evidence at time of trial of this action based upon their failure to comply with the preliminary conference order of September 24, 2009.

Background

This is a personal injury action in which Kalish alleges that, on April 26, 2007, while a guest at the Le Meridien San Francisco Hotel at 333 Battery Street, San Francisco, California ("the hotel"), he was caused to slip and fall due to a bath mat and/or slippery floor in his hotel room. On or about February 25, 2009, Kalish commenced this action against defendants, who variously own, manage and operate the hotel, by filing his summons and complaint with the New York County Clerk's Office, designating New York as the place of trial.[1] Venue was premised

[1]In June 2009, the parties stipulated to discontinue the action as against Starwood Hotels and Resorts Worldwide, Inc.

upon his residence in New York County (CPLR 503). The complaint alleges that defendants are foreign corporations or liability companies authorized to do business in New York. In their answer, defendants admit that defendant Merritt Hospitality did business in New York, but deny the allegations regarding the authority of the other defendants to do business in New York.[2]

The parties started the discovery process and a preliminary conference order setting forth an agreed-upon schedule for disclosure was completed on or about September 24, 2009. Thereafter, defendants served the instant motion to dismiss the complaint based on forum non conveniens. According to defendants, New York is not the convenient forum to litigate this action because Kalish's accident took place in California and because the immediate non-party witnesses, the hotel and emergency service personnel who were called to the scene, are California residents. Specifically, defendants assert that likely fact witnesses are California residents who will sustain hardship if required to come to New York to testify in this matter. Defendants name hotel operator Lorri Smith (Smith), security guard Peter Towle (Towle) and engineer Kaz Tukuhashi (Tukuhashi) as the hotel employees likely to be witnesses at trial, as well as one or more, as of yet unidentified, members of the hotel's cleaning staff who may be called to testify as to the condition of the subject bathroom's floor, and as to the general cleaning procedures at the hotel.

Defendants identify Smith as the hotel operator who received Kalish's emergency call and who then stayed on the telephone with him until help arrived. Defendants identify both

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[2]Defendants do not submit an affidavit adressing their alleged authority to do business in New York but rely, instead, on their answer. In any event, as indicated herein, defendants do not argue that New York is an inconvenient forum for them but, rather, for the witnesses located in California.

Towle and Tukuhashi as individuals who witnessed Kalish on the bathroom floor after he fell, and who might therefore, be called upon to testify as to what they observed including the condition of the bathroom floor. Defendants state that both of these men have since retired, and would suffer a hardship if required to travel to New York.

Defendants do not submit an affidavit from either Towle or Tukuhashi, but rely on an affidavit from Smith, in which she states:

> 1. I am the hotel operator for the Le Merid[i]en Hotel at 333 Battery Street, San Francisco, California. I have retained this position since the year 2005.
> 2. On April 26, 2007, I received an emergency call from [Kalish] who fell in the bathroom of room 907. He stated he slipped and dislocated his knee and was in a lot of pain.
> 3. I am willing to testify as to my conversation with Mr. Kalish immediately following his fall and my observation on the date of accident.
> 4. I reside in Albany, CA and would be inconvenienced if this matter were to remain in New York.

Defendants further argue that even if all other factors were equal (which they do not concede), a transitory action, such as this, should be tried in the jurisdiction where the cause of action arose, that being in or about San Francisco, California. Additionally, they argue that Kalish is no longer a resident of New York State.

In opposition, Kalish asserts that defendants waived their right to request dismissal based on forum non conveniens grounds by failing to raise it as an affirmative defense in their answer, and by waiting until after substantial discovery had been completed before raising it. With respect to his residency, Kalish explains that, although he currently lives in New Jersey, at the time this action was filed, he was a resident of New York County, living at 424 West End Avenue, New York, New York. As to any hardship caused to defendants' witnesses by having to testify in New York, Kalish argues that defendants' do not demonstrate hardship, just an

unwillingness to travel.

In addition, according to Kalish, although he received emergency room treatment in California, the vast majority of his medical care stemming from his accident in defendants' hotel, was received in New York. He states his intention to call as witnesses both his orthopedist Dr. Michael Kelly (of 210 East 61st Street, New York, NY) who performed his knee surgery at Lenox Hill Hospital in Manhattan, and his physical therapist(s), and asserts that these New York-based medical practitioners would suffer a hardship if required to travel to California to testify.

Finally, Kalish argues that California is not a viable alternative forum as the applicable California statute of limitations (California Code of Civil Procedure § 335.1) has run.

Discussion

The common-law doctrine of forum non conveniens, as codified in CPLR 327, provides, in relevant part:

> (A) [w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

It is well settled that the New York courts are not compelled to retain jurisdiction over causes of action which lack a substantial nexus with New York (*Martin v Mieth*, 35 NY2d 414, 418 [1974]). While no one factor is determinative of the question of whether to retain jurisdiction, factors to be considered include:

> 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. No one factor is controlling

(*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984] [internal citations omitted], cert denied, 469 US 1108 [1985]).

The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice (*see Piper Aircraft Co. v Reyno*, 454 US 235 [1981]; *Capital Currency Exch., N.V. v National Westminster Bank PLC*, 155 F3d 603 [2d Cir 1998], *cert denied* 526 US 1067 [1999]). If the balance of conveniences indicates that trial in plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (*see id.*).

The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation (*Brodherson v V. Ponte & Sons*, 209 AD2d 276, 277 [1st Dept 1994] ["It is well settled that the burden of establishing that New York is an inconvenient forum rests squarely with the party challenging that forum"]). That burden is a difficult one to satisfy. "Generally, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*Anagnostou v Stifel*, 204 AD2d 61, 61 [1st Dept 1994] [citation omitted]); *see also Sweeney v Hertz Corp.*, 250 AD2d 385, 386 [1st Dept 1998] ["It is well settled that a plaintiff's choice of forum should not be disturbed absent a balance of factors strongly favoring the defendants"]).

Moreover, when, as here, the defendant seeks to disturb the plaintiff's choice of forum to a sister state, defendant "bears the burden of clearly showing that [the plaintiff's choice] will not serve to achieve the ends of justice and that [defendant's choice] is better suited to accomplish that end." (*Calla v Shulsky*, 139 Misc 2d 881, 883 [Sup Ct, NY County 1988], *affd* 148 AD2d 60 [1st Dept 1989]).

As a preliminary matter, while motion to dismiss on forum non conveniens grounds have been denied when significant discovery has been conducted or the case is on the trial calendar (*see* e.g. *Intertec Contracting A/S v. Turner,* 6 AD3d 1 [1st Dept 2004]; *Bussanich v United States Lines* 74 AD2d 510 [1st Dept 1980], in this case, discovery is in its early stages, as confirmed by the cross motion in which Kalish charges defendants with failing to provide the discovery outlined in the preliminary conference order. Moreover, contrary to Kalish's argument, forum non conveniens need not be raised as an affirmative defense.

That being said, however, defendants are not entitled to dismissal on forum non conveniens grounds as they have not met their burden of showing that the factors here weigh in favor of moving this action from New York to California. First, defendants have not adequately shown that their witnesses will be inconvenienced by a trial in New York. Notably, rather than producing the sworn affidavits of Towle and Tukuhashi, who purportedly witnessed Kalish on the floor in the bathroom, defendants submit only the affidavit of hotel operator Smith who could testify as to her conversation with Kalish. Smith apparently was not present in his bathroom and cannot offer testimony either as to his condition or the condition of the bathroom mat or floor. In any event, the location of witnesses outside of the state is insufficient alone to warrant dismissal on forum non conveniens grounds, particularly as discovery devices are available to reduce any inconvenience to the witnesses. (*Jones v. Eon Labs, Inc.*, 43 AD3d 711 [1st Dept 2007][denying motion to dismiss complaint on forum non conveniens grounds even though many witnesses reside in Virginia]).

Moreover, that Kalish was treated for his injuries in New York County militates in favor of retaining the action here (*see e.g. Cadet v. Short Line Terminal Agency, Inc.*, 173 AD2d 270,

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271 [1st Dept 1991]; *Moschera v. Muraca*, 148 AD2d 591 [2d Dept 1989]). In addition, defendants' argument that the convenience of liability witnesses takes precedence over the convenience of witnesses who will testify as to damages is not persuasive as the case relied on by defendants concerns the standard for a motion to change venue and not one seeking to dismiss on forum non conveniens grounds (*see Katz v Goodyear Tire & Rubber Co.*, 116 AD2d 506 [1st Dept 1986]). Likewise, defendants' argument that transitory actions belong in the county where they arose is a rule that applies to a motion to change venue and not to dismiss on forum non conveniens grounds (*see Chung v. Kivell*, 57 AD2d 790 [1st Dept 1977]). Furthermore, while defendants, with the exception of defendant Merritt Hospitality, deny in their answer that they do business in New York, defendants do not argue that New York is an inconvenient forum on this basis.

With respect to Kalish's residency, there is no dispute that plaintiff was a resident of New York when the action was commenced and received medical treatment here. Notably, defendants do not argue that it would be any more convenient for them to litigate this matter in New Jersey where Kalish currently resides. In addition, defendants do not dispute that this action would be untimely if commenced in California and thus dismissal of this action would potentially deprive Kalish of a forum for his claims.[3] (*Islamic Republic of Iran v Pahlavi*, 62 NY2d at 478-479). Finally, given the nature of this action, this court will not be unduly burdened by it being litigated here.

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[3]While a motion to dismiss on forum non conveniens grounds can be conditioned on defendants' waiver of the statute of limitations in another forum (*see Brinson v. Chyrsler Fin.*, 43 AD3d 846, 848 [2d Dept 2007]), in this case as there is a sufficient nexus between this action and New York, such conditional dismissal which would delay Kalish's prosecution of this action is not warranted.

Accordingly, the motion to dismiss on forum non conveniens grounds must be denied.

Kalish also cross-moves for an order precluding defendants from offering evidence at trial based upon their alleged failure to comply with the preliminary conference order which directs defendants to provide document discovery. Defendants submit an affirmation in opposition stating, at paragraph four; "The Hotel's response to the Preliminary Conference Orders is annexed as Exhibit "A." Annexed to Exhibit "A," however, is a copy of the preliminary conference order, rather than a copy of the defendants' response. That being said, however, any delay by defendants in producing the requested discovery does not warrant the sanction of preclusion at this juncture (CPLR 3126), and the cross motion is granted only to the extent of directing that if defendants have not already done so, that they provide the document response at issue within fifteen days of the date of this order, a copy of which is being mailed by my chambers to counsel for the parties.

Accordingly, it is

ORDERED that the motion to dismiss this action based on forum non conveniens grounds is denied; and it is further

ORDERED that the cross-motion is granted only to the extent of directing that defendants provide the documents ordered to be produced in the preliminary conference order dated September 24, 2009; and it is further

ORDERED that the parties shall appear for a compliance conference on May 6, 2010 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, New York.

Dated: April 12, 2010

J.S.C.

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