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

PRESENT: Hon. HON. CAROL EDMEAD PART 35
Justice

HON. CAROL EDMEAD

Heather Krentsel

-v-

Loews Miami Beach Hotel

INDEX NO. 103823/08

MOTION DATE

MOTION SEQ. NO. 003

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel Operating Company, Inc. to consolidate this action, Index No. 103823/08, with the action entitled *Heather Krentsel v Loews Hotels Holding Corporation*, Index No. 113695/2009 is granted to the extent that plaintiff shall serve the Clerk and all parties with Justice Paul Wooten's order in order to effectuate the consolidation previously granted therein; and it is further

ORDERED that upon receipt of a copy of this order, **the Clerk shall consolidate the papers in this action, Index No. 103823/08, with the papers in *Heather Krentsel v Loews Hotels Holding Corporation*, Index number 113695/2009, under Index No. 103823/08** in accordance with Justice Wooten's March 23, 2010 order in the action under Index No. 113695/2009,, and the consolidated action shall bear the following caption in accordance with the order of Justice Wooten:

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HEATHER KRENTSEL,

Plaintiff,

-against-

LOEWS MIAMI BEACH HOTEL OPERATING COMPANY, INC., and LOEWS HOTELS HOLDING CORPORATION,

Defendants.

----------x

FILED
MAY 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Index No. 103823/08

Dated and it is further

ENTER: Page 1 of 2, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel Operating Company, Inc. pursuant to CPLR §3212 (e) for partial summary judgment on the issue of damages is granted as to Loews Miami Beach Hotel Operating Company, Inc., and is denied as to Loews Hotels Holding Corporation; and it is further

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel Operating Company, Inc. for a protective order pursuant to CPLR §3103 denying plaintiff further discovery is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order striking the answers of defendants Loews Miami Beach Hotel Operating Company, Inc. and Loews Hotels Holding Corporation is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order applying New York law to the action against defendant Loews Hotels Holding Corporation is granted to the extent that New York law shall apply to the issue of damages as against said defendant; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order imposing sanctions on the attorneys for defendants in the amount of $3,500.00 is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order pursuant to 22 NYCRR 130-1.1 awarding plaintiff attorney's fees in the amount of $2,500.00 is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon all parties, the Trial Support Office and the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation.

This constitutes the decision and order of the Court.

Dated 5/10/10 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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HEATHER KRENTSEL,

Plaintiff,

Index No. 103823/08

-against-

LOEWS MIAMI BEACH HOTEL OPERATING COMPANY, INC. and LOEWS HOTELS HOLDING CORPORATION,

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover damages for lost property, Loews Miami Beach Hotel Operating Company, Inc. ("Miami Hotel") now moves for an order pursuant to CPLR §602 consolidating this action with another related action, pursuant to CPLR §3212 granting partial summary judgment on the issue of damages and setting the amount of damages at $500.00, and pursuant to CPLR §3103 granting a protective order denying further discovery to plaintiff.

Factual Background

Plaintiff Heather Krentsel ("plaintiff") is a resident of New York. Loews Hotels Holding Corporation ("Loews Holding") is a Delaware corporation with its principal place of business in New York. The Miami Hotel, is a Delaware corporation operating Miami Beach Hotel.

Plaintiff seeks to recover damages against Loews Holding and its subsidiary Miami Hotel (collectively, "defendants") for two rings, her wedding band and engagement ring, allegedly taken from her hotel room while a guest at the Miami Beach Hotel in Florida. In her Bill of Particulars, plaintiff claims the value of the rings as $10,000.00 and $60,000.00 respectively.

Plaintiff stated in the police and hotel incident reports that on February 15, 2008, she placed both rings on the top of the room TV or cabinet. She left the room the next morning, leaving the rings where she had placed them the previous night, but did not realize that the rings were missing until the next day, February 17, 2008. The rings were uninsured and plaintiff is unable to furnish receipts for them. Plaintiff alleges that defendants were negligent in maintenance and operation of the hotel and hiring and supervision of their employees in that it permitted an unlawful entry into plaintiff's room and commitment of theft thereby causing monetary damages to plaintiff.

Plaintiff initially commenced the instant action against Loews Holding ("Action 1"). According to plaintiff, in connection with settlement negotiations, on December 19, 2008, the parties stipulated to amend the caption to substitute Miami Hotel, the entity owning and operating the premises, as a defendant.[1]

Thereafter, on or about April 20, 2009, Miami Hotel moved to dismiss plaintiff's complaint on the ground that New York is not a convenient forum, and, in the alternative, for an order holding that Florida substantive law applies to the action. The Court (Justice Walter Tolub ("Judge Tolub")) denied dismissal, but held that Florida law applies. Plaintiff moved to renew/reargue the motion, seeking to have New York law apply to this action, and to amend the caption to substitute Loews Holding back into the action; plaintiff also commenced a separate action against Loews Holding (Index No. 113695/09) ("Action 2"), making the same allegations as in the complaint in Action 1. By Order dated October 1, 2009, Judge Tolub denied plaintiff's

[1] According to plaintiff, defendant offered to settle the case if plaintiff agreed to amend the caption naming Miami Hotel as the defendant instead of Loews Holding.

motion for renewal/reargument,[2] and granted plaintiff's motion for substitution to the extent of permitting plaintiff to add Loews Holding as an additional defendant. Loews Holding was not added as a defendant pursuant to Justice Tolub's order; instead, shortly thereafter, Loews Holding moved in Action 2 to consolidate Action 2 with the instant action. Days later, Miami Hotel filed the instant motion to likewise consolidate Action 2 with this action, and for partial summary judgment and a protective order.[3] During the pendency of this motion, Justice Paul Wooten ("Judge Wooten") granted Loews Holdings' motion in Action 2 to consolidate, and amended the caption to include both defendants under the instant action/index number; this action was filed first in time.

In the instant motion, Miami Hotel argues that consolidation is warranted because plaintiff's claims in both actions arise out of the same facts, involve common questions of law and fact and seek the same relief- damages for the lost rings.

In support of partial summary judgment on the issue of damages, Miami Hotel argues that the issue of damages is undisputed as against both defendants since, pursuant to the orders by Judge Tolub, Florida law applies to both defendants, and under the Florida Innkeeper's Statute, section 509.111, the liability of defendants, even if found negligent, is limited to $500.

Defendants further assert that this court should grant a protective order denying plaintiff further discovery because the expenses of complying with plaintiff's discovery demands will significantly exceed the maximum amount of recovery in both actions, *i.e.*, $500.00, available to

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[2] Judge Tolub stated, in pertinent part: that "Plaintiff's motion to apply New York law is denied at this time."

[3] The notice of motion herein contains one caption, which names only one defendant, Miami Hotel. However, the affirmation in support by counsel and the reply papers contain two captions, and refer to "defendants."

her under the applicable Florida law. Defendants contend that plaintiff's insistence on further discovery therefore amounts to harassment.

Plaintiff's Opposition and Cross-Motion

Plaintiff opposes the motion by interposing a cross-motion for an order (1) striking the answer of defendants; (2) applying New York law to Loews Holding; (3) imposing sanctions on the attorneys for the defendants in the amount of $3,500.00, and (4) pursuant to 22 NYCRR 130-1.1, awarding plaintiff attorney's fees in the amount of $2,500.00.

Plaintiff argues that "defendants' motion to consolidate is duplicative" since plaintiff had already made a similar motion which was returnable on December 4, 2009.[4] But, in any event, plaintiff does not oppose the consolidation of the two actions.

Further, plaintiff asserts, that "the defendants' answers" should be stricken because of "the defendant's repeated and willful non-compliance with the plaintiff's discovery demands." Plaintiff asserts that defendant [Miami Hotel] did not comply with any of the six preliminary and/or compliance conference orders.[5] Such non-compliance, without an explanation, amounts to a deliberate delay tactic to avoid the merits of the case, and constitutes willful and contumacious behavior.

Further, plaintiff demands that because defendants' counsel's conduct of non-compliance and misrepresentations to the court is frivolous, defendants' attorneys should be sanctioned and plaintiff's attorneys should be awarded attorney's fees. Plaintiff asserts that, on December 18,

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[4] Plaintiff's cross-motions was filed prior to Judge Wooten's consolidation order.

[5] See exhibits 3 - 9 to cross-motion, orders by Hon. Walter Tolub, dated June 20, 2008; September 19, 2008; November 21, 2008; March 13, 2009; September 4, 2009 and November 13, 2009.

2008, Loews Holding's counsel offered to settle the case in exchange for plaintiff's changing the caption in Action 1 naming Miami Hotel as the defendant. However, plaintiff claims that Loews Holding has not kept its promise, and instead of settling the case, filed a motion to dismiss.

Plaintiff also argues that the court should deny the branch Miami Hotel's motion for a protective order because "no discovery has been exchanged by the moving defendants."

Further, plaintiff argues that in Action 2, since Loews Holding is a Delaware corporation having a principal place of business in New York, both plaintiff and Loews Holding are domiciliaries of New York. Since these parties are not domiciliaries of different states, no conflict of laws exists, and the court should apply New York law. And, even if the court finds there is a conflict of laws and applies an interest analysis under the Court of Appeals' *Neumeier v Kushner* (31 NY2d 121 [1972]), the first of the three *Neumeier* rules mandates that where both parties share the same domicile, the law of that state controls. Thus, plaintiff contends, Florida Innkeepers Statute, section 509.111, limiting damages to five hundred dollars, does not apply to Loews Holding. However, plaintiff concedes that the portion of the motion seeking partial summary judgment against Miami Hotel, should be granted.

Defendants' Opposition to Cross-Motion

Defendants oppose the cross-motion by arguing that (1) the cross-motion does not identify which of the two defendants' answer should be stricken; (2) the prior discovery court orders relate only to defendant Miami Hotel, and Miami Hotel did respond to plaintiff's discovery demands on December 10, 2009[6], as evidenced by exhibit A to plaintiff's opposition;

[6] Defendants sent their response to combined demands on December 10, 2009, the day after plaintiff filed its cross-motion on December 9, 2009.

(3) defendants' alleged delaying of the litigation process has no basis as first, Miami Hotel's motion to dismiss filed in April 2009 stayed all discovery proceedings in Action 1, and second, plaintiff's motion in Action 1 to substitute Loews Holding for Miami Hotel as a defendant made Miami Hotel's response to discovery demands unnecessary. As to Action 2, shortly after plaintiff sent her discovery demands to Loews Holding, defendants filed the present motion seeking to prevent further discovery. Defendants maintain that since plaintiff had conceded in her opposition that damages as against Miami Hotel should be limited to five hundred dollars, and since Miami Hotel did respond to plaintiff's discovery demands, there is no need for further discovery and the court should deny the cross-motion seeking to strike Miami Hotel's answer.

Further, defendants contend that plaintiff's argument that no conflict of laws exists is flawed in that it fails to recognize that: (1) there is a true conflict between the laws of Florida and New York, as under the New York General Business Law (GBL) §201, the innkeeper, if found negligent, is liable for the entire cost of a guest's lost property; (2) one's domicile is but one factor to be considered in the interest analysis; (3) according to June 28, 2009 order by Hon. W. Tolub, as a matter of public policy, "exposing the defendant to liability under New York law would essentially strip both the New York and Florida statutes of much of their meaning since the purpose of both laws is to limit innkeepers' liability; (4) plaintiff voluntarily traveled to Florida where the alleged incident occurred, subjecting herself to the laws of that state; (5) Loews Holding is not a primary defendant but a parent corporation of Miami Hotel, and therefore, Loews Holding may only be held vicariously liable, *i.e.*, through the actions of the real party in interest, Miami Hotel. Thus, it is argued that Loews Holding's domicile should not be determinative in which state's law governs. Defendants also note that, in proceeding with Action

2, plaintiff will need to establish sufficient facts to "pierce the corporate veil"; the *Neumeier* rules are not hard and fast rules but rather guiding principles for a certain class of conflict of laws cases, and as the laws in conflict in this action do not merely allocate loss after the tort occurs, but also regulate behavior required of innkeepers as to different standards of conduct, a place of injury test should be applied.

Further, defendants argue that plaintiff's motion for sanctions is undermined by plaintiff's own statement that partial summary judgment against Miami Hotel should be granted. Defendants contest plaintiff's allegations of lying and misstating to the court the status of the pending discovery. Counsel for defendants denies making a misrepresentation to plaintiff's counsel on December 18, 2008, about the potential settlement in return for plaintiff's amending the caption of Action 1, claiming that, while counsel had general discussions on this subject, neither plaintiff demanded the settlement, nor defendant ever made an offer of the settlement prior to executing the stipulation. Similarly, defendants' counsel denies making misrepresentations at the September 4, 2009 compliance conference to the court in Action 1 about the status of discovery.[7] Defendant requests that the court issue an order "specifically finding that plaintiff's allegations of [defendant's] misconduct have no support in the motion" (id., ¶ 33).

Further, defendants contend that plaintiff's motion seeking attorney's fees pursuant to 22

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[7] Miami Hotel argues that: (1) had it improperly represented to the court that discovery was exchanged, the court would not have issued the order to comply with discovery demands in Action 1 (McGinnis Affirmation, ¶ 30); (2) at the time of the subject discovery order, a motion by plaintiff was pending seeking to substitute a second defendant, Loews Holding, instead of Miami Hotel, which, if substituted, would not have been a party to the subject discovery order. Further, defendant asserts that plaintiff's counsel improperly implied on numerous occasions to significantly expand their discovery demands, thereby forcing defendants to incur extensive litigation expenses and settle for about thirty thousand dollars (id., ¶ 32).

NYCRR 130 -1.1 should be denied because the two motions are based on substantive grounds - choice of law and summary judgment and, plaintiff conceded that the part of the present motion for summary judgment against Miami Hotel should be granted. Defendants contend that the request for a protective order is supported by the facts and the applicable case law.

In reply in further support of its motion, Miami Hotel reiterates the arguments contained in its opposition to plaintiff's cross-motion.

Discussion

Consolidation

The court notes that Miami's Hotel's motion to consolidate is indeed duplicative. By the March 23, 2010 order of Hon. Paul Wooten, Action 1 and Action 2 were consolidated under Index No. 103823/08. The March 23, 2010 order also directed that the new caption bear the names of both defendants, and that the Clerk consolidate the papers in both actions upon receipt of a copy of said order. However, the Clerk was directed to consolidate both actions upon service upon it of the March 23, 2010, which apparently was not done. Thus, although the actions were previously consolidated, the Court grants this branch of defendants' motion to consolidate to the extent that plaintiff shall serve the Clerk and all parties with Judge Wooten's order in order to effectuate the consolidation.

Partial Summary Judgment

CPLR §3212 (e) states in relevant part:

> [P]artial summary judgment may be granted as to one or more causes of action, or part thereof, in favor one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:
>
> 1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

Pursuant to CPLR §3212 (b), a motion for summary judgment shall be granted if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law, in directing judgment in favor of any party (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law [and] demonstrate[s] the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]).

As plaintiff conceded to partial summary judgment on the issue of damages as against Miami Hotel, that branch of motion by defendants as against defendant Miami Hotel is granted and damages shall be limited to five hundred dollars. However, for the reasons that follow, partial summary judgment on the issue of damages as against Loews Holding is denied.

Before deciding whether Loews Holding is entitled to summary judgment on the issue of damages, the court must first determine which of the following laws governing innkeepers liability for property loss applies: Florida, where the alleged loss took place, or New York, where

both parties reside.[8]

"The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Insurance Co. [Stolarz]*, 81 NY2d 219, 223 [1993]).

Once the actual conflict is established, the court must turn to consideration of which jurisdiction, "because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006], citing *Babcock v Jackson*, 12 NY2d 473, 481 [1963] and *Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]). Two separate inquiries are thereby required to determine the greater interest, also known as the "interest analysis test": (1) what are the significant contacts and in which jurisdiction they are located, and (2) whether the purpose of the law is to regulate conduct or allocate loss (*Padulla v Lilarn Properties Corp.*, 84 NY2d 519, 521 [1994], *citing Schultz v Boy Scouts*, 65 NY2d 189, 197 [1985]; *K.T. v Dash*, at 111). If the purpose the competing laws is to allocate loss and the parties are both New Yorkers, "there is often little reason to apply another jurisdiction's loss allocation rules"; if their purpose is to regulate conduct, "the law of the jurisdiction where the tort occurred will *generally* apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*K.T. v Dash,* at 111, *citing Cooney v Osgood Mach., supra* [emphasis added]).

In order to establish the initial requirement that an actual conflict exists, Loews Holding

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[8]The domicile of a corporation for the choice of law purposes is the state where it maintains its principal place of business (*Elson v Defren*, 283 AD2d 109 [1st Dept 2001]; *Ulric v Insurance Co. of State of Penn.*, 259 AD2d 1, 4-5 [1st Dept 1999] lv denied 94 NY2d 763 [2000]). Loews Holding, incorporated in Delaware, maintains its principal place of business and has its corporate offices in New York. Thus, New York is its domicile for the choice of law purposes.

relies on the Florida and New York statutes governing innkeepers' liability for loss of guests' property. Florida Innkeepers Statute provides that:

> The operator of a public lodging establishment is not liable or responsible to any guest for the loss of . . . goods or other property, . . . , unless such loss occurred as the proximate result of fault or negligence of such operator, and in case of fault or negligence, the operator is not liable for a greater sum than $500. . . .
> (Fla. Stat. §509.111 (2)).

The applicable New York law provides:

> No hotel or motel keeper . . . shall be liable for damage or loss of . . . personal property in [a guest's] room . . . for any sum exceeding five hundred dollars unless such loss occurred through the fault or negligence of such keeper. . . .
> (GBL §201).

Consequently, under the Florida law, even if found negligent, Loews Holding would only be responsible for a maximum of $500.00, leaving plaintiff to bear the loss of the rings' remaining value. Conversely, under New York law, Lowes Holding, if found negligent, would bear the entire cost of the missing rings. This disparity underscores the conclusion that a conflict exists between New York and Florida law concerning the limitation on liability of innkeepers.

Next, in applying the interest analysis test, the court must determine "what are the significant contacts and in which jurisdiction they are located" (*Padula*, supra). In this case, the significant contacts are the domiciles of plaintiff and Loews Holding (New York) and the place of the tort (Florida).

The court must then determine whether the relevant innkeeper statutes are primarily conduct-regulating or loss-allocating. Where the laws are, as here, loss-allocating (limitation on damages, contribution, immunities, *etc.*), and the parties are co-domiciliaries of New York, courts, following the mandate of the Court of Appeals, apply the first of the three *Neumeier*

rules,[9] which states that the law of the parties' common domicile controls as it has the greatest interest (*Miller v Bombardier,* 872 F Supp 114, 118 [SDNY 1995] [limitation of non-economic damages rule]; *Cooney v Osgood Mach.* [contribution], *Schultz v Boy Scouts* [vicarious liability]). Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring (*Curley v AMR Corp.*, 153 F3d 5 [2d Cir 1998] [negligence and false imprisonment]; *Universal Marine Medical Supply, Inc.v Lovecchio*, 8 F Supp2d 214 [EDNY 1998] [tortious interference with contractual relations]).

In *Marillo v Benjamin Moore & Co.* (32 AD3d 1313 [4th Dept 2006]), New York plaintiff was injured while unloading a truck of the defendant in Ontario, Canada. New York and Canada laws conflicted with respect to the cap on the amount of non-economic damages. The court ruled that New York law rather than Ontario law applies to plaintiff's claim because Ontario had no interest in applying its limitation on damages law in an action between non-domiciliaries.

New York accepts and applies *depecage* principle under which a conflict resolution is made on per issue basis, with the potential that a different law on different issues can apply in the same case *(Babcock v Jackson*, 12 NY2d 473, 484 [there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction]; *see also Fieger v Pitney Bowes Credit Corp.*, 251 F3d 386, 397 [2d Cir 2001]).

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[9] The "second Neumeier rule addresses 'true' conflicts, where the parties are domiciled in different States and the local law favors the respective domiciliary" (*Miller v Bombardier, Inc.*, 872 FSupp 114 [SDNY1995]). The "third Neumeier rule, applicable to other split-domicilee cases, provides that the usually governing law will be that of the place where the accident occurred, unless 'displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.'" This rule, too, generally uses the place of injury, or locus, as the determining factor..." (*Cooney v Osgood Machinery, Inc.*, 81 NY2d 66 [1993]). The second and third Neumeir rules are inapplicable here as they concern situations where parties are domiciled in different states (*see Neumeir v Kuehner*, 31 NY2d 21 [1972])

In *Moon v Plymouth Rock Corp.* (180 Misc 2d 676 [Sup Ct Queens County 1999]), plaintiff, a New York resident, was injured on Connecticut highway when a truck owned by defendant New York corporation, splashed slush onto his windshield, causing him to loose control of his vehicle. The court found that the statute governing fenders and wheel protectors, was conduct-regulating, therefore the law of Connecticut, the situs of the accident, applied to the issues of defendant's duty of care to other drivers. With respect to the issue of comparative negligence, the court found that this was the question of loss allocation, and New York, the domicile of the plaintiff and the state of incorporation of defendant, had a greater interest, and therefore, New York statute was applicable to this issue.

The Court notes that here, the relevant statutory provisions embody both conduct-regulating and loss-allocating functions. However, the statutes seek mainly to limit the innkeepers' liability for their guests' property loss, while conditioning that limitation on the absence of innkeepers' negligence. Florida, the place of the alleged loss, has a greater interest in applying its law as to the standard of conduct of hotel innkeepers.

With respect to the issue of limitation of damages, however, the court finds that New York, the domicile of the plaintiff and the state of principal place of business of Loews Holding, has a greater interest in allocating plaintiff's damages, while Florida has no interest in applying its limitation on damages law in an action between the two New York domiciliaries.

Accordingly, the court holds that New York law applies to plaintiff's claim for damages as against Loews Holding and the motion for partial summary judgment on the issue of damages is denied.

Protective Order Denying Further Discovery

Since the court concludes that Florida Innkeepers Statute, Section 509.111(2) does not apply as against Loews Holding on the issue of damages, the relief sought by defendants in precluding plaintiff from further discovery on the ground that the costs of discovery exceeds the amount recoverable by plaintiff, lacks merit. Thus, the branch of Miami Hotel's motion for protective order is denied.

Plaintiff's Cross-Motion

Plaintiff moves for an order (1) striking the answer of defendants[10]; (2) applying New York law to Loews Holding; (3) imposing sanctions on the attorneys for the defendant in the amount of three thousand five hundred dollars, and (4) pursuant to 22 NYCRR 130-1.1, awarding plaintiff's attorney's fees in the amount of $2,500.00.

"[S]triking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith, which must be affirmatively established by the moving party" (*Palmenta v Columbia University*, 266 AD2d 90 [1st Dept 1999]; *Conciatori v Port Auth. of N.Y. & N.J.*, 43 AD3d 501, 504 [2d Dept 2007]), whereupon which the burden shifts to the nonmoving party to establish a reasonable excuse, with appropriate findings made by the court.

As to Miami Hotel, plaintiff failed to make such "clear showing" of willfulness or bad faith. Furthermore, even assuming that plaintiff met her initial burden of showing that the Miami Hotel's conduct was willful, defendants offered a reasonable excuse for their failure to comply

[10] Although plaintiff uses "defendant" and "defendants" interchangeably in the portion of her cross-motion to strike the answer, the sole defendant in this action at the time the cross-motion was made was defendant Miami Hotel.

with discovery orders (*see Islar v New York City Bd. of Educ.*, 64 AD3d 405 [1st Dept 2009]; *Pezhman v City of New York*, 57 AD3d 326 [1st Dept 2008]). The record shows that the prior four discovery court orders related to Action 1 against Miami Hotel which, albeit belatedly, did respond to plaintiff's combined discovery demands.[11] This further undermines the notion that defendants' conduct was willful or contumacious (*Art4All, Ltd. v Hancock*, 54 AD3d 286 [1st Dept 2008]; *Davis v Exxon Corp.*, 216 AD2d 134 [1st Dept 1995]). Further, defendants established a reasonable excuse for their failure to comply with discovery orders: the original defendant in Action 1, Loews Holding, explained that it did not have in its possession the names and last known addressed of the three hundred employees of the hotel, and that, because defendant relied on the Florida Innkeepers Statute limiting damages to $500.00, the copying expenses alone of the requested documents would significantly exceed the amount of recovery. Further, motion to dismiss by the substituted defendant in Action 1, Miami Hotel, filed on or about April 20, 2009, stayed all the discovery proceedings in Action 1, and, the motion by plaintiff to reargue in Action 1 seeking to substitute Loews Holding for Miami Hotel as a defendant restarted the discovery process, requiring that the new defendant respond to the demands.

As to Loews Holding's non-compliance, plaintiff failed to affirmatively establish that the conduct by Loews Holding was willful, contumacious, or in bad faith. Reviewing the record, only eleven days passed from November 9, 2009, when plaintiff sent her discovery demands to Loews Holding, to the date of the present motion for preclusion of further discovery on

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[11] Plaintiff filed the Notice of Cross-Motion on December 9, 2009, one day before defendants sent their response to combined discovery demands on December 10, 2009.

November 20, 2009; and only seven days passed since the compliance conference order was issued on November 13, 2009.

Accordingly, contrary to plaintiff's contention, the record does not support the extreme relief requested by plaintiff against either of the defendants. Thus, the branch of plaintiff's cross-motion to strike the answer of defendants is denied.

Application of New York Law

With respect to the portion of the cross-motion seeking to apply New York law, as explained above, New York law applies as against Lowes Holding as to the issue of damages, while the issue of negligence, if any, will be governed by Florida law.

Sanctions and Attorneys' Fees

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1(c) states that conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including

the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

With respect to "successive and frivolous motions, the imposition of sanctions involves a . . . persistent pattern of repetitive or meritless motions" (*Sarkar v Pathak*, 67 AD3d 606 [1st Dept 2009]). Here, Miami Hotel made only two motions, one to dismiss based on *forum nonconvenience* and to apply Florida law and the present motion for partial summary judgment. The court finds that neither of these motions is frivolous. The Court granted the portion of the first motion which sought to apply Florida law and denied the portion based on forum inconvenience. There is no evidence in the record that defendants' counsel made material misstatements or advanced incredible legal arguments, especially since Florida is the place where the alleged loss occurred. As explained above, such conduct, coupled with the reasonable explanation for the delay in complying with plaintiff's discovery demands or prior discovery orders did not rise to the level "frivolous" conduct so as to warrant the imposition of sanctions pursuant to 22 NYCRR 130-1.1(c)). Further, defendants, although belatedly, responded to plaintiff's combined discovery demands on December 10, 2009 (*Davis v Exxon Corp.*, 216 AD2d 134 [1st Dept 1995]). Therefore, the portions of plaintiff's cross-motion for sanctions and attorney's fees are denied.

Conclusion

Accordingly, it is hereby

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel Operating Company, Inc. to consolidate this action, Index No. 103823/08, with the action

entitled *Heather Krentsel v Loews Hotels Holding Corporation*, Index No. 113695/2009 is granted to the extent that plaintiff shall serve the Clerk and all parties with Judge Wooten's order in order to effectuate the consolidation previously granted therein; and it is further

ORDERED that upon receipt of a copy of this order, **the Clerk shall consolidate the papers in this action, Index No. 103823/08, with the papers in *Heather Krentsel v Loews Hotels Holding Corporation*, Index number 113695/2009, under Index No. 103823/08** in accordance with the order of Justice Paul Wooten in the action under Index No. 113695/2009, dated March 23, 2010, and the consolidated action shall bear the following caption in accordance with the order of Justice Paul Wooten:

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HEATHER KRENTSEL,

Plaintiff, Index No. 103823/08

-against-

LOEWS MIAMI BEACH HOTEL
OPERATING COMPANY, INC., and
LOEWS HOTELS HOLDING
CORPORATION,

Defendants.
----------x

and it is further

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel Operating Company, Inc. pursuant to CPLR §3212 (e) for partial summary judgment on the issue of damages is granted as to Loews Miami Beach Hotel Operating Company, Inc., and is denied as to Loews Hotels Holding Corporation; and it is further

ORDERED that the branch of the motion by defendant Loews Miami Beach Hotel

Operating Company, Inc. for a protective order pursuant to CPLR §3103 denying plaintiff further discovery is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order striking the answers of defendants Loews Miami Beach Hotel Operating Company, Inc. and Loews Hotels Holding Corporation is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order applying New York law to the action against defendant Loews Hotels Holding Corporation is granted to the extent that New York law shall apply to the issue of damages as against said defendant; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order imposing sanctions on the attorneys for defendants in the amount of $3,500.00 is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion for an order pursuant to 22 NYCRR 130-1.1 awarding plaintiff attorney's fees in the amount of $2,500.00 is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon all parties, the Trial Support Office and the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation.

This constitutes the decision and order of the Court.

Dated: May 10, 2010

Hon. Carol R. Edmead, J.S.C.