

**Jeffers v Best W. Intl., Inc.**

2010 NY Slip Op 31521(U)

May 27, 2010

Supreme Court, New York County

Docket Number: 108233/09

Judge: Louis B. York

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*2  
p.e.s*

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

PRESENT: LOUIS B. YORK

PART 2

Index Number : 108233/2009 J.S.C.

JEFFERS, MYRNA

INDEX NO. \_\_\_\_\_

vs  
BEST WESTERN INTERNATIONAL

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DISMISS

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

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

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

**FILED**  
JUN 02 2010  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 5/27/10

*Luy*  
\_\_\_\_\_  
J.S.C.

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 : IAS PART 2

----- X  
MYRNA JEFFERS, MYRNA JEFFERS as  
Guardian for SABRINA BERKO and SHARON  
BERKO, both minors, and SAMUEL K. BERKO,

Plaintiffs,

INDEX NO.  
108233/09

-against-

BEST WESTERN INTERNATIONAL, INC.,  
JAI GANESHA ENTERPRISES, INC., d/b/a  
BEST WESTERN WINDER HOTEL,

Defendants.

**FILED**  
JUN 02 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

----- X  
LOUIS B. YORK, J.:

Defendants move to dismiss this action as against defendant Jai Ganesha Enterprises, Inc. ("Jai"), d/b/a Best Western Winder Hotel ("Best Western Winder"), or, alternatively, to "vacate the service of the [s]ummons and [c]omplaint" on the ground that Jai does not do business in New York state and is therefore "not subject to service of process" within this state. No relief is sought with respect to co-defendant Best Western International, Inc. ("Best Western").

This action was brought to recover \$5,000,000 in compensatory and punitive damages for personal and economic injuries allegedly sustained by plaintiffs as a result of being bitten by bedbugs during a two-night stay at Best Western Winder in Georgia.

Plaintiffs, a married couple and their two minor children, are residents of an unspecified county in New York state (see defendants' exhibit A, complaint, ¶ 6). The summons

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states that "Plaintiffs resides[sic] at: c/o Kenneth J. Glassman" (their attorney at that time) (*id.*, summons). The complaint, which is not verified by either plaintiffs or their attorney, alleges that Jai is a Georgia corporation (*id.*, complaint, ¶ 8) and Best Western "is an Arizona corporation authorized to do business in New York" (*id.*, ¶ 7) which "maintains New York County as its residence" (*id.*, ¶ 5). Plaintiffs' basis of venue here is that "Defendants transact business in New York County" (*id.*, summons).

Defendants' motion is supported by the affirmation of its current counsel's associate, Eric A. Schnittman, and the affidavit (defendants' exhibit C) of Jai's general manager, Troy Patel ("Patel").

In opposition to defendants' motion, plaintiffs argue that defendants' motion to dismiss must be denied because: (i) they do not seek dismissal under any particular section of law; (ii) they were properly served with process; (iii) the sole basis for the motion is "Patel's conclusory statement that Jai ... does not transact business ... in the State of New York" (Glassman opposing affirmation, ¶ 12); (iv) the only thing suggesting that Best Western Winder does not do sufficient business in New York to warrant jurisdiction under CPLR 301 is Patel's affidavit, and "[w]e have no way of knowing what Patel staes[sic] is true" (*id.*, ¶ 22); (v) there is no proof that Best Western is a not for profit corporation; (vi) Best Western has not submitted its own affidavits in support of the motion to dismiss; and, (vii) defendants' "various demands for discovery" prior to submission of their motion "should be deemed a waiver of the right to contest personal jurisdiction" (*id.*, ¶ 30).

Defendants have not replied to plaintiffs' opposition.

Despite defendants' silence, the court finds all of plaintiffs' arguments unpersuasive.

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It is immaterial that Jai does not specify the particular section of law under which it seeks dismissal of plaintiffs' claims against it. The statute (CPLR 3211) requires identification of the grounds for dismissal, not the corresponding statutory section. "There is no need to cite the specific subdivision pursuant to which relief is sought when the motion papers apprise one of the actual grounds for the application" (*Schenectady International Inc. v Employers Insurance of Wausau*, 245 AD2d 754 [3d Dept 1997]). It is clear from the moving papers that Jai is seeking dismissal pursuant to CPLR 3211(a)[8] based on lack of personal jurisdiction. "While such an omission would, under ordinary circumstances, constitute a waiver of the defense..., the plaintiff, having been adequately apprised of the basis for the motion ... could not have been prejudiced by this defect in form, and his hypertechnical argument must be rejected" (*Farkas v Tarrytown Lumber, Inc.*, 133 AD2d 251, 253 [2d Dept 1987]; see also *Holy Spirit Association for Unification of World Christianity v Harper & Row, Publishers, Inc.*, 101 Misc 2d 30, 33 [Sup Ct, NY Co, Greenfield, J 1979]).

Plaintiffs have succeeded in showing that defendants were properly served with process by adducing evidence that Jai was personally served in Georgia through Patel (see plaintiffs' exhibit C) and non movant Best Western International was served by service on New York's Secretary of State pursuant to Business Corporation Law § 306 (*id.*). Although defendants' answer (at defendants' exhibit B) raises the affirmative defense of lack of personal jurisdiction "due to non-service or improper service of process" (*id.*, ¶ 18), defendants have not contested service in connection with this motion. Nonetheless, valid service does not serve to confer jurisdiction over a party when it cannot be otherwise obtained (see *American National Bank & Trust of New Jersey v Alba*, 111 AD2d 294, 297 [2d Dept 1985]; *Jerge v Potter*, n.o.r.,

2000 WL 1160459, \*2 [WDNY 2000] ["Even if process had been properly served..., plaintiff has not made a *prima facie* showing that [defendant] is subject to personal jurisdiction in New York").

In his supporting affidavit, Patel avers that Jai and Best Western Winder do not transact sufficient business in New York to warrant the assertion of personal jurisdiction over them. Plaintiffs argue that this evidence must be ignored because Patel's statements are conclusory and his affidavit is uncorroborated. These arguments are misguided. The burden of proving jurisdiction is upon party asserting it (see *Preferred Electric & Wire Corp. v Duracraft Products, Inc.*, 114 AD2d 407 [2d Dept 1985]), and when challenged, that party must prove jurisdiction by a preponderance of the evidence (see *Green Point Savings Bank v Taylor*, 92 AD2d 910 [2d Dept 1983]). Here, defendants have submitted sufficient evidence countering plaintiffs' claim of jurisdiction to meet their moving burden; plaintiffs have offered no evidence at all, not even a verified complaint or the verified bill of particulars demanded by defendants. Under CPLR 301 plaintiffs have the burden of proving defendants' activities meet the "doing business in state" threshold for assertion of personal jurisdiction (*Bialek v Racal-Milgo, Inc.*, 545 F Supp 25 [SDNY 1982]; *Charles Abel, Ltd. v School Pictures, Inc.*, 40 AD2d 944 [4th Dept 1972]). They have not done so.

Other than the unsupported conjecture that Jai does business in New York, plaintiffs' only basis for the assertion of jurisdiction over movants is Best Western's marketing in New York and on the internet of Jai's Best Western Winder. This has been held insufficient to constitute "doing business" in New York so as to confer jurisdiction pursuant to CPLR 301 (*King v Best Western Country Inn*, 138 FRD 39, 41-42 [SDNY 1991]). Mere solicitation of New York

customers is also insufficient (see *Laufer v Ostrow*, 55 NY2d 305, 310 [1982]). A reservation made in New York could constitute the transaction of business required for jurisdiction under CPLR 302, but only with respect to claims arising out of that reservations call, which do not include a tort occurring in a foreign hotel (*id.* at 42, citing *Frummer v Hilton Hotels International, Inc.*, 18 NY2d 533, 536 [1967], remittitur amended 20 NY2d 737 [1967], cert den 389 US 923 [1967]; see also *Tese-Milner v Ad EFX Promotions, Inc.*, n.o.r., 2007 WL 196866, \*5-6 [SDNY 2007]). Best Western is Best Western Winder's franchisor, not its agent (see *ibid.*) or its *alter ego* (see *Best Western International, Inc. v CSI International Corp.*, n.o.r., 1994 WL 465905, \*3-4 [SDNY 1994]).

Even assuming *arguendo* that Best Western acted as Best Western Winder's agent in New York, plaintiffs have failed to establish jurisdiction over Jai based on Best Western's activities. "The decisive test ... is whether the local agent does all the business which the [foreign defendant] could do were it here by its own officials.... [or put another way,] provides services beyond mere solicitation ... sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services" (*I. Oliver Engebretson, Inc. v Aruba Palm Beach Hotel & Casino*, 587 F Supp 844, 850-851 [SDNY 1984]). There is no indication that this is the situation in the case at bar.

Neither is plaintiffs' argument that Best Western has not proven it is a not-for-profit corporation persuasive. Not only is such fact totally immaterial to the motion at bar, which does not seek dismissal of the complaint against Best Western, but a federal court in this state has held that "Best Western is an Arizona Not for Profit corporation which franchises out its name and

7] other services to independently owned hotels, motels, and resorts. It does not own, operate, or lease any properties, but provides its members with the support needed to compete with larger chain hotels and motels through services such as the use of name and logo, reservation system, advertising, and other support services" (*P and J G Enterprises, Inc. v Best Western International, Inc.*, 845 F Supp 84, 85 [NDNY 1994]). Best Western's failure to submit its own affidavits in support of the motion is similarly irrelevant. They have no need to do because they do not seek any relief on their own behalf.

Finally, plaintiffs' waiver argument is also unavailing. Defendants served a verified answer (at defendants' exhibit B) denying the jurisdictional allegations made in the complaint (¶¶ 2, 4) about defendants. The answer (¶ 24), albeit tentatively, also asserts as an affirmative defense that "[u]pon information and belief there is no basis for personal jurisdiction over these defendants." Along with their answer, defendants also served various discovery demands and notices of examination before trial (see defendants' exhibit B). Contrary to plaintiffs' contention, these demands do not effect a waiver of defendants' jurisdictional defense. An affirmative defense of lack of personal jurisdiction can be asserted simultaneously with a defense on the merits, "[t]hus, it cannot be said that the defendant's participation in discovery ... constituted a waiver of lack of personal jurisdiction" (*Beris v Miller*, 128 AD2d 822, 822 [2d Dept 1987], lv den 70 NY2d 610 [1987]), since discovery "*a fortiori*, preparation for a defense on the merits, cannot constitute a waiver of a jurisdictional objection properly interposed in the answer" (*Ortiz v Booth Memorial Medical Center*, 94 AD2d 698, 699 [2d Dept 1983]).

Accordingly, it is

**ORDERED** that defendants' motion is granted in its entirety; and it is further

**ORDERED** that the complaint against Jai Ganesha Enterprises, Inc., d/b/a Best Western Winder Hotel is severed and dismissed; and it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment accordingly; and it is further

**ORDERED** that this action continues against the remaining defendant.

DATED: *May 27*, 2010

*Ley*  
\_\_\_\_\_  
J.S.C.

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

**FILED**  
JUN 02 2010  
NEW YORK  
COUNTY CLERKS OFFICE