

Lavin v Kerzner Intl. Resorts, Inc.

2010 NY Slip Op 31848(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 108209/09

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

MARY ANNE LAVIN and GERALD LAVIN,

Plaintiffs,

-against-

INDEX NO. 108209/09

MOTION SEQ. NO. 001

**KERZNER INTERNATIONAL RESORTS, INC.,
KERZNER INTERNATIONAL NORTH AMERICA,
INC., KERZNER NEW YORK, INC., KERZNER
INTERNATIONAL HOLDINGS LIMITED, its
subsidiaries and affiliates at every tier, including
without limitation, KERZNER INTERNATIONAL
LIMITED, KERZNER INTERNATIONAL BAHAMAS
LIMITED, ATLANTIS HOLDINGS (BAHAMAS)
LIMITED, OCEAN CLUB HOLDINGS LIMITED,
PARADISE ISLAND LIMITED, ISLAND HOTEL
COMPANY LIMITED, PARADISE ENTERPRISE
LIMITED and "ATLANTIS RESORT & CASINO",**

Defendants.

FILED
JUL 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 - 5 were considered on this motion to/for dismiss/summary judgment:

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

1-3
4
5

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided to the extent set forth below.

This personal injury action stems from an incident which allegedly occurred at defendants' property known as Atlantis Luxury Resort and Casino (the "Resort") on Paradise Island in the Bahamas on June 9, 2008. While staying and vacationing at the Resort, plaintiff was allegedly injured when her leg was pulled into an open drain in one of the Resort's water ride.

Defendants Atlantis Holdings (Bahamas) Limited and Island Hotel Company Limited (collectively, the "Atlantis Defendants") now move to dismiss the action against them for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8). Also, the remaining defendants (collectively, the

"Kerzner Defendants") move for summary judgment, pursuant to CPLR 3212, dismissing the complaint as to them.

Motion to Dismiss the Atlantis Defendants

The Atlantis Defendants move to dismiss the complaint, pursuant to CPLR 3211(a)(8), asserting that there is no personal jurisdiction. On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88. Once a defendant raises lack of personal jurisdiction as a defense and moves to dismiss, the plaintiff has the burden of proving a basis of in personam jurisdiction through sufficient evidence, including affidavits and relevant documents.

The general standard for personal jurisdiction over foreign corporations, like the Atlantis Defendants, requires "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v State of Washington, Office of Unemployment Comp. and Placement*, 326 US 310, 316 (1945) (internal quotation omitted); *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291-92 (1980). A foreign corporation is "present" within this state, for the purpose of jurisdiction pursuant to CPLR 301, "if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted." *Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 (1980); see also *Bryant v Finnish Nat'l Airline*, 15 NY2d 426, 430 (1965).

Here, plaintiffs have not put forth any sufficient evidence to show that the Atlantis Defendants are "engaged in . . . a continuous and systematic course of doing business" in New York. *Landoil Resources Corp.*, 77 NY2d at 33 (internal quotations omitted). No affidavits have been supplied to demonstrate that there is general jurisdiction in this case. Plaintiffs, instead, focus on the fact that

certain *Kerzner Defendants* are licensed to do business in this state. However, plaintiffs have produced no real evidence to support a showing of the *Atlantis Defendants'* ties to this state, other than making conclusory allegations that the inter-relatedness of the defendants satisfies "the 'agency' theory of doing business to establish personal jurisdiction over defendants." Epstein Affirmation in Opp ¶ 24. Further, plaintiffs' request that the Court "take judicial notice of the fact that . . . defendants' Atlantis Resort spends millions of dollars in print, radio and television advertisements soliciting business within the State of New York" is improper. *Id.* ¶ 25. As such, the motion to dismiss the Atlantis Defendants is granted.

Summary Judgment as to the Kerzner Defendants

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

The Kerzner Defendants argue that summary judgment should be granted because they have no relation to the Atlantis Resort and, thus, cannot be held liable for plaintiffs' injuries. These defendants contend that since the Atlantis Defendants admitted in their answer that they own and operate the subject property where plaintiffs were injured, the case should be dismissed against them.

Plaintiffs contend that summary judgment should be denied as there are issues of fact as to whether the Kerzner Defendants own or operate the Atlantis premises and what relationship, if any, they

have to the Atlantis Defendants. Plaintiffs assert that, at the very least, it is premature to dismiss the case as to these defendants, since there is some evidence that indicates that the Kerzner Defendants are sufficiently related to the Resort.

In support of their motion for summary judgment, and as *prime facie* evidence that summary judgment should be granted, the Kerzner Defendants have submitted an affidavit by Giselle Pyfrom, a Senior Vice President and General Counsel for Kerzner International Bahamas, who attests that: "The [Kerzner] [D]efendants have no connection with that location. None of them own or operate the water slide or resort in question. They have no ownership interest in the location. They do not operate any portion of the location." Giselle Pyfrom Aff ¶ 6.

However, plaintiffs have submitted evidence that various Kerzner Defendants may either own or operate the Resort. Plaintiffs submit a copy of the accident report, taken after plaintiff Mary Anne Lavin was allegedly injured, which was on letterhead by Kerzner International Bahamas Limited. See Scott W. Epstein Affirmation in Opp, Exh B. Further, correspondence sent to plaintiffs regarding the incident was sent on letterhead entitled Kerzner International Bahamas Limited. See *id.*, Exh C. Also, the proposed general release sent to plaintiffs regarding the incident, listed the main party as Kerzner International Holdings Limited. See *id.*, Exh D. Moreover, webpages of various Kerzner Defendants potentially tie them to the Resort as developers, owners and/or operators. See *id.*, Exhs. E-H.

Therefore, as to defendants Kerzner International Resorts, Inc., Kerzner International Holdings Limited, Kerzner International Limited, and Kerzner International Bahamas Limited, there is a genuine issue of fact as to their relationship to the Resort where plaintiff Mary Anne Lavin was injured. Thus, their motion for summary judgment is denied at this juncture as premature. Said defendants may move for such relief, following completion of discovery, if appropriate.

However, as to defendants Kerzner International North America, Inc., Kerzner New York, Inc., Ocean Club Holdings Limited, Paradise Island Limited, Paradise Enterprise Limited and "Atlantis

Resort & Casino," plaintiffs have not submitted any evidence sufficient to rebut the *prima facie* showing by these defendants that summary judgment as to them is warranted as a matter of law. Plaintiffs have not demonstrated that these defendants own, operate or have any ties to the water ride or the Resort sufficient to make them liable for plaintiffs' injuries. Thus, the motion for summary judgment as to these defendants is granted and the complaint is dismissed.

Accordingly, it is

ORDERED that the motion of defendants Atlantis Holdings (Bahamas) Limited and Island Hotel Company Limited to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion for summary judgment is granted solely to the extent that the complaint is dismissed as to defendants Kerzner International North America, Inc., Kerzner New York, Inc., Ocean Club Holdings Limited, Paradise Island Limited, Paradise Enterprise Limited and "Atlantis Resort & Casino," and the Clerk is directed to enter judgment in favor of said defendants, and is otherwise denied as to defendants Kerzner International Resorts, Inc., Kerzner International Holdings Limited, Kerzner International Limited, and Kerzner International Bahamas Limited; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendants' Verified Answer, attached as Exhibit B to Michael J. Caulfield's Affirmation in Support of the motion, is deemed timely served and filed upon service of a copy of this decision/order with notice of entry; and it is further

ORDERED that the caption be amended to reflect the above dismissals and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that documentary discovery demands shall be served within 30 days and responded to within 30 days thereafter; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on July 30, 2010 at 9:30 AM, in Room 428, 60 Centre Street, New York, NY, at which time an expeditious discovery schedule will be set; and it is further

ORDERED that within 30 days of entry of this order, moving defendants shall serve a copy of this order with notice of entry, upon plaintiffs.

Dated: _____

7/10

DORIS LING-COHAN, J.S.C.

[Signature]

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

JURISDICTION Lavln.Kerzner, dismiss peris juris and ej.wpd

FILED
JUL 13 2010
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