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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C.
Justice

PART 44

Index Number : 104557/2009
NEGRON, RACHEL
vs.
ISRAM WHOLESALE TOURS
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/19/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

Dated: 10/10/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

PART 44

RACEHL NEGRON,

PLAINTIFF,

-V-

ISRAM WHOLESALE TOURS

DEFENDANT

INDEX NO. 104557/2009

The defendant moves the court for summary judgment to dismiss the complaint. Plaintiff opposes the motion.

In 2007, plaintiff Rachel Negron plans a trip to Israel with her friends Carol and David Newman. The tour is selected through a retail travel agency, Central Travel. Central Travel allegedly sends plaintiff a brochure including an itinerary and the bill, by mail. The brochure also includes defendant Isram's Terms and Conditions. Isram describes in the Terms & Conditions, the nature of its operation. Isram describes itself as wholesale travel packager, whose primary clients are retail travel agents who deal with travelers directly. Isram alleges it is not responsible for operating the tours itself, but it contacts various ground operators who actually provide the services at the destination. The services include hotel and tour operations and the ground operators provide pricing. From this information, Isram develops a travel package and puts together a brochure, which is then presented by retail agents like Central Travel, to potential customers.

Plaintiff arrives in Israel on November, 10 2007. While on the tour plaintiff goes to Mount Bental, in Merom Golan, Golan Heights, a public park under the control of the Israel Ministry of Tourism. Prior to arriving at the location, Central Travel allegedly informs plaintiff to wear sneakers for

the tour, however she chooses to wear sandals instead. Upon arriving at the Golan Heights, the tour guide leads the tour group up a slope where they are able to look down upon a settlement of the Golan Heights. Plaintiff claims while coming back down the slope, her right foot goes into what she describes as a "sinkhole," injuring her foot as a result. Israeli soldiers immediately come to her aid, and Plaintiff is brought to an Israeli hospital for treatment.

As to the first branch of defendant's motion regarding the admissibility of a sworn statement from Rachel Negron's friend Carole Newman, the court finds the statement is inadmissible as defendant attached the statement to its reply papers rather than submitting it with its initial motion papers. The function of reply papers is to address arguments made in opposition to the position made by the movant and not to permit movant to introduce new arguments in support of, or new grounds for the motion. Dannasch v. Bifulco, The court finds attaching the sworn statement introduces a new argument in support of defendant's summary judgment motion. This untimely introduction of new evidence will not be accepted by the court as it is an unfair advantage to the defendant.

As to the second branch of the motion regarding defendant's motion for summary judgment, it is denied. The movant on a summary judgment motion must establish his case as a matter of law. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra*. In the instant case, the defendant alleges entitlement to summary judgment on the grounds defendant is in no way responsible for the plaintiff's injuries as defendant relinquished all liability to plaintiff in its Terms & Conditions.

Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden then shifts to the party opposing the motion to tender sufficient evidence in the admissible form to defeat the motion. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The plaintiff's opposition

raises triable issues of fact regarding defendant's culpability to plaintiff for her injuries. Accordingly, defendant's motion for summary judgment is denied.

Further, the court would like to address defendant's untimely filing of its summary judgment motion. Pursuant to C.P.L.R. 3212 movant must file a motion for summary judgment no later than one hundred and twenty days after the filing of the note of issue, except with leave from the court on good cause shown. In this case, plaintiff filed the note of issue and certificate of readiness on or about August 8, 2011, about four months prior to the deadline. At this time, defendant alleges discovery was not complete and moved to vacate the note of issue and moved for an open commission to conduct two depositions. The court denied defendant's motion to vacate the note of issue, but granted the motion for an open commission, staying the trial pending the taking of the two depositions. The defendant's defense for failure to timely file its motion for summary judgment stems from plaintiff's premature filing of the note of issue and certificate of readiness. The court finds this is not good cause for even two months after receiving an order granting an open commission, the depositions still were not taken. Moreover, defendant filed an untimely motion for summary judgment and yet still had not completed the depositions. This trend in untimeliness leads the court to believe the defendant has purposely not complied with the time constraints and is intentionally delaying the process of litigation. This conduct will not be tolerated by the court and all further deadlines must be strictly complied with.

In its argument, defendant also disclaims any liability regarding plaintiff's tour and alleged injury. Defendant claims it absolved itself of any liability to plaintiff by including the following statement in its Terms and Conditions section of the travel brochure:

> [Isram] and its representatives assume no liability in arranging transportation, hotel, and other accommodations and are not responsible for any personal injury, illness or property damages or other loss or expense of any nature whatsoever arising directly or indirectly our of any actions of any person or supplier of services providing any of the services, programs or accommodations offered in connection with a tour…

A disclaimer in the tour contract negates any intent of the defendant to assume a contractual obligation for such safety. Dorkin v. American Express Co., 43 A.D.2d 877, 877, (3d Dep't 1974). In the present case, defendant included a disclaimer in the tour contract explicitly stating it assumed no liability regarding plaintiff's safety while on the tour. Furthermore, in plaintiff's deposition, she attests to receiving the brochure including defedant's Terms & Conditions. The court finds no legitimate question as to plaintiff's receipt of the brochure. Accordingly, the court enforces the contractual provision disclaiming Isram's liability with regard to plaintiff's alleged injury.

Defendant further alleges no liability for the acts of an independent contractor. Defendant alleges the tour guide in the present case constitutes an independent contractor as defendant claims it is solely responsible for packaging the tour and not for organizing anything beyond that point. An independent travel agent or booking agent cannot be held responsible for the negligence of its principal, where the agent solely makes the reservations or packages the tour. Russel v. Celebrity Cruises, Inc., No. 96-Civ.-3328, 2000 U.S. Dist. LEXIS 10332, at *4 (S.D.N.Y. July 20,2000). Generally, the only possible circumstance under which a travel or booking agent can be held liable is if it advertised that it somehow had control over or an ownership interest in the location where the injury occurred. Loeb v. U.S. Dep't of Interior, 793 F. Sup. 431, 439 (E.D.N.Y. 1992). In the present case, defendant alleges it has no office or facility in any of the destinations for which it develops tour packages thus absolving it of liability for the conduct of an independent tour guide. However, in Exhibit A of plaintiff's opposition papers is plaintiff's itinerary which includes defendant's contact information for an office it has in Tel Aviv, Israel. This presents an issue of fact that must be decided by a jury. Thus, the court cannot make a determination as to the defendant's liability for the acts of the tour guide at this time.

Defendant also claims it had no duty to warn plaintiff of a possible hazardous condition at the tour site as it neither owned nor occupied the location. Under New York law, the following is upheld:

> Where tour companies are not owners or occupiers of property where plaintiffs are injured, the tour operator owes no duty to tour members to inform them of the possible hazardous conditions which may exist on

the property of others. Loeb v. U.S. Dep't of Interior, 793 F. Sup. 431, 439 (E.D.N.Y. 1992).

The exception to this rule states a tour operator can be held liable where the tour operator assumes a duty to the plaintiff, such as where one of its employees directs the tour participant to proceed in a particular manner, and that instruction placed the injured party in a more vulnerable position. Maraia v. Church of Our Lady Mount Carmel, 828 N.Y.S.2d 525, 527 (2d Dep't 2007). In the case at bar, defendant alleges it assumed no duty to the plaintiff nor was the tour guide giving plaintiff the tour, an employee of the defendant. The court agrees defendant did not assume a duty to warn plaintiff of a hazardous condition, however, a question of fact exists regarding the instructions given to plaintiff by the tour guide. Despite the sworn statement by plaintiff's friend which states plaintiff's noncompliance with the directions given by the tour guide, the court will not consider the statement in making its decision as it was not properly submitted. Therefore, this question of fact regarding the instructions given to the plaintiff will be submitted to a jury at trial. At that time, defendant may put the sworn statement into evidence to be reviewed by a jury.

Plaintiff has brought a claim against defendant for negligence; however, defendant disputes this claim alleging plaintiff presents no evidence that defendant had a duty with regard to the maintenance or condition of Mount Bental, the location of plaintiff's incident. In order to establish a prima facie case for negligence, plaintiff must show defendant either created a dangerous condition or had actual or constructive knowledge of the condition. Segretti v. Shaunstein, Co., 682 N.Y.S.2d 176, 178 (1st Dep't 1988). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it. In the present case, the court finds plaintiff has presented no evidence to show defendant had actual or constructive notice regarding the "sinkhole" which plaintiff stepped into on Mount Bental. Furthermore, Mount Bental is a government controlled public property for which the government is responsible for maintenance of the premises. Thus, the court finds defendant would not be privy to the condition of the premises and would not be aware of the "sinkhole" which caused plaintiff's alleged injuries.

Furthermore, the court understands a "sinkhole" to not be visible on the surface, thus prohibiting defendant from having constructive notice. Therefore, regarding actual or constructive notice, plaintiff has failed to establish a prima facie case for negligence.

Parties are to proceed with the scheduled mediation.

DATED: October 10, 2012

HON. MILTON A. TINGLING
J.S.C.