

Diaz v Sol Melia, S.A.
2012 NY Slip Op 33321(U)
January 6, 2012
Supreme Court, Bronx County
Docket Number: 308341/10
Judge: Jr., Kenneth L. Thompson
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CASE DISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
MADELINE DIAZ,

Index No. 308341/10

Plaintiff,

-against-

DECISION/ORDER

SOL MELIA, S.A., and THE SOL GROUP
CORPORATION,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant's SOL MELIA, S.A. (Sol Melia) motion for an Order pursuant to CPLR §§ 3211(a)(8) and (a)(7) is **GRANTED**.

Defendant's THE SOL GROUP CORPORATION (Sol Group) motion for an Order pursuant to CPLR §§ 3211(a)(7) is **GRANTED**.

Plaintiff brought suit against Defendants based on an alleged slip and fall on the premises of the ME Cancun Hotel and Resort, located at Blvd. Kukulcan, KM 12 Zona Hotelera 77500, Cancun, Mexico. Melia argues that the Complaint should be dismissed because this Court lacks personal jurisdiction over it. Sol Group contends that it is also entitled to dismissal since it did not own, occupy, operate, supervise, manage, maintain, control or repair the area in question.

"On a motion to dismiss pursuant to CPLR § 3211 the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law." Beal Sav. Bank v. Sommer, 8 NY3d 318, 324 (citations omitted). "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... (8) the court has not jurisdiction of the person of the defendant" CPLR § 3211(a)(8).

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary... who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state; ... or commits a tortious act without the state causing injury to person or property within the state ... if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR § 302(a).

If the motion for dismissal under CPLR § 3211(a)(7) is made on the face of the pleading alone, then it assumes, *arguendo*, the truth of all the allegations of the cause of action or defense and everything reasonably to be implied therefrom, but when ... the moving party offers matter extrinsic to the pleading the court need not assume the truthfulness of the pleaded allegations, the criterion to be applied in such a case being whether the opposing party actually has a cause of action or defense, not whether he has properly stated one.

Rappaport v. International Playtex Corp., 43 AD2d 393, 394-95.

However,

[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action. Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.

Sokol v Leader, 74 AD3d 1180, 1182 (citations omitted).

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) ... that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further ... disclosure to be had and may make such other order as may be just.

CPLR § 3211(d).

According to Juan Ignacio Pardo's Affidavit, Sol Melia did not conduct any activities that would bring it under the purview of CPLR § 302(a). Plaintiff has failed to make a *prima facie* showing that this is not the case. The Complaint fails to allege any facts showing that Sol Melia: "was duly authorized to do business in the State of New York" (Compl. at ¶ 3); "doing business in the State of New York" (id. at ¶ 4); or "had significant business contacts with and/or was carrying on significant business in the State of New York" (id. at ¶ 5). See, e.g., Cornely v. Dynamic HVAC Supply, LLC, 44 AD3d 986 (finding that "the plaintiffs alleged an agreement for consulting services purposefully entered into by the defendant and the plaintiff"); Empire Beef Co. v. Meyners-Robinson Co., 248 AD2d 1012, 1013 (finding that "[b]y sending its trucks to Rochester and taking delivery of the meat there, defendant transacted business in New York within the meaning of the statute"); Montgomery v. Minarcin, 263 A.D.2d 665, 667 (finding that "all of the operative facts giving rise to plaintiff's claims occurred in this State"). Nor has Plaintiff submitted evidence that Sol Melia conducted even one transaction in New York. See Kimco Exch. Place Corp. v. Thomas Benz, Inc., 34 AD3d 433, 434 (finding that "CPLR § 302(a) ... is a "single act statute and ... proof of one

transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York”) (citations omitted).

Plaintiff has also failed to submit any evidence in opposition to Sol Group’s proffer on the issue of liability. Although Plaintiff points to statements in Mr. Pardo’s Affidavit that would raise an issue regarding Sol Melia’s connection to the Premises at issue, she fails to proffer any evidence refuting Ms. Mateos’s averments that Sol Group “does not own, operate, manage the premises, facilities and/or grounds that comprise the Cancun Hotel ... [nor does it] have any responsibility for the Cancun Hotel’s maintenance or repair.” (M. Mateos Aff. at ¶ 7.)

The foregoing shall constitute the decision and order of this Court.

Dated: JAN 06 2012



J.S.C.

KENNETH L. THOMPSON, JR.