

Stern v Four Points by Sheraton Ann Arbor Hotel

2013 NY Slip Op 32091(U)

September 5, 2013

Sup Ct, New York County

Docket Number: 108672/2011

Judge: Anil Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 101595/2012
STERN, GLORIA
vs.
Z.L.C., INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 061

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

SEP 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 05 2013

ACS, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 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 61

-----X
GLORIA STERN,

Plaintiff,

-against-

FOUR POINTS BY SHERATON ANN ARBOR
HOTEL, STARWOOD HOTELS AND RESORTS
WORLDWIDE, INC., and RB HOTEL ANN ARBOR
LLC.,

Defendants.

-----X
GLORIA STERN,

Plaintiff,

-against-

Z.L.C., INC., d/b/a SHERATON INN ANN ARBOR,
MARVIN A. ZETLEY, as owner of Z.L.C., INC d/b/a
SHERATON INN ANN ARBOR and MARVIN A.
ZETLEY, individually,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

The above-captioned cases arise from the same occurrence. Plaintiff, a New York resident at all times relevant to these cases, was a guest at a hotel in Ann Arbor, Michigan when she allegedly tripped and fell on the hotel property, thereby sustaining injuries.

The first suit (hereinafter Stern I, index # 108672/2011) was filed April 23, 2011 and named Four Points by Sheraton Ann Arbor Hotel, Starwood Hotels and Resorts Worldwide, Inc.,

DECISION AND
ORDER

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Mot. Seq. 001

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NEW YORK

and RB Hotel Ann Arbor LLC. as defendants.

The second lawsuit (hereinafter Stern II, index #101595/2012) was filed on February 14, 2012. The defendants in Stern II are Z.L.C., Inc., d/b/a Sheraton Inn Ann Arbor and Marvin Zetley, both as owner of ZLC and individually.

The Motions

There are two motions pending in Stern I. Motion sequence 003, to consolidate the two cases, is unopposed and will be addressed first. RB Hotel Ann Arbor LLC (hereinafter RB Hotel) seeks, in motion sequence 002 of Stern I, to dismiss the plaintiff's complaint against it pursuant to CPLR § 3211(a)(8). This motion is opposed, and there is a cross motion to disqualify Harris, King & Fodera as counsel for the Defendants and, pursuant to CPLR § 3025, to amend the complaint to assert additional jurisdictional claims.

In Stern II, the defendants, Z.L.C., Inc., d/b/a Sheraton Inn Ann Arbor, Marvin Zetley, as owner of Z.L.C., Inc., and Marvin Zetley, individually, move, pursuant to CPLR § 3211(a)(8), to dismiss the complaint on the grounds that the Court does not have jurisdiction over any of the defendants. Plaintiff opposes the motion.

Background

Starwood Hotels & Resorts Worldwide, Inc. (hereinafter Starwood) answered the suit in Stern I on September 9, 2011. In its answer, Starwood included a cross claim against Four Points by Sheraton Ann Arbor Hotel (hereinafter Four Points AA) and RB Hotel Ann Arbor LLC. An amended verified answer, dated October 12, 2011, by Starwood and RB Hotel included a cross claim against Four Points AA.

Plaintiff moved for a default judgment against Four Points AA on March 12, 2012,

subsequent to filing the Summons and Complaint in Stern II. Defendants cross-moved to dismiss the complaint against Four Points AA. This Court, in the November 16, 2012 Order, denied the plaintiff's motion for default judgment as moot and granted the cross-motion dismissing the complaint against Four Points AA, without opposition, on the grounds that the Court lacked jurisdiction over Four Points AA.

The Summons and Complaint in Stern II was filed February 14, 2012. Defendants answer, dated April 9, 2012, asserted a number of defenses, including jurisdictional defenses.

On July 18, 2012, the parties entered into a so-ordered Stipulation in Stern I agreeing that Stern I and Stern II were to be consolidated and that the defendants would make motions for summary judgment returnable on September 28, 2012.

The two cases were not consolidated by the Clerk of the Court - hence, the motion to consolidate the cases (Stern I motion sequence 003) dated January 22, 2013.

The defendants contend that the property where the accident allegedly happened, 3200 Boardwalk Street (hereinafter the premises), was sold by ZLC to RB Hotel on or about July 7, 2010.

Motion to Consolidate

CPLR § 602(a) provides that "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

The two related cases here arise from the same occurrence and involve the same facts. Therefore, consolidation is appropriate.

Plaintiff takes the position that the lawsuits were consolidated by the so-ordered stipulation of July 18, 2012. This being said, Plaintiff consents to Defendants' motion to consolidate the action.

The motion being consented to, and good cause being shown, the motion to consolidate shall be granted.

Cross-Motion to Amend Complaint

"Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies & Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 757 (N.Y. 1983).

In the present case, the defendants are well aware of the claims being made by Plaintiff. There is no prejudice or surprise in allowing the Plaintiff to amend her complaint.

Stern I: Motion to Dismiss

In ruling upon a motion to dismiss, the court must "determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if, from the pleadings' four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference." (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y. 2d 144 [2002], internal quotation marks and citations omitted.). "[T]he facts pleaded in the complaint must be taken as true and are accorded every favorable inference ... However, allegations consisting of bare legal conclusions as well as

factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (N.Y. 1999)(internal citations and quotation marks omitted).

“Where extrinsic evidence is used, the standard of review under a CPLR 3211 motion is ‘whether the proponent of the pleading has a cause of action, not whether he has stated one.’” *Biondi v. Beekman Hill House Apt., Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999)(quoting *Guggenheimer v Ginzburg*, 43 NY 2d 268, 275). “In cases where the court has considered extrinsic evidence on a CPLR 3211 motion, the allegations are not deemed true The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” *Supra* at 81 (internal quotations and citations omitted).

In the Amended Verified Complaint, Plaintiff continues to include Four Points by Sheraton Ann Arbor Hotel as a defendant. As discussed above, the cause of action has been dismissed against Four Points by Sheraton Ann Arbor Hotel. Therefore, although they are named in the Amended Complaint, Four Points by Sheraton Ann Arbor Hotel is no longer a defendant in this case.

CPLR § 301 provides that “[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.” The arguably relevant basis for this Court having jurisdiction over a foreign corporation pursuant to CPLR § 301 is if the corporation is “doing business” in New York.. “To establish jurisdiction under CPLR 301 ... the foreign entity must engage in a continuous and systematic course of activity in this State.” *Landoil*

Resources Corp. v. Alexander & Alexander Servs., Inc., 77 N.Y.2d 28, 36 (1990)l. For jurisdiction under CPLR § 301, the foreign entity must be “doing business” in the State at the time the action is commenced. See *Uzan v. Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 A.D.3d 476 (1st Dep't 2008).

CPLR § 302 provides New York courts with long-arm jurisdiction over any non-domiciliary. CPLR § 302 grants personal jurisdiction on any person who:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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; or
4. owns, uses or possesses any real property situated within the state.

Defendant, RB Hotel, has submitted the sworn affidavits of Howard Zetley and Kenneth Krebs in support of its motion to dismiss. Mr. Zetley was Secretary for ZLC at the time the accident occurred. His affidavit states that Four Points By Sheraton is a licensed trademark name; ZLC purchased a license to use that name for the hotel at which the accident occurred; Four Points by Sheraton Ann Arbor Hotel is a licensed trademark name, not a corporate entity; the only Four Points by Sheraton Ann Arbor Hotel was the one where the accident occurred; and

ZLC does not conduct or solicit business in New York, own property or bank accounts in New York, does not have agents or employees in New York, or supply goods or services in New York. Mr. Zetley's affidavit also states that the property was sold to another company in 2010.

The sworn affidavit of Kenneth Krebs, the Executive Vice President, Secretary and General Counsel for RockBridge Holdings, LLC, which, through a series of entities controls RB Hotel Ann Arbor LLC, states that: RB Hotel Ann Arbor LLC was formed on April 9, 2010; it purchased the premises on or about July 7, 2010; and it does not conduct, solicit, or transact business, maintain a bank account, own property, or have employees or agents in the State of New York. His affidavit also states that the premises is currently known as Sheraton Ann Arbor Hotel.

Plaintiff points out defects in the affidavits. For instance, the affidavits were not taken within the State of New York and lack certificates of conformity. However, this is not a fatal defect. *See Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dep't 2009). Plaintiff mistakenly states that the affidavit of Marvin Zetley was submitted in support of the motion to dismiss in Stern I, when it is actually the affidavit of Howard Zetley (the affidavit of Marvin Zetley is in support of the motion to dismiss in Stern II). The affidavit of Howard Zetley does not contain many of the alleged defects in Marvin Zetley's affidavit. For instance, Howard Zetley's affidavit, as well as the affidavit of Kenneth Krebs, each indicate when the notary's commission expires. As to the other defects alleged, they have to do with the requirements for an affidavit taken in New York State. However, pursuant to Real Property Law § 299-a an oath or affirmation must comply with either the law of New York or the law of the state where the acknowledgment or proof is taken. Plaintiff has failed to show that the sworn

affidavits, submitted in support of the motion to dismiss, do not conform to the law of the state in which they were taken.

The plaintiff, as the party asserting jurisdiction, has the burden of proving jurisdiction. *See O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 (1st Dep't 2003): Plaintiff has failed to provide any evidence rebutting the affidavits of Howard Zetley and Kenneth Krebs. Plaintiff argues that Defendants' use of an interactive website, used by Plaintiff to book her room at the hotel, provides this Court with jurisdiction. This argument is without merit. The solicitation of guests by the listing in a local telephone directory is not sufficient to establish jurisdiction by this Court. *See Ziperman v. Frontier Hotel of Las Vegas*, 50 A.D.2d 581, 582 (2d Dep't 1975). "For jurisdictional purposes, there is no material difference between using the internet to make a reservation with an out-of-state entity and placing a telephone call to that entity for the same purpose." *Rodriguez v. Circus Circus Casinos, Inc.*, 2001 U.S. Dist. LEXIS 61 (S.D.N.Y. Jan. 8, 2001).

The affidavits of Howard Zetley and Kenneth Krebs show that RB Hotel was a foreign corporation and was not doing business in New York. The sworn affidavit of Kenneth Krebs demonstrates that RB Hotel was not engaged in a continuous and systematic course of activity in this State such as would give rise to personal jurisdiction pursuant to CPLR § 301. Furthermore, the affidavits show that RB Hotel does not transact business or supply goods or services in New York or own, use or possess any real property in New York. There is no allegation that RB Hotel committed any tortious act within New York. RB Hotel's alleged negligence resulted in an injury to a person in Michigan, not New York. Therefore, the evidence provided by the affidavits submitted by the defendant is sufficient to establish that Plaintiff has failed to state a cause of

action. Plaintiff has failed to produce evidence that the defendants have sufficient contact with New York to provide this Court with jurisdiction under either CPLR §§ 301 or 302.

Furthermore, defendant RB Hotel Ann Arbor LLC did not exist at the time of the accident.

Therefore, the defendant's motion to dismiss in Stern I should be granted.

Stern II: Motion To Dismiss

The defendants, ZLC, and Marvin Zetley both individually and as owner of ZLC, in Stern II move to dismiss, pursuant to CPLR § 3211(a)(8), on the grounds that the Court does not have personal or subject matter jurisdiction over the defendants and due to lack of jurisdiction due to insufficiency of process.

Plaintiff contends that the motion to dismiss is time-barred by CPLR § 3211(e) and by the July 18th stipulation entered into in Stern I.

Pursuant to CPLR § 3211(e), "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

Defendants raised the insufficiency of service of process in their April 2012 answer. The motion was brought in November 2012. This is well beyond the sixty-day time period for bringing a motion for summary judgment due to insufficiency of process.

The so ordered stipulation was entered into after the sixty-day time limit had passed. Defendants have not shown, or requested an extension of time to file due to, undue hardship.

The only way to avoid the sixty day time limit is by a showing of undue hardship. *See Thompson v. Cuadrado*, 277 A.D.2d 151, 152 (1st Dept. 2000). Therefore, the motion to dismiss cannot be granted on the grounds that the Court lacks jurisdiction due to insufficiency of process.

Plaintiff seeks to apply the sixty-day time limit to Defendant's entire motion to dismiss, not just that portion dealing with insufficiency of process. This position is not supported by the plain language of the statute, which clearly states that it applies to motions based upon lack of proper service.

The stipulation was made in Stern I, a separate case, and was ineffective in consolidating the two actions. Accordingly, it does not bind the defendants in Stern II.

Plaintiff also argues that the affidavits relied upon by the Defendants are inadmissible evidence because: the affidavits were made out of state, and lack certificates of conformity; contain defective jurats; do not state that the affiant has the requisite knowledge; and fail to state that a person known to the notary signed the document.

CPLR § 2309(c) states that "An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation."

Real Property Law § 299-a sets out the requirements for a certificate of conformity. "The acknowledgment or proof, if taken in the manner prescribed by such state, District of Columbia, territory, possession, dependency, or other place, must be accompanied by a certificate to the effect that it conforms with such laws." Such certificate may be made by a New York attorney

residing in the place where the acknowledgment or proof is taken or by an attorney admitted to practice in the place where the acknowledgment or proof is taken.

Real Property Law § 311 does not require a certificate of acknowledgment when the oath or affirmation was taken by a notary public in another state.

The court can reject an affidavit taken out of state which lacks the requisite authentication. *See Spinnell v. Sheldon*, 2007 N.Y. Slip Op. 31500(U). However, lack of a certificate of conformity or certificate of acknowledgment is not necessarily a fatal defect. *See Bey v. Neuman*, 100 A.D.3d 581, 582 (2d Dep't 2012); *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dep't 2009)(“As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary. The absence of such a certificate is a mere irregularity, and not a fatal defect”); *Smith v. Allstate Ins. Co.*, 38 A.D.3d 522, 523 (2d Dep't 2007); *Pierre v Young*, 2013 N.Y. Misc. LEXIS 1729, 4-5 (N.Y. Sup. Ct. 2013)(“Some defects such as the absence of a certificate of authority or certificate of conformity are considered sufficiently technical and non-prejudicial that they may be ignored by the court even where the opposing party has objected.”); *Nandy v. Albany Medical Center Hosp.*, 155 A.D.2d 833 (3d Dep't 1989)(“Rejecting the document, however, would only result in further delay because it can be given nunc pro tunc effect once properly acknowledged”).

The affidavits submitted by the defendants do not contain certificates of conformity. However, this irregularity is not a fatal defect, and the affidavits will be considered by the Court.

With regards to the affidavit of Howard Zetley, as in Stern I above, Plaintiff fails to show

that the affidavit does not conform to the requirements of the state where the affidavit was taken.

As to the affidavit of Marvin Zetley, Plaintiff is correct that the affidavit fails to state when the notary's commission expires, even though it is the same notary as in Howard Zetley's affidavit. Nonetheless, Plaintiff has not shown that this does not conform to the requirements of the state wherein the affidavit was notarized and we know that the date the notary's commission expires is 6-21-2015, because it is on the other affidavit. Therefore, it is a harmless oversight and this Court takes notice of the affidavit. Plaintiff is correct that Marvin Zetley fails to state that he is an officer of the corporation or that he otherwise has personal knowledge of the operations of the corporation. However, the affidavit of Howard Zetley is sufficient as to the operations of the corporation. Marvin Zetley's affidavit is sufficient to show lack of jurisdiction over him personally as a defendant.

As in Stern I, above, the plaintiff has the burden of proving jurisdiction. The sworn affidavit of Howard Zetley provides evidence that ZLC does not have sufficient contacts with the State of New York such that it could reasonably expect to be hailed into court in New York. The sworn affidavit of Marvin Zetley is sufficient to show that he does not have sufficient contact with New York for this Court to have jurisdiction over him. Plaintiff has failed to provide evidence sufficient to establish a question as to jurisdiction. The arguments made in Stern I as to the utilization of a web site conferring jurisdiction apply in Stern II..

Therefore, Plaintiff has failed to show that this Court has jurisdiction over the defendants in Stern II and the Defendants' motion to dismiss should be granted.

Cross-Motion to Disqualify Counsel

In light of the decisions in the other aspects of the motions decided herein, Plaintiff's motion to disqualify Defendants' counsel is moot. The present decision grants the motions of RB Hotel, ZLC, and Marvin Zetley to dismiss the complaint against them. Therefore, the only defendant remaining in the case is Starwood Hotels and Resorts Worldwide, Inc.

Conclusion

ORDERED that the motion to consolidate (Stern I, motion sequence 003) is granted and the above-captioned action is consolidated in the Court with GLORIA STERN vs. Z.L.C., INC., d/b/a SHERATON INN ANN ARBOR, MARVIN A. ZETLEY, as owner of Z.L.C., INC d/b/a SHERATON INN ANN ARBOR and MARVIN A. ZETLEY, individually, under Index No. 108672/2011; and it is further

ORDERED that the motion of defendant RB HOTEL ANN ARBOR LLC. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

ORDERED that the motion of defendants Z.L.C., INC., d/b/a SHERATON INN ANN ARBOR, MARVIN A. ZETLEY, as owner of Z.L.C., INC d/b/a SHERATON INN ANN ARBOR and MARVIN A. ZETLEY, individually to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said Defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and

it is further

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

ORDERED that the consolidated action shall bear the caption:

GLORIA STERN,

Plaintiff,

-against-

STARWOOD HOTELS AND RESORTS
WORLDWIDE, INC.,

Defendant.

and it is further

ORDERED that the cross-motion of the plaintiff to disqualify HARRIS, KING & FODERA as counsel for the defendants is denied; and it is further

ORDERED that counsel for the moving party 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 counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on October 30, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 9/5/13
New York, New York

ACS
Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

FILED

SEP 09 2013

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