

Romano v T.N. Ward Co.
2013 NY Slip Op 32809(U)
October 17, 2013
Sup Ct, Suffolk County
Docket Number: 11-34283
Judge: Joseph Farneti
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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-30-13
ADJ. DATE 8-1-13
Mot. Seq. # 005 - MG
006 - MG

JOHN ROMANO and PRISCILLA ROMANO,
Plaintiffs,

DELL, LITTLE, TROVATO & VECERE, LLP
Attorney for Plaintiffs
Five Orville Drive, Suite 100
Bohemia, New York 11716

- against -

WESTERMANN SHEEHY KEENAN SAMAN
& AYDELOTT, LLP
Attorney for Defendant T.N. Ward
The Omni Building, Suite 702
333 Earle Ovington Boulevard
Uniondale, New York 11553

T.N. WARD COMPANY and KISBY SHORE
CORP.,
Defendants.

SMITH MAZURE DIRECTOR WILKINS
YOUNG & YAGERMAN, P.C.
Attorney for Defendant Kisby Shore Corp.
111 John Street, 20th Floor
New York, New York 10038

Upon the following papers numbered 1 to 25 read on this motion for summary judgment and motion to consolidate; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13, 14 - 21; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22- 23; Replying Affidavits and supporting papers 24 - 25; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant Kisby Shore Corp. for an Order, pursuant to CPLR 3212 and 3211 (a) (8), granting summary judgment dismissing the complaint and all cross-claims against it for lack of personal jurisdiction is granted; and it is further

10-18-13

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ORDERED that the unopposed motion (incorrectly designated as a cross-motion) for an Order, pursuant to CPLR 602 (a), consolidating this action with an action entitled *John Romano, plaintiff, against Harrah's Hotel & Casino and Harrah's Resort Atlantic City, defendants/third-party plaintiffs against T.N. Ward Company, third-party defendant* (Suffolk County Index No. 11-12239), is granted; and it is further

ORDERED that the Clerk of the Court shall consolidate the file for this action with the file for the action assigned Index Number 11-12239; and it is further

ORDERED that the consolidated action shall be entitled *John Romano and Priscilla Romano, plaintiffs, against Harrah's Hotel & Casino and Harrah's Resort Atlantic City, and T.N. Ward Company, defendants, Harrah's Hotel & Casino and Harrah's Resort Atlantic City, defendants/third-party plaintiffs against T.N. Ward Company, third-party defendant*, under Index Number 11-12239.

This is an action to recover damages for injuries allegedly sustained by the plaintiff John Romano as a result of a slip and fall accident that occurred on April 13, 2010, at the Harrah's Resort Hotel & Casino located at 777 Harrah's Boulevard, Atlantic City, New Jersey. In their complaint, the plaintiffs allege that the defendants were contractors hired "to perform installations, construction work, demolition and/or renovation, labor and/or services" at the subject premises, and that the defendants operated, managed, maintained, and controlled said premises.

The defendant Kisby Shore Corp. ("Kisby"), now moves to dismiss the complaint against it on the ground that the Court lacks personal jurisdiction over it pursuant to CPLR 301 and 302 because Kisby does not have "minimum contacts" with the State of New York. In support of its motion, Kisby submits, among other things, the complaint, its verified answer, and the affidavit of its owner. In his affidavit, James Lees, Jr. swears that he is the owner of Kisby, that he conducted a search of the records maintained by the corporation, and that the corporation has not "transacted, solicited, or performed work or business in the State of New York, and has derived no income from the State of New York." He further swears that Kisby does not have a business address or office located in New York, that it does not own, use or possess any real property in New York, and that the work performed in relation to this matter was not performed in New York. It is undisputed that Kisby is incorporated in the State of New Jersey.

A foreign corporation is amenable to suit in New York courts under 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 (see *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 563 NYS2d 739 [1990]; *Lafer v Ostrow*, 55 NY2d 305, 449 NYS2d 456 [1982]; *Farahmand v Dalhousie Univ.*, 96 AD3d 618, 947 NYS2d 459 [1st Dept 2012]). Here, Kisby's submission establishes *prima facie* that it is a New Jersey corporation, that it has not performed work or done business in New York, and that it does not have any offices, employees, bank accounts or property in New York.

However, a Court may also obtain personal jurisdiction over a foreign corporation under New York's long-arm statute, CPLR 302 (a). Said statute provides:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. 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, or his executor or administrator, who in person or through an agent:

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.

Pursuant to CPLR 302 (a) (1), a nondomiciliary is subject to the jurisdiction of a New York court if it has purposefully transacted business within the state, and there is a "substantial relationship" between this activity and the plaintiff's cause of action (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 527 NYS2d 195 [1988]; *Paolucci v Kamas*, 84 AD3d 766, 922 NYS2d 792 [2d Dept 2011]; *Arroyo v Mountain School*, 68 AD3d 603, 892 NYS2d 74 [1st Dept 2009]; *Bogal v Finger*, 59 AD3d 653, 874 NYS2d 217 [2d Dept 2009]). Here, Kisby has established *prima facie* that it does not transact any business in New York, purposeful or otherwise, and that the plaintiff's injury and this action cannot be said to have arisen directly out of the transaction of any business in this state. In addition, it is undisputed that the instant action does not involve any allegation that Kisby committed a tortious act within the state making it subject to jurisdiction pursuant to CPLR 302 (a) (2).

With respect to CPLR 302 (a) (3) (i), Kisby's owner avers that his corporation does not conduct or solicit business in New York, nor does it "derive any revenue from goods or services rendered within the State of New York." The second subsection, CPLR 302 (a) (3) (ii) involves five elements, that is, whether: (1) the defendant committed a tortious act outside the State; (2) the cause of action arises from that act; (3) the act caused injury to a person or property within the State; (4) the defendant expected or should reasonably have expected the act to have consequences in the State; and (5) the defendant derived substantial revenue from interstate or international commerce (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 713 NYS2d 304 [2000]). The establishment of long-arm jurisdiction in connection with a New York injury under CPLR 302 (a) (3) (ii) does not implicate constitutional due process concerns inasmuch as said provision was not designed to go to the full limits of permissible jurisdiction (*Ingraham v Carroll*, 90 NY2d 592, 665 NYS2d 10 [1997]).

The instant motion only addresses the fourth and fifth elements of CPLR 302 (a) (3) (ii). The fourth element is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to the State to answer for tortious conduct committed elsewhere (*Ingraham v Carroll*, *supra*). The fifth element, in turn, is designed to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but who have local business operations (*LaMarca v Pak-Mor Mfg. Co.*, *supra*). Here, Kisby's submission establishes *prima facie* that it does not derive substantial revenue from interstate or international commerce, and that is unreasonable to require it to come to New York to litigate this matter.

Finally, Kisby has established *prima facie* that it does not own, use or possesses any real property situated within the state (CPLR 302 [a] [4]). Therefore, the Court finds that Kisby has established that CPLR 301 and CPLR 302 (a) do not confer jurisdiction herein. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In opposition, the defendant T.N. Ward Company ("Ward") asserts that it contracted with Kisby to perform certain work at the Harrah's Resort Hotel & Casino, and that, pursuant to that contract, Kisby is obligated to defend and indemnify it for all claims resulting directly or indirectly from Kisby's work. Ward contends that "it is in the best interests of all parties" that all parties remain in this action. However, Ward has made no showing of any activities by Kisby which would demonstrate that Kisby is doing business in New York or is subject to long-arm jurisdiction herein. In addition, Ward fails to cite to any authority which permits the Court to exercise jurisdiction over a party based on the interests of other parties to the action, and it has not established that it would be prejudiced in its ability to pursue any claim it might have against Kisby in another jurisdiction.

The Court notes that the plaintiff has executed a stipulation of discontinuance in favor of Kisby, and they have not opposed Kisby's motion for summary judgment. As the party seeking to assert personal jurisdiction, Ward bears the burden of proof on this issue (*see Lettieri v Cushing*, 80 AD3d 574, 914 NYS2d 312 [2d Dept 2011]; *Castillo v Star Leasing*, 69 AD3d 551, 893 AD3d 123 [2d Dept 2010]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 796 AD3d 126 [2d Dept 2005]). That burden does not entail making a *prima facie* showing of personal jurisdiction, but Ward must demonstrate that facts "may exist" to exercise personal jurisdiction over Kisby (*see Lettieri v Cushing, supra; Castillo v Star Leasing, supra; Ying Jun Chen v Lei Shi, supra*). Here, Ward does not allege any facts regarding the issue.

Instead, Ward contends that the motion must be denied because further discovery is necessary to determine whether the New York Courts have personal jurisdiction over Kisby. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Williams v D & J School Bus*, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; *Panasuk v Viola Park Realty*, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; *Gasis v City of New York*, 35 AD3d 533, 828 NYS2d 407 [2d Dept 2006]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion as to what that discovery would uncover (*see generally, Lauriello v Gallotta*, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Kimyagarov v Nixon Taxi Corp.* 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]).

Here, by analogy to a motion to dismiss pursuant to CPLR 3211 (a) (8) only, Ward need not make a *prima facie* showing of jurisdiction, but instead must only set forth "a sufficient start, and [show its] position not to be frivolous" (*Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624, 885 NYS2d 88 [2d Dept 2009] citing *Peterson v Spartan Indus.*, 33 NY2d 463, 467, 354 NYS2d 905 [1974]). Ward need only demonstrate that facts "may exist" to defeat the motion, it need not be demonstrated that they do exist (*see Peterson v Spartan Indus., id.; Lettieri v Cushing, supra; Castillo v Star Leasing*, 69 AD3d 551 [2d Dept 2010]; *Ying Jun Chen v Lei Shi, supra*).

Here, Ward has failed to establish that there is an evidentiary basis to suggest that discovery might lead to relevant evidence to defeat Kisby's motion for summary judgment, failed to allege that facts "may exist" to exercise personal jurisdiction over Kisby, and failed to make a "sufficient start" to warrant further discovery on the issue of personal jurisdiction (*see Doe v McCormack*, 100 AD3d 684, 953 NYS2d 666 [2d Dept 2012]; *Lettieri v Cushing, supra; Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 781 NYS2d 4 [1st Dept 2004]; *Federal Ins. Co. v Chevalier Mach.*, 258 AD2d 904, 685 NYS2d 377 [4th Dept 1999]; *Mandel v Busch Entertainment Corp.*, 215 AD2d 455, 626 NYS2d 270 [1995]; *National Union Fire Ins. Co. of Pittsburgh v Ideal Mut. Ins. Co.*, 122 AD2d 630, 505 NYS2d 416 [1986]). Accordingly, Kisby's motion to dismiss the complaint and all cross-claims against it is granted.

Ward now moves to consolidate this action with an action entitled *John Romano, plaintiff, against Harrah's Hotel & Casino and Harrah's Resort Atlantic City, defendants/third-party plaintiffs against T.N. Ward Company, third-party defendant*. The defendants/third-party plaintiffs Harrah's Hotel

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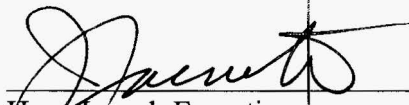
& Casino and Harrah's Resort Atlantic City ("Harrah's") joins in Ward's motion to consolidate these actions, and the motion is unopposed by the plaintiffs.

Here, consolidation is appropriate, as the above-entitled actions involve common questions of fact and law, and there is no showing of prejudice to a substantial right (*see Nigro v Pickett*, 39 AD3d 720, 833 NYS2d 655 [2d Dept 2007]; *Dukhvalov v Pshierer*, 15 AD3d 334, 789 NYS2d 521 [2d Dept 2005]; *McDutchess Builders v Dutchess Knolls, Inc.*, 244 AD2d 534, 665 NYS2d 579 [2d Dept 1997]). Therefore, it is clear that consolidation of these two actions will serve the interests of the court, and the parties (*see Viafax Corp. v Citicorp. Leasing, Inc.*, 54 AD3d 846, 864 NYS2d 479 [2d Dept 2008]; *Best Price Jewelers.Com, Inc. v Internet Data Stor. & Sys., Inc.*, 51 AD3d 839, 857 NYS2d 731 [2d Dept 2008]; *Nigro v Pickett, supra*). Accordingly, the above-entitled actions are consolidated under Index No. 11-12239, and the consolidated action shall be entitled, *John Romano and Priscilla Romano, plaintiffs, against Harrah's Hotel & Casino and Harrah's Resort Atlantic City, and T.N. Ward Company, defendants, Harrah's Hotel & Casino and Harrah's Resort Atlantic City, defendants/third-party plaintiffs against T.N. Ward Company, third-party defendant.*

All matters of trial practice are reserved to the Justice presiding at the trial of this consolidated action. Counsel for Ward is directed to promptly serve a copy of this Order upon the County Clerk, who shall consolidate the files of these actions under Index No. 11-12239, and upon the Calendar Clerk of this Court.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: October 17, 2013


 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION