

<b>Leon v Hilton Hotels</b>
2013 NY Slip Op 33165(U)
April 18, 2013
Supreme Court, New York County
Docket Number: 102939/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 102939/2011
LAI, LEON, AN INFANT
vs.
HILTON HOTELS AND THE HILTON
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 3/18/13
MOTION SEQ. NO. 0014
002

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

Motion sequence 001 and 002 are consolidated for joint disposition herein.

The motion (sequence 001) by defendant Anatole Partners III, LLC s/h/a The Hilton Anatole a/k/a Anatole Partners III, LLC ("defendant") to dismiss the complaint pursuant to CPLR 327(a) (inconvenient forum) or in the alternative, to apply Texas law to this litigation is denied, except that Texas law applies to this litigation. However, defendant's separate motion (sequence 002) for summary judgment dismissing the complaint, is granted.

It is alleged that on December 12, 2009, the infant plaintiff was injured when he came into contact with a chair inside a Dallas, Texas hotel room owned by Anatole Partners III, LLC s/h/a The Hilton Anatole a/k/a Anatole Partners III, LLC, a Delaware limited liability company.

Forum Non Conveniens: CPLR §327 (a)

As to whether New York is an inconvenient forum, a court may stay or dismiss an action if it finds "that in the interest of substantial justice the action should be heard in another forum" (CPLR §327(a); Atlantic Mut. Ins. Co. v Cadillac Fairview US, Inc., 125 AD2d 181, 508 NYS2d 445 [1st Dept 1986] [a court can stay or dismiss an action when it determines that such

1 CPLR §327(a) provides: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

Dated: , J.S.C.

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

- 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

action, although jurisdictionally sound, would be better adjudicated elsewhere than in New York State]).

Although no one factor is controlling, factors which the court must weigh in deciding a motion to dismiss on such grounds are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action and the burden which will be imposed upon the New York courts (*Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294, 797 NYS2d 89, 92 [1st Dept 2005]; *Intertec Contracting v Turner Steiner Intern. S.A.*, 6 AD3d 1 [1st Dept 2004]; *Neville v Anglo American Management Corp.*, 191 AD2d 240, 594 NYS2d 747 [1st Dept 1993]; *Daly v Metropolitan Life Ins. Co.*, 4 Misc3d 887, 894 [Supreme Court, New York County 2004]). “The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985]). To override plaintiff’s chosen forum, “defendant[ . . . ] bear[s] the burden to identify the non-party witnesses and the testimony they would offer and to show it would be unobtainable in this forum (*Islamic Republic*, at 479-480; *Anagnostou v Stifel*, 204 AD2d 61, 62 [1st Dept 1994]).

The court holds that this dismissal of this action on the ground of forum non conveniens is unwarranted. Generally, ““unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed”” (*Anagnostou v Stifel*, 204 AD2d 61 [1994]) (“defendants have a particularly high burden to carry in light of the substantial delay in not raising their argument that New York is an inappropriate forum until three years had elapsed from commencement of the action and only after a significant degree of activity had already taken place”). Although plaintiffs’ residence is the only nexus between this litigation and New York (*Islamic Republic*, *supra*, at 479 (The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action)), and the situs of the underlying accident is Texas, the majority of the witnesses and documentary evidence are situated in Texas (see *Certain Underwriters at Lloyd’s, London v Millennium Holdings, LLC*, 44 AD3d 536, 844 NYS2d 226 [1st Dept 2007]; *Certain Underwriters at Lloyd’s, London v Mobil Corp.*, 303 AD2d 259, 756 NYS2d 204 [1st Dept 2003]), as plaintiff points out, defendant’s motion, made some two years after the commencement of this action, and *after discovery has been completed*, was untimely (*Jones v Eon Labs, Inc.*, 43 AD3d 711, 841 NYS2d 558 [1<sup>st</sup> 2007]; see also *Grizzle v Hertz Corp.*, 305 AD2d 311, 761 NYS2d 163 [1st Dept 2003] [dismissal of the New York action for *forum non convenience* denied where the witnesses of the accident in Jamaica were willing to travel to New York and the non-witness police officer could not offer any material evidence]).<sup>2</sup> Notably, defendants already produced its Front Office Manager for a deposition in New York, and the Security Officers who are not under defendant’s control responded to the scene after the fact. Thus, dismissal for *forum non convenience* is unwarranted. (*Williamsport Capital Ltd. v Costa*, 2008 WL 2157885 (Trial Order) [Supreme Court, New York County 2008] (denying dismissal where the preliminary conference and compliance conferences have been held; pre-trial discovery has reached an advanced state; more than 20,000 pages of

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<sup>2</sup> Although this Court enlarged defendants’ time to “make a dispositive motion,” it is unclear whether this order, ordinarily limited to summary judgment motions, applied to motions pursuant to CPLR 327.

documents have been produced and seven depositions have been taken)).

However, plaintiff's sole opposition to the application of Texas law on the ground that defendant's companion motion for summary judgment cites to New York law is insufficient. Therefore, the branch of defendant's motion seeking the application of Texas law to this litigation is warranted (*DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 922 NYS2d 32 [1<sup>st</sup> Dept 2011] ("Under New York's choice of law rules, if the plaintiff and the defendant are domiciled in different states, the law of the situs of the injury generally applies")).

#### *Summary Judgment*

As to the merits of defendant's summary judgment motion, 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 issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is well settled that, unless plaintiff proves that the defendant landlord created the defective condition, in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, "the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; see *Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must have existed for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; see also *Segretti*, 256 AD2d 234, 682 NYS2d 176 [1<sup>st</sup> Dept 1998]; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1<sup>st</sup> Dept 2000]; *Gutierrez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1<sup>st</sup> Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1<sup>st</sup> Dept 2005]). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; see also *Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

The Court notes that these principles appear under Texas law as well (*Knox v Fiesta Mart, Inc.*, Not Reported in S.W.3d, 2011 WL 1587362 [Tex.App.-Houston [1 Dist.] 2011] ("To hold Fiesta Mart liable on the basis that it had constructive knowledge of the allegedly dangerous condition, Knox had to raise a fact issue regarding whether the condition had existed "for a sufficient period of time that [the defendant] had a reasonable opportunity to discover it.")).

Defendants' submissions establish that it did not cause, create or have actual or constructive notice of the alleged dangerous condition. Plaintiff, Yon Lai ("Mr. Lai"), the father of the injured plaintiff, testified that his son stated he was cut by something in the hotel room, and Mr. Lai saw an "industry staple" protruding from a chair in their hotel room. Mr. Lai did not notice the nail prior to the incident and did not make any complaints about the chair prior thereto. According to the affidavit of Tony Hilton, Director of Security at the Hilton Hotel, a search of the

hotel records for complaints, incident reports, and work orders for the subject chair for one year prior to the date of the accident produced no records except for the records concerning the subject accident. In the affidavit of housekeeper Francisa Romera, she states that she did not notice any problems with the subject chair prior to the date of the incident. The deposition of Henry Arevalo, the Director of the Front Office at the Hilton Hotel, indicates that he did not see a staple or nail protruding from the chair, or was aware of any complaints of such chair prior to the accident, and that complaints regarding damaged furniture would come through the Housekeeping or Engineering Department. And, defendants' photographs of the chair demonstrate that the alleged defect is not readily visible.

In response, plaintiffs failed to raise an issue of fact on the issue of notice. Plaintiffs' conclusory assertion their "clear" photographs show that the dangerous condition existed for a significant length of time to give rise to the application of constructive notice lacks merit. "When circumstantial evidence is relied upon to prove constructive notice, the evidence must establish that it is more likely than not that the dangerous condition existed long enough to give the proprietor a reasonable opportunity to discover the condition." (*Sova v Bill Miller Bar-B-Q Enterprises, Ltd.*, Not Reported in S.W.3d, 2006 WL 1788231 [Tex.App.-Austin 2006]). It is uncontested that plaintiffs did not notice or make any complaints about the object during the two-day time period they were in the hotel room (Lai EBT, pp. 4, 9). The photographs contain no objective indication that the alleged object existed for any length of time prior to the accident, and plaintiffs fail to point to any objective indication in the photographs indicating such (*Sova v Bill Miller Bar-B-Q Enterprises, Ltd.*, *supra* ("subjective beliefs" about the puddle's "temporal longevity were not supported by any other evidence and, thus, amount to nothing more than conjecture and speculation insufficient to negate a no evidence summary judgment motion"); *Wal-Mart Stores, Inc. v Gonzalez*, 968 SW2d 934, 935 [Tex 1998] ("evidence showing only 'possibility' that condition existed long enough to put store on notice was insufficient"); *see also Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 928 NYS2d 529 [1<sup>st</sup> Dept 2011] (dismissing case where "plaintiff's own deposition testimony established that about five hours before the accident, he did not see any objects in the corridor where he alleges he later tripped and fell")). While the photographs presented by plaintiffs show that the corner of the chair was frayed, there is no indication that there are any staples in the corner of such chair, or that any staples were protruding from the chair for any length of time (*see Wal-Mart Stores, Inc. v Gonzalez* (holding that the evidence that the subject cooked macaroni salad was covered by "a lot of dirt," had shopping cart tracks and footprints through it, and "seemed like it had been there awhile" "is no evidence that the macaroni had been on the floor long enough to charge Wal-Mart with constructive notice of this condition)).

Therefore, summary dismissal of the complaint as asserted against defendant is granted.

#### *Conclusion*

Accordingly, it is hereby

ORDERED that the branch of the motion (001) by defendant Anatole Partners III, LLC s/h/a The Hilton Anatole a/k/a Anatole Partners III, LLC, pursuant to CPLR §327 (a) to dismiss the complaint by plaintiffs for *forum non conveniens*, is denied; and it is further

ORDERED that the branch of the motion (001) by said defendant to apply Texas law to this litigation is granted; and it is further

ORDERED that defendant's motion (002) for summary judgment dismissing the complaint as asserted against it is granted, the complaint as against defendant The Hilton Anatole a/k/a Anatole Partners III, LLC, is severed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

**HON. CAROL EDMEAD**

Dated 4/18/13

ENTER: [Signature], J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                     REFERENCE