JG v Goldfinger
2016 NY Slip Op 32660(U)
February 6, 2016
Supreme Court, New York County
Docket Number: 151453/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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JG and CG, individually and on behalf of CG, a minor,

Plaintiffs,

-against-

MYRON GOLDFINGER, JUNE GOLDFINGER, COVECASTLES DEVELOPMENT CORPORATION, and COVECASTLES LIMITED,

Defendants.

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DECISION/ORDER
Index No. 151453/2016
Mot. Seq. Nos. 002 & 004

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED[1]
MOT. SEQ. NO. 002	
NOTICE OF MOTION, AFFS. IN SUPP. AND EXHIBIT ANNEXED	7-10
MEMO. OF LAW IN SUPP.	11
AFF. IN OPP.	24
MEMO OF LAW IN OPP.	25
REPLY AFFS.	48, 51-55
REPLY MEMO. OF LAW	56
MOT. SEQ. NO. 004	
NOTICE OF MOTION, BROOMES AFF. IN SUPP. AND EXHIBITS ANNEXED	29, 31-35
FONTAINE AFF. IN SUPP. AND EXHIBITS ANNEXED	36-42
REID AFF. IN SUPP. AND EXHIBITS ANNEXED	43-44
ASKANASE AFF. IN SUPP. AND EXHIBITS ANNEXED	45-47
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NOTICE OF CROSS-MOTION, AFF. IN SUPP.	49-50
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[1] Unless otherwise indicated, the papers are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

MEMO. OF LAW IN OPP. 65
REPLY MEMO. OF LAW 71
REPLY MEMO. OF LAW 73

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this negligence action brought by JG and CG (hereinafter referred to as "plaintiffs") on behalf of the minor CG (hereinafter referred to as "the child"), defendants Myron and June Goldfinger (hereinafter "the individual defendants") move, pre-answer, to dismiss the complaint against them pursuant to CPLR 3211 (motion sequence No. 002).[2] Defendants Covecastles Development Corporation and Covecastles Limited (hereinafter "the corporate defendants") move, pre-answer, to dismiss the complaint against them pursuant to CPLR 3211 or, in the alternative, pursuant to CPLR 327 under the doctrine of *forum non conveniens* (motion sequence No. 004), and the Goldfingers cross-move for the same relief, including on the basis of *forum non conveniens* (Doc. Nos. 49-50). After oral argument, and following a review of the papers submitted as well as the relevant statutes and case law, **the corporate defendants' motion and the individual defendants' cross motion under motion sequence No. 004 to dismiss the complaint are granted, the motion by the individual defendants is rendered academic, and the complaint is dismissed in its entirety.**

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a heinous assault against the child, then 12 years old, during a

[2] By order dated April 12, 2016, this Court ruled that plaintiffs' and the criminal defendant's identities be redacted from all filings and discovery, to avoid exposure or potential discovery of the victim's name. (Doc. No. 14.); *see* Civil Rights Law § 50-b.

family vacation at the Covecastles Resort (hereinafter "Covecastles"), located at Shoal Bay Village, A12640, on Anguilla – a small, English-speaking island in the British West Indies and a British Overseas Territory. Covecastles is a luxury resort/enclave consisting of various one- to five-bedroom villas abutting the beach. There are also common spaces including a gym, tennis court, "pump house," restaurant, front office, storage facility, roadways, walkways, and a parking area. According to the complaint, at all times relevant to this action, Covecastles Development Corporation owned "the common spaces" and "eight of the villas located at the resort." (Doc. No. 2.) Covecastles Limited is, in theory, the managing agent of the resort, but plaintiffs allege that the individual defendants "unilaterally managed all aspects of Covecastles from New York."[3] Plaintiffs paid $15,000, in advance, via wire transfer to a New York bank account, for a stay from March 13, 2015 to March 28, 2015.

On the morning of March 14, 2015, the child was walking alone on a beach near the resort when she encountered a person, referred to by the parties as "LW," who was working for Covecastles as a gardener. LW attempted to forcibly rape the child, then stabbed her repeatedly with a broken bottle. The child attempted to appear dead, and LW left her in that condition. After the child was finally found, she was rushed to Princess Alexandra Hospital, where she was initially treated for multiple lacerations, a fractured skull, and a punctured lung, among other things. She was thereafter airlifted back to the United States, and the remainder of her treatment was rendered at New York (Columbia) Presbyterian Hospital.

Plaintiffs commenced this action in February 2016, naming the corporate entities that

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[3] Covecastles Development Corporation is a Delaware corporation (Doc. No. 37), and Covecastles Limited is an Anguilla corporation (Doc. No. 38).

owned and, at least nominally, managed the resort, as well as the individual defendants, who are claimed to have managed the resort remotely from New York City. The corporate defendants and the individual defendants now separately move, pre-answer, to dismiss the complaint in its entirety.

POSITIONS OF THE PARTIES

The corporate defendants maintain that plaintiffs have no cause of action against them. They claim that the attack conclusively took place off-premises and that they neither knew nor had reason to know that LW had violent or sexually deviant propensities. They also claim that New York is an inconvenient forum for this action. The individual defendants likewise assert that plaintiffs have no cause of action against them for similar reasons, but also because they cannot be sued in their individual capacities as mere directors or shareholders of the corporations. They also maintain that it is palpably incredible that they could possibly exercise control over the corporate defendants such that they could be found directly negligent for hiring decisions.

Plaintiffs assert, in response, that there should be an opportunity for discovery to establish, among other things, that LW had a criminal record that should have been uncovered had a reasonably prudent search been performed. They also claim that there was insufficient security at Covecastles. In addition, plaintiffs assert that the location of the attack is not clear and, in any event, the exact location of the attack is not conclusive as a legal matter on the issue of duty to maintain adequate security.

LEGAL CONCLUSIONS

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence." *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (internal quotation marks, brackets and citations omitted). For a complaint to be dismissed based upon evidence submitted in the context of a CPLR 3211 (a) (7) motion, the evidence must "conclusively establish that [the plaintiff] has no cause of action" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]; *see NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640, 640 [1st Dept 2016]; *MCAP Robeson Apts. L.P. v MuniMae TE Bond Subsidiary, LLC*, 136 AD3d 602, 602 [1st Dept 2016]), and the motion should only be granted where "the essential facts have been negated beyond a substantial question." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 95 NY2d 659 (2000); *see M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 (1st Dept 2008), *mod* 12 NY3d 798 (2009).[4]

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[4] Plaintiff disputes whether dismissal is appropriate under CPLR 3211 (a) (1), based on documentary evidence and, specifically, whether certain of the evidence submitted is documentary. *See United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 (1st Dept 2014); *Matter of Walker*, 117 AD3d 838, 839 (2d Dept 2014); *State of N.Y. Workers' Compensation Bd. v Madden*, 119 AD3d 1022, 1028-1029 (3d Dept 2014). It is not necessary to reach this issue, however, since the corporate defendants have also moved under CPLR 3211 (a) (7).

"It is a fundamental principle of tort law that a plaintiff in a negligence claim must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the threshold question in any negligence action, and it is a legal question for the court." *Aracelis On v BKO Express LLC*, ___ AD3d ___, 2017 NY Slip Op 00281, *2 (1st Dept 2017) (internal quotation marks and citations omitted); *see Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 (1st Dept 2016).

Where, as is unquestionably the case here, the acts of an employee constitute an intentional tort committed solely for personal reasons and not in furtherance of the employer's business interests, those acts are not attributable to the employer based on vicarious liability principles. *See Horvath v L & B Gardens, Inc.*, 89 AD3d 803, 803-804 (2d Dept 2011); *Kunz v New Netherlands Routes, Inc.*, 64 AD3d 956, 985 (3d Dept 2009). Thus, defendants are only liable to plaintiffs if they are found to have breached some other, distinct duty of care owed to them.

To that end, an employer may be liable for the intentional torts of its employee based on the theories of negligent hiring or supervision. In order to set forth a cause of action under these theories, a plaintiff must allege that the employer "knew or should have known that the employee had violent propensities, or a propensity for the conduct which resulted in the plaintiffs' alleged injury." *DeJesus v DeJesus*, 132 AD3d 721, 722-723 (2d Dept 2015) (internal citation omitted); *Vicuna v Empire Today, LLC*, 128 AD3d 578, 578 (1st Dept 2015); *Coronado v 3479 Assoc. LLC*, 128 AD3d 496, 496 (1st Dept 2015). Here, plaintiffs allege that LW "had a criminal record and had not been vetted or screened in any manner by [defendants] or their agents." (Doc. No.

2.)

In support of their motion, the corporate defendants submit the affidavit of Patricia Broomes. (Doc. No. 31.) Broomes states that she is Covecastles's Acting Manager, and that such was her title in 2015. She avers that, at the time of the incident, her responsibilities included "[i]nterviewing, vetting, hiring, dismissing and overseeing all [r]estort staff" and that, as part of those responsibilities, she hired LW initially as a temporary worker to clean up after hurricane damage. In October 2015, because LW had been a very good worker during the hurricane cleanup, Broomes "asked [him] to apply" for an opening as a part-time groundskeeper. In support of this contention, Broomes includes what is purported to be LW's redacted two-page application for employment but, contrary to her recitation, it is dated April 10, 2014. (Doc. No. 32.) She states that nothing in his answers to the questions on the application raised any red flags but, this Court notes that the application did not ask whether LW had ever been convicted of a crime. In the space for previous employment, LW wrote that his job title was "painting," at one of Anguilla's major hotels, which position he held for four years, and which was "coming to an end." Broomes states that she contacted LW's employer, and the employer provided an excellent reference. Broomes continues that, prior to the incident, she neither personally observed nor obtained information from other employees or guests that there was anything inappropriate about LW's behavior.

Broomes concedes that she did not perform a background check for LW, but contends that "[c]ompanies in Anguilla are not required to do background checks on employment applicants." She states that she was provided with a copy of his police report, however, and that it came back "negative for [c]riminal [r]ecords in Anguilla." (Doc. No. 33.) She concludes,

based on the report, that, even if she had asked for the report before hiring LW, she would not have discovered anything that would have caused her to question whether to hire him.

The corporate defendants also submit the affidavit of Joseph Reid, who has worked at Covecastles since 2012 as a member of the maintenance crew. (Doc. No. 43.) Reid avers that, after the child was reported as missing, he went out to search for her. He states that he found her more than 500 feet away from the resort, next to a "Y" shaped dirt path in the middle of an area called Sherricks Bay West End. Annexed to Reid's affidavit are location maps from the Department of Lands and Surveys. The maps support Reid's contention that the child was found more than 500 feet away from Covecastles property. Covecastles begins in what is marked as parcel 11. There is a dirt path from the beach northward beginning in parcel 6, and parcels 11 and 6 are separated by parcel 10. (Doc. No. 44.) Reid avers that there is a "shrubby outcropping" separating Shoal Bay West, where the resort is located, and Sherricks Bay West End, where the child was found on the dirt path. The outcropping is also visible on the maps provided. Reid states that, later that same day, he and the police went to the beach in Sherricks Bay West End, "not far from the 'Y' shaped dirt path where [he] discovered the [child]." On the beach, he observed the child's footwear, a piece of clothing, the child's camera "a few feet away," and that the sand was disturbed in a manner evidencing a "real tussle."

Eustella Fontaine, a solicitor and barrister-at-law licensed to practice law in Anguilla, submits an affidavit in which she avers that she has acted as local counsel for the corporate defendants since 2013. (Doc. No. 36.) She avers that Covecastles is located on the western end of the island on what is known as Shoal Bay West, and that no part of the resort is located on what is known as Sherricks Bay West End. She maintains that "[n]either the [r]esort [nor the

corporate defendants] has any rights in, or control over, any beach on the island, including the beaches that abut the [r]esort." Fointaine explains that the corporate defendants are not legally able to have any rights or control over the beaches, "because, under the Anguilla Beach Control Act . . . 'all rights in and over' Anguilla's beaches are 'vested in the Crown' and access must always be open to the public." In support of this contention, Fontaine annexes a copy of the Beach Control Act, chapter B20 of the Revised Statutes of Anguilla. (Doc. No. 39.)[5]

In opposition, JG submits an affidavit in which he states that, "[s]hortly before the attack, [the child] left [plaintiffs'] Covecastles Villa to walk towards the beach." (Doc. No. 66.) He avers that "an attack ensued and [the child] has explained that it involved a chase along a stretch of the beach before she was ultimately dragged, beaten and stabbed." JG relates that, despite the fact that defendants submit "evidence as to where [the child] and certain personal articles of hers were found after the attack," such "evidence does not speak to . . . where all aspects of the attack

[5] In support of the motion, Broomes also submits a letter, dated November 5, 2016, which indicates that it is from the Office of the Commissioner of Police of the Government of Anguilla, addressed "[t]o whom it may concern." (Doc. No. 34.) It was signed by Inspector Randolph Yearwood, but it is not notarized or certified, and Yearwood has not submitted an affidavit. Yearwood stated that a "report of attempted murder was made to the Valley Police Station from an employee at [Covecastles] Resort West End. Officers from the Criminal Investigation Department responded to this report and on arrival they were informed [that] a female [g]uest, who was staying at a villa on said compound, had been wounded by a male person while walking along the beach at Sherricks Bay West End." The letter provides no indication as to where Yearwood gained information about exactly where the child was attacked and found. Since the police report is uncertified, and there is otherwise basis on which to determine whether it is based on anything other than hearsay statements to Yearwood, it is inadmissible against plaintiffs in this context. *See Sanchez v Taveraz*, 129 AD3d 506, 506 (1st Dept 2015); *Raposo v Robinson*, 106 AD3d 593, 593 (1st Dept 2013); *Coleman v Maclas*, 61 AD3d 569, 569 (1st Dept 2009).

occurred."[6] JG asserts that he witnessed the child positively identify LW in two photographs – one taken the day of the attack, and the other that appeared to be a mug shot after LW was arrested sometime in 2008. JG claims to still be in possession of the mug shot, and asserts that it is available upon request. He further contends that "detectives of the Royal Anguilla Police Department . . . informed [him] that [LW] was known to the police on the island for having been involved in criminal activity in the past." He stated that he has "the exact names" of the officers in his possession. JG fails to explain why that information was not provided in the opposition papers.

The corporate defendants' papers conclusively establish beyond a substantial question both that the events complained of did not take place on the resort premises and that they were not in possession of any information that would have caused a reasonably prudent person to further investigate LW as a prospective employee. In response, plaintiffs have not provided any basis on which to cast doubt on defendants' showing. Thus, the negligent hiring cause of action must fail. *See Shu Yuan Huang v St. John's Evangelical Lutheran Church*, 129 AD3d 1053, 1054 (1st Dept 2015); *Everett v Eastchester Police Dept.*, 127 AD3d 1131, 1132 (1st Dept 2015), *lv denied* 26 NY3d 911 (2015); *"John Doe 1" v Board of Educ. of Greenport Union Free Sch. Dist.*, 100 AD3d 703, 705-706 (2d Dept 2012), *lv denied* 21 NY3d 852 (2013); *cf. Boadnaraine v City of New York*, 68 AD3d 1032, 1033 (2d Dept 2009); *compare Hooker v Magill*, 140 AD3d 589, 589 (1st Dept 2016).

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[6] To the extent that JG's affidavit contains specific assertions regarding where the incident occurred, it is not based on personal knowledge, and is thus devoid of probative value as to that issue. *See Brookwood Companies, Inc. v Alston & Bird LLP*, ___ AD3d ___, 2017 NY Slip Op 00535, *4 (1st Dept 2017); *Bhowmik v Santana*, 140 AD3d 460, 461 (1st Dept 2016).

The only other theory available to plaintiffs under these circumstances is breach of duty as an innkeeper. "[A]n inkeeper has a duty to provide reasonable security to protect its guests against criminal acts where such acts are reasonably foreseeable." *Rednour v Hilton Hotels Corp.*, 283 AD2d 221, 222 (1st Dept 2001). However, this duty does not extend to a situation where a hotel "ha[s] no reason to anticipate . . . an attack [on its premises], [and] the only security measure that even arguably could have prevented the attack would have been the fortuitous presence of a security guard stationed at the exact location of the attack." *Id.* An innkeeper also has "no duty to warn guests as to the [naturally-occurring] danger[s] of using an off-premises [public] beach," where the government has taken it upon itself to monitor the conditions of the beach and issue its own warnings. *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 349-340 (2001); *see Oxman v Mountain Lake Camp Resort Inc.*, 105 AD3d 653, 654 (1st Dept 2015).

In support of this branch of their motion, the corporate defendants rely on the proof they submit establishing that the attack did not occur on resort premises and assert that, as a result, they had no duty to maintain security. In opposition to the motion, in JG's affidavit, he avers that he and his family had traveled to Covecastles on two prior occasions beginning in 2012, during which he "did notice some security personnel." (Doc. No. 66.) He states that, during the second trip, he did "not recall seeing much of a security presence, if at all" and, on the trip during which the attack took place, he "did not see any security personnel whatsoever at the resort." JG further recalls that he "never saw any security devices or other indications of security while on the property."

JG also relies on marketing materials produced by the corporate defendants – specifically

statements on their website. The website represents that "*our* pristine white sand beach" is "one half-mile" long, "secluded and quiet," and is the "perfect beach" for a "brisk morning walk . . . or a leisurely stroll under the stars." (Doc. No. 69.) JG maintains that he "saw no signs whatsoever delineating public from private spaces," and states that he and his family were "encouraged to traverse the beaches freely." He insists that it "was directly implied that the beaches were part and parcel of the Covecastles resort and experience." However, JG does not explain what he means by the term "directly implied," and he does not specify who made any such representation.

JG further states that he received correspondence between Myron Goldfinger and others, indicating that the Goldfingers were responsible for mismanaging the resort. In one email dated April 7, 2015, Bruce Male, whose identity and role with respect to Covecastles is not explained, wrote that he felt "compelled to respond" with respect to "security problems." (Doc. No. 68.) Male stated his opinion that, "[a]s a direct . . . consequence of [Myron Goldfinger's] reducing the security force at the resort from three security guards to one part-time guard in approximately 2011 or 2012 and henceforth, . . . incidents have occurred." Male asked Myron Goldfinger, "why did you reduce the security force without letting the owners know?" He stated that it was "pretty obvious that if we had daytime security the first incident would not have happened." Male accused Myron Goldfinger of not having "a professional manager on the site to run [Covecastles] as it should be." Male specified that Myron Goldfinger "attempt[ed] to fill this role as an absentee manager and run down to Anguilla on a crisis basis." Male also stated to Myron Goldfinger that "[a] full time, professional manager, or you yourself, should have taken on the responsibility of interviewing everyone individual who would be hired to maintain the security of [Covecastles'] guests and staff. Instead you have relied on the 'reputation' of the Amor Guard

company."

Nothing in plaintiffs' papers casts doubt on the corporate defendants' conclusive showing that the attack took place off of the resort property. This fact alone obviates the corporate defendants' duty to secure the location where the attack occurred. *See generally Darby v Compagnie Natl. Air France*, 96 NY2d at 349-340. Further, the cause of action for negligent security must fail because the resort "had no reason to anticipate" that there would be a brutal attack of this kind, and "the only security measure that even arguably could have prevented the attack would have been the fortuitous presence of a security guard stationed at the exact location of the attack." *Rednour v Hilton Hotels Corp.*, 283 AD2d at 222. In other words, to have prevented this attack, not only would additional security guards had to have been hired, but a guard would have had to personally escort the child during her walk on the beach. In the absence of any indication that Anguilla is generally a dangerous place to visit, this is far beyond the duty that defendants had to plaintiffs as innkeepers.

There can be no doubt that this was a horrific, vicious attack. But, under the circumstances presented and on the instant papers submitted, this Court is constrained to determine that the law of this State does not provide recompense for the child's injuries as against defendants. The corporate defendants' motion must be granted in its entirety, and the complaint dismissed. This determination renders the individual defendants' motion, as well as the remaining asserted grounds for dismissal, academic. *See generally Silver v Whitney Partners LLC*, 130 AD3d 512, 514 (1st Dept 2015), *lv denied* 26 NY3d 910 (2015); *Vasquez v Almanzar*,

107AD3d 538, 541 (1st Dept 2013).[7] To the extent not addressed herein, plaintiffs' remaining arguments have been examined and found to be lacking in merit.

Accordingly, it is hereby:

ORDERED that the motion by Covecastles Development Corporation and Covecastles Limited to dismiss the complaint against them (motion sequence No. 004), as well as Myron and June Goldfinger's cross motion thereto, are granted; and it is further

ORDERED that the motion by Myron and June Goldfinger to dismiss the complaint against them (motion sequence No. 002) is resolved as academic; and it is further

ORDERED that the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: February 6, 2016

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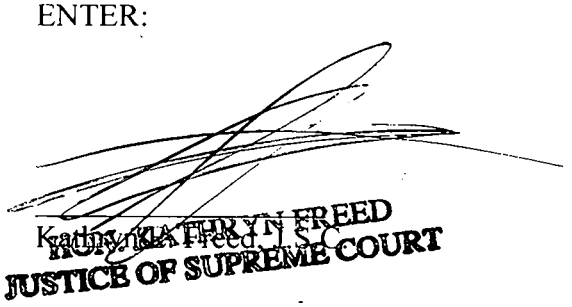

[7] The individual defendants' motion focuses more on whether they can be held liable in their individual capacity. Since this Court's ruling is conclusive regardless of who, precisely, made hiring decisions on behalf of the corporate defendants, it is unnecessary to reach this issue.