SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 151453/2016

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

Plaintiffs,

MOTION SEQ. NO. 009

- v -

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

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion to/for DISMISS ACTION/INCONVENIENT FORUM.

In motion sequence number 009, defendants Covecastles Development Corporation (CDC) and Covecastles Limited (CL, together with CDC, Covecastles) move pursuant to CPLR 327(a) to dismiss the complaint of plaintiffs JG and CG (collectively the Parents), individually and on behalf of the minor CG (CG, together with the Parents, the Family) on the basis that New York is an inconvenient forum to litigate the Family's claims.

Factual and Procedural Background

Briefly, this action arises out of the tragic attempted rape of CG while at a Covecastles resort in Anguilla (the Resort). CG was attacked by an employee of the resort and suffered serious injuries as a result. In February 2016, the Family commenced this action against the defendants asserting a single cause of action for negligence alleging that defendants were

negligent and breached their duty of reasonable care by: (1) failing to implement adequate security procedures and policies necessary to protect their guests and residents, and (2) failing to adequately screen its employees for prior criminal conduct. A full recitation of the facts may be found in this Court's prior decision, dated February 6, 2017 (the 2/6/17 Decision) (NYSCEF Doc. No. 87).

The Family are all individuals and residents of New York. CDC is a Delaware corporation and owner of certain parcels of real estate within the Resort's premises. Myron Goldfinger and June Goldfinger (the Goldfingers) are two of the three shareholders of CDC.

CL is an Anguillan corporation, established to operate and manage the Resort. CL was granted a license by the Anguillan government to operate the Resort. CL contends that it has been inoperative since 2017 as a result the hurricanes that occurred that year. CDC and the Goldfingers are three of the five shareholders of CL.

Procedural History

In the 2/6/17 Decision, this Court dismissed the complaint against all defendants on the basis that the laws of New York "do not provide recompense for [CG's] injuries as against defendants" (*id.* at p. 13). Plaintiffs subsequently filed a notice of appeal from the 2/16/17 Decision.

On May 24, 2018, the Appellate Division, First Department issued a decision modifying the 2/6/17 Decision. The First Department denied the motion to dismiss and reinstated the complaint as to Covecastles (the First Department Decision), finding that Covecastles "failed to conclusively establish either that no part of the attack occurred on [its] property or that [it] had no responsibility for that area" or offer sufficient evidence to defeat the allegation that "the

assailant had a criminal history that made the attack foreseeable to defendants" (*JG v Goldfinger*, 161 AD3d 640, 640 [1st Dept 2018]). The First Department Decision did not modify this Court's dismissal of the complaint against the Goldfingers, finding that "the allegation regarding their involvement in the security and hiring at the resort are insufficient" to state a cognizable claim (*id.*).

On July 2, 2018, Covecastles filed the instant motion seeking dismissal of the complaint on the basis that New York is an inconvenient forum.

Forum Non Conveniens

Covecastles argues that New York is an inconvenient forum because: (1) Anguilla is an adequate forum to litigate these issues, (2) the relevant witnesses and evidence reside in Anguilla, and (3) the Family's residence is the only connection to New York.

In opposition, the Family argues that: (1) JG booked the trip from New York and the payment went to a New York bank account, (2) all decision making related to the management of the Resort occurred in New York, (3) in a prior litigation, Covecastles has represented that its principal place of business is in New York, and (4) CG's medical providers are located in New York.

"The doctrine of forum non conveniens permits a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum" (*Boyle v Starwood Hotels & Resorts Worldwide, Inc.*, 110 AD3d 938, 939 [2d Dept 2013], *affd*, 23 NY3d 1012 [2014] [internal quotation marks and citations omitted]).

Covecastles bears the burden of establishing that there are relevant private or public interests that would be served by having this litigation commenced in Anguilla (*id.*).

A court must "weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system" in rendering its determination (*id.* [internal quotation marks and citations omitted]). No one factor is dispositive (*id.* [internal quotation marks and citations omitted]). "[G]enerally, a plaintiff must be able to show more than its own convenience for selecting the forum when the choice imposes a heavy burden on the court and the defendant" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 482 [1984] [internal citations omitted]). "It is well established law that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991] [internal quotation marks and citations omitted])

Here, Covecastles has met its burden by establishing that Anguilla is the appropriate forum for adjudicating these claims. The Family's single cause of action for negligence arises from Covecastles alleged negligence in failing to implement adequate security procedures and policies necessary to protect their guests and residents of the Resort, and failing to adequately screen the Resort's employees for prior criminal conduct during the hiring process.

It is undisputed that the Family are all New York residents, but "[t]he application of the doctrine of forum non conveniens should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties." (*Fertel v Resorts Intl.*, 35 NY2d 895, 897 [1974] [internal quotation marks and citations omitted]) "Although such residence is, of course, an important factor to be considered" (*id.* [internal quotation marks and

citations omitted])). Similarly, the fact that the Goldfingers are residents of New York is an insufficient basis for New York to retain the litigation.

The Family attempts to characterize the subject of the litigation as only pertaining to the decisions made by the managers of Covecastles, but the Family's sole cause of action for negligence goes beyond just the decisions of management and asserts that Covecastles had various lapses in its duty to properly provide security for the Resort and its guests. The execution of any management directives would have occurred in Anguilla by the staff and employees that were present at the Resort daily (Krellenstein aff, exhibit 3, ¶ 9). It is unclear how the Anguillan witnesses, who are not subject to New York jurisdiction as Anguillan residents, can be compelled to testify in New York. "Availability of witnesses is consideration in deciding a forum non conveniens motion" (*World Point Trading PTE. v Credito Italiano*, 225 AD2d 153, 161 [1st Dept 1996]).

In addition, Covecastles submits an affidavit from Eustella Fontaine (Fontaine), an Anguillan solicitor and barrister affirming that: (1) the attacker was arrested and incarcerated by the Anguillan authorities pursuant to the Anguillan criminal justice system (Krellenstein aff, exhibit 3, ¶ 5); (2) the former staff and employees were responsible for the day-to-day operations and management of the Resort (*id.*); (3) the attacker's employment screening and hiring occurred in Anguilla (*id.* at ¶ 14); and (4) all records, evidence, and witnesses related to the attack reside in Anguilla (*id.* at ¶ 10).

Furthermore, CG's medical providers in New York are not critical witnesses considering that Covecastles maintains that it is not liable for CG's injuries, since the attack occurred on a beach outside of the Resort's premises, the attacker was acting outside the scope of his employment, and Covecastles is not obligated to provide security outside of the Resort premises

because it is owned and controlled by the Anguillan government, necessitating a determination as to Covecastles' obligations of securing the beach under Anguillan law (*id.* at ¶ 4).

Fontaine further affirms that Anguilla has a "mature system of jurisprudence based on English law and practices by an established bar of attorneys and counselors" and that Anguilla has a substantial interest in adjudicating claims involving its beaches and tourism industry (*id.* at ¶¶ 7, 15).

The Family contends that Anguilla is an insufficient alternative forum and that they will not receive a fair trial in Anguilla because: (1) the first three lawyers JG interviewed after the incident occurred declined representation because they allegedly had conflicts of interest; and (2) JG was allegedly informed by local residents that he would have a difficult time finding representation because most attorneys would have concerns given prominence of the tourism industry in Anguilla. These allegations are insufficient to rebut Fontaine's affidavit and do not outweigh Anguilla's interests in adjudicating this action (JG aff, ¶¶ 26-28). Moreover, the Family has failed to identify an instance where the Anguillan court was unable to adjudicate such issues.

The fact that Covecastles pleaded that New York was its principal place of business in an answer in a prior litigation almost 20 years ago is insufficient to form a nexus to render New York a more convenient forum than Anguilla (*World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d at 160 [1st Dept 1996] ["Even granting, for argument's sake, that World Point Trading could establish standing to sue, plaintiff has nevertheless failed to demonstrate that the nexus between the dispute and this State is sufficient to render it a convenient forum"]). Similarly, the Family fails to identify any legal support for finding New York is a convenient forum based purely on the fact that the payment for the Family's booking occurred in New York.

Covecastles has established that there is an adequate alternative forum, that the location of key witnesses and evidence resides in Anguilla, and that Anguilla has a much greater interest in adjudicating these issues than New York. "The minimal contacts with this State are insufficient to warrant continuance of the litigation here" (*Bader & Bader v Ford*, 66 AD2d 642, 648 [1st Dept 1979]). "Forum non conveniens relief should be granted when it plainly appears that New York is inconvenient forum and that another is available which will best serve ends of justice and convenience of parties" (*Economos v Zizikas*, 18 AD3d 392, 394 [1st Dept 2005]). However, this Court will condition the dismissal of the Family's complaint on Covecastles accepting service of process and waiving any statute of limitation defenses in Anguilla (*Fertel v Resorts Intl.*, 43 AD2d 241, 243 [1st Dept 1974] *affd*, 35 NY2d 895 [1974]).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion of defendant Covecastles Development Corporation and defendant Covecastles Limited to dismiss this action on the ground that New York is an inconvenient forum is granted on condition that defendants stipulate to waive any statute of limitations defenses and accept service of process in the event that this action is commenced in Anguilla; and it is further

ORDERED that, within 30 days from service of a copy of this order with notice of entry, defendant shall file proof of compliance with the above condition with the Clerk of Part 2 and with the Clerk of the Court (60 Centre Street, Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff;

and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of Part 2 shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);

and it is further

ORDERED that, upon the timely filing of the foregoing, the Clerk of the Court shall enter judgment dismissing the action; and it is further

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

8/12/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE