

Felker v Ponte Gadea Park, LLC
2020 NY Slip Op 32767(U)
August 25, 2020
Supreme Court, New York County
Docket Number: 158084/2018
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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VIKTORIYA FELKER,

Plaintiff,

INDEX NO. 158084/2018
MOTION DATE 10/10/2019
MOTION SEQ. NO. 001 002

- v -

PONTE GADEA PARK, LLC, CITUSA PARK AVENUE, LLC

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 45, 47, 48, 49
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 50, 51, 52, 53, 54
were read on this motion to/for JUDGMENT - SUMMARY.

Defendants Ponte Gadea Park, LLC (PGP) (motion sequence number 001) and Citusa Park Avenue, LLC (CPA) (motion sequence number 002) move for summary judgment dismissing this personal injury action on the ground that neither one owns the property where plaintiff sustained her injury. CPA additionally moves, pursuant to CPLR 3214 (b), to stay all discovery and disclosure in this matter until its summary judgment motion is determined and, pursuant to CPLR 8303-a, for the costs and reasonable attorneys' fees of defending this action. Motion sequence numbers 001 and 002 are consolidated for disposition.

BACKGROUND/CONTENTIONS

The complaint alleges that each defendant owned, operated, maintained, and controlled a luxury hotel named Iberostar Paraiso del Mar located in Riviera Maya, Mexico. On March 4, 2018, water on the stairs caused plaintiff to slip and fall while descending from the third to the second floor at the hotel.

Each defendant alleges that it has no involvement with the accident site. Alina R. Toyos, vice president in asset services at PGP, submits an affidavit based on her personal knowledge of the facts and circumstances in this litigation (NYSCEF 23). Toyos states that PGP owns property at 70 Park Avenue in New York City, and that PGP leases it to a third party which runs the property as a luxury hotel named Iberostar 70 Park Avenue. Toyos states that PGP does not own, lease, operate, or manage the site of the accident. Upon her information and belief, Iberostar Hoteles Y Apartamentos, S.L., a Spanish limited liability company (the Spanish Iberostar), operates the hotel where the accident happened.

CPA submits an attorney affirmation, two affidavits, a deed, and an operating license in support of its motion. The attorney affirmation states that, during a preliminary conference on January 22, 2019, defense counsel for CPA advised counsel for plaintiff that CPA had no involvement of any kind with the premises, and advocated that plaintiff should voluntarily discontinue the action against CPA with prejudice.

The affidavit of Brenda Correa, the general manager of CPA, identifies the accident site as “Iberostar Paraiso Del Mar located at Carretera Chetumal, Av Benito Juarez Km. 309, Playa Paraiso, Playa del Carmen, Quintana Roo, Mexico” (NYSCEF 33, para 2). Correa states that she is familiar with the overall corporate structure and operation of CPA. Correa states that CPA is a New York domestic company whose sole purpose is to manage a hotel located on 70 Park Avenue in New York City. Correa states that CPA does not conduct any business or own property outside New York State. CPA does not conduct any advertising, marketing, or other business-related operations for the accident premises, does not own any stock or management interest relating to those premises, and does not operate any part of those premises.

CPA also submits the affidavit of Elena Martinez, who states that she has been employed as the general manager of Paraiso Del Mar & Beach Iberostar Hotel for approximately one year. The entity that employs Martinez “includes” the hotel where the accident allegedly occurred (NYSCEF 34, para 1). Martinez states that she is familiar with the overall ownership and operation of the accident premises and that of its owner and operator, Hotelera Playa Paraiso S.A. de C.V. (Hotelera Playa Paraiso), a Mexican corporation. Hotelera Playa Paraiso “owns the entire Iberostar Paraiso Complex” which is comprised of five hotels, including the accident premises (id., para 4). Martinez and Correa provide the same address for the accident site, which according to Martinez is also the address of the entire Iberostar complex.

Martinez states that Hotelera Playa Paraiso does not conduct any business operations with CPA and has no ownership interest in CPA, and that CPA has no ownership interest or business relations of any kind with the hotel that is the accident site or with Hotelera Playa Paraiso.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact of fact (*Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 10 [1st Dept 2002]). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Plantamura v Penske Truck Leasing*, 246 AD2d 347, 348 [1st Dept 1998]). The court's function on a summary judgment motion is issue finding, not issue determination (*Farias v Simon*, 122 AD3d 466, 468 [1st Dept 2014]). Because summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). In determining the motion, the court must construe the evidence in the

light most favorable to the non-moving party (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]).

Concerning Toyos' affidavit on behalf of PPG, sworn statements taken in the United States but outside New York must be accompanied by a proper certificate of conformity (CPLR 2309 [c]; *Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]). As plaintiff points out, Toyos' affidavit was sworn in Florida and a certificate of conformity is not included. PPG does not offer to cure this irregularity (see *Bank of N.Y. v Singh*, 139 AD3d 486, 487 [1st Dept 2016] [failure to include a certificate of conformity can be corrected nunc pro tunc by filing a new conforming affidavit]; *Matter of Renren, Inc. Derivative Litig. v XXX*, 67 Misc 3d 1219[A], 2020 NY Slip Op 50588[U] [Sup Ct, NY County 2020]). Toyos' affidavit is not admissible. Even if were admissible, as plaintiff argues, it would not be sufficiently probative of PPG's lack of interest in the hotel where the accident allegedly happened. Toyos does not state that PPG had no interest in the site at the time of the accident, does not cite to any documents or records that she examined, and does not explain how her position enables her to know the facts that she alleges.

Correa's affidavit in support of CPA is similarly deficient. In regard to Martinez's affidavit supporting CPA, it indicates that she was not employed at Paraiso Del Mar & Beach Iberostar at the time of the accident. She states that she has been employed there for about one year, her affidavit is dated May 30, 2019, and the accident occurred on March 4, 2018. Plaintiff reasonably argues that, as Martinez was not in her position at the time of the accident, she is unable to state whether Hotelera Playa Paraiso operated the accident premises at the time of the subject accident. In addition, her affidavit does not speak to whether CPA had any relation to the property in Mexico at the time of the accident.

CPA submits a deed, dated in 1999, which states that Hotelera Playa Paraiso is the sole owner of five properties, which were consolidated in 1999. The deed does not clearly identify whether the place where plaintiff fell is included in the five properties. The accident site, if it is named in the deed, is under a different name than that in Martinez's affidavit or the complaint. The address given in the deed is different from the address for the accident site in CPA's affidavits and the complaint. CPA submits Hotelera Playa Paraiso's operating license for the accident site, which is dated January 25, 2019, after the accident. It is unknown whether the license was in effect at the time of plaintiff's accident.


Plaintiff argues that it should be allowed to conduct discovery relative to the question of defendants' relationship with the accident site. The evidence indicates that PPG owns 70 Park Avenue, which CPA operates under the name of Iberostar. Plaintiff argues that this indicates that there is some relationship between the hotel complex in Mexico, also bearing the name Iberostar, and the defendants. Plaintiff is entitled to discover whether there is any evidence to that effect.

Pursuant to CPLR 8303-a, CPA seeks costs and attorneys' fees from plaintiff, alleging that plaintiff acted frivolously in refusing to discontinue this action. A claim must be completely lacking in merit to be deemed frivolous (*West Hempstead Water Dist. v Buckeye Pipeline Co., LP*, 152 AD3d 558, 559 [2d Dept 2017]). The claim that defendants have an ownership interest in the accident site cannot be deemed to be totally without merit. Accordingly, it is hereby

ORDERED that motion sequence number 001 by defendant Ponte Gadea Park, LLC for summary judgment dismissing the complaint is denied; and it is hereby

ORDERED that motion sequence number 002 by defendant Citusa Park Avenue, LLC for summary judgment dismissing the complaint, and for a stay of discovery, and for costs and attorneys' fees is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>8/25/2020</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE