

Robinson v Best Western Governors Inn Richmond
2022 NY Slip Op 31193(U)
April 12, 2022
Supreme Court, New York County
Docket Number: Index No. 151340/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 151340/2021

NAKISHA ROBINSON and TERRENCE ROBINSON,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

BEST WESTERN GOVERNORS INN RICHMOND and
BEST WESTERN INTERNATIONAL, INC.,**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32

were read on this motion to/for

DISMISSAL

In this personal injury action, defendant Best Western Governors Inn Richmond (BWG) moves, pursuant to CPLR 327 and 3211 (a) (8), to dismiss the complaint for lack of personal jurisdiction, improper service and forum non conveniens. Plaintiffs Nakisha Robinson and Terrence Robinson (plaintiffs) oppose the motion and cross-move, pursuant to CPLR 306-b, for an extension of time to serve BWG or for a traverse hearing. For the reasons set forth below, the motion is granted and the cross motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint, plaintiffs are New York residents (NY St Cts Elec Filing [NYSCEF] Doc No. 10, Nicole C. Salerno [Salerno] affirmation, Ex A, ¶¶ 1). BWG, a Virginia corporation, operates a hotel known as the “Best Western Plus Governor’s Inn” (the Hotel) located at 9826 Midlothian Turnpike, Richmond, Virginia (*id.*, ¶¶ 2 and 6). Defendant Best Western International, Inc. (BWI) is an Arizona corporation authorized to conduct business in

New York (*id.*, ¶ 4). Plaintiffs were guests at the Hotel when plaintiff Nakisha Robinson was bitten by a bedbug on February 9, 2020 (*id.*, ¶¶ 16-17).

Plaintiffs commenced this action by filing a summons and complaint on February 8, 2021. The complaint alleges that defendants were negligent in their ownership and operation of the Hotel and breached their duty to maintain the Hotel in a reasonably safe condition (*id.*, ¶¶ 14-21). In its answer, BWG pleaded as twenty-second and twenty-third affirmative defenses, respectively, a lack of personal jurisdiction based on improper service and the absence of general and/or specific jurisdiction (NYSCEF Doc No. 13, Salerno affirmation, Ex D, ¶¶ 29-30).

BWG now moves to dismiss the complaint. First, it argues that this Court lacks jurisdiction under CPLR 301 and 302. Second, BWG contends that service was improper because plaintiffs failed to file an affidavit of compliance within 30 days of service as required under Business Corporation Law (BCL) § 307 (c) (1). Last, BWG argues the complaint must be dismissed based on forum non conveniens. The incident occurred in Virginia, where BWG's witnesses reside and where plaintiff Nakisha Robinson received medical treatment for her injuries.

BWG tenders an affidavit from Vibha Jasani (Jasani), the vice president of Shaanta Inc. (Shaanta), the corporation that operates the Hotel under a membership agreement with BWI and owns the property where the incident occurred (NYSCEF Doc No. 12, Salerno aff, Ex C, ¶¶ 1-2). Jasani avers that she personally checked in the plaintiffs as guests, who were “walk-ins ... [who] booked their room with us in-person” on February 9, 2020 (*id.*, ¶ 9). She explains that Shaanta's staff maintain the Hotel, including all guest bedrooms (*id.*). Jasani avers that Shaanta and BWG maintain offices only in Virginia, generate all their revenue from business conducted in Virginia, and do not operate or conduct any business outside of that state (*id.*, ¶¶ 3-5). Jasani states that

Shaanta and BWG do not maintain a presence in New York, are not affiliated with any New York hotels, do not solicit business in New York, have no contracts to provide goods or services within this state and do not maintain bank accounts, own property or pay taxes here (*id.*, ¶¶ 6-8). As for service of process, an affidavit of service sworn to February 23, 2021 shows that BWG was personally served by delivery of the summons and complaint to Carina Zuniga (Zuniga), the “Manager on Duty,” at the Hotel at 12:35 p.m. on February 17, 2021 (NYSCEF Doc No. 11, Salerno affirmation, Ex B). Jasani states that Zuniga is not an officer or director of Shaanta, which does business as BWG, and that her front desk duties at the Hotel are strictly clerical in nature (NYSCEF Doc No. 12, ¶ 10).

Plaintiffs argue the motion is premature under CPLR 3211 (d) and contend that discovery is necessary to ascertain the degree of control BWI exercised over BWG. Plaintiffs next argue that Jasani’s affidavit and the membership agreement are inadmissible. The affidavit lacks a certificate of conformity under CPLR 2309 (c), and the agreement is not authenticated. They reject the contention that BWG does not benefit from interstate commerce since Best Western’s website and other third-party travel websites offer hotel room bookings at BWG. Plaintiffs also assert that BWG has not satisfied the factors ordinarily considered for dismissal for forum non conveniens. As for service of process, plaintiffs maintain that Jasani’s affidavit is insufficient to rebut specific facts contained in the affidavit of service. Alternatively, they cross-move for a traverse hearing and for an extension of time to serve BWG with process.

LEGAL CONCLUSIONS

CPLR 3211 (a) (8) provides for dismissal of a complaint on the ground that the court lacks personal jurisdiction over the defendant. The plaintiff, in opposing a motion brought under CPLR 3211 (a) (8), bears the burden of coming “forward with sufficient evidence, through

affidavits and relevant documents, to prove the existence of jurisdiction” (*Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007] [internal citation omitted]). The evidence must be sufficient to demonstrate a prima facie basis for personal jurisdiction (*see Aramid Entertainment Fund Ltd. v. Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682, 683 [1st Dept 2013], *lv denied* 22 NY3d 858 [2013]). Whether jurisdiction over a non-domiciliary is proper involves a two-step inquiry (*see Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]). First, the court must determine whether jurisdiction is permissible under CPLR 302, this state’s long-arm statute (*id.*). Second, the exercise of jurisdiction must comport with federal due process (*id.*).

At the outset, plaintiffs do not challenge BWG’s assertion that general jurisdiction under CPLR 301 does not lie. Instead, they maintain that CPLR 302 (a) (1) confers personal jurisdiction over BWG because it transacts business in New York. CPLR 302 (a) (1) provides for “personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state.” Jurisdiction under CPLR 302 (a) (1) is permissible where a non-domiciliary “conducted sufficient activities to have transacted business in the state” and “the claims ... arise from the transactions” (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016], *rearg denied* 28 NY3d 1161 [2017]). “A non-domiciliary defendant transacts business in New York when ‘on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business’” (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017], quoting *Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014]). The non-domiciliary must have engaged in purposeful activities, which are “volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and

protections of its laws” (*Paterno*, 24 NY3d at 376 [internal quotation marks and citation omitted]). “[W]here the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302 (a) (1)” (*id.* at 377). Jurisdiction under CPLR 302 (a) (1) may be found even if the defendant is not physically present in the state and even if the defendant engaged in just a single transaction ““so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted”” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006] [citation omitted]).

A “passive website[] ... which merely impart[s] information without permitting a business transaction” does not constitute purposeful activity for purposes of CPLR 302 (a) (1) (*Paterno*, 24 NY3d at 377). Plaintiffs submit that BWI’s website offers visitors more than just information because they may view and book a room at the Hotel. Plaintiffs argue that BWI, by way of its website, benefits from interstate commerce and purposefully avails itself of the benefit of transacting business in New York. These arguments are insufficient to invoke jurisdiction under CPLR 302 (a) (1). As discussed above, the cause of action must arise from the defendant’s transaction of business in this state. Stated another way, there must be an “articulable nexus” between the transaction and the claim (*McGowan v Smith*, 52 NY2d 268, 272 [1981]). Assuming BWG’s participation in BWI’s website constitutes the transaction of business, “the relationship between [BWI’s] website activities and plaintiff’s negligence action arising from an allegedly defective condition of premises in [Virginia] is too remote to support the exercise of long-arm or specific jurisdiction under CPLR 302 (a) (1)” (*Stern v Four Points by Sheraton Ann Arbor Hotel*, 133 AD3d 514, 514 [1st Dept 2015] [dismissing a negligence action

for a defective premises condition against a hotel operator]; *Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1044 [2d Dept 2017] [granting dismissal where plaintiffs failed to show a substantial relationship between the negligence claims and the hotel operator's transaction of business on a website]; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914 [2d Dept 2014] [stating that the relationship between plaintiff's purchase of services on defendant's website and the tort was too remote for CPLR 302 (a) (1)]. Moreover, plaintiffs have not rebutted Jasani's averment they were "walk-in" guests, which implies that they did not use BWI's website, or any other website, to reserve their room. Thus, the claims do not arise from BWG's transaction of business here (*see Jeffers v Best W. Intl., Inc.*, 2010 NY Slip Op 31521[U], *6 [Sup Ct, NY County 2010] ["A reservation made in New York could constitute the transaction of business required for jurisdiction under CPLR 302, but only with respect to claims arising out of that reservations call, which do not include a tort occurring in a foreign hotel"]).

Plaintiffs' argument that the motion is premature is unpersuasive. It is uncontroverted that Shaanta owns and operates the Hotel, and plaintiffs have failed to rebut Jasani's averments on those points. Plaintiffs have not produced any evidence to show that BWG is a BWI subsidiary, and thus, they only speculate that BWI controlled BWG. Nor have plaintiffs rebutted BWG's proof that it lacks sufficient New York contacts (*see Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004] [granting dismissal to a subsidiary that lacked sufficient minimum contacts with New York]).

Their contention that Jasani's affidavit and the membership agreement are inadmissible is equally unpersuasive. While Jasani's affidavit, executed in Virginia, is not accompanied by a certificate of conformity under CPLR 2309 (c), this "is a mere irregularity, and not a fatal defect" (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

In this instance, the oath was duly given (*see Forman v Whitney Ctr. for Permanent Cosmetics Corp.*, 172 AD3d 412, 413 [1st Dept 2019]), and BWG corrected the deficiency in reply (*see DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016] [excusing the failure to submit a certificate of conformity because the defendant provided a correct copy in reply]). Likewise, an affidavit may be used to authenticate documentary evidence (*Muhlhahn v Goldman*, 93 AD3d 418, 418 [1st Dept 2012]). Here, Jasani signed the membership agreement as a voting member (*see 830 Eighth Ave. LLC v Global at 8th LLC*, 198 AD3d 404, 405 [1st Dept 2021] [reasoning that an affidavit from the managing member who signed the lease was sufficient to authenticate it]). BWG also was not required to produce a certificate of acknowledgement under CPLR 4538. Jasani's signature was notarized, and a notarized signature constitutes "*prima facie* evidence of proper execution" (*Indemnity Ins. Co. of N. Am. v Levine*, 168 AD2d 323, 325 [1st Dept 1990]).

To the extent plaintiffs submit that BWG derived substantial revenue from interstate commerce, CPLR 302 (a) (1) does not impose a revenue requirement. That requirement appears in CPLR 302 (a) (3). Plaintiffs, though, have not alleged that CPLR 302 (a) (3) confers jurisdiction over BWG. In any event, CPLR 302 (a) (3) is inapplicable because the injury occurred in Virginia (*see Stern*, 133 AD3d at 515; *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 202 [1st Dept 2003] [concluding that CPLR 302 (a) (3) is inapplicable in a medical malpractice action because "the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred"]). In sum, plaintiffs have not established that jurisdiction is permissible under CPLR 302.

Given the foregoing findings, this Court need not address the remainder of the contentions raised in BWG's motion and, in the absence of personal jurisdiction, it would be

futile to grant plaintiffs' cross motion for a traverse hearing or for an extension of time under CPLR 306-b.

Accordingly, it is hereby:

ORDERED that the motion brought by defendant Best Western Governors Inn Richmond to dismiss the complaint herein (motion sequence no. 001) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the cross motion brought by plaintiffs Nakisha Robinson and Terrence Robinson for an extension of time to serve defendant Best Western Governors Inn Richmond or for a traverse hearing is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Best Western International, Inc.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the amended caption is as follows:

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

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NAKISHA ROBINSON and TERRENCE ROBINSON,

Index No. 151340/2021

Plaintiffs,

- against -

BEST WESTERN INTERNATIONAL INC.,

Defendant.

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and it is further

