

Malik v Como Holdings USA, Inc.

2023 NY Slip Op 33509(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 159140/2022

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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INDEX NO. 159140/2022
NAJAM M. MALIK, GUL YASMIN SHAH, 03/23/2023,
Plaintiffs, 03/27/2023,
MOTION DATE 03/27/2023
- v -
MOTION SEQ. NO. 001 002 003

COMO HOLDINGS USA, INC., THE PARROT CAY CLUB
LTD., P.C. HOTEL MANAGEMENT LTD., CAICOS
HOLDINGS LIMITED,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28,
29, 30, 31, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 91
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36,
37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 72, 88, 89, 92, 94, 96
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55,
56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 73, 90, 93, 95, 97
were read on this motion to DISMISS.

Upon the foregoing documents, and for the reasons stated hereinbelow, defendants' motions to
dismiss are granted.

Background

On October 28, 2020, newlywed honeymooners Mohammad M. Malik and Nor G. Shah were
crossing from one sandbar to another in the waters in front of their private villa at their resort
hotel, non-party COMO Parrot Cay Resort (the "Resort"), in the Turks and Caicos Islands
("TCI"), a British Overseas Territory in the Caribbean, when they apparently were caught in a
strong current and drowned.

On October 20, 2021, plaintiffs, Najam M. Malik ("Malik"), as Administrator of the Estate of
Mohammad M. Malik, and Gul Yasmin Shah ("Shah"), as Executor of the Estate of Nor G.
Shah, and their families, commenced two actions (the "Prior Actions") in the Supreme Court of
the Turks and Caicos Islands, pursuant to TCI's Fatal Accidents Ordinance, to recover damages
from defendants The Parrot Cay Club LTD, P.C. Hotel Management LTD, and Caicos Holdings
Limited. NYSCEF Doc. No. 29, 28.

On October 26, 2022, plaintiffs commenced the instant action against defendants, Como Holdings USA, Inc. (“CHUSA”), The Parrot Cay Club LTD (“PCC”), P.C. Hotel Management Ltd., and Caicos Holdings Limited, asserting causes of action for (1) negligence and (2) wrongful death. NYSCEF Doc. No. 1. Plaintiff based venue on CHUSA’s principal place of business. *Id.*

On March 23, 2023, CHUSA moved, pursuant to CPLR 327(a), to dismiss on the grounds of *forum non conveniens*. NYSCEF Doc. No. 24.

CHUSA argues, inter alia, that: TCI, where the Prior Actions are pending, is an available and more appropriate forum; the underlying accident occurred in the TCI and, therefore, the law of that jurisdiction applies; plaintiffs are essentially asking defendants, other than CHUSA, to litigate in two places; and that plaintiffs do not reside in New York.

In opposition, plaintiffs argue that, subsequent to filing the Prior Actions, counsel determined that CHUSA had operating control over the Resort, and therefore New York is an appropriate venue. Plaintiffs further argue that deference should be given to their choice of venue because: CHUSA is not a defendant in the Prior Actions and the instant action was filed after the TCI Statute of Limitations had expired; CHUSA has not established the existence of an alternative forum; and New York is not an inconvenient forum because relevant witnesses to be examined live in the United States and CHUSA and one of the plaintiffs, Malik, reside in New York.

On March 27, 2023, P.C. Hotel Management Ltd. and Caicos Holdings Limited (together, “PCHM/Caicos”) moved, pursuant to CPLR 3211(a)(8) and CPLR 327(a), to dismiss based on lack of jurisdiction and *forum non conveniens*. NYSCEF Doc. No. 32.

PCHM/Caicos argue, inter alia, plaintiffs have failed to show either is subject to general or specific personal jurisdiction in New York, as they are foreign corporations neither incorporated in nor having their principal places of business here, and, further, there is no affiliation pled that would trigger CPLR 302, New York’s long-arm statute. PCHM/Caicos further argue for dismissal, pursuant to CPLR 3211(a)(4) and CPLR 327(a), based on the parallel Prior Actions, and suggest minimal deference should be given to plaintiffs’ “forum shopping.”

In opposition, plaintiffs argue that they need not make a prima facie showing of jurisdiction at this stage, but only show that their position is not frivolous and, to that end, TCI corporate registrations show that the CEO of CHUSA is a director of each of the other instant defendants and argue that discovery will establish this Court has “alter ego jurisdiction” over PCHM/Caicos as CHUSA’s wholly owned subsidiaries. Plaintiffs also argue that New York is an appropriate forum because CHUSA is located here, that one plaintiff resides in New York and the other in New Jersey, and that CPLR 3211(a)(4) does not apply as the parallel action pending is in a foreign country.

On March 27, 2023, PCC moved, pursuant to CPLR 3211(a)(2), (4) and (8) and CPLR 327, to dismiss based on lack of personal jurisdiction and *forum non conveniens*. NYSCEF Doc. No. 51.

PCC argues that New York does not have jurisdiction over it and that New York's long-arm statute does not reach it because, inter alia: contrary to the complaint, PCC neither maintains its principal place of business in New York nor is it authorized to do business here, and plaintiffs cannot establish sufficient contacts with New York or that the injury confers jurisdiction. PCC further argues for dismissal in deference to TCI's jurisdiction, where the Prior Actions precedes the instant action, as well as based on *forum non conveniens*.

In opposition, plaintiffs argue that discovery will show PCC is dominated by CHUSA, conferring jurisdiction on this Court, and, further, that New York is an appropriate forum for the reasons stated in opposition to the other motions.

In reply the defendants argue, inter alia, that: the Prior Actions should take precedence; in any event, TCI's Statute of Limitations precludes the instant action; no witnesses are located in New York; and that maintaining the instant action will burden the New York courts.

Discussion

"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." CPLR 327(a).

"*Forum non conveniens* is a flexible doctrine that depends on the unique facts and circumstances of each case." Travelers Cas. & Sur. Co. v Vale Can. Ltd., 215 AD3d 507, 510 (1st Dept 2023). However, when considering a motion to dismiss based on *forum non conveniens*, courts will consider factors including:

"the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit ... The court may also consider that both parties to the action are nonresidents ... and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction.... No one factor is controlling"

Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171, 176 (1st Dept 2004), quoting Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984) (internal citations omitted). "The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience." Pahlavi at 479 (internal citations omitted).

Here, the interests of justice, fairness and convenience, mandate this Court must dismiss the instant action, finding New York an inconvenient forum, as the underlying accident occurred in TCI, the Prior Actions were already brought there, most of the parties are located outside of New York, and no witnesses reside here. To allow the action to continue against only CHUSA, the only defendant not named in the Prior Actions, would be counterproductive, as CHUSA correctly notes that it would implead the remaining defendants.

Having found the matter must be dismissed, this Court need not reach defendants' jurisdictional arguments. Estate of Kainer v UBS AG, 37 NY3d 460, 466 (2021) ("We did not hold ... that a court invariably must resolve any outstanding personal jurisdiction issue prior to addressing *forum non conveniens*, decline to adopt such a rule in this case, and conclude that the court here did not abuse its discretion in that regard.").

This Court has considered plaintiffs' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

The motions of defendants are granted and the Clerk is hereby directed to dismiss the complaint in its entirety.



<u>10/10/2023</u> DATE	<u>ARTHUR F. ENGORON, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE