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

PRESENT: MARTIN SHULMAN J.S.C. PART 1
Justice

E 2/28/12 oc

Index Number : 101620/2009
ROJAS, ELIZABETH
vs.
CHOICE HOTELS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 101620/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A - H	1
Answering Affidavits — Exhibits A	2,3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

RECEIVED
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FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Dated: Feb. 28, 2012

MARTIN SHULMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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Elizabeth Rojas,

Plaintiff,

Index Number: 101620/2009

-against-

Choice Hotels International Services Corp., Choice Hotels International, Inc., Great West Inns, Inc. d/b/a Comfort Inn West,

Defendants.

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Martin Shulman, J.:

Defendants Choice Hotels International Services Corp. ("Choice Services"), Choice Hotels International, Inc. ("Choice International") and Great West Inns, Inc. d/b/a Comfort Inn West ("Great West") move for summary judgment dismissing plaintiff's complaint and Great West moves to dismiss the complaint against it pursuant to CPLR 3211 (a) (8) based upon lack of jurisdiction. Plaintiff opposes the motion.

Background

Plaintiff alleges that from January 17 to January 21, 2009 she stayed in a hotel (the "Hotel"), located at 1344 North 27th Avenue, Phoenix, Arizona, where she allegedly suffered from a bedbug infestation (complaint, ¶ 1). Great West owns and operates the Hotel (Mankad affidavit, ¶ 2). Choice Services and Choice International operate hotel chains, including the Comfort Inn hotel chain and Great West is a franchisee of Choice International (complaint, ¶¶ 10-12; Radadiya EBT, at 12).

Plaintiff asserts that she worked as an independent contractor for Mary Kay cosmetics and that, in January 2009, she booked a trip to Phoenix, Arizona through the

website www.hotels.com to attend a Mary Kay convention (plaintiff EBT, at 21-24). She states that she checked in at the Hotel late in the evening of January 17, 2009, was given a room key, went up to room 215 (the "Room") and when she woke up the next morning she felt itchy (*id.* at 32, 36-37, 42). She further states that the itching grew worse throughout the day and that, in the evening at the Hotel, she spoke with Maria and Elvia, both of whom were employed in housekeeping at the Hotel, and told them that she had some marks and was itching (*id.* at 47, 51, 54).

Plaintiff contends that the itching grew steadily worse, that she had marks on her arms, legs and back that resembled mosquito bites and that when she woke up at 3 A.M. she "saw bugs on the bed" (*id.* at 58, 62). She states that she went downstairs to the front desk to complain and was given a new room (the "New Room") on a different floor (*id.* at 66, 70, 72). She also states that there were no problems with the New Room and that later that day, when she went with Maria to the Room to get her clothing and luggage, Maria told her that "she was aware that they [the Hotel] had a problem with the bugs" (*id.* at 74, 76, 82).

Plaintiff asserts that she later spoke with the manager of the Hotel about the condition, that he apologized for it and after she returned to New York on January 21, 2009, she did research on the internet and realized that she had seen bedbugs (*id.* at 84, 90, 96-97). On February 2, 2009, plaintiff went to Doctor Josephine Velasquez, who gave a prescription for pills and ointment and the condition cleared up by the end of February 2009 when she returned to see Doctor Velasquez (*id.* at 103-104, 106-112, 116-117).

Plaintiff claims that she suffers anxiety whenever she goes to a hotel, that she threw out the clothing and suitcase from the trip and that she missed three or four appointments in the weeks after her return (*id.* at 115, 117, 120). However, plaintiff also states that she never saw a psychologist, social worker or dermatologist as a result of the incident and that her activities had not been limited (*id.* at 121-124).

Great West alleges that it owns and operates the Hotel and neither owns nor operates any property in New York, nor does it transact any business in New York (Mankad affidavit, ¶ 2). Defendants allege that the front desk moved plaintiff from the Room to the New Room in response to her complaint and that Dilip Radadiya ("Radadiya"), the manager, examined the Room after learning of plaintiff's complaint (Radadiya EBT, at 16-18, 21). Defendants state that Radadiya checked the Room but found no bugs, and that he spoke with plaintiff later that day and offered to pay for a doctor as a matter of customer satisfaction (*id.* at 22, 43). They further state that there was never any problem with bedbugs at the Hotel, either before or after this incident (*id.* at 56-57). They also state that Maria and Elvia worked in housekeeping at the Hotel, but no longer are employed there (*id.* at 31, 49, 57).

Plaintiff alleges that defendants are responsible for the alleged bedbug condition based upon their purported negligence and seeks compensatory and punitive damages (complaint, ¶¶ 2-3).

Great West's Motion to Dismiss

Great West has presented evidence that it lacks any connection to New York and thus is not subject to New York's jurisdiction (Mankad affidavit, ¶ 2). Plaintiff

argues that Great West waived any jurisdictional defense since it did not move to dismiss within 60 days after serving its answer. However, Great West's motion is not based upon an objection that "the summons and complaint ... was not properly served," but rather, that it lacks contacts with New York sufficient to allow a New York court to exercise jurisdiction over it (CPLR 3211 [e]).

"Generally, a nondomiciliary is subject to the jurisdiction of a New York court if it has engaged in some purposeful activity within the State and there is a substantial relationship between this activity and the plaintiff's cause of action" (*Armouth Intl., Inc. v Haband Co., Inc.*, 277 AD2d 189, 190 [2d Dept 2000]; *see also McGowan v Smith*, 52 NY2d 268, 271 [1981]). "The burden of proving jurisdiction is upon the party asserting it and when challenged that party must sustain that burden [by producing appropriate evidence]" (*Green Point Sav. Bank v Taylor*, 92 AD2d 910, 910 [2d Dept 1983]). Since plaintiff has not controverted Great West's allegations that it lacked any connection with New York, she has failed to obtain jurisdiction over it and the complaint against Great West must be dismissed.

Summary Judgment

Having dismissed the complaint against defendant Great West, the court now turns to defendants Choice Services and Choice International's (collectively the "remaining defendants") portion of the motion seeking summary judgment dismissing the complaint. A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Uncontroverted Facts

"Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d

539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]; *Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 1999]).

Punitive Damages

Generally, "punitive damages are not available for ordinary negligence" (*Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003]). Rather, a plaintiff seeking punitive damages must "present clear, unequivocal and convincing evidence of willful conduct that was morally culpable, or was actuated by evil and reprehensible motives" (*CDR Créasances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009]).

Analysis

Plaintiff fails to present any evidence of "willful conduct" or of "evil or reprehensible motives" (*CDR*, 62 AD3d at 577). At most, she presents evidence of an "individually sustained wrong [but a claim for punitive damages] ... must be shown to reflect pervasive and grave misconduct affecting the public generally" (*Fabiano v Philip Morris Inc.*, 54 AD3d 146, 150 [1st Dept 2008], citing *Walker v Sheldon*, 10 NY2d 401, 406 [1961]). In light of this failure to proffer evidence of a quasi-criminal nature aimed at the public in general plaintiff's claim for punitive damages is dismissed as to the remaining defendants (*Fabiano*, 54 AD3d at 150).

A claim for extreme emotional distress "must be supported by medical evidence" (*Walentas v Johnes*, 257 AD2d 352, 353 [1st Dept], *lv dismissed* 93 NY2d 958 [1999]) and plaintiff fails to present any medical evidence of any residual injury or that she went to any doctor after February 2009 for treatment for this incident (plaintiff EBT, at 121-

124). As a result, plaintiff's fourth cause of action for negligent infliction of emotional distress must also be dismissed as to the remaining defendants.

Plaintiff's third cause of action for breach of quiet enjoyment is based upon her assertion that defendants, as owners of the Hotel, owed her a duty to maintain the premises in a reasonably safe condition (Glassman affirmation, ¶ 40). Plaintiff fails to address this cause of action and as it is duplicative of her negligence causes of action it must be dismissed as against the remaining defendants.

Negligence Claim

Plaintiff asserts that the Room's bedbug infestation was a dangerous condition and that defendants knew, or should have known, of this condition (bill of particulars, items 6, 18). The remaining defendants state that they did not create this condition and they had no actual or constructive notice of it (Radadiya EBT, at 56-57). Plaintiff contends that defendants were aware of the condition since the maid Maria "told [plaintiff] that she was aware that the hotel had a problem with the bugs" (plaintiff affidavit, ¶ 18; plaintiff EBT, at 76).

"'Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'" (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006] [citation omitted]; *Gordon,* 67 NY2d at 837*; Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 141-142 [1st Dept 2000]). Plaintiff has not presented proof as to how long the alleged bedbug infestation existed prior to January 17, 2009 or when the Hotel purportedly became aware of it.

Accordingly, she has not presented evidence that the remaining defendants had notice of the condition.

Moreover, "the hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay evidence rule only if the making of the statement is an activity within the scope of his authority" (*Loschiavo v Port Auth. of N.Y. & N.J.*, 58 NY2d 1040, 1041 [1983]; *Pascarella v Sears, Roebuck & Co.*, 280 AD2d 279 [1st Dept 2001]). While a manager may have the authority to make admissions on behalf of his employer (*Candela v City of New York*, 8 AD3d 45, 48 [1st Dept 2004]), "a low-level employee" usually does not have such speaking authority (*Lowen v Great Atl. & Pac. Tea Co., Inc.*, 223 AD2d 534, 535 [2d Dept 1996]).

Since Maria was a housekeeper (Raddaiya EBT at 31, 49; plaintiff affidavit, ¶ 18), she was not the type of supervisory employee with the authority to bind defendants. Additionally, "[t]he burden is on the proponent of such testimony to establish its admissibility ... [and where plaintiff] failed to adduce any evidence as to the speaking authority of the declarant, the declaration is not admissible as evidence of actual or constructive notice of the alleged defect" (*Alvarez v First Natl. Supermarkets, Inc.*, 11 AD3d 572, 574 [2d Dept 2004]; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 221 [1st Dept 2007]). Consequently, the remaining defendants' motion for summary judgment dismissing plaintiff's first and second causes of action sounding in negligence is granted based upon lack of notice.

Finally, plaintiff fails to address the remaining defendants' arguments regarding her fifth cause of action alleging strict liability. As this court can discern no basis for the claim, it is also dismissed. For all of the foregoing reasons, it is

ORDERED that Great West Inns, Inc. d/b/a Comfort Inn West's motion to dismiss the complaint against it based upon lack of personal jurisdiction is granted and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining defendants' motion for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment in favor of defendants Choice Hotels International Services Corp. and Choice Hotels International, Inc. dismissing this action, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
February 28, 2012

HON. MARTIN SHULMAN, J.S.C.