

Scholl v Access Indus., Inc.

2017 NY Slip Op 30163(U)

January 27, 2017

Supreme Court, New York County

Docket Number: 156748/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

-----X
GARY SCHOLL,

Plaintiff,

DECISION & ORDER
Index No. 156748/2016

-against-

Mot. Seq. 002

ACCESS INDUSTRIES, INC., KERZNER INTERNATIONAL NEW
YORK, INC., CHRISTOPHER COX

Defendants.

-----X
HON. ARLENE P. BLUTH, J.:

The motion by Kerzner International New York Inc. (Kerzner New York) to dismiss plaintiff's complaint is granted.

Background

This action arises out of a fight that allegedly occurred at the One & Only Ocean Club Resort in Paradise Island, Bahamas on October 30, 2015. Plaintiff claims that Cox, while intoxicated, assaulted plaintiff after Cox mistakenly entered plaintiff's hotel room.

Kerzner New York argues that it is not the owner of the One & Only Ocean Club Resort and, therefore, there is no subject matter jurisdiction over it. Kerzner New York maintains that the resort is 100% owned by OC Resort Holdings, Ltd., a Bahamian company. Kerzner New York clarifies that One & Only is a trademark owned by a different entity (Kerzner International Limited), which has a registered office in the Bahamas. Kerzner New York also attaches, as exhibit C, a registration document, containing what it claims to be plaintiff's signature, that states

that the exclusive venue for any claims against the resort resulting from events occurring in the Bahamas is the Supreme Court of the Bahamas.

Kerzner New York also moves to dismiss on the ground of forum non conveniens.

In opposition, plaintiff claims that defendant has presented no evidence that plaintiff received the terms and conditions or that plaintiff signed them. Plaintiff also cites to an article in the Jewish Business News that Kerzner International operates resorts under the One & Only Brand. Plaintiff claims that it can only obtain the necessary information regarding the resort's ownership through discovery. Plaintiff also argues that the registration document containing plaintiff's signature has not been verified.

In reply, Kerzner New York observes that plaintiff's opposition did not include an affidavit from plaintiff denying that the signature on the registration document (exh C) was his. Kerzner New York also argues that an article in a publication cannot establish jurisdiction over it, especially when the article references another Kerzner entity (Kerzner International Resorts, Inc.).

Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

Here, defendant Kerzner New York provided an affidavit from Giselle Pyfrom stating that Kerzner International New York, Inc. is not the owner of the resort where plaintiff was

injured. This same affidavit states who the owner is, where they are located, and their business address. Defendant Kerzner New York also provided a signed registration statement from plaintiff indicating that the Bahamas was the exclusive jurisdiction for any claims against the resort arising from his stay.

Plaintiff failed to refute these two claims. The article by the Jewish Business News states that 'Kerzner International' (not Kerzner New York) manages One & Only resorts and that an entity called Access Industries acquired the One & Only Ocean Club in Paradise Island, Bahamas. The article does not state that Kernzer International New York, Inc. owns the resort. Accordingly, plaintiff's complaint against Kerzner is dismissed.¹

Even if Kernzer's argument that plaintiff sued the wrong entity failed, the registration statement (Kerzner's exh C) compels this Court to dismiss plaintiff's complaint because it contains an exclusive venue provision, which requires that this action be brought in the Bahamas. In response to Pyfrom's affidavit (exh A) stating that exhibit C is plaintiff's registration statement, plaintiff's attorney theorizes that the signature was not verified and that "it is entirely possible that plaintiff opted out of these terms and conditions." However, plaintiff did not submit his own affidavit denying that it was his signature or swearing that he opted out of the terms and conditions. Speculation by plaintiff's attorney is not sufficient to rebut the registration statement.

¹Further, Kerzner's motion is not a tactic to delay or prevent plaintiff from seeking redress because Ms. Pyfrom identified, under penalty of perjury, the resort's owner and gave that entity's business address. Therefore, there is no reason to conduct discovery. As stated in this Courts' decision in motion sequence 003, plaintiff may seek to pursue his claims in the Bahamas.

Further, the Court would dismiss this matter on the ground of forum non conveniens for the reasons discussed in the Court's decision in Motion Sequence 003. Although Kerzner is a New York corporation, there is no indication that there are any witnesses in New York except for defendant Cox.

Accordingly, it is hereby

ORDERED that Kerzner International New York Inc.'s motion to dismiss is granted.

Dated: January 27, 2017
New York, New York

ARLENE P. BLUTH
J.S.C.

ARLENE P. BLUTH, JSC