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

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

JANE ZUCKERMAN, MARK ZUCKERMAN and RACHEL ZUCKERMAN

INDEX NO. 154685/2013

Plaintiffs,

- v -

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

JMJ HOSPITALITY, L.L.C., ROSEWOOD HOTELS AND RESORTS, L.L.C. and OBRASCON HUARTE LAIN, S.A.,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answer — Affidavits — Exhibits	6
Replying Affidavits	7

Cross-Motion: Yes X No

This is an action for negligence arising from an alleged accident on January 7, 2012. Plaintiff, Jane Zuckerman ("Plaintiff"), a resident of Nassau County, New York, New York, alleges that in response to an exclusive offer targeting New York tourists through American Express Travel Services, Plaintiff chose to vacation at a resort known as the "Rosewood Myakoba," located at Ctra. Federal Cancun-Playa del Carmen KM 298, Solidaridad, Q. Roo, CP 77710 Mexico (the "Premises"). Plaintiff further alleges that, during the course of this vacation, she sustained personal injuries while boarding a golf cart that shuttles guests around the grounds of the Premises.

Plaintiff asserts claims against the following defendants for personal injuries and loss of the benefit of the enjoyment of her vacation: JMJ Hospitality LLC ("JMJ"), Rosewood Hotels and Resorts, LLC ("Rosewood"), and Obrascón Huarte

Lain, S.A. ("OHL") (collectively, "Defendants").[1] The Complaint alleges JMJ, Rosewood, and OHL to be "one of the owners" of the Premises, "a lessee" of the Premises, an entity that "operated," "managed," and "controlled" the Premises, and had a duty to "maintain the premises."

Defendants Rosewood and OHL (collectively, "Movants") move for an Order, pursuant to CPLR § 327, dismissing Plaintiffs' complaint on the basis of *forum non conveniens* in favor of a new action to be commenced in Mexico; or, pursuant to CPLR § 1003, dismissing this case against OHL, on the grounds that OHL is not a real party in interest and owed no duty to Plaintiffs.

Although Movants raise lack of personal jurisdiction over OHL as an affirmative defense in their answer to Plaintiffs' complaint, Movants do not, in this motion, challenge the Court's jurisdiction over them.

Movants submit the affidavit of Andrés Pan de Soraluce Muguiro, the legal representative of OHL, the affidavit of Graeme Davis, Regional Vice President of Rosewood, and the affidavit of Manuel Garcia Pimental Caraza, an attorney in good standing duly licensed to practice law "within the United Mexican States."

Plaintiffs oppose. JMJ does not appear.

Movants argue that OHL is not properly named as a defendant in this action. Specifically, Movants contend,

> "Obrascón does not directly own the subject land. Islas de Mayakoba, S.A. De C.V., a Mexican corporation, owns the subject hotel, and is the real party in interest. Islas de Mayakoba, S.A. De C.V. is a subsidiary corporation of a subsidiary corporation of a subsidiary corporation of Obrascón. Obrascón is neither a direct tortfeasor to the alleged accident which is the subject of this

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[1]Plaintiff, Rachel Zuckerman, Jane Zuckerman's daughter, claims to have been in the "zone of danger" when the alleged accident occurred, and asserts derivative claims. Plaintiff, Mark Zuckerman (and together with Plaintiff and Rachel Zuckerman, collectively, "Plaintiffs"), Jane Zuckerman's husband, asserts a derivative claims for loss of consortium and loss of the benefit and enjoyment of his vacation.

litigation, nor does it own the property on which it took place."

Plaintiffs, in turn, argue that OHL created Islas de Mayakoba, S.A. de C.V. to carry out business on OHL's behalf and OHL derives substantial revenue from the hotel at issue.

CPLR § 1003 provides, in relevant part,

> Misjoinder of parties is not a ground for dismissal of an action. . . . Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

Here, there are issues of fact with respect to the complex corporate relationships involved, and as to whether OHL exercises control over its subsidiary. Accordingly, at this juncture, Plaintiffs should be allowed to learn whether the complex corporate relationships involved the parents' exercise of control over their subsidiaries.

With respect to Movants motion to dismiss Plaintiffs' complaint on the basis of *forum non conveniens*, "[t]he common-law doctrine of *forum non conveniens*, now codified in CPLR 327, permits a court to dismiss an action when, 'in the interest of substantial justice the action should be heard in another forum' (CPLR § 327 [a]). The doctrine is based upon 'justice, fairness and convenience.' . . . Among the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum." (*Grizzle v. Hertz*, 305 AD2d 311[1st Dept. 2003]) (citations omitted). "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]).

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation. . . . No one factor is controlling." (*Islamic Republic of Iran v. Pahlavi*,

62 N.Y.2d 474, 479 [1984]). Unless the balance weighs strongly in favor of the defendant, a plaintiff's choice of forum should not be disturbed.

Here, Movants fail to meet their heavy burden of establishing that New York is not a convenient forum for the instant litigation. Plaintiffs are New York residents, and Jane Zuckerman purportedly received extensive follow up medical treatment in this state and allegedly is unable to travel to Mexico to as a result of the claimed injuries. Movants fail to show that they would be more inconvenienced by trial in New York than Plaintiffs would be by litigating in Mexico. Although the subject accident occurred in Mexico, and some potential witnesses presumably are located there, these witnesses are present or former employees of Defendants, and there is no indication that such persons are not still within Defendants' control or would be unwilling to testify absent a court-ordered subpoena, (*Kronengold v. Hilton Hotels Corp.*, 166 A.D.2d 325, 326 [1st Dep't 1990]).

Wherefore, it is hereby,

ORDERED that defendants' motion is denied in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: MAY 29, 2014

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE