Girimonti v International Council of Shopping Ctrs., Inc.
2018 NY Slip Op 33344(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 159285/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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MICHAEL GIRIMONTI,

Plaintiff,

-against –

INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., OLIVER MCMILLAN, LLC and LEWELLEN & BEST EXHIBITS, INC. a/k/a LAB EXHIBITS, INC.,

Defendants.

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Index No. 159285/2017

Motion Date: 11/21/2018

Motion Seq. No.: 001

DECISION/ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51, were read on these motions and cross-motions to dismiss.

This is an action by a New York resident who alleges he suffered personal injuries at a convention in Las Vegas. Defendant Lewellen & Best Exhibits, Inc. a/k/a LAB Exhibits, Inc. (LAB) now moves to dismiss the action and all cross-claims against it for lack of personal jurisdiction (CPLR 3211[a][8]). Defendants International Council of Shopping Centers, Inc. (ICSC) and Oliver McMillan, LLC (McMillan) each separately cross-move to dismiss on the grounds of forum non conveniens (CPLR 327). In the event that jurisdiction is found to be lacking over LAB, ICSC and McMillan alternatively seek dismissal on the grounds of LAB's absence as a necessary party (CPLR 3211[a][10]).

BACKGROUND

The following facts are taken from the Verified Second Amended Complaint (AC) (Dkt. 10)[1] and the documentary evidence and affidavits submitted by the parties. On May 22, 2017, plaintiff Michael Girimonti was present at the RECon Global Retail Real Estate Convention at the Las Vegas Convention Center in Nevada, an event under the control of defendant ICSC (*id.*, ¶¶ 27-50). While at an exhibit booth leased from ICSC by defendant McMillan, plaintiff was seriously injured when a wooden letter "e" from an overhead sign fell and struck him on the head (*id.*, 54-67, 86-89; Ferris Affirm. [Dkt. 32], Ex. C [Incident Report] [Dkt. 35]; Ayoub Affirm. [Dkt. 27], Ex. A [Photographs of sign] [Dkt. 38]). The exhibit was designed and constructed by defendant LAB (AC ¶¶ 81-82). It is alleged that McMillan contracted with LAB to perform certain work in connection with the design and construction of the exhibit booths.

Plaintiff is a resident of New York County (*id.* ¶ 1) and ICSC is a New York corporation (ISCS Answer] [Dkt. 13] ¶ 3). McMillan is a California corporation with a place of business in New York (AC ¶¶ 11, 19).[2] LAB is an Illinois corporation (AC ¶ 20; LAB Answer [Dkt. 15] ¶ 2). The Incident Report indicates that paramedics responded at the scene of the Las Vegas accident and that plaintiff was then transported to a hospital. However, plaintiff's counsel avers that all of plaintiff's medical providers are in New York (Ayoub Affirm. ¶ 35) and plaintiff is

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1 References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

2 Plaintiff alleges, with specificity, that McMillan "maintained a place of business at 46 West 55th Street, in the County, City and State of New York" (AC ¶ 19). Although McMillian's answer denies that allegation (McMillan Answer [Dkt. 11] ¶ 3], the company's public website's contact page lists a "New York City Showroom" at that address (*see* www.olivermcmillan/story/contact). It is unclear whether McMillan is denying the existence of any physical presence in New York, or merely objecting to the characterization of the showroom as a "place of business."

pursuing a related claim before the New York State Workers' Compensation Board (Ayoub Affirm., Ex. K [Workers' Comp. Subsequent Report of Injury form] [Dkt. 48]).

DISCUSSION

I. LAB's Motion to Dismiss for Lack of Jurisdiction is Granted

As is relevant to the question of personal jurisdiction, plaintiff alleges that on the date of the incident LAB was authorized to transact, and transacted, business in New York, and that LAB maintained a place of business in New York (AC ¶¶ 24-26). LAB, however, has submitted an affidavit from its controller asserting that the company is organized solely under the laws of Illinois, has its principal place of business in that state, has no real estate or bank accounts in New York, and has never made any corporate filings in New York (Turkel Affirm. [Dkt. 21], Ex. C [Smolen Affidavit.] [Dkt.23] ¶ 3-4, 9). The controller also avers that, over the past four years, only two of LAB's 224 clients were based in New York, generating approximately $250,000 of its over $26 million in revenue (Smolen Aff. ¶¶ 7-8). Further, the work for the New York-based clients was performed outside of the State of New York. Finally, the controller notes that LAB's website has always been informational rather than interactive and has never offered customers the option of ordering or purchasing online (*id.* ¶ 10).

"On a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017], *citing Fischbarg v Doucet*, 9 NY3d 375, 381 n. 5 [2007].) In the instant motion, LAB has established prima facie that jurisdiction is lacking over it. Plaintiff has not offered any evidence to support his allegations that LAB has meaningful contacts with New York, or to rebut the showing of

LAB's controller. It is not even clear which jurisdictional statute plaintiff means to invoke. Although plaintiff's papers refer to CPLR 302(a)(3) -- and at oral argument his counsel indicated that that section was the relevant one (tr at 11:18–13:5) -- the record suggests plaintiff also relies on other subsections of 302 as well as section 301.

None of them, however, confers jurisdiction over LAB. Section 302(a)(3) applies only where a defendant "commits a tortious act without the state *causing injury to person or property within the state*" (emphasis supplied). The situs of an injury is the location of the original event which caused the injury, not where the party may suffer (or may continue to suffer) the consequences of the injury (*see Paterno v Laser Spine Institute*, 24 NY3d 370, 381 [2014]; *McGowan v Smith*, 52 NY2d 268, 273-74 [1981]; *Stern v Four Points by Sheraton Ann Arbor Hotel*, 133 AD3d 514, 514–15 [1st Dept 2015] ["Long-arm jurisdiction also cannot be asserted under CPLR 302(a)(3), which applies when a tortious act committed outside the state causes injury within the state, because plaintiff's injury occurred in Michigan"]; *Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 532 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012].) Here, plaintiff was injured in an accident occurring within Nevada, not within New York. Plaintiff does not address this fatal defect, bypassing it instead to move forward to an academic discussion of whether LAB regularly does or solicits business in New York, or derives substantial revenue from interstate or international commerce. But those considerations, set forth in subsections (i) or (ii) of CPLR 302(a)(3), simply have no bearing on the jurisdictional question unless the plaintiff was injured in New York.

Also irrelevant is plaintiff's discussion of how LAB solicited customers through its website (Ayoub Affirm. ¶¶ 25-26). To the extent that plaintiff may be suggesting that LAB

transacted business in New York within the meaning of CPLR 302(a)(1), that theory fails for two reasons. First, the website – which plaintiff has reproduced in full in the record (Ayoub Affirm., Ex. J [Dkt. 47]) -- is indisputably a passive, informational one which does not permit a business transaction and thus cannot serve as a basis for personal jurisdiction (*Paterno*, 24 NY3d 370, 377-78). Counsel's suggestion that LAB "directly solicit[s]" business through it (tr at 10:5–7) is irrelevant, as merely providing a generic contact input form that can be accessed by a New York customer does not suffice (*id.*).

Second, there must be "a substantial relationship between the transaction and the claim asserted" (*Fischbarg*, 9 NY3d 375, 380, *citing Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]; *Paterno*, 24 NY3d 370, 376; *McGowan*, 52 NY2d 268, 272). Jurisdiction cannot be asserted unless *both* prongs of this test are met (*Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]). Thus, even where a defendant clearly transacts business in New York through an interactive website, the interaction must be closely related to plaintiff's cause of action (*Stern*, 133 AD3d 514,514 ["Although (defendant's) participation in the interactive website for Sheraton hotels may demonstrate that it transacted business in New York, the relationship between (defendant's) website activities and plaintiff's negligence action arising from an allegedly defective condition of premises in Michigan is too remote to support the exercise of long-arm or specific jurisdiction under CPLR 302(a)(1)"]). No such relationship whatsoever exists between plaintiff's personal injury claim and any activity on LAB's website. Plaintiff did not transact business with LAB through it, and he was not lured by it to travel from New York to Nevada. Indeed, there is no claim that he ever even saw LAB's website.

Finally, plaintiff's speculation that LAB may conduct substantial business activities in New York fails to support general jurisdiction under CPLR 301 because plaintiff has not meaningfully countered LAB's showing that the company's activities in New York are not "so constant and pervasive as to render [it] essentially at home in the forum State" (*Daimler AG v Bauman*, 571 US 117, 122, 139 fn.19 [2014]). Generally, that section does not apply where a defendant "is not incorporated in New York and does not have its principal place of business in New York" (*Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]; *see Daimler*, 571 US 117 139 fn.19). Furthermore, plaintiff's threadbare submissions have not made a "sufficient start" on any of the jurisdictional issues to warrant discovery (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974].) As such, the court finds that the plaintiff has failed to raise any genuine issue in opposition as to jurisdiction, and the motion is granted.

II. ICSC's and McMillan's Motions to Dismiss in the Absence of a Necessary Party and *Forum Non Conveniens* are Denied.

A. Absence of a Necessary Party

The motions of defendants McMillan and ICSC to dismiss on the ground that LAB is a necessary party are denied. CPLR § 3211(a)(10) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court should not proceed in the absence of a person who should be a party." CPLR 1001(a), in turn, provides that a person should be joined as a party (1) if necessary to insure that "complete relief is to be accorded between the persons who are parties to the action", or (2) if that person "might be inequitably affected by a judgment in the action."

However, it is well settled that joint tortfeasors, such as the defendants here, are not necessary parties (*see Hecht v City of New York*, 60 NY2d 57, 62-63 [1981]); *Amsellem v Host*

Marriott Corp., 280 AD2d 357, 359-60 [1st Dept 2001].) Rather, they are parties for whom joinder is merely permissive under CPLR 1002(b) (*see Kellogg v All Saints Hous. Dev. Fund Co.*, 146 AD3d 615, 617 [1st Dept 2017].) Although section 1001(b) sets forth a list of factors which must be considered in determining whether an action should proceed in the absence of a party over whom the court lacks jurisdiction, they only apply where the party has been deemed indispensable. "If a party is not necessary, analysis goes no further; that is, consideration of CPLR 1001(b), whether an action can proceed in that party's absence, is not required" (*New York City Transit Auth. v Heights Med. Care, P.C.*, 52 Misc 3d 1214(A), 43 NYS3d 768 [Sup Ct, NY Co 2016], *citing* Alexander, Practice Commentaries, CPLR 1001:1 [2016]).

B. Forum Non Conveniens

The motions of defendants McMillan and ICSC to dismiss on the ground of *forum non conveniens* are also denied. CPLR 327(a) provides:

> 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.

"On a motion to dismiss on the ground of *forum non conveniens*, a defendant bears the burden of demonstrating that the "relevant private or public interest factors militate against accepting the litigation" (*Swaney v Acad. Bus Tours of New York, Inc.*, 158 AD3d 437, 438 [1st Dept 2018], quoting *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The burden of establishing that substantial justice militates against plaintiff's choice of a New York forum is a heavy one (*Swaney*, 158 AD3d 437, 438; *Wilson v Dantas*, 128 AD3d 176, 187 (1st Dept 2015] *affd* 29 NY3d 1051 [2017]). "[U]nless the balance

is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Swaney*, 158 AD3d 437, 438, *quoting Gulf Oil Corp. v Gilbert,* 330 U.S. 501, 508 [1947]). "The factors in weighing such a motion to dismiss include the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2103].)

Defendants have not met their burden here. Although the location of the accident was Nevada, in a personal injury action "the most significant factor in the equation" is a plaintiff's residence in New York (*Bacon v Nygard*, 160 AD3d 565, 566 [1st Dept 2018]; *see Cadet v Short Line Terminal Agency, Inc.*, 173 AD2d 270, 270–71 [1st Dept 1991].) The corporate presence and contacts of the remaining two defendants in New York further weighs heavily against dismissal (*Bacon*, 160 AD3d 565, 566; *Swaney*, 158 AD3d 437, 438-39; *Sweeney v Hertz Corp.*, 250 AD2d 385, 386 [1st Dept 1998]; *Cadet*, 173 AD2d 270). And a different result is not required just because plaintiff received his initial medical treatment in Nevada (*see Sweeney*, 250 AD2d 385, 386), particularly since he has since received most of his treatment in New York (*Moschera v Muraca*, 148 AD2d 591, 591 [2d Dept 1989]; *Cadet*, 173 AD2d 270, 270–71). Nor does the prospect that this court might be required to apply Nevada law create a burden justifying dismissal, "since New York courts are more than capable of applying the laws of other jurisdictions and often do" (*Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431, 432–33 [1st Dept 2015] [internal citation omitted]; *Swaney*, 158 AD3d 437, 439; *Travelers Cas. & Sur. Co. v Honeywell Int'l Inc.*, 48 AD3d 225, 226 [1st Dept 2008]).

It may be, as counsel for ICSC suggested (tr at 21:17–21), that Nevada is a *possible*

forum convenient to all defendants. McMillan's counsel, though, denied that the state would have jurisdiction over his client (tr at 22:2–5), and LAB's counsel deflected by saying that he was a "New York attorney" unfamiliar with Nevada law (tr at 22:6–14). Whatever the case, Nevada is clearly not a *superior* forum because none of the parties reside there. Thus, defendants have not established "that New York is an inconvenient forum and that another is available which will *best* serve the ends of justice and the convenience of the parties" (*Economos v Zizikas*, 18 AD3d 392, 393 [1st Dept 2005]) (emphasis supplied).

As noted *infra* at footnote 2, there may be questions regarding whether McMillan owns or leases space in New York City. However, as both plaintiff and ICSC are still both in New York, and McMillan does not dispute that the court's jurisdiction over it is appropriate due to its other contacts with the state, the court's conclusion would remain the same even if McMillan did not have a permanent physical outlet here. Furthermore, dismissal would be improper because this is a "multijurisdictional action with no single convenient forum amenable to all the parties" (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 429 [1st Dept. 2013]; *Coelho v Grafe Auction Co.*, 128 AD3d 615, 616 [1st Dept 2015]) and the same *forum non conveniens* claims could be raised in Nevada.

Finally, in the course of the discussion of *forum non conveniens* at oral argument, counsel also suggested that the five factors enumerated in CPLR 1001(b) should be weighed in favor of dismissal. As noted above, however, those considerations all relate to the dismissal of an action in the absence of an indispensable party. They have no bearing on the test for whether a forum is inconvenient.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Lewellen & Best Exhibits, Inc. a/k/a LAB Exhibits, Inc.to dismiss is granted, and the Verified Second Amended Complaint is dismissed without prejudice, with costs and disbursements to that defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motions of defendants International Council of Shopping Centers, Inc. (ICSC) and Oliver McMillan, LLC are denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, movant shall serve a copy of this order with notice of entry on all parties.

The foregoing constitutes the decision and order of the court.

12/21/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE