SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

KAREN BRENNER AND LAWRENCE BRENNER **NASSAU COUNTY**

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 7/14/11

SHERATON WAIKIKI HOTEL AND RESORT, KYO-YA HOTELS & RESORTS, LP, AND STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,

INDEX NO.: 3383/10

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Defendants, Kyo-Ya Hotels & Resorts, LP d/b/a Sheraton Waikiki Hotel and Resort (s/h/a Sheraton Waikiki Hotel and Resort and Kyo-Ya Hotels & Resorts, LP) and Starwood Hotels & Resorts Worldwide, Inc., move for an Order, pursuant to **CPLR §3211** (a)(7) and (8), dismissing the plaintiffs', Karen Brenner and Lawrence Brenner, complaint on the grounds that the complaint fails to state a cause of action against Starwood Hotels & Resorts Worldwide, Inc. ("Starwood Worldwide") and that the court lacks personal jurisdiction over the defendant, Kyo-Ya Hotels & Resorts, LP d/b/a Sheraton Waikiki Hotel and Resort ("Kyo-Ya"). Defendants also seek to dismiss the plaintiffs' complaint on the grounds of forum non *conveniens*. The motion is determined as follows.

According to the complaint, plaintiffs Karen Brenner and Lawrence Brenner (collectively referred to herein as "Brenner"), were guests at the Sheraton Waikiki Hotel and Resort located at 2255 Kalakaua Avenue in Honolulu, Hawaii on February 19, 2008. Plaintiff, Karen Brenner, alleges that while she was using the stairway leading from the buffet area to a lower area within the hotel on February 19, 2008, she

was caused to fall down the stairway and sustain serious and permanent injuries due to inadequate lighting of the stairway (Affirmation in Opposition, ¶11). Plaintiffs claim that she fell as a result of the negligent operation, maintenance, control, possession, supervision, direction, construction, inspection, management, renovation, installation, rehabilitation and/or alteration of the premises.

Plaintiffs are citizens and residents of the State of New York, County of Nassau. Defendant, Kyo-Ya, is the owner of the Sheraton Waikiki Hotel and Resort located at 2255 Kalakaua Avenue in Honolulu, Hawaii. Kyo-Ya is a Delaware Limited Partnership with its principal place of business located at the address in Honolulu, Hawaii. It is undisputed that Kyo-Ya has never had any offices located in the State of New York, nor has it ever had any bank accounts or other property located in this state, and it has never maintained any records or telephone listings in the State of New York (Affidavit of Cyrus Oda, Treasurer of Ky.-Ya, ¶4). Although residents of New York are admittedly from time to time guests of the hotel in Hawaii, Kyo-Ya does not do any business in the State of New York and does not sell or distribute any volume of products or services in New York (*Id.* at ¶5). Kyo-Ya does not have any employees in the State of New York that solicit business on behalf of the hotel and Kyo-Ya does not continuously or systematically target advertising in New York. Rather, Kyo-Ya states that it occasionally runs a print ad that appears in a newspaper or magazine in New York (*Id.* at ¶6).

Defendant, Starwood Worldwide, is a Maryland corporation with its principal place of business located at 1111Westchester Avenue, White Plains, New York 10604. At all times relevant to this action, including the date of filing of the complaint, Starwood did not own or operate the subject hotel.

Pursuant to an Amended and Restated Hotel Management Agreement (hereinafter referred to as the "Management Agreement") effective January 26, 2006, and in effect at the time of plaintiff's accident, defendant Kyo-Ya retained non-party Starwood Hotels & Resorts Management Company, Inc. ("Starwood Management"), a Delaware corporation, and non-party Sheraton Hawaii Hotels Corporation ("Sheraton Hawaii"), a Hawaii corporation, to collectively serve as the operator of the Sheraton Waikiki Hotel and Resort. Neither of these entities is a party to this action. Notably however, both Starwood Management and Sheraton Hawaii Corporation maintained and continue to maintain their principal place of business at 1111 Westchester Avenue, White Plains, New York 10604, i.e., at the same location as Starwood Worldwide (Affidavit of David Marshall, Vice

President and Associate General Counsel at defendant Starwood, ¶5).

Upon the instant motion, defendants Kyo-Ya and Starwood Worldwide, seek an Order, pursuant to **CPLR §3211** (a)(7) and (8), dismissing the plaintiffs' complaint on grounds that the complaint fails to state a cause of action against Starwood Worldwide and that the Court lacks personal jurisdiction over the defendant, Kyo-Ya. Defendants also seek to dismiss the plaintiffs' complaint on the grounds of forum non *conveniens.*

Kyo-Ya

CPLR §3211(a)(8) establishes that a party may move to dismiss one or more causes of action against him on the ground that "the court has no jurisdiction of the person of the defendant." While the ultimate burden of proof rests on the party asserting jurisdiction (*Ying Jun Chen v. Lei Shi*, 19 AD3d 407 [2nd Dept. 2005]; *Roldan v. Dexter Folder Co.*, 178 AD2d 589 [2nd Dept. 1991]), to survive a motion to dismiss pursuant to CPLR 3211, plaintiff need only prove a prima facie showing that the defendant is subject to the jurisdiction of the Court (*Alden Personnel, Inc. v. David*, 38 AD3d 697, 698 [2nd Dept. 2007]). The evidence submitted must be viewed in the light most favorable to the plaintiff (*Id*).

On a motion to dismiss for lack of personal jurisdiction, the Court must first determine whether it has jurisdiction under the laws of this State, and if so, whether the exercise of such jurisdiction would comport with constitutional due process (*La Marca v. Pak–Mor Mfg. Co.*, 95 NY2d 210 [2000]).

A foreign corporation, i.e., one that is neither incorporated in New York nor licensed to do business in New York, is amenable to suit in this State if it is present in the State **(CPLR §301)**, or subject to long-arm jurisdiction pursuant to **CPLR §302.**

Conceding that long-arm jurisdiction pursuant to **CPLR §302** is not present in this case (Affirmation in Opposition, p. 3, fn. 2), plaintiffs assert that Kyo-Ya is present in this State based on the presence of its agents in this State, to wit: Starwood Management (nonparty) and Sheraton Hawaii (nonparty).

The well settled principles of general personal jurisdiction **(CPLR §301)** provide that in order for the court to have jurisdiction over a foreign corporation pursuant to **CPLR §301**, the corporation must be "doing business" in New York; the foreign corporation "must be engaged in systematic and continuous course of conduct of doing business such that the aggregate of the corporation's activities are not occasional or casual but have a fair measure of permanence" (*Jurlique, Inc. v. Austral Biolab Pty., Ltd.*, 187 AD2d 637 [2nd Dept. 1992]; *see also Laufer v. Ostrow*, 55 NY2d 305 [1982]). The test for determining whether a non-

domiciliary defendant is doing business in this state centers on the "quality and nature of the corporation's contacts with the State sufficient to make it reasonable and just according to 'traditional notions of fair play and substantial justice' that it be required to defend the action here" (*Laufer v. Ostrow*, supra; *see also International Shoe v. Washington*, 326 US 310, 316 [1945]).

> The Court of Appeals in *Laufer v. Ostrow*, supra, explained the following:
> "Solicitation of business alone will not justify a finding of corporate presence in New York with respect to a foreign manufacturer or purveyor of services***, but when there are activities of substance in addition to solicitation there is presence and, therefore, jurisdiction***" (*Laufer v. Ostrow*, supra at 309-310 [citations omitted]).

The "activities of substance" noted by the Court of Appeals include office, office staff and bank account in New York (*Bryant v. Finnish Nat. Airline*, 15 NY2d 426, 432 [1965]), financial transactions and directors meetings in New York (*Elish v. St. Louis Southwestern Ry. Co.*, 305 NY 267, 270 [1953]).

In this case, there is no dispute that Kyo-Ya, by itself, is not subject to the jurisdiction of this Court (Affidavit of Cyrus Oda, the Treasurer of Kyo-Ya). The issue here is whether, by retaining Starwood Management and Sheraton Hawaii, to serve as the operators of the Sheraton Waikiki Hotel & Resort, Kyo-Ya is amenable to suit in New York based on the presence of its agents in this state.

A defendant which is not itself present in this State may be held to be present by virtue of another entity's presence where the other entity is the defendant's agent or is, in reality, a mere department of the defendant (*Frummer v. Hilton Hotels Inter., Inc.*, 19 NY2d 533, 536–37 [1967]). To be an agent, the plaintiff must demonstrate that the related entity does all the business the foreign business could do were it in New York and on its behalf (*Id*). On the other hand, in order to establish that a subsidiary or related entity is a "mere department" of the defendant, the plaintiff must demonstrate that the defendant's control over the other entity is pervasive enough that the corporate separation is more formal than real (*Taca International Airlines, SA v. Rolls–Royce of England, Ltd.*, 15 NY2d 97 [1965]).

Notably, counsel for the plaintiffs herein concedes that the "mere department" doctrine is inapplicable as there is no evidence that any of the New York entities involved in this action are subsidiaries of Kyo-Ya (Affirmation in Opposition, ¶22). Rather, counsel for plaintiffs contends that the applicable theory in this matter is agency.

Relying principally upon the Court of Appeals decision in *Frummer v. Hilton Hotels International, Inc.*, supra, counsel for the plaintiffs advances the following arguments: Specifically, counsel for plaintiffs maintains that in this case, agency is established by the Management Agreement as well as by the parties' conduct. Counsel for plaintiffs submits that the Management Agreement with Starwood Management Company, Inc which stated in part that "[o]perator shall act solely as agent of Owner [Kyo-Ya]," plainly establishes that Starwood Management is Kyo-Ya's agent (Management Agreement, Article VI, §4.1). Plaintiffs argue that the fact that Kyo-Ya does not own Starwood Management and/or Sheraton Hawaii is of no moment because for purposes of jurisdiction, the activities of Starwood Management and/or Sheraton Hawaii as agent of Kyo-Ya gives rise to a valid inference as to the broad scope of the agency (Affirmation in Opposition, p. 6, fn. 4).

Counsel for plaintiffs also argues that the business conducted by Starwood Management and Sheraton Hawaii on behalf of Kyo-Ya also makes it obvious that they are agents of Kyo-Ya. Counsel for plaintiffs points to the Management Agreement at p. 17, §6.1 wherein it states that Starwood Management and Sheraton Hawaii "shall arrange and contract for all Hotel marketing, public relations, advertising and promotion" (Affirmation in Opposition, ¶33). Counsel also points to the Management Agreement at p. 18, §7.1.1, which states that Starwood Management and Sheraton Hawaii "shall cause Starwood and its affiliates to provide for the Hotels and its guests the full benefit of the Starwood centralized reservation services" which makes and confirms reservations at the Kyo-Ya owned Sheraton Waikiki Hotel & Resort (Affirmation in Opposition, ¶34). Based on the foregoing and citing the need for additional discovery as to, *inter alia*, the bank accounts of Starwood Management, counsel for plaintiff argues that "it is palpable that STARWOOD MANAGEMENT and SHERATON HAWAII 'does all the business which [Kyo-Ya] could do were it [in New York] by its own officials,' ***and is therefore 'doing business here in the traditional sense' " (Affirmation in Opposition, ¶37 [citation omitted]).

Counsel for plaintiff submits that "[f]urthermore, it is unquestionable that STARWOOD MANAGEMENT and SHERATON HAWAII are 'doing business' in New York as they have their principle place of business in New York" (Affirmation in Opposition, ¶50 [citing to Exhibit B of Opposition]).

Finally counsel for plaintiffs argues that at a minimum this Court should deny defendant's motion to dismiss pending the results of further jurisdictional discovery.

Plaintiffs' reliance on *Frummer v. Hilton Hotels International, Inc.*, supra, is

persuasive. In *Frummer*, plaintiff was injured in the London Hilton Hotel. He sued Hilton Hotels (U.K.) Ltd., lessee and operator of the hotel and a British Corporation, in New York. The Court of Appeals, interpreting Section 301, held that a plaintiff who alleged that he was injured in the Hilton Hotel in London could establish personal jurisdiction in New York over the British corporation which operated the London Hilton. The Court of Appeals reasserted its rule that solicitation of business in the state without more is insufficient to provide a basis for personal jurisdiction. It therefore found the necessary additional activities in the corporation's use of a New York representative to make reservations at the London Hilton and to do "public relations and publicity work" (*Frummer v. Hilton Hotels International, Inc.*, supra at 537).

The Court of Appeals stated in *Frummer* that to establish that a domestic corporation is an agent for a foreign parent, "the plaintiff must show that the subsidiary 'does all the business which [the parent corporation] could do were it here by its own officials' " (*Id.* at 537). This "mean[s] that a foreign corporation is doing business in New York...when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar activities" (*Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 [2nd Cir. 1967]).

Based on this record, including the activities and responsibilities of Starwood Management in New York, there are sufficient facts which establish personal jurisdiction of the defendant, Kyo-Ya.[1] Significantly, in this case, and as evidenced by the plain terms of the Management Agreement, it is clear to this Court that, as in *Frummer*, non-party Starwood Management can bind Kyo-Ya to a reservation at one of its hotels, including the Sheraton Waikiki Hotel and Resort where plaintiff was injured. While there is no evidence other than the Management Agreement upon which the plaintiffs's principally rely to support their

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[1]Inasmuch as it is undisputed that non party Sheraton Hawaii is a Hawaii corporation with its principal place of business in Hawaii, plaintiff's resort to an agency theory for general jurisdiction for Sheraton Hawaii fails. Without addressing the merits of whether it is even appropriate to consider Sheraton Hawaii to be Kyo-Ya's agent for the purposes of the Frummer test, Sheraton Hawaii is not a New York entity and does not perform the alleged services for Kyo-Ya in New York. It is therefore unnecessary to explore whether the services that Sheraton Hawaii performs for Kyo-Ya, if any, extend sufficiently beyond solicitation of business to support a finding of general jurisdiction in the event these services were performed by a New York entity.

claim for New York jurisdiction over the defendants, the obligations incurred and the agreements reached by Starwood Management and Kyo-Ya therein, plainly establish that Kyo-Ya retained Starwood Management to "provide[] services beyond 'mere solicitation'," that "these services [were] sufficiently important" to Kyo-Ya, and that Starwood Management was acting in a "representative" capacity to Kyo-Ya.

Therefore, affording the plaintiffs the benefit of every favorable inference and under a liberal construction, this Court **denies** defendant Kyo-Ya's motion pursuant to **CPLR §3211**(a)(8) on the basis that it has personal jurisdiction over said foreign defendant via the presence of its New York agent.

Starwood Hotels & Resorts Worldwide, Inc.

Defendant Starwood Worldwide's motion to dismiss plaintiffs' complaint on the grounds that the complaint fails to state a cause of action against it is also **denied.**

CPLR §3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. When deciding such a motion, the court must determine whether the plaintiff has a legally cognizable cause of action and not whether the action has been properly plead (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). The complaint must be liberally construed, and plaintiff must be given the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83 [1994]; *Sitar v. Sitar*, 50 AD3d 667 [2nd Dept. 2008]). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*511 West 232rd Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

As noted above, the entire premise of plaintiffs' claim is that Karen Brenner fell as a result of the negligent operation, maintenance, control, possession, supervision, direction, construction, inspection, management, renovation, installation, rehabilitation and/or alteration of the subject hotel.

"To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury" (*Dabnis v. West Islip Public Library*, 45 AD3d 802, 803 [2nd Dept. 2007]; *Pulka v. Edelman*, 40 NY2d 781, 782–783 [1976]).

The Management Agreement plainly states that non-parties Starwood Management and Sheraton Hawaii, which, as stated above, were retained by Kyo-Ya to collectively serve as the operator of the Sheraton Waikiki Hotel and Resort, "is an affiliate of [defendant]

Starwood Hotels & Resorts Worldwide, Inc." (Management Agreement, p. 1). The Management Agreement also states that the "Operator or an affiliate of Operator has been operating the Hotels, pursuant to [a] certain Management Agreement made as of November 30, 1990" (*Id*). While there is nothing explicitly stated in the subject Management Agreement which obligates or requires defendant Starwood Worldwide to inspect, supervise or otherwise maintain the hotel, in light of the plain language in said Management Agreement that Starwood Worldwide is an "affiliate" of the operators of the Hotel and itself was once engaged in the operation of the Hotel, this Court finds that there remains an issue of fact as to whether it nonetheless retained any control over the subject property.

There is no doubt that Starwood Worldwide is related to the subject property. Further, the affidavit of its Vice President and Associate General Counsel, David Marshall, confirms that the non-parties operators Starwood Management and Sheraton Hawaii, together with defendant Starwood Worldwide all maintained and continue to maintain their principal place of business at 1111 Westchester Avenue, White Plains, New York 10604 (Affidavit of David Marshall, Vice President and Associate General Counsel at defendant Starwood, ¶5).

Therefore, on this motion to dismiss plaintiffs' complaint as against it for failure to state a cause of action, this Court finds that under a liberal construction of the Complaint and giving the plaintiffs the benefit of every favorable inference (*Leon v. Martinez*, supra), plaintiffs have a legally cognizable cause of action against defendant Starwood Worldwide, an "affiliate"of the operators of the hotel where plaintiff Karen Brenner's accident occurred.

Therefore, defendants' motion to dismiss plaintiffs' claim against Starwood Worldwide is **denied.**

Forum Non Conveniens

Having determined that this Court has jurisdiction over the foreign defendant Kyo-Ya, and that the complaint states a cause of action against defendant Starwood Worldwide, this Court turns to the question of whether plaintiffs' complaint should nevertheless be dismissed on the basis of forum non *conveniens*.

CPLR 327(a) and the common law doctrine of forum non *conveniens* permit the court to dismiss an action over which the court would have jurisdiction if it would be better adjudicated in another jurisdiction (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984], *cert. den.*, 469 US 1108 [1985]). The party seeking dismissal on this ground must establish that the selection of New York as the venue will not serve the interests of substantial justice

(*Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Co.*, 62 NY2d 65 [1984]; *Stamm v. Deloitte and Touche*, 202 AD2d 413 [2nd Dept. 1994]).

The fact that one or more of the parties is a resident of New York does not preclude dismissal on this ground (*Silver v. Great American Ins. Co.*, 29 NY2d 356 [1972]). The courts of New York are not compelled to retain jurisdiction over an action or proceeding that does not have a substantial nexus to New York (*Cheggour v. R'Kiki*, 293 AD2d 507 [2nd Dept. 2002]; *Wentzel v. Allen Machinery, Inc.*, 277 AD2d 446 [2nd Dept. 2000]).

The court must consider and weigh several factors including the difficulties to the defendant in litigating the action in New York, the burden on New York courts in hearing the action, the availability of another more convenient forum in which to litigate the action, the residence of the parties and whether the cause of action arose out of a transaction that occurred in another jurisdiction (*Islamic Republic of Iran v. Pahlavi*, supra; *Wentzel v. Allen Machinery, Inc.*, supra).

Taking these factors into account, and notwithstanding the fact that the accident which gave rise to this action took place in Hawaii, this Court believes that the action should remain in New York.

While the residence of a party is not a determinative factor on a forum non *conveniens* motion, it is an important one (*Temple v. Temple*, 97 AD2d 757 [2nd Dept. 1983]), and a plaintiff's choice of forum will not be disturbed unless the balance of convenience is strongly in favor of the defendants (*Id*; *Bader & Bader v. Ford*, 66 AD2d 642 [1st Dept. 1979]). In the instant case the plaintiffs' residence in New York provides a substantial nexus to this State, and the record does not show that the defendants will be inconvenienced or prejudiced in any way if the action is maintained in New York.

Further, in support of their motion, defendants have failed to identify any nonparty witness who resides in Hawaii and would be inconvenienced by a trial in New York (*O'Connor v Bonanza Intl.*, 129 AD2d 569 [2nd Dept. 1987]). Rather, the record confirms that, in this case involving the claim of negligent operation, maintenance and management of the premises, the operators of the Sheraton Waikiki Hotel and Resort, to wit, non parties Starwood Management and Sheraton Hawaii maintain their principal place of business in White Plains, New York. The defendants' reliance on choice of law also lacks merit. While the choice of law is also an important factor to be considered on an issue of forum non *conveniens* (*Hormel Intl. Corp. v. Andersen & Co.*, 55 AD2d 905 [2nd Dept. 1977]), it is not a determinative factor, and this court will "not be overly eager to dismiss an action on that

ground when other factors militate against dismissal" (*Temple v. Temple*, supra at 758). Therefore, defendants' motion for an Order dismissing the complaint on the grounds of forum non *conveniens* is **denied.**

On the basis of the foregoing, it is

ORDERED, that defendants' motion to dismiss plaintiffs' complaint pursuant to **CPLR §3211** is **denied.**

This constitutes the Order of the Court.

Dated: September 23, 2011

J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE