Offen v Intercontinental Hotels Group

2010 NY Slip Op 30484(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 117285/09

Judge: Carol R. Edmead

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SCANNED ON 3/10/2010

[* 1]

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

PRESENT: HON. CAROL EDMEAD, Justice — PART 35

Index Number : 117285/2009	INDEX NO.
OFFEN, ELEGANT ELLIOT	MOTION DATE 3/2/10
vs.	MOTION SEQ. NO. 001
INTERCONTINENTAL HOTELS GROUP	MOTION CAL. NO.
SEQUENCE NUMBER : 001	
DISMISS	this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

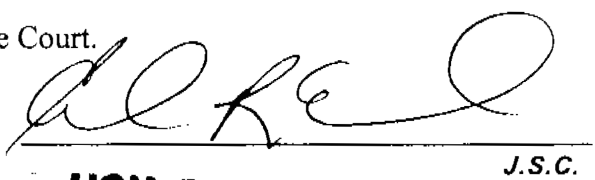
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion to dismiss plaintiff's Amended Verified Complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action under 42 USC §1983 is denied, as no such claim is asserted; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's Amended Verified
Complaint pursuant to CPLR §327(a) based on *forum non conveniens*, is granted, without prejudice, and this action is hereby dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.



Dated: 3/10/10

J.S.C.

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

ELEGANT ELLIOT OFFEN,

Plaintiff,

-against-

INTERCONTINENTAL HOTELS GROUP, CHARLES GROUP HOTELS, FRU MANAGEMENT, INC., all d/b/a THE HOLIDAY INN MIAMI BEACH-OCEANFRONT HOTEL and CHARLES NEISS, INDIVIDUALLY,

Defendants.

---X

Index No.: 117285/09
Sequence No.: 001

FILED
MAR 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Intercontinental Hotels Group,[1] Charles Group Hotels, Fru Management, Inc., all d/b/a the Holiday Inn Miami Beach-Oceanfront Hotel and Charles Neiss, individually ("defendants") move to dismiss the Amended Verified Complaint of the plaintiff Elegant Elliot Offen ("plaintiff") pursuant to CPLR §3211(a)(7), for failure to state a cause of action or, in the alternative, pursuant to CPLR §327(a) based on *forum non conveniens*.

Factual Background

According to the Amended Verified Complaint, plaintiff was a guest at the Holiday Inn Miami Beach-Oceanfront Hotel (or "Hotel") from October 8, 2008 through October 12, 2008. On October 12, 2008, plaintiff was dressed in "a girl's black g-string exercise body attire," when a bellboy at the Hotel "charged" over to plaintiff and addressed plaintiff "with his 'thumb out' stating "fag get out of the hotel.'" This same bellboy then said "fag, you heard me, get out of the

[1] According to defendants, "Intercontinental Hotels Group" is not a legal entity, and they reserve all rights with respect to plaintiffs bringing suit against a non-entity.

hotel or get locked up or get jacked up." The bellboy then gave a "deafening finger to mouth whistle" to his buddies, and within seconds a group of three of his "cartel cronies" from the Hotel came rushing over and threatened plaintiff in like manner. Plaintiff "immediately dialed 911." When the police arrived, defendants gave a "fictional" account of what transpired and plaintiff was arrested and held for 20 hours, and that all of the charges were dismissed. According to the Amended Summons and Verified Complaint, plaintiff sues for "unlawful arrest" and imprisonment, violation of the anti-discrimination city and state laws, and intentional infliction of emotion distress.

In support of dismissal, defendants argue that plaintiff cannot maintain a claim under 42 USC §1983 against a private entity that does not act under the color of state law and that liability thereunder can only attach to governmental actors. Plaintiff does not allege in his Amended Verified Complaint for humiliation that defendants acted under the color of state law. Plaintiff alleges that the private defendants (non-public entities) deprived him of his civil rights by subjecting him to humiliation when defendants allegedly had plaintiff removed from their place of business due to plaintiff wearing female underwear in the lobby of the Hotel. Plaintiff does not allege that the defendants conspired with the local Miami Beach Police Department to have all middle-aged men "bedecked in a girl's black capezio g-string style bustier with black nylon panty hose" removed from the premises. As such, plaintiff has not alleged that defendants acted under the color of state law. Thus, the Amended Verified Complaint must be dismissed with prejudice, pursuant to CPLR §3211(a)(7), for failure to state a cause of action upon which relief can be granted.

Further, New York State is an inconvenient forum for the instant action. All five factors

New York courts consider in dismissing an action under CPLR §327 must be resolved in favor of defendants. The alleged incident occurred in Miami Beach, Florida. The only connection this matter has to the State of New York is plaintiff's alleged residence within New York. All relevant evidence (*e.g.*, the police investigation file) and the numerous witnesses to the alleged incident are located in Florida. In particular, the investigating officer from the Miami Beach Police Department, who would be called at trial as a witness, is located in Florida. Furthermore, the corporate defendants maintain their places of business in the states of Florida and Georgia. It would be a severe hardship for defendants' multiple representatives to travel to New York to testify at the trial of this frivolous matter. Additionally, Florida law will apply to any potential state claims in this matter as, *inter alia*, plaintiff was cited for violating Florida law. The State of Florida also has a substantial interest in having Florida courts decide issues potentially involving its discrimination laws. The four-year statute of limitations for plaintiff to bring suit in Florida has not yet run. Also, this Court would be unnecessarily burdened were the instant action to proceed through discovery and further motions to a trial when a convenient forum with a greater interest in the litigation is available to plaintiff. This Court need not be burdened with having to decide legal issues that may concern Florida law.

In opposition, plaintiff contends that he is not suing for humiliation. Citing Florida law, plaintiff argues that defendants are liable for malicious prosecution and intentional infliction of emotional distress and damages for "throwing" plaintiff into a psychiatric relapse.[2] Plaintiff

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[2] Plaintiff's psychologist reports that "While staying at a Holiday Inn in Miami he was subject to harassment, threats and intimidation by a group of workers at the facility. Mr. Offen demonstrates many common PTSD [post traumatic stress disorder] symptoms since that time. He describes flashbacks of the incident at various times throughout the day . . . continues to have nightmares that sometimes result in his waking up screaming and in cold sweat [and] . . . has periods where he will ruminate for hours about the event. . . . He has had to pull his car over to the side of the road sometimes for prolonged periods until he feels he can get his equilibrium back.

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claims that he initiated the 911 call out of fear, and when the police arrived, defendants contrived and devised up a "devious, diabolical plan to feed the cops phony fictitious, fraudulent and mendacious information regarding [plaintiff's] behavior" which caused the police to arrest him.

Plaintiff argues that Section 1983 is not applicable to his malicious prosecution and intentional infliction of emotional distress claims under Florida law. Plaintiff did not initiate or mention a violation or deprivation of his civil rights under 42 USC §1983.

Plaintiff contends that he states a claim for malicious prosecution under Florida law since (1) defendants commenced or continued an original criminal or civil judicial proceeding; (2) defendants were the legal cause of the original proceeding against the plaintiff; (3) there was a *bona fide* termination of the original proceeding in favor of the plaintiff; (4) there was an absence of probable cause in the original proceeding; (5) defendants acted with malice; and (6) plaintiff suffered damages. Defendants, without probable cause of any crime being committed without any provocation, and without any legitimate reason, had plaintiff "ex-communicated, exiled and ostracized" from their hotel, and subsequently had plaintiff arrested based on a "counterfeit charge" and for doing nothing more than exercising my unbreakable, unchangeable and unshakeable human rights of freedom of choice and human rights of freedom of expression to be dressed as a Girl." The County Court of the 11th Judicial Circuit in and for Miami, Dade County, Florida, vindicated, exonerated and exculpated plaintiff of every criminal charge. Further, plaintiff suffered damages, as demonstrated in the documents concerning his psychiatric

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The PTSD situation has exacerbated his previous anxiety/ depressive matrix and he feels desperate and confused at times. His anxiety can sometimes reach a panic or crescendo. . . . It is my opinion that his situation is chronic, having lasted over one years time with acute symptoms and psychotherapy will most likely need long term support and psychotherapy.

condition.

Plaintiff also states a claim for intentional infliction of emotional distress. Under Florida law, plaintiff must allege that (1) defendants' conduct was intentional or reckless, (2) defendants' conduct was outrageous, (3) defendants' conduct caused emotional distress, and (4) plaintiff suffered severe emotional distress. Plaintiff claims that his allegations sufficiently state such a cause of action.

Regarding the New York forum/venue of this action, plaintiff "could possibly voluntarily agree to withdraw, without prejudice, my Summons and Complaint from the New York arena providing all of the defendants will accept service in Florida (Circuit Court of the 11th Judicial Circuit in and for Miami, Dade County, Florida)" as defendants concede that Florida is the appropriate forum for my litigation based on investigative records, monetary interest and witness availability.

A finding against defendants by a Florida jury "make America a safer and better place to live in," in that defendants will "think twice" before ever issuing death threats and committing malicious prosecution of "another innocent transgender, transexual, transvestite or homosexual." Plaintiff requests that this Court grant him his "day in the sun" before the Circuit Court of the 11th Judicial Circuit of Florida, Miami-Dade County.

In reply, defendants point out that plaintiff acknowledges that New York State is not a convenient forum for this action and that Florida law applies in this matter. Defendants have forwarded a Stipulation of Discontinuance Without Prejudice to plaintiff. As a condition of the proposed voluntary discontinuance, defendants would be willing to stipulate to accept service of process in Florida. However, should plaintiff not voluntarily discontinue his Amended Verified

Complaint, then defendants request that this Court dismiss said Complaint for the reasons previously set forth.

Discussion

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "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 into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

As to the branch of defendants' motion to dismiss the Amended Verified Complaint based on plaintiff's failure to state a claim under 42 USC §1983, this statute provides that:

> every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress.

"Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. . . [T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief" (*Felder v Casey*, 487 US 131, 139 [1988]). Section 1983 gives a remedy at law or in equity to any person for infringement of his civil rights by one who acts under color of state authority (*Kellerman v Askew*, 541 F2d 1089 [5th Cir (Fla.) 1976]). To state a claim under 42 USC §1983, plaintiff must establish that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. . . . [T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful" (*Focus on the Family v Pinellas Suncoast Transit*, 344 F3d 1263 [11th Cir (Fla.) 2003]).

Plaintiff's Amended Verified Complaint does not seek relief pursuant to 42 USC §1983, or even cites to this statute. There is no claim in the Amended Verified Complaint or in opposition to defendants' motion indicating that defendants were in any way state actors or acting under color of state law. No federal law is implicated. Instead, plaintiff alleges claims for false arrest and imprisonment, intentional infliction of emotional distress, and violations of city and state anti-discrimination laws, which defendants do not address in their motion papers. For example, Under Florida law, to be liable for false imprisonment or false arrest,[3] a person must

[3] Under Florida law, false imprisonment and false arrest "are different labels for the same cause of action" (*Hernandez v Metro-Dade County*, 992 F Supp 1365 [S.D. Fla. 1997] citing 24A Fla.Jur.2d False Imprisonment and Malicious Prosecution § 1, at 406 (1995 & Supp. Feb. 1997)).

personally and actively participate, directly or indirectly by procurement, in the unlawful restraint of another person against their will (*Harris v Kearney*, 786 So 2d 1222, Fla App [4th Dist 2001] citing *Pokorny v First Fed. Sav. & Loan Ass'n of Largo*, 382 So 2d 678, 681 [Fla 1980]). And, "under Florida law a private citizen may not be held liable in tort where he neither actually detained another nor instigated the other's arrest by law enforcement officers (*Harris, supra* (stating "If the private citizen makes an honest, good faith mistake in reporting an incident, the mere fact that his communication to an officer may have caused the victim's arrest does not make him liable when he did not in fact request any detention")). Further, merely providing information to the authorities that a violation of law occurred is not sufficient to support an action for false arrest (*id.* at 1225). However, defendants' motion does not address whether plaintiff's Amended Verified Complaint fails to satisfy the Florida standard for false arrest or imprisonment. And, defendants do not address plaintiff's arguments in opposition, wherein plaintiff contends that he states claims under Florida law for intentional infliction of emotional distress and malicious prosecution. Therefore, dismissal of the Amended Verified Complaint for failure to state a claim pursuant to 42 USC §1983 is denied, as no such claim is asserted, and defendants failed to establish that plaintiff did not state a cause of action with respect to the actual claims asserted.

However, as to defendants' motion pursuant to CPLR 327, a court may stay or dismiss an action if it finds "that in the interest of substantial justice the action should be heard in another forum" (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" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US

1108 [1985]). "This burden becomes even more onerous where the plaintiff is a New York resident" as in the case at bar (*Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 129 [1 Dept 1990]). However, a defendant can overcome this burden by showing that they will suffer disproportionate hardship. Among the factors to be considered are the residence of the parties, the location of the transaction giving rise to the cause of action, the applicability of the laws of another state or country, the location of the witnesses and any pending discovery, the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum where the plaintiff may bring suit (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Daly v Metropolitan Life Ins. Co.*, 4 Misc.3d 887, 894 [2004]). Further, no one factor is controlling, since the doctrine of *forum non conveniens* is flexible in application, based on the facts and circumstances of each case.

Here, four of the five factors militate in favor of dismissal of this action on the ground of *forum non conveniens*. Defendants failed to demonstrate that the defendants would suffer "severe" hardship from having to travel from Florida and Georgia to New York. However, it is uncontested that (1) the alleged incident occurred in Florida, (2) all relevant evidence, including but not limited to the police investigation file, and numerous witnesses to the alleged incident, *i.e.*, the Holiday Inn staff, and the investigating officer from the Miami Beach Police Department, are located in Florida. , (3) Florida law applies to plaintiff's malicious prosecution and intentional infliction of emotional distress claims. Further, the State of Florida has a substantial interest in having Florida Courts decide issues potentially involving its own laws and the Florida statute of limitations for plaintiff's action has not expired. Moreover, this Court would be burdened with having to decide legal issues concerning Florida law. There are no persuasive

reasons supporting plaintiff's choice of New York as the situs of this action. Notably, plaintiff agrees to have this action heard in Florida provided defendants accept service in Florida, and requests that this Court grant him his "day in the sun" before the Circuit Court of the 11th Judicial Circuit of Florida, Miami-Dade County. Therefore, dismissal pursuant to CPLR 327 on the ground of *forum non conveniens* is warranted, and defendants' motion to dismiss the Amended Verified Complaint pursuant to same is granted.

Conclusion

Based on the foregoing, it is hereby

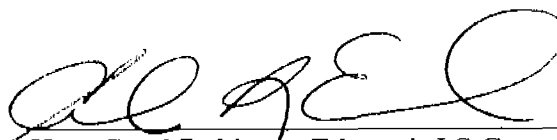
ORDERED that the branch of defendants' motion to dismiss plaintiff's Amended Verified Complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action under 42 USC §1983 is denied, as no such claim is asserted; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's Amended Verified Complaint pursuant to CPLR §327(a) based on *forum non conveniens*, is granted, without prejudice, and this action is hereby dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 10, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

MAR 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

[* 12]

Case Name: OFFEN, ELEGANT ELLIOT vs INTERCONTINENTAL HOTELS

Mar 03, 2010 10:19 AM

Index #: 0117285/2009 ( ) Calendar #: Case Age: 33 days

Case Status: Active | Post Judgment Status:

Disposition Date: | Jury Status:

Action Type: OTHER | Note of Issue Date:

Curr.Court Part: SUBMISSIONS PART | Complexity Indicator: Standard

Assgn Justice: EDMEAD, CAROL R. | Estimated Trial Time:

Post Judgment Justice: | Case Identifier:

Case Description: | Injury Type:

Personal #:

Compliance Conf Schedule Date: | Compliance Conf Date:

Latest Compliance Conf Date:

Plaintiff's Attorney(s):

ELEGANT ELLIOT OFFEN - Prose P

Defendant's Attorney(s):

CALLAHAN & FUSCO, LLC Attorney Of Record (212) 448-9570

Motions:

Seq. Number	Original Motion Date	Submission Date	Motion Status	Decision Date	Decision
1	02/23/2010	03/02/2010	Open		

Relief Sought: DISMISS

Appearances:

Date	Motion (Seq.)#	Appear. (Seq.)#	Court Part
03/02/2010	1	2	SUBMISSIONS PART Action: FULLY SUBMITTED
02/23/2010	1	1	MOTION PART Action: ADJOURNED