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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY: CIVIL TERM: PART 2

-----X
JG and CG, individually and on : Index No.
behalf of CG, a minor, : 151453/2016
Plaintiff(s). :

-against- :

MYRON GOLDFINGER, JUNE GOLDFINGER, :
COVECASTLES DEVELOPMENT CORPORATION, :
and COVECASTLES LIMITED, :

Defendant(s). :

-----X
80 Centre Street
New York, New York 10013

September 20, 2016

B E F O R E:

THE HONORABLE KATHRYN E. FREED, Justice

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(Whereupon, the following takes place in open court, in the presence of the Court, Mr. Gitkin, Mr. Sirignano, Mr. Shapiro, and Mr. Askanase:)

THE COURT: So let's deal with the pro hac vice first.

MR. GITKIN: Absolutely. This is Jim Gitkin. I'm the pro hac applicant from Florida.

THE COURT: Welcome to New York.

MR. GITKIN: Thank you.

THE COURT: Okay. Do you have a proposed order in the --

MR. GITKIN: I do have a proposed order.

THE COURT: Good.

MR. GITKIN: May I approach?

THE COURT: Sure.

All right, so I'll sign this and have it stamped up.

I gather there was no opposition to this?

MR. SIRIGNANO: No, your Honor.

MR. SHAPIRO: No, your Honor.

THE COURT: In that case, let's get to the immediate matter.

MR. ASKANASE: Good morning.

MR. SHAPIRO: Good morning.

1 Proceedings

2 THE COURT: Good morning.

3 MR. SHAPIRO: My name is David Shapiro. I'm here
4 with Eric Askanase. We represent the two corporate
5 defendants. One is an Anguilla corporation Cove Limited,
6 and the other is a Delaware corporation called Covecastles
7 Development Corp. And as I understand the Court's focus
8 the last time the parties were in front of you in
9 connection with the individual defendants' motion, the
10 Court, rightly I think, was focusing the parties' attention
11 on one central allegation. Where did the attack take
12 place.

13 Our position, your Honor, is that when you accept
14 the allegations of the Complaint as true and when the Court
15 takes a look at the documentary evidence, it is beyond
16 peradventure that this horrible attack took place on a
17 public beach in Anguilla that the resort had no control
18 over. And I think the best place to start is with the
19 plaintiffs' Complaint, and here's what they alleged in
20 paragraph 16.

21 J.G. and C.A. [sic] and their children traveled
22 to the resort, as planned, on March 13, 2015; and the
23 family began their vacation. The next day, on the morning
24 of Saturday March 14, 2015, C.G. took a walk along the
25 beach to film part of a movie.

26 On paragraph 17, accepting their allegations as

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2 true, On her way from the villa down the beach, suddenly
3 and without warning, there was an attack.

4 Now, I know that in New York, of course, when we
5 make an allegation that the complaint is defective,
6 plaintiffs are allowed to put in an affidavit; and they
7 certainly did that. But here's what the affidavit, this is
8 from the victims's father. Paragraph four.

9 Shortly before the attack, my daughter left our
10 Covecastles villa to walk towards the beach. An attack
11 ensued, and she has explained that it involved a chase
12 along a stretch of the beach.

13 Now, what's very interesting to me, your Honor,
14 is that in many of these cases what a plaintiff will allege
15 is, hey, I need more information from the defendant; we've
16 got to go forward. But I find it really fascinating that
17 they did not put in an affidavit from the victim.

18 Here's a situation where an investigation is
19 really on their part. They have the facts. And what
20 they've done to bolster their Complaint is an affidavit
21 from the father complaining hearsay, which is totally
22 acceptable, and it says my daughter told me I was attacked
23 on the beach.

24 Then what did we do?

25 We did investigation on our part to find
26 documentary evidence because I think one of the geniuses of

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2 the CPLR, unlike federal court, of course, is we have this
3 opportunity.

4 What did we find?

5 Number one, a police report. And this is
6 attached as Exhibit D to the Fontaine affidavit. I know
7 there's some dispute, and we could talk about the case law.
8 I know plaintiffs don't think this is acceptable
9 documentary evidence, but I think the cases are clear.

10 And what did the police report say?

11 "A 12-year-old female guest who was staying at a
12 villa on the said compound had been wounded by a male
13 person while walking along the beach."

14 And not only that, Judge, they specifically
15 mentioned which beach it is, which is Sherricks Bay West
16 End. And I know I've given the Court some colorful maps.
17 I don't know if we have the time, patience right now to
18 bring them out and talk to you about them, we tried to do
19 as best as we could in our papers; but what you'll see from
20 the map is she's attacked far, far to the west of the
21 resort. She's attacked on a beach called Sherricks Bay
22 West End. She's attacked by a Y., and you'll see in the
23 map; and to get to that point, you have to cross over
24 almost a wall of rocks.

25 So we also have -- and what we also have is the
26 Fontaine affidavit, Exhibit E. And what we've done in our

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2 investigation to give the Court documentary evidence are
3 satellite maps and land records. And, again, you'll see
4 that there's a parcel, it's called Number Six; and that's
5 Sherricks Bay. And we've given land records, documentary
6 evidence, establishing without any question that the Parcel
7 Number Six is owned by individuals, not owned by the
8 corporate defendant.

9 We've also given you a map that shows number 10,
10 Parcel 10, also to the west of the resort, to the west of
11 that rocky wall, that wall of rocks. Again, documentary
12 evidence, not owned by the resort. And then we went a step
13 further because I wanted more; so what we found -- and this
14 makes sense to me, but the government of Anguilla passed a
15 law, and it's called The Beach Control Act.

16 And what does it say? And we've attached it to
17 the Fontaine affidavit, that's Exhibit C.

18 All rights in and over the beaches of Anguilla
19 "vested in the Crown." As a Canadian it made me very happy
20 to read the Crown.

21 What we have is, just to summarize, on the
22 documentary evidence side, the (a)(7) side of our
23 motion -- I'm sorry, the (a)(1) side of our motion, a
24 police report, land records, satellite maps, and statute;
25 and more importantly than that, or in conjunction with that
26 I should say, your Honor, their own Complaint. And then we

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2 have the affidavit, and the affidavit says attacked on the
3 beach.

4 Now, we've also because we are moving under
5 (a)(11) -- (a)(1) -- (a)(7), I'm sorry, Judge, (a)(7), I
6 apologize, we're allowed to put in affidavits. And what
7 we've given you, your Honor, is we've given you an
8 affidavit by an employee of the resort. His name is
9 Mr. Reid. What did he say? Paragraph seven.

10 I found her more than 500 feet away from the
11 resort on Sherricks Bay West End.

12 And that's key for us, Judge, because Sherricks
13 Bay West End, as we've demonstrated in the satellite maps
14 and as we've demonstrated in land own records, 500 feet
15 away from the resort.

16 And I know that they, they, they -- the
17 plaintiffs in their papers do make this argument. They
18 said, well, maybe the Court shouldn't rely on affidavits;
19 but, again, we are moving under two separate prongs of
20 motion to dismiss, so I think it's acceptable for the
21 Court. And what we've tried to do with these affidavits
22 is, again, what we've done is we've bolstered their
23 allegations, really, their allegation that it happened on
24 the beach.

25 And, again, I apologize for being repetitive, but
26 there's no, no affidavit from victim; there's no affidavit

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even with the hearsay.

So then, then what we do, at that point, it seems to me, is we got to go to the case law. And we went out of our way to try to be exhausted -- exhaustive on this point. And what we find dispositive, your Honor, is Darby, Court of Appeals, 2001, 96 N.Y.2d 343. And from our perspective, we found it very important and very significant that the Court of Appeals was answering a question posed by the Second Circuit. What does New York common law say about a situation where someone is attacked on a beach?

And here's what they said. An innkeeper owes no duty to a guest who is injured or endangered while away from the premises.

Plaintiff would have us in effect charge innkeepers with the obligation to oversee whether the entity maintaining the beach -- here, the Brazilian government -- was performing its function properly. This court has never gone so far as to hold that a hotel owner or innkeeper has a duty to warn guests as to the danger of using an off premises beach. Under these circumstances, we decline to impose one.

Judge, the way I read that case, I respectfully submit it's dispositive. We have a situation here. The allegations, the father's affidavit, the documentary evidence, our affidavits. It happened on a beach. You,

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2 Court of Appeals, says we're not responsible.

3 And it seems to me that -- I know that they've
4 tried distinguish the case, and I'll just take a second to
5 deal with that, if I may, just a second.

6 THE COURT: I have a lot of cases.

7 MR. SHAPIRO: They say that, well, in that case,
8 David, the beach was across the road; so everybody knew we
9 didn't own the beach. But the Court of Appeals was very
10 clear in that case; it was about ownership, and it was
11 about control.

12 So -- and we also would point the Court's
13 attention to a First Department case of 2013, Oxman, very
14 similar facts. That's at 105 AD3d 653. We have a lake
15 resort. We have a gentleman who rents a cabin. He's
16 injured on the beach. Cabin owner is sued. And the First
17 Department says, no, you don't control, you don't on the
18 beach.

19 Now, Judge, that's really where we could stop;
20 and I know you have a very full court today.

21 THE COURT: Yes, and I'd like to hear from your
22 opponent.

23 MR. SHAPIRO: And I would just briefly say, I
24 would just briefly say that I'm prepared to talk to you
25 about, if you'd like, would it be different if this
26 actually happened at the resort, which it didn't; and I

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2 would, I would submit, your Honor, it wouldn't because of
3 an unforeseeable intervening act of a sexual attack.

4 THE COURT: Which I think --

5 MR. SHAPIRO: And on the negligent hiring, we
6 gave you a police report. No history.

7 THE COURT: Yes, I think you pretty much covered
8 it in your papers.

9 MR. SHAPIRO: Thank you very much, Judge. We
10 appreciate your time today.

11 THE COURT: Counsel.

12 MR. GITKIN: Thank you, your Honor. Thank you,
13 Counsel.

14 Your Honor, it is uncontroverted that a
15 12-year-old girl was brutally assaulted when she was at
16 this particular resort in Anguilla. It is uncontroverted,
17 as far as I am concerned, based on the papers that I have
18 read, that a resort employee committed this heinous act. I
19 have seen nothing in the papers from opposing counsel,
20 either of them, to suggest that this individual did not
21 commit this terrible, terrible attack.

22 Now, what I think is missing from counsel's
23 analysis is what we have sued them for. We have sued them
24 for two things; negligent security; and then negligent
25 hiring, screening, and supervision.

26 As it relates to negligent security, it is our

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2 position that whether this attack happened on the premises
3 or semantically on a beach that is right there adjacent to
4 the premises, where all of the advertising documentation on
5 the website suggest that the beach is part and parcel with
6 this very exclusive high-end resort, that it really doesn't
7 matter. Ultimately, what we are saying is -- and, at this
8 stage, we actually have evidence that we have submitted.

9 This is the third complaint that has been filed against the
10 Covecastle entities and also against these individual
11 defendants as well. In those complaints they allege, and
12 we allege gross mismanagement of the resort. And we have
13 also submitted evidence that shows that there has been a
14 reduction in security staff from full-time individuals to
15 one part-time guard.

16 It is our position that whether this happened off
17 premises, on premises, our client began her journey at her
18 villa at this Covecastles Resort. This minor child started
19 to walk during broad daylight, during walking hours. And
20 this employee of Covecastles ended up following her,
21 brutally attacking her, and dragging her along the beach.

22 Now, what we know about negligent security and
23 the multitude of negligence security cases that I have
24 handled is that a security presence does a number of
25 things. Number one, had there been an adequate security
26 presence on this particular property, they could have seen

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2 that the minor child was walking, as they say, off the
3 premises or on the beach. They could have seen that their
4 employee was bizarrely, even though he is a gardener,
5 walking along the beach, surprisingly, freely and able to
6 walk after a female minor individual.

7 Moreover, we actually put in our documentation a
8 textbook from an expert -- this is someone that I could
9 literally call into this case that we've used
10 before -- where in negligent security cases it's not just
11 about stopping the crime as it happens. It's also about
12 deterring crime.

13 And in this case, what we would like to flesh
14 out, if we are given the opportunity to not have the case
15 summarily decided on the evidence today and we can actually
16 conduct discovery, we would like to find out did this
17 individual feel safe and comfortable to walk freely amongst
18 the premises; did he realize that this reduced security
19 staff was such that, that he could basically have carte
20 blanche to walk around the premises as he wished; or did he
21 actually have some level of fear that he would be caught.

22 What we know from negligent security cases and
23 from attacks from when I was a public defender defending
24 individuals is other than the very rare cases where someone
25 is just completely out of their mind, most of these attacks
26 have some level of premeditation; and most of these attacks

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2 could be deterred if there is some level of security
3 presence.

4 Now, secondly, what we have also submitted is a
5 claim for negligent hiring, training, and supervision.

6 Now, what do we have from opposing counsel in
7 terms of evidence at this early stage in the case?

8 They have presented evidence in the form of a
9 letter from some police officer, who I have not been able
10 to depose or talk to, saying that we have done a background
11 check of this individual and he doesn't have a criminal
12 background check.

13 Now, I don't know what's happening in Anguilla.
14 I don't know why that background check came up with, with
15 that sort of result.

16 When my client, the minor, was in the hospital,
17 there was a photographic lineup. And I made reference to
18 this in the documents; and we didn't want to actually
19 include the pictures, so that we could maintain anonymity
20 for our clients. However, there was a photographic lineup;
21 and in the photographic lineup there was a picture of the
22 assailant from the day the attack occurred; and
23 additionally, there was a picture of the assailant holding
24 a whiteboard -- and it's hard to see in this particular
25 picture; showing that he had been arrested in 2008. So --

26 THE COURT: What was the result of the 2008

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arrest?

MR. GITKIN: I do not know. All I have currently is the picture that was presented to my client's father. He said can I, please, keep a copy of this for my records; and the police officers, he has the name of the police officers he talked to, who additionally told my client -- and this is in his affidavit -- that this individual, I won't use his name now for the record, was known on the island as someone who had engaged in criminal activity. So, to me, that sounds like a factual dispute and not something that should be summarily decided.

So if I'm hearing opposing counsel correctly -- and, and, you know, their, their documentation also seems to suggest that our very simple negligence Complaint that sets forth duty of breach causation and damages, somehow that they don't understand what the allegations are; and we have cited cases that suggest that as long as they're on notice of what the claim is and what the central allegations are, that's good enough, essentially, when all of these defendants are in essentially a group together.

They've also tried to say that this case should be pursued in Anguilla as opposed to here, where we know that all of the central medical doctors are located here, five of the seven parties are residents in New York. We've

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2 cited cases that suggest that when there are no
3 eyewitnesses in the foreign country, which there are not
4 right now, that if it's just medical records and police
5 reports, those records and reports can be sent to the
6 United States and easily translated. And we actually have
7 a, a, a better standard here because these documents are in
8 English. And, and we, we also have when we weigh the
9 standards for forum non conveniens, that adequacy of the
10 alternative forum is only one consideration. Every other
11 consideration actually points to the plaintiffs' choice
12 here.

13 But ultimately, what I'm hearing from opposing
14 counsel -- and then I'll try to finish up -- is that their
15 central issue is, is they say we know, without any
16 discovery, without doing anything, where exactly this
17 attack occurred; that it occurred on the beach, and,
18 therefore, the case must be dismissed today. And it is our
19 position that if that's their central argument, that is not
20 enough to dismiss the case today.

21 We know that she was staying at the resort. We
22 know that she started her journey at the resort. We know
23 that this resort employee is the assailant and is the one
24 who attacked her. We have documents and pictures to prove
25 that he may have had a criminal record in the past. And we
26 know, based on the ownership, who reside and own at this

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2 particular resort, that they sent e-mails to the
3 Goldfingers, the individual defendants in the case, saying,
4 Myron, you mismanaged our resort from New York; and you
5 reduced security staff, which led to not one, but two
6 criminal incidents.

7 We don't even know what the second incident is
8 yet because we haven't been able to conduct discovery yet;
9 but this was one of two criminal attacks that occurred on
10 this particular resort within a week's time; and so we
11 don't even have the benefit of knowing what those are. And
12 I can promise you, your Honor, if we have the benefit of
13 proceeding and going forward with the merits of this case,
14 the first thing we're going to find out is was this the
15 first of the two attacks, the second of the two attacks;
16 was it within a week, two weeks. And if it was the second
17 attack, were there any changes that were made on resort
18 security to safeguard the premises for the patrons and
19 individuals staying there.

20 THE COURT: Very quickly.

21 MR. SHAPIRO: Judge, counsel's making a
22 significant error in law. Security cases, you have to make
23 an allegation that a change in the security on the premises
24 would have made a difference. That's what's key. And, and
25 in 2004 the Court of Appeals in Colarossi, 2 N.Y.3d, "Mere
26 conclusions, expressions of hope, or unsubstantiated

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2 allegations that the alleged insufficient security was a
3 proximate cause of the shooting or that the criminal attack
4 was foreseeable, preventable within normal course of
5 events.

6 He -- counsel could have an argument if his
7 allegation in the Complaint was there was a lack of
8 security at this resort and my client's daughter was
9 sexually attacked at the resort. But the case law -- and I
10 think it makes sense from a public policy and a common law
11 tort point of view -- is you have to allege how it is that
12 a lack of security at the resort would have prevented an
13 attack on a public beach that we under Anguilla law cannot
14 control. We're not allowed to control it, we're not
15 allowed to own it, we're not allowed to provide security on
16 it because it's all vest in the Crown.

17 And I think what's important, your Honor, is this
18 is the language I'm gonna read now about what Covecastles
19 Resorts had to say about the beach. And what you'll hear,
20 Judge, is they don't say we own it, we controlled it, or
21 secure it. And this is attached as an Exhibit C to
22 plaintiffs' affidavit.

23 The Beach. One half-mile of glistening white
24 sand. Secluded and quiet. Oftentimes, you will only have
25 the warmth of the sun and the murmuring sea for company.
26 Whether it's a brisk morning walk, an opportunity to build

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2 your castle in the sand, a leisurely evening stroll,
3 beach -- try your hand at a bit of sunfish sailing.

4 That's all it is. Right? So it cannot be
5 logically that the, the web page -- and on the negligent
6 hiring, the documentary evidence is crystal clear. It's
7 not a letter. It's an official Anguilla document.

8 And what's important from an analytical point of
9 view, your Honor, I would submit, is the following: In
10 order to sustain the Complaint, they have to allege that
11 these dispirit criminal acts, whatever they are, were, were
12 of a sexual content because if they weren't, then there's
13 no foreseeability.

14 And we've got case law that we've given you where
15 one or two things happen over a 15-year-period, and the
16 court says, look, as a matter of law that's not good
17 enough. So negligent hiring case, I think they stand for
18 the proposition that this case -- and finally --

19 THE COURT: Very quickly.

20 MR. SHAPIRO: Yeah.

21 THE COURT: Because I must move on.

22 MR. SHAPIRO: Forum non conveniens, there's a
23 really strong --

24 THE COURT: That's fine.

25 MR. SHAPIRO: And we would just end by saying,
26 Judge, we don't understand, they haven't alleged what my

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2 clients did here. I represent two corporations. They say
3 it's all Myron and June's fault. I think they have an
4 obligation in their Complaint to put me on notice of what
5 my clients did, and they haven't done that.

6 THE COURT: Okay.

7 MR. SIRIGNANO: Your Honor, could I answer your
8 question about the 2008 arrest that --

9 THE COURT: Yes.

10 MR. SIRIGNANO: -- plaintiffs' counsel referred
11 to?

12 The Anguillan police explained to my clients that
13 in 2008 the perpetrator of this heinous crime was arrested
14 and charged with possession of stolen property, a
15 non-violent offense. He pled to some lesser charge, and
16 part of that plea arrangement was a sealing of his records.
17 So fast-forward to when he was hired some six months before
18 this incident, the background check showed no prior
19 criminal record; but the only record was in fact a
20 non-violent possession of stolen property.

21 THE COURT: Do we have that in writing?

22 MR. GITKIN: That was not submitted before today.

23 THE COURT: That's why I'm asking.

24 MR. GITKIN: Yeah. And I don't have an
25 opportunity to deal with that in writing.

26 MR. SIRIGNANO: And, your Honor --

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2 THE COURT: All right.

3 MR. SIRIGNANO: -- plaintiffs' counsel referred
4 to a second crime at the resort. That second crime --

5 MR. GITKIN: Your Honor --

6 MR. SIRIGNANO: -- was --

7 MR. GITKIN: -- I have to object. There's
8 nothing in the documentation. He's just proffering for the
9 Court.

10 THE COURT: Unless I have documentation, I can't
11 hear it.

12 MR. SIRIGNANO: It's in my motion papers that
13 already are fully submitted to the Court. I just want to
14 point out that second crime was when a private security
15 guard hired after this attack by one of the home owners to
16 protect his own family, that private security guard made
17 inappropriate remarks to the hotel clerk, a young clerk,
18 about her garments; and the hotel clerk reported it to the
19 police.

20 THE COURT: I read that.

21 MR. SIRIGNANO: There's a 30-year history. This
22 is the only --

23 THE COURT: Okay.

24 MR. SIRIGNANO: -- criminal act of any
25 significance.

26 THE COURT: You'll get my decision.

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MR. SHAPIRO: Thank you.

(Whereupon, the matter concluded.)

* * *

C E R T I F I C A T E

This is certified to be a true and accurate transcription of the stenographic minutes taken in the above proceedings.

Jeanette Lake-Mason
JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter