

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY  
IN THE COURT OF COMMON PLEAS**

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| <b>KENNETH RUX and<br/>NICOLE VANDINO RUX</b>   | : |                                  |
|   | : | <b>CIVIL TRIAL DIVISION</b>      |
|   | : |                                  |
| <b>Appellants/Plaintiffs</b>  | : | <b>MARCH TERM, 2006</b>          |
|   | : | <b>No. 0706</b>                  |
|   | : |                                  |
| <b>v.</b>   | : | <b>Superior Court Docket No.</b> |
|   | : | <b>3189 EDA 2006</b>             |
|   | : |                                  |
| <b>MARRIOTT INTERNATIONAL, INC.<br/>c/o MARRIOTT PHILADELPHIA<br/>CONVENTION CENTER</b> | : |                                  |
|   | : |                                  |
| <b>Appellee/Defendant</b>   | : |                                  |
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**TERESHKO, J.**

**OPINION**

**PROCEDURAL HISTORY**

Plaintiffs appeal from the order dated October 30, 2006, wherein the lower court granted the Defendant's Preliminary Objections and Dismissed the Plaintiffs' Amended Complaint.

**FACTUAL BACKGROUND**

Plaintiffs Nicole Vandino Rux and Kenneth Rux (hereinafter Plaintiffs) were guests at the St. Kitts Marriott Resort and Royal Beach Casino, 282 Frigate Bay Road, Frigate Bay, St. Kitts, in the Federation of St. Christopher & Nevis in the British West Indies (hereinafter the Resort). (Amended Complaint, ¶ 3). On July 4, 2005, Ms. Rux slipped and fell as she was exiting the swimming pool using its steps. (Plaintiff's Memorandum in Opposition to Defendant's Preliminary Objections, pg. 1). Plaintiff

states that the green algae, which Defendants allowed to accumulate on the surfaces of its steps, caused the slip and fall. Plaintiff alleges that Defendants failed to equip the steps with abrasive coating or slip resistant treads. (Plaintiff's Memorandum in Opposition to Defendant's Preliminary Objections, pg. 2). Ms. Rux claims that she suffered a maioneuve fracture of her right fibula.<sup>1</sup> (Amended Complaint, ¶ 10). Ms. Rux further avers that these injuries caused her to lose her job as an assistant professor at the Community College of Philadelphia, and has further impaired her earning capacity. (Amended Complaint, ¶ 11).

On March 9, 2006, the Plaintiffs filed suit against Marriott Corporation<sup>2</sup> only. The Complaint alleges that The Marriott Corporation "is a corporation authorized to do business in Pennsylvania and doing business at c/o Marriott Convention Center, 1201 Market Street, Philadelphia, Pennsylvania 19107." (Complaint, ¶2). The cause of action was brought in the Common Pleas Court of Philadelphia. (See Docket, pg. 2). The Plaintiffs alleged that the Defendant was negligent in its maintenance of the pool area at the Resort, thus causing Ms. Rux to slip and fall. (Amended Complaint, ¶ 9). Plaintiffs alleged that this incident caused Ms. Rux to incur medical expenses and loss of earning capacity, and she seeks compensation for the same. (Amended Complaint, ¶¶ 10-11). Mr. Rux, also seeks compensation for loss of consortium caused by the injuries to his wife. (Amended Complaint, ¶ 13).

On April 28, 2006, the Plaintiffs filed an Amended Complaint,<sup>3</sup> which also named Marriott International, Inc. d/b/a Host Marriott Corporation (hereinafter MII), Royal St.

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<sup>1</sup> The Plaintiffs do not further elaborate on the nature of this injury.

<sup>2</sup> The original complaint listed the defendant as "THE MARRIOTT CORPORATION c/o MARRIOTT PHILADELPHIA CONVENTION CENTER." (Complaint, Caption).

<sup>3</sup> The Plaintiffs state that the purpose of filing the Amended Complaint was to redesignate defendant MII in accordance with its proper corporate name. (Plaintiff's Answer to Preliminary Objections, p.3).

Kitts Beach Resort, Ltd. and Marriott St. Kitts Management Company, Inc. as the defendants. (Amended Complaint, ¶1-5). All defendants were served at the same address, 1201 Market Street, Philadelphia PA 19107. (See Amended Complaint). In their Complaint, Plaintiffs claimed that Royal St. Kitts Beach Resort, Ltd. (hereinafter Royal) owned the Resort. (Amended Complaint, ¶ 4). Plaintiffs further claimed that Marriott St. Kitts Management Company, Inc., (hereinafter Management Company) operated and managed the Resort. (Amended Complaint, ¶ 4). Both Royal, which owns the Resort, and Management Company, which operates the Resort, are corporations organized in, and under the laws of, the Federation of St. Christopher-Nevis. (Defendant's Supplemental Memorandum, pg. 7). The Plaintiffs further averred that MII, a Maryland corporation, owned, operated, and controlled both Royal and Management Company and therefore MII was vicariously liable through its alleged wholly owned and controlled subsidiaries. (Amended Complaint, ¶ 5). However, Plaintiffs failed to allege any counts or acts of negligence on behalf of Royal or Management Company. Nor have Plaintiffs attempted to effectuate service on behalf of either Royal or Management Company. (Amended Complaint).

The Defendant filed its Preliminary Objections to Plaintiffs' Amended Complaint on May 25, 2006. (See Docket, p. 3). The Defendant filed a Memorandum of Law in Support of its Preliminary Objections on June 9, 2006. (See Docket, p. 6). The Plaintiffs filed their Answer to the Defendant's Preliminary Objections (hereinafter Plaintiff's Answer to Preliminary Objections), on June 20, 2006, and filed an amended answer on July 5, 2006. (See Docket, p. 3). This court entered an Order on July 13, 2006, directing

MII to take depositions on disputed issues of fact, in accordance with Pa. R.C.P. 206.6, with such depositions to be completed by September 1, 2006. (See Docket, pp. 3-4).

After the depositions were concluded Defendants filed their Supplemental Memoranda in Support of the Preliminary Objections Seeking Dismissal of Plaintiff's Amended Complaint (hereinafter Defendant's Supplemental Memoranda date September 25, 2006). (See Docket, p. 5). The Plaintiffs filed their reply (Plaintiffs' Legal Memorandum in Opposition to the Preliminary Objections (hereinafter Plaintiffs' Opposition)), on October 3, 2006. (See Docket, p. 5). The Defendants filed a response on the next day, October 4, 2006. (Reply to Plaintiff's Opposition to Defendant's Supplemental Memoranda in Support of its Preliminary Objections (hereinafter Defendant's Reply)). (See Docket, p. 5). On October 10, 2006, the Plaintiffs filed their Sur-Reply to Defendant's Reply (hereinafter Plaintiff's Sur-Reply). (See Docket, p. 5). By Order dated October 31, 2006, this Court granted defendant MII's Preliminary Objections and dismissed the case. (See Docket, pp. 5-6).

On November 13, 2006, Plaintiffs filed their Notice of Appeal from the trial Court's Order of October 31, 2006 and issued its Statement of Matter accordingly.

Pursuant to their 1925(b) statement, the two issues before the court are whether:

- 1) The trial court committed an error of law or abuse of discretion in determining that the Plaintiff failed to prove that MII owned or controlled Royal or Management Company sufficient to sustain preliminary objections under Pa.R.C.P. 1028(a)(4).
- 2) The trial court committed an error of law or abuse of discretion in not deeming admitted the Plaintiff's request for admission.

## LEGAL ANALYSIS

Pursuant to *Pa.R.C.P. 1028(a)(4)* permits the filing of preliminary objections in the form of a demurrer for legal insufficiency of a pleading. As a general matter, preliminary objections in the nature of a demurrer allege that a pleading is, quite simply, legally insufficient. *Nationwide Mut. Ins. Co. v. Wickett*, 563 Pa. 595 763 A.2d 813, 817 (2000). According to *Pa.R.C.P. 1028(c)(2)*, when ruling on preliminary objections, the court shall consider evidence “by depositions or otherwise.”

Our scope of review over a trial court's decision to sustain preliminary objections in the nature of a demurrer is plenary and our standard of review is identical to the trial court's. *Schwarzwaelder v. Fox*, 2006 PA Super 61, 895 A.2d 614, 618 (Pa.Super. 2006) (citations omitted). Accepting all of the plaintiff's material averments as true, the question is whether the Complaint states a claim for relief cognizable under the law. *Id.* When affirming a trial court's decision to sustain preliminary objections would result in a dismissal of an action, the appellate Court will only affirm when the case is free and clear from doubt. *Youndt v. First Nat'l Bank*, 2005 PA Super 42, 868 A.2d 539, 544 (Pa.Super. 2005) (citation omitted). All material facts set forth in a complaint and reasonable deductions therefrom are admitted as true for the purposes of review. *Id.* at 542 (citation omitted).

Here, the legal insufficiency is Plaintiffs' act of naming MII as a defendant to this litigation. Although Plaintiff slipped and fell at Royal, they name MII as the only defendant and claiming that MII does business as Host Marriott Corporation, Royal and Management Company. In making this argument, Plaintiffs have not attempted service on any of these entities or alleged counts of negligence against them. MII's preliminary

objections contend that the Plaintiffs named the wrong party because MII does not own, operate, maintain, supervise or control the property where plaintiff fell.

In support of this theory, the deposition of Deborah Nichols, the International Entity Administrator & Secretary of MII was noticed. At her deposition Ms. Nichols testified that MII has no relationship to Host Marriott Corporation. (Deposition of Deborah Nichols, 9/1/06 pgs. 12-13, 19, 35).

Ms. Nichols also previously prepared an Affidavit dated May 23, 2006, which states several facts regarding the relationship of the aforementioned entities:

- As International Entity Administrator & Secretary of MII, she has knowledge of the parties involved with the ownership, management and operation of the subject premises. (Affidavit, ¶2).
- That Marriott Corporation is not a legal entity and the name has changed to Host Marriott Corporation in 1993. Marriott Corporation has no relationship to the subject premises or MII. (Affidavit, ¶3).
- That Host Marriott Corporation has no relationship to the subject premises MII. (Affidavit, ¶3, Deposition pgs. 12-13, 19, 35).
- That Royal is organized and exists under the laws of the Federation of St. Christopher-Nevis, West-Indies. (Affidavit, ¶3, Deposition pgs. 14, 18, 31-32, 38).
- That Management Company is organized and exists under the laws of the Federation of St.Christopher-Nevis, West-Indies. (Affidavit, ¶3).
- MII does not do business as Host Marriott Corporation, Royal, or Management Company. (Affidavit, ¶4-6). (Deposition pgs. 19, 21-22, 35).

In addition to her sworn testimony, Ms. Nichols presented a agreement entered into between the Government of St. Christopher-Nevis (“Government”) and the Frigate Bay Development Corporation (“Frigate Bay Corporation”) and Royal. This agreement confirms the Royal is the owner of certain lands and premises on North Frigate Bay.

(Defendant MII Supplemental Memoranda in Support of its Preliminary Objections, Exhibit F, ¶2) (Nichols's Deposition pgs. 26-27). The agreement from the Government confirms that Royal has received all necessary approvals to develop the lands as a hotel-condominium. MII is not a party to this agreement.

Ms. Nichols also produced a second agreement dated November 2, 2000 between the Government and Royal. (Defendant MII Supplemental Memoranda in Support of its Preliminary Objections, Exhibit G). This document also confirms that Royal is the owner of the subject property where plaintiff allegedly fell. Again, MII is not a party to this Agreement.

Finally, Ms. Nichols provided letters from St. Christopher-Nevis Government directed to St. Kitts Marriott Royal Beach Resort, Frigate Bay, St. Kitts confirming that the Government agreed to allow the property owner, Royal, to defer payment of the hotel room accommodation tax for a certain period of time. (Defendant MII Supplemental Memoranda in Support of its Preliminary Objections, Exhibit H).

Ms. Nichols' uncontradicted testimony and supporting documentation confirms that MII does not own, operate, supervise or control the location in St. Kitts where the alleged negligence occurred. MII has no staff or employees working at the hotel and pays no taxes to the Government of St. Christopher-West Indies. (Deposition, pgs. 33-34, 46, 49). Beyond what Ms. Nichols classifies as an indirect relationship through numerous subsidiaries and the receipt of royalties, MII has no ownership interest or control over the Management Company. (Deposition pgs. 16-17, 21-22).

Plaintiffs, through their own depositions, cannot establish that MII owns, operates or manages Royal. Mrs. Rux confirmed in her deposition that she first learned of Royal

when she logged onto SkyAuction.com (Deposition Nicole Rux dated 8/7/06, pg. 11). SkyAuction.com is a website that allows people to bid on auction for vacation packages. (Deposition, pg. 12). Mrs. Rux placed a bid to attend the Royal for seven (7) days and was notified by SkyAuction.com, via email, that she was the winning bidder with a confirmation number. At no time did MII contact her to provide any information with respect to the bid and/or property location. (Deposition, pgs. 38-41). Although Mrs. Rux testified that, upon receipt of the notification from SkyAuction.com she was permitted to access a web page [www.mariott.com](http://www.mariott.com), which allowed her to view the Royal Resort and Casino, she also testified she did not see anything on the website which indicated that MII owns Royal. (Deposition, pgs. 55-56). Mrs. Rux was also never told by anyone at Royal that they were employed by MII (Deposition, pg. 57). In fact, the website was the only fact Mrs. Rux could provide that for her position that MII owned the Royal where she stayed. (Deposition, pg. 73-74).

Plaintiffs' counsel submitted two documents that, in attempting to book a reservation for Royal through [www.marriott.com](http://www.marriott.com) and [www.marriottgolf.com](http://www.marriottgolf.com), reference MII on the web pages. (Exhibit C, Defendant Marriott International Inc.'s Supplemental Memo in Support of Preliminary Objections). However, neither of these documents produced by Plaintiffs' counsel, states that MII owns, operates, supervises or controls Royal to established that MII is an appropriate defendant in this case.

The testimony and documents presented confirms that Plaintiffs have named an improper party as the defendant for this litigation. The pleadings, as filed, have averments exclusively against MII contending it owns, operates, supervises or controls the property located in St. Kitts, West Indies without sufficient evidence to support such

allegations. Plaintiffs did not name the owner or property manager as direct defendants; neither did they attempt service on any of these entities. Instead, the only service made by Plaintiffs was on MII, which is a Maryland entity, which was made “c/o” at Marriott’s Philadelphia Convention Center in an attempt to gain venue in the Philadelphia Court of Common Pleas. Therefore, it cannot be established that MII owns, operates, supervises or controls the Royal property where Mrs. Rux was injured. Failing this service upon MII of the Philadelphia Convention Center accomplishes nothing because MII is not a proper defendant in this action.

It is for these reasons that this Court believes it properly sustained the preliminary objections of Defendants and dismissed Plaintiffs’ Amended Complaint.

#### **Request for Admissions**

On June 21, 2006, the Plaintiff’s served Request for Admissions on Defendant MII, pertaining to the ownership and control MII has over Royal and Management Company. (Plaintiff’s Opposition, pg. 3). These requests for admissions sought to provide evidence regarding the MII’s ownership, control, and business relationship with both Royal, the corporation which owns the Resort, and the Management Company, the corporation which manages the Resort. (Requests for Admissions). However these types of questions were also asked on Ms. Nichols in her deposition of September 1, 2006.

The Defendant never answered the requests for admissions, and MII claims that Plaintiffs’ counsel granted MII a written extension “through at least August 15, 2006.” (Defendant’s Reply, pg. 8). Defense counsel further argues that at the Case Management Conference on August 4, 2005, the Plaintiffs’ counsel “agreed to an open-ended period of time for MII to provide responses to the Requests for Admissions.” (Defendant’s Reply,

pg. 8). Plaintiffs' counsel acknowledges that there was an initial written extension, requested around June 29, 2006. (Plaintiffs' Sur-Reply, pg. 2). However, Plaintiffs' counsel contends that no further extensions of time were agreed to. (Plaintiffs' Sur-Reply, pg. 3). Plaintiffs demand that the Request of Admissions be deemed admitted is an alternative attempt to establish MII as having ownership and control over Royal and Management.

Pa.R.Civ.P. 4014 (d), which addresses Request for Admissions, necessitates the withdrawal of admissions "when presentation of the merits would be subserved" and when the party who obtained the admissions<sup>4</sup> failed to prove that withdrawal would result in prejudice. The test of whether a party is prejudiced turns on whether a party opposing the withdrawal is rendered less able to obtain the evidence required to prove the matters which had been admitted. *Dwight v. Girard Medical Ctr.*, 154 Pa. Commw. 326, 623 A.2d 913, 916 (1993).

A withdrawal request pursuant to the Rule was not made in this case because defense counsel was not aware that the Request for Admissions were due since defendants believed that an oral agreement was previously reached to an open-ended period of time for MII to provide responses. It was only after plaintiff's filed their responses to preliminary objections that the issue of timeliness of the Request for Admissions had been raised. Therefore, defendants were unaware of plaintiff's assertion that the request for admissions should be deemed admitted until after preliminary objections had been filed and were not previously afforded an opportunity to request withdrawal.

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<sup>4</sup> It must be noted that these "admissions" arise under Pa.R.C.P. 4014 (b) for failing to respond as in *Dwight*, supra, and as such it is plaintiff's position that they should be "deemed" admitted.

Any further litigation on the issue of negligence would create a severe injustice to defendant because there is insufficient evidence to show that MII is a proper party to this action. Plaintiff cannot also be said to have suffered any prejudice from the withdrawal of MII admissions because the information retrieved from depositions held in this matter resolve the issue of who owns, operates and controls where Plaintiff fell.

In *Innovate, Inc. v. United Parcel Service, Inc.*, 275 Pa. Super. 276, 418 A.2d 720, (1980), appellant/plaintiff did not timely answer appellee's/defendant's request for admissions of facts after having first conducted depositions of defendants. *Id.* at 721. The Court found that appellant's contention that appellee was not permitted to request admissions of fact under *Pa. R. Civ. P.* 4014 was without merit. *Id.* The request for admissions were thus deemed admitted. However, in *Innovate*, the plaintiff conducted her deposition of defendants prior to issuing request for admissions. *Id.* The admissions in *Innovate* were sought as a means to expound on deposition testimony in an attempt to further clarify whether the deponent recalled how much the tools were to be insured for. *Id.* In *Innovate* the representative of Stanley Works could not recall how much he insured the tools for. *Id.* The admissions provided the clarification that the representative agreed to have the tools shipped to plaintiff with insurance coverage for a maximum amount of \$250.00. *Id.*

The Commonwealth Court in *Dwight*, questioned the finding in *Innovate*. In *Dwight*, appellees requested admissions pursuant to *Pa. R. Civ. P.* 4014(a), which appellant answered late and were, thereby, deemed admitted by the trial Court. *Id.* at 330-331. The Commonwealth Court reversed and remanded the trial court's decision, holding the revised rules of civil procedure allowed for liberal withdrawal of admissions and it

was the burden of the party opposing the withdrawal to prove he is prejudiced in that he will not be able to obtain the same evidence by other means. Id.

The concept of liberal withdrawal of admissions as stated in *Dwight* clearly applies to the *case sub judicie*, wherein Plaintiff cannot prove prejudice because the same information was contained in the admissions previously obtained by Ms. Nichols deposition. Unlike in *Innovate*, Ms. Nichols deposition first established unequivocally, that MII does not own, operate, control or do business as the Royal property where Plaintiff fell. Therefore any subsequent discovery, including request for admission by Plaintiffs on this specific issue, would defeat the very purpose of effective discovery by way of deposition.

In light of such testimony, which established MII as a separate, non-owner entity from Royal and Management, together with the fact that the admissions cannot bind defendant on the issue of ownership, this Court's decision to sustain the preliminary objections should therefore be affirmed.

### **CONCLUSION**

For the aforementioned reasons, this Court did not commit an error of law or abuse of discretion in granting defendant's Preliminary Objections to plaintiffs' Amended Complaint. Thus, this Court respectfully requests that the Order of October 30, 2006, be affirmed.

**BY THE COURT:**

**6-25-2007**

\_\_\_\_\_  
Date

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ALLAN L. TERESHKO, J.