

**Matter of D.B. Zwirn Special Opportunities Fund,
L.P.**

2007 NY Slip Op 33642(U)

November 9, 2007

Supreme Court, New York County

Docket Number: 0113510/2006

Judge: Nicholas Figueroa

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

PRESENT: FIGUEROA
Justice

PART 46

D.B ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.

INDEX NO. 113510/06

MOTION DATE 11/02/07

- v -

PNC BANK, N.A.

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decide at rules all necessary

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

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: November 9, 2007

[Signature]
J.S.C.

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 46

Index No. 113510/06

In the Matter of the Application of,

D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.,

**DECISION
AND ORDER**

Petitioner,

for an Order to Compel the Production of Documents
from PNC BANK, N.A., Before Instituting Suit

Nicholas Figueroa, J.:

Petitioner seeks an order directing PNC Bank, N.A., to produce various books and records of Cincom, Inc., for pre-action discovery and inspection pursuant to CPLR §3102(c). Petitioner states that it is seeking a “supplemental order” to the order previously issued by this court against PNC Bank, N.A., granting pre-action disclosure of its records relating to other entities. Although the prior order was marked as a final order, petitioner brings this new proceeding under the same index number and caption as the later proceeding.

Petitioner alleges that it discovered the existence of Cincom, Inc. when it examined the material PNC Bank furnished in compliance with the court’s prior order. Petitioner does not reveal what cause of action it may have against Cincom, Inc. It states that records of the California Secretary of State show the incorporation of Cincom Inc. on April 6, 2004, had an office in Fort Lee, New Jersey, and that its officers were two persons who were mentioned as fraud perpetrators on the prior motion and who transferred funds to it.

On oral argument, petitioner conceded that it could obtain discovery relating to Cincom, Inc. in the course of litigation that it was planning to commence (but has not yet commenced), against

the persons and entities mentioned on the prior motion. However, petitioner's attorney stated that petitioner's request for pre-action disclosure was a strategic move.

Moreover, neither the papers nor petitioner's attorney's responses to the court's questions during oral argument reveal the basis for an action in New York. The court asked petitioner's attorney several times what the basis for an action in New York is. Petitioner's attorneys responses were that PNC Bank maintains an office here.

PNC bank will not be a defendant in an action against Cincom, Inc. or any of the other parties identified on the prior motion. Petitioner's attorney failed to reveal any acts in New York that would give rise to an action in a New York court.

The papers reveal that any transaction Cincom, Inc. may have participated in occurred in New Jersey. Petitioner has failed to demonstrate that a New York cause of action exists. Moreover, while pre-action disclosure may be obtained where it is necessary to frame a complaint, "it cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all" (*Holzan v. Manhattan and Bronx Surface Transit Operating Authority*, 271 AD2d 346, citing *Stump v. 209 East 56th Corporation*, 212 AD2d 410). A party seeking pre-action disclosure must demonstrate that a meritorious cause of action exists and that the information sought is material and necessary to the actionable wrong (*Matter of Bliss v. Jaffin*, 176 AD2d 106, 108).

Petitioner has not demonstrated that it has a meritorious New York cause of action. While it may have a cause of action elsewhere, this court cannot grant pre-action discovery in a proceeding outside its jurisdiction. This court's ability to grant discovery in a non-New York action is limited to granting discovery that has been authorized by the sister state court (CPLR §3102(e)). Although the court granted pre-action disclosure on the prior motion, that decision may have been erroneous. The court will not perpetuate this error on this motion.

The court notes that petitioner made one attempt to give Cincom, Inc. notice of this proceeding. According to petitioner's attorney, the process server employed found that Cincom's address is an abandoned structure in New Jersey. While the court is denying the petition for other reasons, the lack of notice to Cincom, Inc., the aggrieved party, although not named in the caption, is a matter of concern to the court. This is particularly true, given the merely token opposition PNC Bank asserts. PNC's affirmation in opposition fails to raise any concerns about its customer's privacy rights; rather, it seeks only to avoid bearing the cost of providing its records to petitioner.

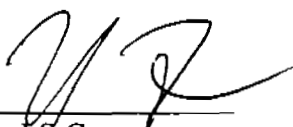
Accordingly, it is

ORDERED that the petition is denied.

This constitutes the decision and order of the court.

Dated: November 9, 2007

ENTER



J.S.C.

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NEW YORK