

**Gameologist Group, LLC v New York State Div. of
Lottery**

2010 NY Slip Op 30500(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 102951/09

Judge: Joan M. Kenney

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

PRESENT: Kenney Justice

PART 8

Index Number : 102951/2009
GAMEOLOGIST GROUP LLC
 vs.
NEW YORK DIVISION OF LOTTERY
 SEQUENCE NUMBER : 006
 CHANGE VENUE

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

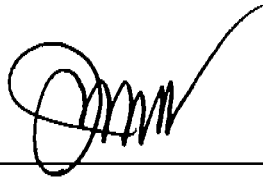
Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
 MAR 12 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 3/8/10


JOAN M. KENNEY 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 8

-----X

THE GAMEOLOGIST GROUP, LLC,

Index # 102951/09
Cal.: 1/19/2010
Motion Seq. No.: 006

Plaintiff,

-against-

DECISION AND ORDER

NEW YORK STATE DIVISION OF LOTTERY,
SCIENTIFIC GAMES INTERNATIONAL,
INC., and SCIENTIFIC GAMES CORPORATION,
INC.,

Defendants.

-----X

KENNEY, JOAN, M., J.S.C.

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FILED
MAR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to change venue:

Papers

Notice of Motion, affirmations in support, Exhibits
and Memorandum of Law
Memorandum of Law in Opposition
Reply Memorandum of Law

Numbered
1-7
8
9

Defendants move, pursuant to CPLR 503, 510 (3) and 511 (a), to transfer venue of this case from Supreme Court, New York County to the Supreme Court in Schenectady, New York. Plaintiff opposes the motion.

PROCEDURAL HISTORY

Plaintiff commenced the captioned action with the service of a summons and complaint. The last date for defendants to answer the complaint was on or about April 6, 2009. Defendants filed a request for judicial intervention with a motion to dismiss on April 6, 2009. The motion was denied

in part and granted in part.

Pursuant to a stipulation dated December 23, 2009, the parties agreed that “Defendants had until January 15, 2010 to move or serve an answer to the complaint.” On January 15, 2010, defendants simultaneously served an answer and the instant application. A review of the record in this matter indicates that SGI did not serve a demand to change venue and did not raise an affirmative objection to Gameologist’s choice of venue in its answer. Nor is there any indication that plaintiff served an objection to any voluntary request to change venue, prior to the service of this application.

FACTUAL BACKGROUND

Plaintiff is The Gameologist Group, LLC (Gameologist), a New Jersey corporation, with its principal place of business in Atlantic City, New Jersey. Gameologist’s pleading alleges, *inter alia*, federal and state trademark infringement claims; unfair competition and false advertisement claims; pursuant to the Lamham Act and violations of the General Obligations Law.¹

Defendant, the New York State Division of Lottery (the Lottery), maintains its principal place of business in Schenectady, New York. Scientific Games International Inc. and Scientific Games Corporation, Inc. (collectively SGI), are Delaware chartered corporations, with manufacturing facilities located in Alpharetta, Georgia.

The crux of Gameologist’s claims allege that its trademark and the attendant property rights (IP or intellectual property), to a scratch-off gambling game called “BLING BLING 2002, have been violated.” In April, 2003, Gameologist commenced negotiations with MDI Entertainment (MDI),

¹A prior decision of this court rendered by Shafer, J., dated December 7, 2009, dismissed Gameologist’s fifth, seventh and eighth causes of action.

a wholly owned subsidiary of SGI. This occurred after approximately one year of attempting to market the IP through, among other methods, using an "email blast" in the Summer of 2002. In or about October 2003, Gameologist's representatives and the President of MDI met in Alpharetta, Georgia, and a licensing agreement was executed in January 2004 between Gameologist and MDI (licensing agreement). Approximately, two months later MDI cancelled the licensing agreement.² After termination of the licensing agreement, Gameologist attempted to market its gaming concept and IP to the Lottery directly. On July 19, 2004, the Lottery informed Gameologist that it was not interested in the IP because of disappointing focus group results.

In December 2007, the Lottery began selling a scratch off game called "BA-DA BING." This game was developed by SGI, exclusively for the Lottery's use within the State of New York. SGI's game used representations of diamonds and dollar signs, similar to those used in the IP owned by Gameologist. The personnel who worked on the BA DA BLING game project for both the Lottery and SGI are employed in Schenectady, New York.

ARGUMENTS

Gameologist argues that venue is properly placed in New York County because MDI maintains a principal place of business in Manhattan and there is no "general rule" that supports transfer. "The place of trial shall be in the County in which one of the parties resided when it was commenced." Further, this is a transitory action that should be tried in the county in which the cause arose, which Gameologist contends is New York County.

In sum, SGI argues that the only location where MDI and Gameologist met was Alpharetta,

Judge Shafer's December 7, 2009, decision also made a finding that MDI was not the alter ego of SGI and SGI was never a signatory to the licensing agreement.

Georgia. Second, SGI are Delaware chartered corporations, Gameologist is a New Jersey corporation, with its principal place of business in Atlantic City. The only witnesses with personal knowledge of the facts pertinent to the claims are all located in Schenectady, New York. Finally, SGI contends that both the interests of justice and the convenience of the material witnesses are better served by transferring the case.

DISCUSSION

The threshold issue to be decided is whether SGI's motion complies with CPLR 511 (a) and (b). CPLR 511 (a) and (b) are the controlling sections for changing the place of trial, which state in their entirety as follows:

(a) Time for motion or demand. A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.

(b) Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

As required in the foregoing sections, once the written demand for a change of venue is

served, the party seeking to change the situs of the trial, must then wait 15 days to serve the motion to change venue. On the record before this Court, it appears that SGI did not serve a demand to change venue as required under subsection (b) of CPLR 511, nor did it raise the issue of venue in its responsive pleading. However, the usual rules for motion practice govern motions based on either of the discretionary grounds, i.e., to insure an impartial trial (CPLR 510[2]), or to accommodate the convenience of material witnesses (CPLR 510[3]). A demand need not, and should not, be served prior to either of these motions. Such is the case here.

A motion to transfer under CPLR 510 (2) or (3) must be made within "a reasonable time after commencement of the action." (CPLR 511[a].) Whether a given delay is reasonable depends upon the circumstances of each case (*Mena v Four Wheels Co.*, 272 AD2d 223 [1st Dept 2000] [one year delay was not reasonable where there was no "plausible explanation" for the delay and where the note of issue had already been filed]); *see also Johnson v Cherry Grove Island Mgt., Inc.*, 190 AD2d 598 [1st Dept 1993] [motion timely despite two-year delay where there was no showing of prejudice]). Inasmuch as SGI did not delay in making the instant application, this Court deems the application timely. However, because SGI raised various theories to support a change of venue this Court is treating the application as a discretionary motion, seeking to accommodate the convenience of material witnesses and in the interest of justice.

CPLR 510 (1-3) sets forth the grounds to change the place of trial.

The court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county;
- or
2. there is reason to believe that an impartial trial cannot be had in the proper county; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

Gameologist contends that New York County is the appropriate county to try this case because it is within plaintiff's prerogative to place venue here and because it is the principal place of business for MDI. Plaintiff merely opposes the instant motion and has not cross moved to retain venue in the designated county. Plaintiff could have attempted to avoid transfer to SGI's designated venue by cross-moving under the discretionary grounds of CPLR 510 (2) or (3), and argue to either to retain venue in New York County, or to transfer to some county other than the one designated by SGI. (*Fisher v Finnegan-Curtis*, 8 AD3d 527 [2d Dept 2004].) It bears emphasizing that Gameologist would have had to make a formal cross-motion to achieve the outcome it seeks. The Appellate Divisions have made it clear that merely opposing SGI's motion without affirmatively requesting an order under CPLR 510(2) or (3) will not suffice (*see e.g. Sellars by Sellars v Tubbs*, 171 AD2d 1025 [4th Dept 1991]). One court explained: "A cross motion is mandatory because two different concepts are involved: defendant's right to a change to the proper county and plaintiff's application, addressed to the discretion of the court, to retain the action in an otherwise improper county for the convenience of material witnesses and the ends of justice...." (*Pitegoff v Lucia*, 97 AD2d 896, 896-97 [3d Dept 1983]).

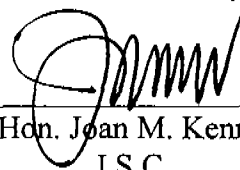
The First Department in *Clinton v Griffin* (176 AD2d 501 [1st Dept 1991]), restated "[t]he general rule [which] is that a transitory action, such as this, other things being equal, should be tried in the County in which the cause of action arose." (citations omitted). This rule is predicated upon and requires a showing as to the convenience of material non-party witnesses (*Moghazeh v Valdes-Rodriguez*, 151 AD2d 428 [1st Dept 1989]). In this respect, SGI's most persuasive argument is that the Lottery, has its principal place of business in Schenectady, and both the relevant decisions and transactions were made there. Furthermore, the pertinent witnesses would be enormously

inconvenienced, if they were forced to come to New York County for discovery and trial purposes. Therefore, the instant action should be transferred to Schenectady County. (*Timber Hill Assoc., Ltd. v. Shultis*, 157 AD2d 579 [1st Dept. 1990].) The record establishes that, in support of its motion, SGI listed the material witnesses, all residents of Schenectady County, providing their names, addresses, and occupations. In addition, SGI summarized the substance of the witnesses' expected testimony and stated, that the witnesses were material to the defense of this action. This showing is sufficient to establish that the convenience of necessary witnesses would be promoted by the transfer. (*Thomas v Small*, 121 AD2d 622 [2d Dept 1986]). Here, "the county with the preponderance of witnesses is the county in which the cause of action arose, [and] venue should be therein placed." (*Seabrook v Good Samaritan Hosp.*, 58 AD2d 538 [1st Dept 1977]). Consequently, and for the reasons set forth above, the motion to change venue is granted. It is therefore,

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Schenectady, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Schenectady upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

Dated: March 8, 2010

ENTER:



Hon. Joan M. Kenney
J.S.C.

FILED
MAR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE