

**Sannon-Stamm Assoc., Inc. v Keefe, Bruyette & Woods, Inc.**

2013 NY Slip Op 30793(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 106510/2008

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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SANNON-STAMM ASSOCIATES, INC.,

Plaintiff,

Index No. 106510/2008

-against-

**FILED**  
APR 18 2013

**DECISION/ORDER**

KEEFE, BRUYETTE & WOODS, INC.,

Defendant

**COUNTY CLERKS OFFICE  
NEW YORK**

-----x  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	_____

**FILED**

APR 18 2013

**COUNTY CLERKS OFFICE  
NEW YORK**

Plaintiff, an executive search firm, has commenced the present action to recover the balance of a placement fee it alleges it is owed for referring Andrew Crossfield to defendant as a candidate for employment. It has brought the present motion to amend its complaint to increase its *ad damnum* clause. Defendant has brought a cross- motion in limine to exclude the testimony of plaintiff's experts at trial, to exclude any testimony by plaintiff that the value of the services provided by plaintiff exceeds \$100,000 and to quash, in part, the subpoena to Andrew Crossfield.

Although plaintiffs complaint originally contained four causes of action including a

claim for breach of contract and account stated, two of the four causes of action have been dismissed and the remaining claims for trial are the quantum meruit and unjust enrichment claims. The note of issue in this action was filed in June 2011 and this action was scheduled for trial on March 5, 2013 but has been adjourned to May 20, 2013. In plaintiff's amended complaint, plaintiff requests damages in the amount of \$75,000 plus ten percent (10%) of the actual gross billings of Andrew Crossfield in excess of \$1,000,000 during the first year of his employment with the defendant. It now seeks to amend the *ad damnum* clause of the amended complaint to cover the five year period that Andrew Crossfield was employed by defendant as opposed to only the first year of his employment, by seeking to recover "an amount to be determined based upon the actual gross billings of Andrew Crossfield for each year of his employment with defendant." The reason that it gives for seeking to amend the complaint at the present time, just as the trial is about to commence, is that the claim is now based on unjust enrichment and quantum meruit theory of recovery rather than a contract or account stated theory.

CPLR section 3025 (b) provides that a party may amend his pleading by leave of court and that leave shall be freely given upon such terms as may be just. The general rule is that "in the absence of prejudice to the defendant, a motion to amend the *ad damnum* clause, whether made before or after the trial should generally be granted.." *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981). Moreover a defendant is not prejudiced just because it is exposed to greater liability. *Id.* Rather, "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Id.* However, where a motion for leave to amend is not made until long

after the case has been certified for trial, “judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious.” *Fischer v. RWSP Realty, LLC*, 53 A.D.3d 595 (2d Dept 2008). In *Fischer*, the court denied plaintiff leave to amend where the note of issue certifying the action as ready for trial was filed in December 2005, the plaintiff did not seek leave to amend his complaint until January 2007, the plaintiff offered no excuse for his delay in seeking the amendment, and did not establish that the proposed increase “in his demand for damages was based upon new facts that only recently came to his attention.” *Id.*

In the present case, the court finds that the motion to amend the complaint should be denied based on all of the circumstances in this case. Initially, defendant will be prejudiced by the amendment of the complaint beyond simply being exposed to greater damages. This action was commenced many years ago in 2008, the note of issue certifying this case as ready for trial was filed in June 2011, almost two years ago and this case is scheduled to be tried in a month from now. Defendant has conducted all of its discovery in this action based on the assumption that plaintiff was only seeking to recover a percentage of the billings for Crossfield’s first year of employment with defendant. If defendant had been aware that plaintiff was seeking to recover a percentage of the billings for five years rather than one year, it would have conducted discovery differently than it did where the theory of the case was based on recovering a percentage of only the first year of billings. If plaintiff were allowed to amend at this late date, right before the trial is about to commence, defendant would be forced to defend against a theory of damages for which it has not had an adequate opportunity to prepare. Moreover, in this case, just as in *Fischer*, the plaintiff has not sought leave to amend its complaint until almost two years after it initially filed its note of issue certifying that discovery is complete, the plaintiff has offered no

excuse for its delay in seeking the amendment and plaintiff has not established that the proposed increase in its demand for damages was based on any new facts that only recently came to its attention. The only reason plaintiff has provided for bringing the motion to amend at this late date is that it just realized that it has a different theory of damages available to it pursuant to its equitable claims for unjust enrichment and quantum meruit. However, plaintiff's causes of action for quantum meruit and unjust enrichment, which form the basis for its increased damage claim, were pled in its original complaint in 2008. There is no reason why plaintiff could not have asserted its new theory of damages in 2008 when it originally commenced this action. Under these circumstances, the court exercises its discretion to deny the motion to amend the complaint.

The court declines to rule on defendant's in limine cross-motion at the present time, except for that aspect of the motion which seeks to quash the subpoena, as this type of motion should be decided by the trial judge at the commencement of the trial. However, the parties should request that Justice Silver assign this trial to Part 55 for trial before me if I am available for trial at that time.

With respect to the cross-motion to quash the subpoena in part, the motion is granted to the extent that the demand for w-2 or 1099 tax forms for 2009-through 2012 and the demand for tax returns for 2009-2012 are quashed. These documents are not relevant to the action based on this court's determination denying plaintiff leave to amend its complaint.

Based on the foregoing, the motion to amend is denied, the cross-motion is granted to the extent that the motion to quash is granted as described above and the court declines to rule on the remainder of the cross-motion as these issues should be decided by the judge who is trying the

