

<b>Mill Fin., LLC v Gillett</b>
2013 NY Slip Op 32407(U)
June 25, 2013
Mill Financial, LLC
Docket Number: 652055/2010
Judge: Eileen Bransten
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This opinion is uncorrected and not selected for official publication.

PRESENT: EILEEN BRANSTEN  
Justice

PART 3

-----X  
MILL FINANCIAL, LLC and MILL FOOTBALL  
HOLDINGS, PLC,

INDEX NO. 652055/2010

Plaintiffs,

-against-

GEORGE N. GILLETT, JR.; BOOTH CREEK  
MANAGEMENT CORP.; GILLETT FAMILY  
SKI, LLC; BOOTH CREEK PARTNERS  
LIMITED II, LLLP; GILLETT COLEMAN, LLC;  
GILLETT WHEAT LLC; FOOTBALL  
INVESTMENTS, LLC; GILLETT GEMS, LLC;  
BOOTH CREEK, INC.; SPRADDLE CREEK  
AUTO INVESTMENT, LLC; SPRADDLE  
CREEK AUTOMOTIVE REAL ESTATE, LLC;  
GILVEST GP, LLC; GILLETT SUMMIT, LLC;  
GILLETT FOOTBALL, LLC and THE ROYAL  
BANK OF SCOTLAND, PC,

MOTION DATE: JUNE 19,  
2013

MOTION SEQ. NO.: 007

Defendants.

-----X  
The following papers, numbered 1 to 3 were read on this motion for a  
commission asking a Texas Court to issue a Subpoena Duces Tecum on non-  
party Thomas O. Hicks

Notice of Motion / Order to Show Cause - Affidavits — Exhibits  
Answering Affidavits - Exhibit  
Replying Affidavits

PAPERS NUMBERED	
	<u>1</u>
	<u>2</u>
	<u>3</u>

CROSS MOTION .....YES .X. NO

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

Plaintiffs MILL FINANCIAL LLC and MILL FOOTBALL HOLDINGS, PLC (collectively "Plaintiffs"), move for a commission asking the Dallas County Court for the State of Texas to issue a *Subpoena Duces Tecum* to a non party, Thomas O. Hicks, to produce for inspection and copying all documents requested in a Schedule A attached to the documents.

Thomas O. Hicks did not oppose, nor did he appear at the hearing on, the motion. Patrick Oh, Esq., of Freshfields, Bruckhaus, Derringer US LLP, counsel for The Royal Bank of Scotland ("RBS") submitted an affirmation in opposition to Plaintiffs' three motions for commissions (sequence nos. 005, 006 and 007) and orally opposed the motions at the hearing. Mr. Oh argued that CPLR 3108, the rule governing commissions, provides for narrower discovery than the standard applied under CPLR § 3101. (Record of June 19, 2013 (Alan F. Bowin, C.S.R.), 15:20-16:7.) Mr. Oh contended that because CPLR 3108 reads that commissions may be issued only where "necessary or convenient", the Court should not grant Plaintiffs' motion for commissions at this time. *Id.*

CPLR 3108 provides that "a commission or letters rogatory may be issued where necessary or convenient for the *taking of a deposition* outside of the state." (emphasis added).

The Appellate Division, First Department has held that a trial court providently exercised its discretion when it denied plaintiffs' motion for commissions to take depositions outside of the state where plaintiffs failed to demonstrate that the commissions were necessary or convenient. See *Coventry Real Estate Advisors, L.L.C. v. Developers Diversified Realty Corp.*, 85 A.D.3d 450 (1st Dep't 2011). However, *Coventry Real Estate Advisors*, is not applicable to the case at hand because Plaintiffs are not seeking to depose out-of-state witnesses. Rather, Plaintiffs are seeking a commission to serve a *subpoena duces tecum* to secure certain documents limited to the time that Plaintiffs argue is pertinent to RBS's breach of its intercreditor agreement with Plaintiffs (the "Tri-Party Agreement") resulting in direct damage to Plaintiffs.

Plaintiffs claim they need documents from Mr. Thomas O. Hicks because he "was a 50% owner and board member of LFC (the "Liverpool Football Club"), and the subject of the Tri-Party Agreement), during this time, and was privy to written and oral communications regarding RBS, LFC, and others related to the sale of LFC[.]" (Affirm. Of Seth Moskowitz in Support of the OSC for Mot. Seq. 7, p 2.) Plaintiffs ask for documents that are related to "the bidding process, board approval and the purchase price. . ." *Id.*

CPLR § 3101 provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by . . . any [] person, upon notice stating the

