SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. JAMES V. BRANDS
Justice.

SUPREME COURT: DUTCHESS COUNTY

GILMAN CIOCIA, INC.,
Plaintiff,

-against-

STEVEN GILBERT and
MORGAN STANLEY SMITH BARNEY LLC,
Defendants.

DECISION AND ORDER
ON THREE MOTIONS

Index No.: 2016-50146

Motion Seq. No. 1, 2, 3

The following papers were read and considered on the three pending motions filed in this matter.

Motion Seq. No. 1 Filed By NYSCEF Docs. No. 18-23
Motion Seq. No. 2 Filed By NYSCEF Docs. No. 24-59
Motion Seq. No. 3 Filed By NYSCEF Docs. No. 60-73

Background Facts:

Plaintiff, a tax and financial planning company, filed the instant action alleging that its former employee Steven Gilbert breached the terms of their employment contract by failing to provide a timely notice of resignation, failing to repay the balance due on a promissory note issued by plaintiff which became due upon resignation, misappropriating confidential information obtained during Gilbert's employment with plaintiff, and soliciting two of plaintiff's employees (non-parties Lisa Gurian and Michael Gilbert) to join him at MSSB in contravention of his non-compete clause. It is further alleged that co-defendant Morgan Stanley Smith Barney LLC (hereinafter, "MSSB") tortiously interfered with the aforementioned employment contract.

MSSB filed a motion to dismiss this action based on New York being an inconvenient forum to litigate this matter (Motion Seq. No. 1). It is their contention that this matter should be filed in Florida since the dispute has no nexus with New York. Counsel interprets certain provisions of the Plaintiff-Gilbert employment agreement dated December 1, 2011 to permit adjudication of disputes in New York or Florida courts (*citing* Employment Agreement ¶7[c],[d]). According to the affidavit of Bert White, the Managing Director and Complex Manager for MSSB, plaintiff's claims arise out of Gilbert's employment by plaintiff in Florida, MSSB's subsequent hiring of plaintiff in Florida, and Gilbert's list of contacts serviced in Florida. MSSB states that most (if not all) witnesses are located in Florida. Gilbert filed a motion for the same relief (Motion Seq. No. 2) adopting MSSB's arguments.Plaintiff filed two separate

oppositions. Plaintiff contends that the Plaintiff-Gilbert employment contract at issue contains a New York choice of law and forum selection provision (*citing* Complaint ¶4, ¶6; Employment Agreement ¶13). Counsel claims that the employment contract gives plaintiff the option to choose the venue for the dispute as New York or Florida. Counsel argues that the controversy bears a nexus to New York since the plaintiff maintains its principal office in Poughkeepsie, New York; the employment contract permits New York for venue and choice of law; MSSB also maintains a principal office in New York; and MSSB refused service of pleadings in Florida and directed plaintiff's process server to serve MSSB upon its officers in New York.

Plaintiff filed a motion for leave to serve a sur-reply based on defendants' alleged mis-characterization of facts. (Motion Seq. No. 3).

Decision:

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." (CPLR 327[a]). The party moving for dismissal based on the doctrine of *forum non conveniens* has the burden of proving that the plaintiff's venue selection of New York is not in the interest of substantial justice (*see id.*; Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 479 [N.Y. 1984]; Smolik v. Turner Constr. Co., 48 AD3d 452, 453 [2nd Dept. 2008]). "On such motion, the Supreme Court is to weigh the parties' residencies, the location of the witnesses, and any hardship caused by the choice of forum, the availability of an alternate forum, and the burden on the New York court systems" (Boyle v Starwood Hotels & Resorts Worldwide, Inc., 110 AD3d 938, 939 [2nd Dept. 2013])[citations omitted]), as well as any contractual choice of forum clauses (*see* Trump v. Deutsche Bank Trust Co. Americas, 65 AD3d 1329, 1331 [2nd Dept. 2009]).

In consideration of the foregoing factors, this court finds that defendants have not met the requisite burden to warrant dismissal of this action. The complaint alleges that the plaintiff sued MSSB, both corporations with principal offices in New York, and Gilbert a Florida resident who agreed to the New York forum in the subject employment agreement. (Complaint ¶1-¶6). Paragraph 13 of the subject employment contract between plaintiff and Gilbert supports New York choice of law and Dutchess County, New York as a proper forum. Specifically, the choice of law provisions state that the employment contract "shall be governed by and constructed in accordance with the laws of the State of New York" (Employment Contract at ¶13[a]); and "any dispute or controversy arising between [Gilbert] and [plaintiff] or its affiliates shall be governed by the laws of the State of New York" (*id.* at ¶13[b]). It further provides that "*At [plaintiff's] option*, any dispute or controversy arising between [Gilbert] and [plaintiff] or any of its affiliates shall be determined...*in a lawsuit at the New York State Supreme Court* or in Florida State Court" (*id.* at ¶13[c])(emphasis added); and "the venue of...the Supreme Court action shall be *picked and determined by the [plaintiff]* from one of the following" which includes "*Dutchess County, New York*, Nassau County, New York, Broward County, Florida, or Hillsborough County, Florida" (*id.* at ¶13[d])(emphasis added). Although defendant MSSB is not a party to that employment contract, it is nonetheless a corporation with a principal office in New York which directed service of the pleadings upon officers in New York and the allegations against

MSSB stem from the alleged tortious interference of the aforementioned employment contract that permits plaintiff to elect this forum. MSSB's broad allegations that unidentified witnesses and evidence are located in Florida as opposed to New York are insufficient to disregard plaintiff's aforementioned contractual rights and reject plaintiff's choice of forum (*see* DeVita v Vita, 240 AD2d 536, 536-537 [2nd Dept. 1997]).

Based on the foregoing, it is hereby

ORDERED that defendants' motions for dismissal based on improper forum are denied. It is further

ORDERED that plaintiff's motion for leave to file sur-reply is denied as moot. It is further

ORDERED a preliminary conference is scheduled for **June 3, 2016 at 9:15a.m.**

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: May 4, 2016
Poughkeepsie, New York

ENTER:

HON. JAMES V. BRANDS. J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed form and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do <u>not</u> submit any copies. Submit only the original papers.