

<b>Gilman Ciocia, Inc. v Gilbert</b>
2017 NY Slip Op 32868(U)
April 3, 2017
Supreme Court, Dutchess County
Docket Number: 2016-50146
Judge: James V. Brands
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SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

\_\_\_\_\_  
GILMAN CIOCIA, INC.,

Plaintiff,

DECISION AND ORDER  
ON SIX MOTIONS  
Index No. 2016-50146

-against-

STEVEN GILBERT and MORGAN STANLEY  
SMITH BARNEY, LLC,

Defendants.

\_\_\_\_\_  
STEVEN GILBERT,

Counterclaim Plaintiff,

-against-

GILMAN CIOCIA, INC.,

Counterclaim Defendant,

\_\_\_\_\_  
MORGAN STANLEY SMITH BARNEY, LLC,

Third Party Plaintiff,

-against-

NATIONAL SECURITIES CORPORATION,

Third Party Defendant.

The following papers were read and considered on the following documents filed under  
Motion Sequence No. 8, 9, 10, 11, 12, 13.

NYSCEF Docs. No. 154 - 346

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 MSSB tortiously interfered with the aforementioned employment contract.

Of note in connection with the instant motions are two prior decisions related to prior Motion Sequences No. 1 and No. 5.

MSSB previously filed a motion to dismiss this action based on New York being an inconvenient forum to litigate this matter (Motion Seq. No. 1). By decision dated May 4, 2016, MSSB's motion was denied since MSSB failed to satisfy its burden of proof to warrant dismissal based on forum non conveniens. The court noted MSSB's "broad allegations that unidentified witnesses and evidence are located in Florida as opposed to New York" were insufficient "to disregard plaintiff's aforementioned contractual rights and reject plaintiff's choice forum", referencing provisions of the subject employment contract permitting plaintiff to select New York or Florida as a forum for litigation. (*See* Motion Ex. F).

National Securities Corporation ("NSC") filed a motion to dismiss MSSB's third-party action alleging breach of contract, breach of covenants of good faith and fair dealings, and unfair competition. By decision dated November 3, 2016, NSC's motion was granted and MSSB's third-party complaint was dismissed as against NSC. (*See* Motion Seq. No. 5).

MSSB filed the instant motion (Motion Seq. No. 9) pursuant to CPLR §2221 to renew Motion Sequence No. 1 and reargue Motion Sequence No. 5. As regards the former, MSSB contends that it had not identified the specific clients which Gilbert allegedly misappropriated at the time of the prior motion. Having subsequently served interrogatories which identified such persons, MSSB now argues that dismissal is warranted since 372 of the 400 identified clients reside in Florida and only 1 resides in New York. (*See* Motion Ex. L).

As regards the latter, MSSB seeks to restore the third-party complaint against NSC. MSSB argues that it stated a viable claim against NSC by alleging that NSC breached its duty "to perform its obligations under the Protocol for Broker Recruiting "for which the parties are required to "implement and adhere to it in good faith" (Motion Ex. G ¶16, ¶20, ¶26; Motion Ex. H ¶21). In support, counsel cited NSC's agreement with plaintiff whereby NSC would rely on plaintiff to sue any of its registered employee representative (such as Gilbert) who allegedly misappropriated client information to solicit such clients. Counsel claims that as a result of this arrangement, NSC used the Protocol as a "shield against the enforcement of confidentiality and non-solicitation agreements, while at the same time using Plaintiff, its affiliate, as a sword against any of its competitors (such as MSSB) who hired its registered representatives" (Gehring Aff. ¶19).

Counsel for Plaintiff and NSC filed opposition which essentially contends that MSSB failed to identify any new facts to support its forum non conveniens motion and further failed to identified any facts or law overlooked or misapprehended by this court in dismissing the third-party complaint.

Decision:

A motion for leave to renew a prior motion pursuant to CPLR §2221[e] must be “based upon new facts not offered on the prior motion that would change the determination or a change in the law that would change the prior determination.” There must be what the court, in exercising its discretion, determines to be “reasonable justification” for the delay for the failure to present such facts on the original motion must be presented” (CPLR §2221[e][3]).

Here, MSSB submitted newly-discovered facts identifying specific clients which were allegedly solicited and/or misappropriated. Such facts were not known to the movant MSSB at the time of the filing of Motion Seq. No. 1 for dismissal based upon forum non conveniens. Such facts were subsequently discovered by the movant MSSB upon receipt of plaintiff’s responses to MSSB’s interrogatories (*see* Motion Ex. K, L). Based on such disclosures, an overwhelming majority of 372 of the 400 identified clients reside in Florida and only 1 resides in New York. This court, having weighed this information regarding the location of the potential witnesses, as well as the hardship caused by the choice of forum in New York, the availability of an alternate forum in Florida, and the burden on the New York courts systems, finds that the interest of substantial justice warrants filing this matter in the Florida courts as opposed to New York (*see generally Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 478-479 [N.Y. 1984]; *Smolik v. Turner Constr. Co.*, 48 AD3d 452, 453 [2<sup>nd</sup> Dept. 2008]; *Boyle v Starwood Hotels & Resorts Worldwide, Inc.*, 110 AD3d 938, 939 [2<sup>nd</sup> Dept. 2013]).

Based on the foregoing, it is hereby

ORDERED that Motion Sequence No. 9 filed MSSB for renewal of Motion Sequence No. 1 pursuant to CPLR §2221[e] is granted and upon such renewal, it is hereby

ORDERED that MSSB’s motion to dismiss the complaint on the ground of *forum non conveniens* is granted. It is further

ORDERED that based on the foregoing determination, the remaining pending motions filed as Motion Sequence No.s. 8, 10, 11, 12, and 13 are denied as moot.

The foregoing constitutes the decision and order of this court.

Dated: April 3, 2017  
Poughkeepsie, New York

ENTER:

  
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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 from 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 not submit any copies. Submit only the original papers.**