

**Gilman Ciocia, Inc. v Byrne**

2017 NY Slip Op 33177(U)

October 16, 2017

Supreme Court, Dutchess County

Docket Number: 2017-50580

Judge: James V. Brands

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This opinion is uncorrected and not selected for official publication.

AD

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 TWO MOTIONS  
Index No. 2017-50580

-against-

BRIAN BYRNE,

Defendant.

\_\_\_\_\_  
X

The following papers were read and considered on plaintiff's motion for a default judgment. Also considered was defendant's cross-motion for an order compelling arbitration, or an order transferring this matter to Suffolk County or, in the alternative, an order extending the time to file an answer.

NYSCEF DOC. No. 3-40

Background Facts:

Gilman Ciocia, Inc. (hereinafter, "Plaintiff" or "Gilman") operates a tax preparation and financial planning business with a principal office in Poughkeepsie, New York. Plaintiff hired defendant to work as an "accountant/tax preparer" until he resigned in September 2016. The parties executed an employment agreement on an annual basis with the most recent agreement being the Tax Preparer and Accountant/Financial Planner Employment Agreement ("TPEA") dated January 22, 2014.

Upon his resignation, defendant began to engage in accounting/tax preparation/financial planning practices at Equity Services Inc. located in Hauppauge, New York. Plaintiff alleges that the defendant violated the confidentiality, anti-piracy, and non-circumvention provisions of the TPEA by misappropriating confidential client lists and files to solicit business from plaintiff and plaintiff's "affiliates" as further defined in the TPEA.

Plaintiff commenced this action against defendant alleging breach of contract and breach of implied duty of good faith and fair dealing, thereby seeking to recover damages on behalf of plaintiff and its "affiliates". Plaintiff filed the instant motion for a default judgment pursuant to CPLR §3215.

It is alleged that defendant failed to timely file an answer following service of the pleadings upon defendant via substitute service upon a person of suitable age and discretion at his place of employment (*see* Plaintiff's Motion Ex. A).

Defendant filed a cross-motion seeking the following alternative relief:

- (i) Compel arbitration pursuant to CPLR §7503, or
- (ii) Dismiss this matter for forum non conveniens or, in the alternative, transfer this matter to Supreme Court, Suffolk County pursuant to CPLR §327, or
- (iii) Extend the time for defendant to file an answer pursuant to CPLR §§2004, 3102[d].

Counsel contends the defendant is a former representative of National Securities Corporation (NSC). Both defendant and NSC are registered with the Securities and Exchange Commission and the Financial Industry Regulatory Authority (FINRA), a self-regulatory agency requiring arbitration of disputes amongst its members and associated persons. Counsel submits a copy of FINRA Rule 13200 ("Required Arbitration"), Interpretive Memo-10100 ("Failure to Act Under Provisions of Code of Arbitration Procedure"), and a broker report evidencing plaintiff's affiliation with NSC, a registered member of FINRA.

It is defendant's contention that this dispute over clients engaged in securities and tax services relate to NSC, a registered broker-dealer regulated by FINRA, and any disputes therefrom are subject to arbitration. Defendant's supporting affidavit states that while he worked at plaintiff's Suffolk County office, he provided tax preparation services through plaintiff and engaged in securities trades through NSC. He also states that his present clientele portfolio consists of 60% securities and insurance products (for which plaintiff is not authorized to engage) and 40% tax services (for which plaintiff is authorized to engage). He argues that NSC, by and through plaintiff, is attempting to mis-characterized the nature of defendant's prior employment and current revenue to take this matter out of the purview of FINRA.

Alternatively, defense counsel contends that this matter should be dismissed or at least transferred to Suffolk County. Defendant's affidavit contends that he worked in Suffolk County at all relevant times during his employment with plaintiff and has never worked in its Poughkeepsie office. He further contends that 90% of his clientele who are potential witnesses reside in Suffolk County.

Plaintiff filed a reply challenging defendant's contentions. The affidavit of Jay Isreal, General Counsel of NSC, "the parent corporation of Plaintiff", attests that Gilman is a Delaware corporation with its principal place of business in Poughkeepsie, New York. (Isreal Aff. ¶1). Counsel states that plaintiff "offers integrated financial advice to its clients" and deems its methods of obtaining and retaining clients as "trade secrets" (*id.* at ¶5, ¶6). Counsel cites the parties' employment agreement to the extent that it prohibits defendant from "circumventing clients for a period of two years after his employment ended" (Isreal Aff. Ex. B ¶8) and to the extent that the agreement contemplates Dutchess County as a proper forum to bring suit (*id.* at ¶9[g]).

Defendant's reply reiterates the arguments set forth in his cross-motion. He further contends that NSC and Gilman are "alter egos" intended for NSC to hide behind the veil of Gilman in an effort to circumvent the mandatory arbitration requirement related to NSC disputes. Defendant claims that during the relevant times of his employment with plaintiff, he provided tax preparation services for clients through the guise of plaintiff while providing securities services under the auspices of NSC. In fact, an officer of NSC is the signatory of a majority of defendant's annual employment contracts with plaintiff. Accordingly, it is defendant's contention that this court must pierce the corporate veil to hold NSC to the FINRA regulations governing such disputes.

Decision:

Pursuant to CPLR §3012(d), a defendant seeking an order to compel the plaintiff to accept an untimely answer as timely must demonstrate a reasonable excuse for the delay and a potentially meritorious defense to the action. CPLR §2004 permits such extension even where the statutorily-proscribed period has already expired. Defendant demonstrated a reasonable excuse based on what appears to have been a law office error by former counsel followed by a change of counsel. Also noted is the lack of prejudice deriving from the de minimis delay in filing an answer and the longstanding deference given to resolving matters on the merits.

Defendant also proffered a potentially meritorious defense to the action, "potentially" being the operative word only requiring a showing that the proffered defense(s) are not palpably insufficient or patently devoid of merit (*see generally Marcum, LLP v Silva*, 117 AD3d 917 [2<sup>nd</sup> Dept. 2014]; *Needleman v Tornheim*, 106 AD3d 707 [2<sup>nd</sup> Dept. 2013]).

The complaint alleges that NSC and National Management, Inc. are "affiliates" of Gilman. Gilman's business scope is limited to tax preparation and financial planning, whereas NSC's business scope relates to securities brokerage services regulated by the SEC and FINRA. The parties executed annual employment agreements. The prior employment agreements dating back to 2009 were signed by Gilman, Byrne, and plaintiff's affiliates Prime Capital Services, Inc. and Prime Financial Services, Inc., the latter being predecessors of NSC (Kutner Aff. In Opposition Ex. D). Notably, the most recent employment contract dated January 22, 2014 (referred to herein as "TPEA") is executed by Byrne as "Employee" and Gilman as the "Company". Notwithstanding, the contractual provisions extend to Gilman and non-party "affiliates" including NSC. In fact, the TPEA includes a non-compete clause in favor of Gilman and any "affiliates" whereby Bryne is prohibited from engaging in similar business services proffered by Gilman or "affiliates services" proffered by its "affiliates", including any securities brokerage services proffered by Gilman's parent company NSC. (*Id.* at Ex. B ¶6). The TPEA also includes a damages provision which permits recovery for losses incurred by plaintiff Gilman and its "affiliate" including NSC. (*Id.* at Ex. B). In doing so, the maker of the contract is essentially attempting to contract NSC out of FINRA requirements- in other words, the maker of the contract attempts to enable NSC, a non-signatory "affiliate" operating as a securities brokerage firm, to circumvent the FINRA requirement of mandatory arbitration by classifying such business as "affiliated services" of Gilman for which Gilman can litigate in this forum.

Plaintiff cannot have it both ways - plaintiff cannot assert that defendant's employment is solely with Gilman (and thus not subject to mandatory arbitration) and then assert damages on behalf of NSC, a non-signatory to the employment agreement and non-party to this litigation, where NSC is a securities brokerage firm subject to SEC regulations and mandatory arbitration under FINRA.

Plaintiff failed to assert any legal basis by which it can assert claims on behalf of its affiliate NSC, which is a non-signatory to the employment agreement and non-party to this litigation. Thus, this court lack jurisdiction over such claims related to NSC or any affiliates' losses due to Byrne's alleged misappropriation of securities brokerage clients. And to the extent that Gilman seeks entitlement by way of the terms of TPEA, such claims seeking recovery for losses related to NSC's securities brokerage clients are subject to mandatory arbitration under FINRA.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment is denied, and it is further

ORDERED that defendant's cross-motion is granted to the extent that defendant's time to answer is hereby extended and defendant's proposed answer is deemed timely served upon plaintiff, and it is further

ORDERED that plaintiff shall file any reply to the counterclaims asserted therein within 20 days hereof. It is further

ORDERED that defendant's cross-motion is granted to the extent that any claims for damages on behalf of plaintiff's affiliates including, without limitation, NSC are hereby dismissed. Plaintiff's claims for damages are limited to those damages related to tax preparation and financial planning which defendant performed during its employment with plaintiff. It is further

ORDERED that defendant's cross-motion for dismissal based on forum non conveniens or, in the alternative, an order transferring this matter to Suffolk County is denied without prejudice.

The burden rests on the party challenging the forum selection to demonstrate those private or public interest factors to support a change of forum. "Amongst the factors the court must weigh are the residency of the parties, the potential hardship to the proposed witnesses, the availability of an alternative forum, the situs of the actionable events, and the burden imposed" on the selected court, with no single factor controlling." (*Smolik v Turner Constr. Corp.*, 48 A.D.3d 452 [2<sup>nd</sup> Dept. 2008][internal citations]).

When balancing the competition interests at this early juncture, defendant has not proffered or is likely unable to proffer a witness list identifying witnesses and their residences and identifying potential hardships so as to support a change of venue to Suffolk County, particularly when balanced against the fact that TPEA contemplates litigation in Dutchess County.

It is further

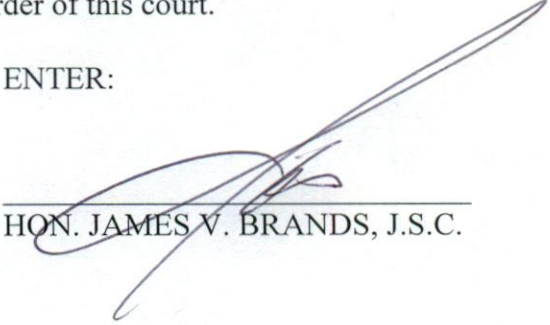
ORDERED that a Preliminary Conference is scheduled for November 22, 2017 at 9:15 a.m.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: October 16, 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.**