Gilman Ciocia, Inc. v Gilbert
2016 NY Slip Op 32885(U)
November 3, 2016
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,

-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 Petitioner,

-against-

NATIONAL SECURITIES CORPORATION,

Third Party Respondent.

DECISION AND ORDER
Index No. 2016-50146
Motion Seq. Nos. 5 & 6

The following papers were read and considered on the motion of third-party defendant to dismiss the third party action (Motion Seq. no. 5) and the motion of defendant/third-party plaintiff for leave to file a sur-reply (Motion Seq. no. 6):

Motion Seq. No. 5 filed by NYSCEF Docs. No. 96-108; 19-122; 125
Motion Seq. No. 6 filed by NYSCEF Docs. No. 133-144

Background Facts:

In July 2015, defendant Steven Gilbert notified third-party defendant National Securities Corporation (the sister company of plaintiff Gilman Ciocia, Inc.) of his resignation from National Securities and any other affiliated entities including Gilman.[1] Gilbert obtained new employment with defendant Morgan Stanley Smith Barney, LLC (MSSB). On or about January 21, 2016, Gilman commenced an action against Gilbert for, inter alia, breach of his employment agreement. In addition, Gilman sued Gilbert's new employer, MSSB, for, inter alia, tortious interference with that employment agreement. On or about June 2, 2016, MSSB answered the complaint and commenced a third-party action against National Securities for breach of contract; breach of covenant of good faith and fair dealing; and unfair competition. National Securities now moves to dismiss the third party complaint pursuant to CPLR 3211(a)(1) and (a)(7).

The third-party complaint alleges that National Securities and MSSB are both members of The Protocol for Broker Recruiting and agree to be bound by its terms. (*See* exhibit 2 and 3 of moving papers). The Protocol is an agreement between a number of firms in the securities industry. Its purpose is to "further the clients' interests of privacy and freedom of choice in connection with the movement of their Registered Representatives ("RRs") between firms." Thus, if a RR leaves a firm and follows the Protocol requirements, the former firm will not seek to enforce confidentiality and non-solicitation agreements against the RR or his/her new firm. The Protocol permits the leaving RR to take certain client account information.

The third-party complaint further alleges that Gilman is not a licensed broker-dealer and is not a member of the Protocol. However, Gilman offers securities services through its affiliate National Securities, and, therefore, "Gilbert was able to offer securities services to the clients he serviced as an employee of [Gilman]." MSSB alleges that Gilman and National Securities "conspired in order to obtain the benefits of the Protocol while not abiding by the Protocol's provisions when a [RR] leaves," and, therefore, even though MSSB and Gilbert complied with their obligations under the Protocol, they were sued "for doing nothing more than what the Protocol expressly permits."[2]

Based on these allegations, MSSB asserts a cause of action against National Securities for breach of the Protocol Agreement by supervising and licensing employees of Gilman so that Gilman can offer security services "while not ensuring that its [RRs] (and their new employers) would be free of litigation." MSSB also alleges that National Securities breached its implied covenant of good faith and fair dealing required by the Protocol Agreement. Finally, MSSB claims that National Securities "engag[ed] in unfair competition by joining the Protocol to obtain for [RRs] leaving other

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[1]Affiliates Gilman and National Securities are both owned by National Holding Corp.

[2]For purposes of this motion, the court accepts, as true, MSSB's allegation that it and Gilbert complied with their obligations under the Protocol (*see* Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409 [2001]); *accord Fred Tuck and Co., Inc. v Bronxville Props., Inc.*, 267 AD2d 423 [2d Dep't 1999]). Therefore, MSSB's motion for leave to file a sur-reply to correct the record is academic.

Protocol members to join National Securities the protections of the Protocol while subjecting its own [departing RRs] (and their new employers) to litigation by [Gilman]."

Decision:

On a motion to dismiss, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]); *accord Fred Tuck and Co., Inc. v Bronxville Props., Inc.*, 267 AD2d 423 [2d Dep't 1999]). The sole issue on a motion to dismiss is whether the pleading states a cause of action, and "if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion to dismiss will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, such a motion "should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action" (*Parekh v Cain*, 96 AD3d 812, 815 [2d Dep't 2012]).

"[I]n terms of legal responsibility, parent, subsidiary or affiliated corporations are treated separately and independently and one will not be held liable for the contractual obligations of the other, unless it is shown that there was an exercise of complete dominion and control... Similarly, one corporation will generally not have legal standing to exercise the rights of other associated corporations" (*Alexander & Alexander of New York v. Fritzen*, 114 AD2d 814, 815 [1st Dep't 1985], *aff'd* 68 NY2d 968 [1986]; *cf. Utica Mut. Ins. Co.*, 62 AD3d 692 [2d Dep't 2009]). To the extent the third party complaint discloses any allegation of wrongful conduct, it was clearly directed at Gilman, not National Securities, for filing the lawsuit. MSSB does not provide any specific provision of the Protocol that National Securities allegedly breached. Rather, MSSB asserts that National Securities failed to insure that its departing RRs and their new employers would be free from litigation if they complied with the Protocol Agreement, a non-cognizable cause of action.

"A cause of action based upon breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties (*Duration Mun. Fund, LP v JP Morgan Sec., Inc.*, 77 AD3d 474, 474 [1st Dep't 2010]; *accord Clervil v Bellevue*, 77 AD3d 697, 698 [2d Dep't 2010]). Here, MSSB alleges no breach of contract between it and National Securities. Rather, MSSB advances the convoluted argument that National Securities "conspir[ed] with [Gilman] as an attempt to enjoy the protections of the Protocol when hiring registered representatives from other parties to the Protocol and to deny those same protections to registered representatives who leave their employment" (Opposition ¶ 24). The third-party complaint does not allege a separate cause of action for conspiracy. However, even if it did, "New York does not recognize an independent cause of action for civil conspiracy" (*Rose v Different Twist Pretzel, Inc.*, 123 AD3d 897, 898 [2d Dep't 2014]). In any event, the allegations set forth in the third-party complaint are based on the conduct of an entity other than National Securities, namely Gilman, an affiliate of National Securities, for filing the lawsuit against MSSB. Accordingly, MSSB has no cause of action for breach of a covenant of good faith and fair dealing against National Securities.

"A cause of action based on unfair competition may be predicated upon trademark infringement or dilution in violation of General Business Law §§360-k and 360-l, or upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of propriety information or trade secrets" (*Out of the Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dep't 2008]). Here, MSSB alleges that "National Securities is engaging in unfair competition by joining the Protocol to obtain for registered representatives leaving other Protocol members to join National Securities the protections of the Protocol while subjecting its own registered representatives [who leave] (and their new employers) to litigation by [Gilman], its affiliated entity" (third-party complaint at Ex 2 to moving papers, ¶33). In opposition to the motion, MSSB again claims that National Securities "conspired" with Gilman to protect those joining National Securities from other Protocol members while exposing those representatives leaving and their new employers to litigation (Opposition at ¶42). Again, there is no separate action for civil conspiracy (*Rose, supra*). In addition, MSSB has not alleged that National Securities has misappropriated its "labor, skills, expenditures, or good will and displayed some element of bad faith in doing so" (*Abe's Rooms, Inc. v Space Hunter, Inc.*, 38 AD3d 690, 692 [2d Dep't 2007]). Rather, MSSB's only claim appears to be that it was sued by Gilman, a nonactionable wrong. (*See Landscape Forms, Inc. v Columbia Cascade Co.*, 117 F.Supp.2d 360, 371 [SDNY 2000]; *see also Kaplan v Helenhart Novelty Corp.*, 182 F2d 311, 314 [2d Cir. 1950] ["it is not an actionable wrong for one in good faith to make plain to whomsoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are]).

Based on the foregoing, it is hereby

ORDERED that National Securities Corporation's motion to dismiss the third-party complaint is granted; and it is further

ORDERED that Morgan Stanley Smith Barney's motion for leave to file a sur-reply is denied as academic. It is further

ORDERED that counsel for the remaining parties are reminded of the compliance conference scheduled for **December 12, 2016 at 9:15a.m.**

This constitutes the decision and order of the court.

Dated: November 3, 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 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.