

Citigroup Global Mkts. Inc. v SCIP Capital Mgt., LLC
2021 NY Slip Op 32637(U)
December 7, 2021
Supreme Court, New York County
Docket Number: Index No. 651031/2019
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN **PART** **49M**

Justice

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CITIGROUP GLOBAL MARKETS INC., CITIGROUP GLOBAL MARKETS LIMITED, CITIGROUP GLOBAL MARKETS ASIA LIMITED, CITIGROUP GLOBAL MARKETS SINGAPORE PTE LIMITED, CITIBANK, N.A., NEW YORK BRANCH, CITIBANK, N.A., LONDON BRANCH, CITIBANK, N.A., ZURICH BRANCH, CITIBANK, N.A., GENEVA BRANCH, CITIBANK, N.A., SINGAPORE BRANCH, CITIBANK, N.A., HONG KONG BRANCH, CITIBANK, N.A., JERSEY, CHANNEL ISLANDS BRANCH, CITIBANK INTERNATIONAL PLC, CITIBANK (SWITZERLAND) AG, CITIBANK CANADA INVESTMENT FUNDS LIMITED, CITITRUST (BAHAMAS) LIMITED, CITIBANK, N.A.

INDEX NO. 651031/2019

MOTION DATE 06/08/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Plaintiffs,

- v -

SCIP CAPITAL MANAGEMENT, LLC, THE SILVERFERN GROUP, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for MISCELLANEOUS.

Defendants-counterclaim plaintiffs SCIP Capital Management, LLC and The Silverfern Group, Inc. (Silverfern) move for an order granting Silverfern's motion for the issuance of Letters Rogatory. Plaintiffs oppose the motion.

Background

In this action, plaintiffs Citibank Global and its affiliates (Citi) allege that Silverfern breached a January 12, 2012 Distribution Agreement (the Agreement) between the parties by failing to pay "Placement and Incentive Fees now totaling \$4 million" (NYSCEF # 1-Complaint, ¶1). Citi entered into the Agreement to give Citi Private Bank (CPB) clients "the option of joining a Silverfern "Equity Club" where members would have the opportunity to co-invest in private equity or similar arrangements sponsored by Silverfern" (*id.*, ¶ 3; NYSCEF 28-Amended Answer and Counterclaims, ¶ 8). The original investment period was extended for one-year by

Silverfern in 2015, 2016, and 2017, and the complaint alleges that during this period, CPB clients invested in fifteen Silverfern investments, representing \$190 million in total commitments and resulting in fees, including a 2% Management fee paid to Silverfern (NYSCEF #1, ¶¶ 35-39; 40-41). It is further alleged that beginning in 2016, Silverfern often paid Citi its contractually required placement fees late, in contravention of Section 3(a) of the Agreement (NYSCEF #1, ¶¶ 7-14, 43). And, for much of 2017, it is alleged that when Citi reached out to Silverfern to request payment and despite reassurances from Silverfern, Citi was not paid or was paid less than the full amount due for placement fee (*id.*, ¶¶ 44-55; 56, 60). The same thing allegedly happened in 2018, and after a meeting in which Silverfern allegedly indicated that it did not intend to pay (*id.*, ¶¶ 59-64; 65-67), Citi commenced this action asserting a single cause of action for breach of contract based on the failure to pay the fees required under the Agreement.

Silverfern answered the complaint and asserted various counterclaims (NYSCEF # 28; ¶¶ 214-247). By Decision and Order dated December 13, 2019, Justice Peter Sherwood¹ granted Citi's motion to dismiss Silverfern's counterclaims with the exception of the breach of contract counterclaim (NYSCEF # 41). The surviving counterclaim alleges, *inter alia*, that Citi breached the Agreement including its "best efforts" provision by sending a letter to Club members in April 2016, without Silverfern's approval, stating that it was no longer supporting Silverfern's products (NYSCEF # 28, ¶¶ 155-158, 171). The counterclaim alleges that the letter caused participation in the Club to drop precipitously resulting in a loss of fees by Silverfern and other damages (*id.*, ¶¶ 214-217).

Silverfern now moves for an order allowing for the issuance of letters rogatory to obtain evidence from abroad, arguing that their issuance is proper under CPLR 3108, CPLR 3113, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (the Hague Convention) and/or other applicable laws. Specifically, Silverfern seeks documents from six individuals, who are former CPB clients in the Silverfern Equity Club or their investor representatives, which individuals are located in Hong Kong, Singapore, London, Mexico, or Taiwan (NYSCEF #'s 70-75, Letters Rogatory). Silverfern asserts that these individuals corresponded with their Citi Private Bank representatives regarding the Silverfern Equity Club and Silverfern's products, and as a result are likely to possess information concerning what Citi was telling investors about the Silverfern Equity Club and Silverfern's products without Silverfern's knowledge.

Furthermore, Silverfern argues that courts evaluate requests for letters rogatory the same way they evaluate domestic non-party discovery disputes, and thus a party seeking a letter rogatory need only show that "the disclosure sought is

¹ Justice Sherwood is retired.

relevant to the prosecution or defense of the action,” citing *Kapon v Koch*, 23 NY3d 32, 38 [2014]).

Citi opposes the motion, arguing that it is untimely as it was made after the May 25, 2021 deadline set by the court for third-party document subpoenas and is also contrary to the limitations set by Judge Sherwood’s prior orders for third-party discovery. Additionally, Citi asserts that contrary to Silverfern’s arguments, the standard for international discovery of third-parties is not the liberal “material and necessary” standard applicable to domestic discovery. Instead, to be entitled to international discovery of third-parties it must be shown that the information sought is “crucial to the resolution of a key issue in the litigation,” which is not the case here, citing *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 32 AD3d 150, 156-157 [1st Dept 2006]).

Additionally, Citi argues that New York law authorizes the issuance of letters rogatory only for depositions of foreign witnesses, and not documents as sought by Silverfern. Citi also argues that the Hague Convention does not authorize broad document discovery.

Discussion

The first issue to be addressed is the timeliness of the motion. Although the motion was filed on May 25, 2021, which was the court-ordered deadline for service of third-party document subpoenas, Citi argues that it was filed too late because Silverfern will not be able to serve the third parties with letters rogatory before the deadline. (NYSCEF # 76, ¶ 2). This argument is unavailing. Even assuming *arguendo* that Silverfern should have filed the motion prior to the deadline for third-party document subpoenas, the court has the authority to extend discovery deadlines in the absence of any demonstrable prejudice to the opposing party (*Vazquez v 3M Co.*, 177 AD3d 428, 429 [1st Dept 2019]; *White v. Associates Leasing, Inc.*, 11 AD3d 397, 397 [1st Dept 2004]). Here, Citi has failed to show any prejudice resulting from the purported delay in seeking the issuance of letters rogatory.

As for Citi’s assertion that Silverfern’s motion violated prior discovery orders limiting the number of depositions of Citi custodians, whose communications Silverfern sought in the letters rogatory (NYSCEF # 76, Citi MOL in Opp at 12-13), as noted by Silverfern, the subject discovery orders did not limit discovery from third parties, as opposed to party custodians (NYSCEF # 79, Silverfern MOL in Reply at 8).

Regarding Citi’s argument that letters rogatory cannot be used for production of documents when, as here, no depositions are sought (NYSCEF # 76 at 14-16), such argument appears to be supported by CPLR 3108 which provides that

“commission or letters rogatory may be issued where necessary or convenient for taking of a deposition outside of the state.” However, New York courts have allowed letters rogatory to be used for production of documents only (*see e.g., Conway v Marcum & Kliegman LLP*, 2017 WL 1362698, at *1 [Sup Ct, NY County, 2017] [“upon proper application, a court may issue letters rogatory to a court in a foreign jurisdiction requesting the same to assist in the production of documents relevant to the suit at hand”]; *In re Grunwald*, 2019 WL 5087154, at *3 [Surr Ct, Richmond County, 2019] [granting motion for the issuance of letters rogatory to third parties living in Poland, to obtain the decedent’s death certificate, copies of bank statement, and the list of registered voters]).

In any event, even if use of letter rogatory for documents only were permissible, Silverfern’s motion must be denied because Silverfern has not made the showing necessary to obtain international discovery. Although Silverfern claims that “[c]ourts evaluate requests for letters rogatory the same way that they evaluate domestic non-party discovery requests” (NYSCEF # 68, ¶ 16), the law is to the contrary. Specifically, the standard of international discovery is “whether the requested documents are crucial to the resolution of a key issue in the litigation” (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 32 AD3d 150, 156-157 [1st Dept 2006] [internal citations and quotations omitted]); *see also Azria v Azria*, 184 AD3d 419, 419 [1st Dept 2020] [denying motion seeking the issuance of letters rogatory to a third party living in France because the movant failed to prove the information sought by letters rogatory was “crucial to the resolution of a key issue in this litigation” [internal citation omitted]].


In the proposed letters rogatory, Silverfern seeks written communications between six individuals living outside the United States and Citi’s custodians (NYSCEF # 70-75). However, Silverfern has not shown that the information from these communications cannot be obtained from the extensive discovery ordered from Citi. In fact, Silverfern filed this motion for the issuance of letters rogatory before the completion of party discovery, including the depositions of Citi’s custodians. Accordingly, because Silverfern has not shown that discovery sought via the issuance of letters rogatory is crucial to a key issue or that this information cannot be obtained through domestic discovery, its motion is denied (*see e.g. Kahn v Leo Schachter Diamonds, LLC*, 139 AD3d 635, 636 [1st Dept 2020] [affirming denial of application for the issuance of letters rogatory for discovery from nonparty entities in Brazil noting that plaintiff failed to show that he could not obtain this discovery from defendants]).

In view of the foregoing, this court need not reach whether the letters rogatory comply with the Hague Convention or other applicable laws.

Conclusion

Accordingly, it is

ORDERED that Silverfern's motion for the issuance of letters rogatory is denied.

<u>12/7/2021</u>					
DATE			MARGARET CHAN, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>