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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON PART 55

Index Number : 116714/2009
WHITE, HOWARD
VS.
R&G BRENNER INCOME TAX
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 2/19/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

FILED
JUL 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/29/10

JANE S. SOLOMON
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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HOWARD WHITE,
Plaintiff,

Index No. 116714/2009
DECISION and ORDER

-against-

R&G BRENNER INCOME TAX CONSULTANT, ROBERT BRENNER, BENJAMIN BRENNER and MICHAEL DeVITO,
Defendants.
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SOLOMON, J.:

Plaintiff Howard White (White), sues defendants for breach of contract and unjust enrichment stemming from his sale of his tax preparation practice to R&G Brenner Income Tax Consultant (R&G), a partnership. The individual defendants are partners in R&G. Robert Brenner is its CEO, Benjamin Brenner is its president, Michael Deito is head of mergers and acquisitions (hereinafter, collectively "the Individual Defendants"). The defendants move for an order dismissing the complaint for lack of personal jurisdiction; dismissing the complaint against the Individual Defendants for failure to state a cause of action; change of venue from New York County to Nassau County; and a stay of this action pending the determination of the application for transfer of venue.

FACTS

White was the sole owner of Botten & White (B&W), an income tax preparation service. In 2008, he outsourced some of

B&W's work to lighten his workload. Then, by an agreement dated December 8, 2008 (and amended on March 11, 2009) (Agreement), R&G purchased his practice; paragraph 11 of the Agreement restricts White from competing with R&G. Also on December 8, White entered into a General Employee Agreement the (GEA) with R&G, and on December 11, he executed a General Restrictive Covenant (the GRC). He claims that the persons that R&G assigned to his former clients were not competent and did not timely prepare returns. As a result, in the Spring of 2009, White retrieved his clients' files and prepared the returns himself. Nevertheless, R&G collected its contractual share of the fees, and refuses to pay for White's work. White also claims that R&G threatens to sue him based on the restrictions in the parties' agreements.

In his complaint, White sues for (1) breach of contract, (2) a declaration that he did not breach the Agreement, (3) a declaration that restrictive covenants are unduly burdensome, (4) unjust enrichment, (5) tortious interference, (6) rescission of the Agreement based on fraud, and (7) conversion. This pre-answer motion followed after defendants' lawyers wrote to White's lawyer and unsuccessfully raised the venue issue under CPLR section 511(b).

DISCUSSION

A. Personal Jurisdiction:

Defendants argue that the court lacks personal

jurisdiction over R&G, a New York partnership, because White improperly served R&G under CPLR 310(b). In support, defendants supply an affidavit of service dated December 21, 2009, which shows that R&G, the entity, was served by in hand delivery to a "Ms. Jamie Ballen, Managing Agent" (Affidavit of service, attached to Motion, Ex. 2). No further service was made on R&G. White counters that service was properly effectuated under CPLR 310(a). In support it supplies two affidavits of service, dated December 21, 2009, which show that Robert Brenner and Benjamin Brenner were served by leaving a copy of the summons and complaint with "Ms. Jamie Ballen, Co-Worker" and mailing a copy to the Brenners' actual place of business (Affidavits of service, attached to Gropper Affirmation, Ex. C, D).

While White's CPLR 310(b) service attempt may be flawed, CPLR 310(a) allows personal service upon a partnership to be effectuated by personally serving the summons upon any partner in the partnership. The Brenners are partners in R&G and were served by delivery to Ballen at their actual place of business, and then by subsequent mailing to the R&G Nassau office.

Service pursuant to CPLR 310(a) is governed by CPLR 308 personal service, including deliver and mail, CPLR 308(2) (*Bell v. Bell, Kalnick, Klee & Green*, 246 AD2d 442 [1st Dept, 1998] [sustaining jurisdiction on partnership because summons and complaint were delivered to receptionist at actual place of

business of an individual defendant who was one of the partners of defendant partnership, and then mailed next day to that individual at his actual place of business]). Accordingly, R&G was properly served and the court has jurisdiction over it.

B. Failure to state a cause of action:

Defendants argue that White failed to state a cause of action against the Individual Defendants on the ground that the complaint contains no allegations against the individuals; Rather, all the allegations are against R&G. Defendants do not argue in any further specificity.

In considering a motion to dismiss for failure to state a cause of action, all facts are accepted as true and viewed in a light most favorable to the plaintiff (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). A review of the complaint reveals that while some allegations address conduct of an individual, each claim for relief is against R&G. Accordingly, the complaint must be dismissed against the individuals.

C. Venue

Defendants next argue that the only proper venue is Nassau County, because plaintiff resides in Nassau, worked for R&G in Nassau, R&G's principal place of business is there, and because the GRC has an enforceable forum selection clause. They point out that the assertion for venue in New York is pleaded upon information and belief. White initially counters that

defendants are collaterally estopped from arguing that they are not residents of New York County because in motion sequence 001 of *Fullman v. R&G Brenner Income Tax Consultants*, Index No. 106634, (Sup Ct, New York County, 2007)(Ramos, J.S.C.), decided at the bench on transcript (attached to Groper Affirmation, Ex. B), it was held that venue was proper in New York County . White also argues that any language in the GRC is outside the scope of this action because the complaint only concerns the Agreement.

1. Collateral Estoppel:

"The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point . . . There are now but two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v. Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). Moreover, the issue must have been material to the first action, essential to the decision rendered, and "it must be the point actually to be determined in the second action or proceeding such that a different judgment in the second would destroy or impair rights or interests established by the first"

(citations and internal quotation marks omitted)(*Ryan v. New York Telephone Co.*, 62 NY2d 494 [1984]).

White has not established how the choice of venue in the *Fullman* action was material, or essential to the eventual decision rendered in the case.[1] In any event, venue is not the point to be determined in this lawsuit. Accordingly, White has not shown that collateral estoppel should be applied to this matter.

2. Principal place of business:

Venue shall be in the county in which one of the parties resided when the action was commenced (CPLR 503[a]). White is a resident of Nassau County, and so venue in New York County cannot be based on his residence. White claims venue in New York County based on CPLR 503(d), governing venue for partnerships which states: "A partnership . . . shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner . . . being sued actually resided."

R&G contends that its principal office is located in Nassau County. In support, R&G relies on the GEA (attached to Motion, Ex. 6) which states that R&G's Nassau office is its principal office and a 2004 Business Certificate for Partners

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[1] Notably, according to a brief record search, the Fullman case settled before trial.

that lists the Nassau office as its address (Brenner Affidavit, Ex. A). White argues that R&G "holds itself out as doing business from its Manhattan office" (Memorandum of Law in Opposition, p. 6). This may be so, as firms can do business from any number of locations--R&G has over 40 offices--while only having a single principal office (see, e.g. *Mid Valley Discount Mall Associates v. Credit Alliance Corp.* 139 Misc2d 271 [Sup Ct, New York County, 1988]). No evidence is provided as to the residences of R&G's partners. From the facts presented here, R&G resides in Nassau.

Under the facts here, venue properly is in Nassau County.

Based on the foregoing, it hereby is

ORDERED that the branch of Defendants' motion seeking to dismiss the complaint for lack of personal jurisdiction over R&G is denied; and it further is

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Nassau, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Nassau; and it further is

ORDERED that the branch of Defendants' motion seeking to dismiss the complaint against the individual defendants is granted, with entry of judgment to abide the transfer to Nassau County.

Dated: June 29, 2010

ENTER:

JANE S. SOLOMON

J.S.C.