

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

INDEX NO. 653145/2014

GENESIS MERCHANT PARTNERS, LP, and GENESIS MERCHANT PARTNERS II, LP,

MOTION DATE 01/21/2020

Plaintiffs,

MOTION SEQ. NO. 014

- v -

GILBRIDE, TUSA, LAST & SPELLANE LLC, JONATHAN WELLS, KENNETH GAMMILL and CHARLES TUSA

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 014) 290, 291, 292, 293, 294, 295, 296

were read on this motion to/for DISCOVERY

In this action to recover damages, inter alia, for legal malpractice, this court, in an order dated December 7, 2018, granted a prior motion by the defendants pursuant to CPLR 3108 for the issuance of an open commission to depose non-party Christopher Kelly in the State of Connecticut. According to counsel, due to some clerical error, the Clerk never issued the commission order. The same relief is requested in this motion, which is essentially one to renew the prior motion. Whatever the reason the defendants did not depose Kelly, they have not explained the year-long delay in making this motion. The final Note of Issue date, December 17, 2018, has come and gone, and no Note of Issue has been filed and no motion to extend the deadline has been made by the plaintiffs. The plaintiffs do not oppose this motion. Thus, the defendants will be granted additional time to depose Kelly, but must do so promptly, within 60 days, or they will be deemed to have waived it.

As explained more fully in this court's order dated December 7, 2018, it previously granted a motion by the plaintiff for summary judgment on the issue of liability. However, by order dated January 11, 2018, the Appellate Division, First Department, reversed this court's decision, reopening the issue of liability. Thereafter, the defendants sought to conduct the deposition of the plaintiffs' in-house counsel, Christopher Kelly, who is located in Greenwich, Connecticut. The defendants assert that Kelly was responsible for perfecting the plaintiffs'

security interests in the subject life insurance policies and that he possesses information material and necessary to the defense of this action.

Like New York, several of the insurance companies' home states have enacted the streamlined provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA) (CPLR 3119). However, Connecticut has not enacted the UIDDA. Connecticut requires an out-of-state litigant seeking to depose a Connecticut resident to (a) secure an open commission, letters rogatory, or other permission from the forum state's courts to conduct the deposition, and (b) commence a proceeding in the courts of Connecticut to compel issuance of a subpoena. New York's CPLR 3108 provides, in relevant part, that "[a] commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." "As long as the witness is without the State, rendering him [or her] unavailable to the service of a subpoena within the State, resort to CPLR 3108 is permissible." Wiseman v American Motors Sales Corp., 103 AD2d 230, 235 (1st Dept. 1984).

As this court previously found, the defendants have established that the information sought to be obtained via a deposition in Connecticut is material and necessary to the prosecution of the action. They have also established that the employment of a notice procedure for conducting a deposition in Connecticut is impractical, since that state requires the issuance of a commission or letters rogatory by a New York court and the commencement of a proceeding in its own courts for the issuance of a subpoena. See Wiseman v American Motors Sales Corp., supra.

Accordingly, it is

ORDERED that the defendants' motion, in effect, for renewal of its motion for the issuance of open commission is hereby granted; and it is further,

ORDERED that a commission issue in this action to the Clerk of the Superior Court of the State of Connecticut, Judicial District of Stamford-Norwalk, any person or entity authorized by Conn. Gen. Stat. § 52-148e, or any other competent person or entity, who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions of Christopher Kelly, 16 Deerfield Lane, Greenwich, Connecticut, 06830, as a nonparty witness in this action, and that he or she return the transcript of the testimony subscribed by the witness,

certified to be correct, annexed to the commission, with any exhibits produced and proved before him or her, to the Clerk of the Supreme Court of the State of New York, New York County, 60 Centre Street, New York, NY, 10007 by certified or registered mail, with all convenient speed; and it is further,

ORDERED that the defendants shall serve a paper copy of this order upon the Clerk of the court within 20 days of this order; and it is further,


ORDERED that the Clerk of the court shall issue the commission described herein in the form provided to him by the defendants, and attached as exhibits to the defendants' motion papers, place the seal of the court on each of them, and deliver them to the counsel for the defendants, and it is further

ORDERED that, upon issuance of the commission by the Clerk, the defendants shall act with all convenient speed and depose Christopher Kelly within 60 days, or they will be deemed to have waived the deposition, and it is further

ORDERED that the parties shall appear for a status/settlement conference on May 7, 2020, at 3:00 p.m., and shall bring a copy of this order to the conference.

This constitutes the Decision and Order of the court.

2/23/2020
DATE


NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE: CASE DISPOSED GRANTED DENIED NON-FINAL DISPOSITION

APPLICATION: SETTLE ORDER SUBMIT ORDER OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE