Georgia State University
ScholarWorks @ Georgia State University

Georgia Business Court Opinions | College of Law

3-30-2010

Order (MICHAEL MACKE)

Elizabeth E. Long
Superior Court of Fulton County

Follow this and additional works at: http://scholarworks.gsu.edu/col_businesscourt

Recommended Citation
Long, Elizabeth E., "Order (MICHAEL MACKE)" (2010). *Georgia Business Court Opinions*. Paper 143.
http://scholarworks.gsu.edu/col_businesscourt/143

This Court Order is brought to you for free and open access by the College of Law at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
MAR 3 0 2010
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

MICHAEL MACKE,	)(	
	)(	
Plaintiff,	)(	
	)(	
v.	)(	Civil Action No. 2008-CV-158015
	)(	
CADILLAC JACK INC., SMART GAMES GROUP CORP., EUGENE CHAYEVSKY, AND OLEG BOYKO,	)(	
	)(	
Defendants.	)(	

ORDER

This case is before the Court on Defendant Cadillac Jack, Inc.'s Motion to Dismiss or, in the Alternative, Transfer Counts X and XI of Second Amended Complaint. After reviewing the briefs submitted on the motion, the Court finds as follows.

Defendant Cadillac Jack, Inc. ("Cadillac Jack") moves for dismissal or transfer of Count X of Plaintiff's Second Amended Complaint to Gwinnett County on forum non conveniens grounds pursuant to O.C.G.A. § 9-10-31.1. In addition, Cadillac Jack moves for dismissal or transfer of Count XI of Plaintiff's Second Amended Complaint on three grounds arguing that (1) Count XI is a compulsory counterclaim in a previously-filed action currently pending in Gwinnett Superior Court ("Gwinnett Action"), (2) Plaintiff failed to join an indispensable party pursuant to O. C.G. A. § 9-11-19, or (3) pursuant to the doctrine of forum non conveniens, as codified under O.C.G.A. § 9-10-31.1, Count XI is more appropriately heard in Gwinnett County.

First, as to Count X, O.C.G.A. § 9-10-31.1 requires the Court to consider the following seven factors when deciding if transfer or dismissal is appropriate:

(1) Relative ease of access to sources of proof;
(2) Availability and cost of compulsory process for attendance of unwilling witnesses;

(3) Possibility of viewing of the premises, if viewing would be appropriate to the action;
(4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy;
(5) Administrative difficulties for the forum courts;
(6) Existence of local interests in deciding the case locally; and
(7) The traditional deference given to a plaintiff's choice of forum.

Cadillac Jack argues that the sources of proof involved in Count X are "overwhelmingly located in Gwinnett County." However, the Court is unconvinced that Cadillac Jack will be unduly burdened by litigating this claim in Fulton County, a county that neighbors Gwinnett County. Moreover, if documents or witnesses are needed from the lending bank, which is located in Utah, the Court finds that there will be no additional expense to have any such documents produced or witnesses attend proceedings in Fulton County rather than Gwinnett County.

As to the third factor, the Court finds that there should be no need to view the property which is only tangentially related to this claim.

As to the fourth factor, the Court notes that counsel for all parties work in offices in the City of Atlanta, Fulton County. Therefore, the Court is not persuaded that Cadillac Jack will face unnecessary expense or trouble if Count X remains pending in this Fulton case.

As to the fifth factor, the Court notes that the Gwinnett Superior Court has already transferred a related case to this Court, which has since been consolidated with this Fulton case. This Fulton case already involves multiple claims and counterclaims and the Court finds that the addition of one more claim will not cause this Court any measurable additional "administrative difficulties."

As to the sixth factor, Cadillac Jack argues that Gwinnett County has "a far greater interest" in Count X because it involves a loan used to purchase property located in Gwinnett

County. The Court finds that Count X does not directly involve the property in Gwinnett County, rather it involves accusations of wrongdoings associated with the acceleration of a loan extended to Plaintiff by a bank in Utah and guaranteed by Cadillac Jack which happened to be used to buy property in Gwinnett County.

As to the final factor, Plaintiff apparently has a strong preference for litigating his claims in this Court where litigation between these parties is already pending, and this preference is entitled to deference. O.C.G.A. § 9-10-31.1(a)(7); R.J. Taylor Memorial Hospital, Inc. v. Beck, 280 Ga. 660 (2006). Weighing all of these factors, the Court finds that the Cadillac Jack has failed to meet its burden for transfer or dismissal of Count X under OCGA § 9-10-31.1(a).

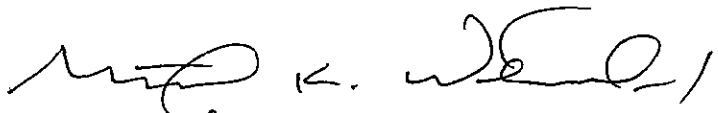
Turning to Count XI, the Court finds that it is a compulsory counterclaim that should have been filed in Cadillac Jack, Inc. v. Macke,10A002408, filed on January 12, 2010 and currently pending in Gwinnett Superior Court. That being said, this Court questions whether the Gwinnett Action should go forward because it appears to violate the prior pending action doctrine. See O.C.G.A. 9-2-5(a). But, this issue is best addressed by the Gwinnett Superior Court.

Cadillac Jack's motion is GRANTED IN PART and DENIED IN PART. Count X of Plaintiff's Second Amended Complaint shall remain pending in this Fulton case. Count XI of Plaintiff's Second Amended Complaint shall be transferred to the Gwinnett Superior Court as a counterclaim in Cadillac Jack, Inc. v. Macke,10A002408.

Pursuant to Uniform Superior Court Rule 19.1, unless Plaintiff pays all accrued court costs within 20 days of mailing or delivery of the cost bill to Plaintiff, Count XI shall automatically stand dismissed without prejudice.

Pursuant to Uniform Superior Court Rule 19.1, the Court declines to assess a transfer fee against Plaintiff. The Court also declines to award any attorneys' fees associated with this motion.

SO ORDERED this 30th day of March, 2010.



Judge Melvin K. Westmoreland for
at her request

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiff
G. Brian Raley, Esq,
Kathryn E. Thomson, Esq.
RALEY & SANDIFER, PC
2650 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326
braley@raleysandifer.com
kthomson@raleysandifer.com

Attorneys for Defendants
Counsel for Defendants Cadillac Jack Inc., Eugene Chayevsky, Oleg Boyko, and Smart Games Group Corp.
William G. Leonard, Esq.
Michele L. Stumpe, Esq.
TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle, Suite 400
Atlanta, GA 30339
(770) 434-6868
bleonard@taylorenglish.com
mstumpe@taylorenglish.com

Counsel for Defendant Cadillac Jack Inc.
Scott M. Ratchick, Esq.
Jill R. Johnson, Esq.
HARTMAN, SIMONS, SPIELMAN & WOOD, LLP
6400 Powers Ferry Road, N.W., Suite 400
Atlanta, Georgia 30339
sratchick@hssw.com
jilljohnson@hssw.com

C. Celeste Creswell
Eileen H. Rumfelt
MILLER & MARTIN PLLC
1170 Peachtree Street N.E.
Suite 800
Atlanta, GA 30309
404-962-6100