

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

GUARDIAN AUTO GLASS, LLC,
a Delaware limited liability company,

Plaintiff,

-v-

KEN STAPLES, JR.
an individual,

Defendant

Case No. 2012-cv-11813
Hon. Denise Page Hood
Magistrate Judge Mona K. Majzoub

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**PLAINTIFF'S SUR-REPLY BRIEF IN SUPPORT OF MOTION TO TRANSFER
VENUE AND IN OPPOSITION TO MOTION FOR CONTEMPT**

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BRIEF

This Court has two motions scheduled for hearing on July 11, 2012, Defendant's Motion to Transfer Venue and Plaintiff's Motion for Contempt. A central issue for both motions is the content of the Motion Hearing in the Oakland County Circuit Court on April 11, 2012. Defendant provides to this Court, in advance of the hearing, the transcript of the hearing in front of the Hon. Daniel P. O'Brien on April 11th. Of note in that transcript are material misrepresentations by Plaintiff's counsel regarding communications with Mr. Staples' counsel.

First, although Plaintiff's counsel correctly tells the court that Mr. Staples was served with the order to show cause, Plaintiff's counsel incorrectly implies that she also spoke with Mr. Staples' counsel regarding the Order and the scheduled hearing.

THE COURT: As a professional courtesy from one lawyer to another, I would invite you, though not require it, to go on back, you can use our phone in chambers and just call that attorney and just say you're here now, pursuant to this order, anything that you choose to say at or whatever, maybe the person is not there. But just as a professional courtesy, I offer that invitation. I don't know if you want to accept it or not.

MS. YEE: We did talk to him yesterday. ... And he was not willing to resolve this.

THE COURT: Did he talk at all about ---

MS. YEE: No he's completely ignoring it. He didn't mention it. He didn't say we're going to show up, we're not going to show up, we're going to send someone from Michigan. In his mind, the Michigan action is just a way to bully his client. And he said that in so many words.

THE COURT: ...Therefore, you decline the invitation to call today. It's kind of moot because you already did speak to him yesterday?

MS. YEE: Yeah. And he's kind of mean. We've had email exchanges. We have talked to him, and I would prefer not to.

(Exhibit 1, pp. 5-6) In fact, as previously set forth in Defendant's briefs, Plaintiff's counsel never provided Staples' counsel with the Order to Show Cause and her conduct evinces an intent to hide the show cause order from Staples' counsel.

Ms. Yee emailed **part** of the Michigan pleadings to Staples' counsel on April 6th, telling counsel that those were the Michigan filings. Conspicuously absent from those emailed pleadings was the Show Cause Order. Although Ms. Yee was not obliged to serve Staples' counsel, once she sent the email saying "this is what was filed", she had a duty to be truthful and include **everything** that was filed. Staples' Counsel relied on the statement in Ms. Yee's email that he had been provided with all of the pleadings that had been filed. That Staples' counsel did not accept service on behalf of Staples is a red herring.¹ Staples' counsel reasonably believed that Ms. Yee's April 6th email gave him with everything that was filed in the Michigan case, as her email purports. Staples' counsel had every right to rely on Ms. Yee's truthfulness and candor in providing him the Michigan pleadings. Ms. Yee's error or deception was the cause of Mr. Staples not appearing at the Show Cause hearing. Similarly, during discussions on April 10, Guardian's counsel never apprised Staples' counsel of the Order or the scheduled hearing. Yet, Ms. Yee's representations clearly led the Oakland Circuit Court to believe otherwise.

Further, Plaintiff has repeatedly stated to this Court that Judge O'Brien spoke to the Virginia Judge about the pending case in Virginia. The transcript makes clear that that is not true. Judge O'Brien first expresses his concern about going forward in Oakland County while a case is pending in Virginia. (Exhibit 1 pp 8-9) Judge O'Brien then attempts to contact the Virginia Court but, as he states, "there's no human judge assigned to the case yet, ...that court system operate in such a way that until there's service or perhaps responsive pleadings, no just judge is assigned. So there's no on to whom this Court could speak." (Exhibit 1 p. 11)

¹ Staples' counsel is not a Michigan attorney and was not about to accept service in an out-of-state jurisdiction, while the same case is pending in Virginia, without, at the very least, first obtaining the consent of his client to submit the client to the jurisdiction of Michigan by accepting such service. What lawyer would under such circumstances?

Further, the Circuit Court sought information relevant to application of *Chrysler Corp. v. Skyline Indus. Services, Inc.*, 448 Mich. 113 (1995) and 28 U.S.C. § 1404(a). However, without Mr. Staples' counsel present to present factual and legal argument, those relevant issues were largely undeveloped. In particular, this exchange is relevant to issues more fully developed in Defendant's motion to transfer venue:

THE COURT: [T]he posture of this case is Delaware and a Virginia guy do business and agree, according to you, that even though the business will occur outside of Michigan, and have nothing to do with Michigan, nevertheless Michigan law will apply and the forum would be Michigan for litigation and so forth.

MS. YEE: Right.

(Exhibit 1 p. 8) But, as Defendant demonstrated in its his motion to transfer, that is not right: the forum selection clause is permissive, not mandatory, an argument never presented to the Circuit Court. And Virginia law, not Michigan law, applies pursuant to *Chrysler Corp. v. Skyline Indus. Services, Inc.*, 448 Mich. 113 (1995) regardless of the choice-of-law clause.

In fact, Judge O'Brien expresses his concern that the Agreement, in order to be enforceable, "must be reasonable in time or duration and space or geographic proximity." (Exhibit 1 p. 12) But, because Mr. Staples' counsel had not received notice, no argument regarding the applicability of Virginia law, pursuant to *Chrysler Corp. v. Skyline Indus. Services, Inc.*, 448 Mich. 113 (1995), was presented to the Court. Relatedly, no argument that the Agreement is unenforceable under Virginia law, *Home Paramount Pest Control Companies, Inc. v. Shaffer*, Record No. 101837, November 3, 2011, and thus no injunction should issue, was ever made.

The Court also sought information relevant to forum questions, i.e., the location of relevant parties and events in Virginia (Exhibit 1 p. 7) No information was presented on behalf of Mr. Staples that the Michigan forum was improper or inconvenient. And no argument was

presented that, rather than enter an injunction on the basis of an unenforceable contract in an improper and inconvenient venue, that venue be transferred or the matter be stayed in deference to the prior filed case in Virginia.

Instead, the Circuit Court held: “[T]he Court finds that Defendant, Ken Staples, having failed to appear, that there is a palatable basis upon which this Court believes that it has jurisdiction and that this is an appropriate forum, and the Court therefore grants the relief that you request.” (Exhibit 1 p. 21)

Staples contends that the Circuit Court reached that holding because he was never afforded the opportunity to present countervailing evidence and argument to the Court. In fact, given the opportunity to correct its failure to provide Mr. Staples’ counsel with the Order to Show Cause, Guardian’s counsel declined to do so and made misrepresentations to the Court.

CONCLUSION

Defendant Staples requests that this Court grant his motion and transfer the present action to the District Court for the Eastern District of Virginia and deny Plaintiff’s motion for contempt.

Respectfully submitted,

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