



The Voice

And The Defense Wins

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DRI members [Steven Gerber](#) and [Ola Akache Nunez](#) of **Gonzalez Saggio & Harlan LLP** in the firm's New Jersey and New York offices secured a pre-answer dismissal of a lawsuit after two rounds of motion practice in two federal courts in New Jersey and New York. They successfully defended against the appeal of the dismissal order before the Second Circuit Court of Appeals.

The plaintiff, a corporate barter and media services company, originally filed a complaint alleging business torts by the defendant, a subsidiary of a large media conglomerate, in the United States District Court for the District of New Jersey. Mr. Gerber and Ms. Nunez filed a pre-answer motion for dismissal based upon 12(b)(6) grounds for failure to state a claim, 12(b)(3) grounds for improper venue, and because the action was time-barred by the statute of limitations. Without reaching the merits of the 12(b)(6) motion, the District Court in New Jersey dismissed the complaint for improper venue with leave to re-file the action in a proper venue. The plaintiff then re-filed its action in the Southern District of New York with additional factual allegations to overcome the grounds of failure to state a claim. Mr. Gerber and Ms. Nunez moved for pre-answer dismissal on 12(b)(6) statute of limitations grounds. The plaintiff argued for the application of equitable estoppel, but the District Court ruled in the defendant's favor, finding that the action accrued nine years before suit was brought and the plaintiff failed to plead the elements of equitable estoppel. The plaintiff appealed the decision to the Second Circuit Court of Appeals. After the appeal was fully briefed, Mr. Gerber appeared for oral argument before the Second Circuit panel. One week later, the Second Circuit issued a summary order affirming the District Court's determination and effectively ending the case.

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