[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

R. BROOKS ASSOCIATES, INC.

Plaintiff,

-vs- **Index No. 55263**

HARTER, SECREST & EMERY LLP 2004

Defendant,

APPEARANCES: ROEMER, WALLENS & MINEAUX, L.L.P.
(Matthew J. Kelly, Esq., of counsel)
Attorneys for Plaintiff

GEIGER and ROTHENBERG, L.L.P.
(David Rothenberg, Esq., of counsel)
Attorneys for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. INTRODUCTION

Plaintiff's short-lived Ohio venture to expand its market reached its seeming nadir in December 2000. After some weeks of trial, a jury sitting for the Cuyohaga County Court of Common Pleas, Eighth District, Ohio, hit plaintiff with an adverse verdict remarkable not only in the assessment of liability against plaintiff, the size of the monetary award, but its disproportion compared to the small capital put forward by plaintiff just over a year and a half earlier to acquire the Ohio business. And as if the situation could not get any worse, plaintiff's appeal was not only unsuccessful, but part of the case against plaintiff that had been dismissed prior to trial was restored and remanded for trial, thus committing plaintiff to further proceedings and potentially even more liability.[1] Now viewing the facts most favorably to the plaintiff, as this court must, we ask how

---

[1] In the works of John Gay, plaintiff was mired in a "bloody mess" (Gay Depo at 121).

plaintiff found itself highjacked hundreds of miles away from its Wayne County home and whether any legally cognizable claim now lies against defendant law firm for damages suffered by plaintiff. Well, to quote Shakespeare, therein lies a tale.

II. STATEMENT OF FACTS

The plaintiff, R. Brooks Associates, Inc. *("Brooks" or "Brooks Associates ")*, headquarters in Williamson, Wayne County, New York, and specializes in inspection services to the commercial nuclear power industry. Brooks builds robotic delivery systems that carry miniature cameras that inspect remotely the internal systems of nuclear power plants. Brooks' personnel operate this equipment at the site of those facilities that contract for this service.[2] Raymond Brooks *("Ray Brooks")* founded Brooks Associates in 1984, and in 1990, John Gay joined the company. Brooks owns sixty percent of the stock and John Gay forty percent. Both individuals have been and remain the operating principals of Brooks Associates.

Two factors combined in 1998 that lead Brooks Associates to acquire a Ohio business owned by one George McNulty. Ray Brooks and John Gay had been crossing paths with McNulty since the early 1990's at various trade shows.[3] McNulty was not a competitor of Brooks. Whereas Brooks inspected nuclear facilities, McNulty inspected pipeline (water, sewer, gas) and coal mine facilities. And whereas Brooks designed and built highly sophisticated robotics to transport special cameras into otherwise inaccessible parts of nuclear plants, McNulty's operation was decidedly low-tech, using, in most cases, off-the-shelf cameras attached to a cable that would "snake" into pipes or lines. But McNulty did have something of value to Brooks. First, Brooks was aware of its limited market in the nuclear field and the advantages of diversification within the remote inspection field.[4] Second,

---

[2] Brooks Depo at 23.

[3] John Gay states that he first met McNulty in the "[e]arly nineties" at a conference, and he [McNulty] invited me [Gay] to dinner with his wife and we had dinner in Toronto overlooking the ballpark." (Gay Depo at 43). Ray Brooks recalled that he "met George McNulty at trade shows maybe two or three different times." (Brooks Depo at 25).

[4] According to the deposition testimony of John Gay, the future of the nuclear utility industry was "in a quandary" in the late 1990's, so much so that Gay conceived that it "could ultimately be shut down" entirely, and undermine the future viability of Brooks Associates. As such, Gay's "goal

McNulty had an established customer base that would inaugurate Brooks' entry into the non-nuclear field and a base for expansion.[5] At this time, McNulty was in severe financial straits, motivating McNulty to approach Brooks as a means to avoid bankruptcy and salvage some vestige of his company.[6]

John Gay engaged McNulty in negotiations and with Ray Brook's approval reached agreement with McNulty about the terms and conditions of acquiring his business for $45,000. Both Gay and Brooks viewed this as a "low risk' foray into the non-nuclear robotic inspection field.[7] They viewed the potential loss of $45,000 if the venture did not work out as acceptable compared to the cost of starting from scratch "trying to build up a customer list [like McNulty's] with salespeople and travel, advertisements, etcetera" (Brocks Depo at 29).

John Gay called upon Brooks Associates' long standing counsel, Harter, Secrest & Emery, to assist with the transaction . To limit potential liability, the deal was structured as an asset purchase agreement with the purchaser being a new corporation specifically formed for the sole purpose of owning the assets being purchased from McNulty and being a separate, albeit wholly owned, subsidiary of Brooks Associates. William Kreienberg was the partner at Harter, Secrest & Emery who managed the legal affairs of Brooks either individually or cooperatively with other lawyers in the office. Harter, Secrest prepared two agreements: (1) the Asset Purchase Agreement between McNulty's company, PLS International, Inc *("PLS")* and Brooks Associates' newly formed subsidary, PLS Acquisition Corp. *("PLSA")*, later known as ISI Technologies, Inc. *("ISI")* and (2) a three year Employment Agreement between PLSA and George McNulty under which McNulty

---

was to find avenues where we could take our technology and move into other markets, including other non-nuclear markets, where our technology had application" (Gay Depo at 56).

[5] At the time, Ray Brooks "didn't feel that there was very much value in [McNulty's] assets, but the customer list might be worthwhile, looking at moving in that direction; it would be a new field for us." (Brooks Depo at 28). John Gay opined as well that McNulty's Company "had been around for at least ten years and I knew that they had done business in numerous non-nuclear applications, and so therefore, they had contacts that we didn't have" (Gay Depo at 56),

[6] Gay Depo at 46; Brooks Depo at 28.

[7] Gay Depo at 47; Brooks Depo at 29.

would serve as a "Sales and Marketing Consultant" at an initial annual salary of $70,000.[8] Both agreements were signed contemporaneously on April 16, 1999.

For present purposes, a couple aspects of the transaction merit mention. First, it was important to Brooks Associates that their liability be limited. Given the precarious fiscal condition of PLS and the debt that company owed, John Gay "needed to make sure that Bill [Kreienberg] did everything he [could] to make sure there was no liability on [Brooks'] part for" for PLS's extant debt (Gay Depo at 61). [9] In fact, Gay "depended on Bill Kreienberg to assure that everything that we did was safeguarding our company - meaning number one company, R. Brooks Associates and its principals, Ray Brooks and John Gay and the employees of Brooks, and that was my number one concern in whether we [did] the deal or not ..." (Gay Depo at 90). Based upon his conversations with Bill Kreienberg, Gay told Ray Brooks that "the maximum ... the most you're at risk for is what you invest in the assets" (Brooks Depo at 32). Second, Gay recalled that he did not have any discussions with Bill Kreienberg or any other attorney from Harter, Secrest about the option of including arbitration and venue clauses in the Asset Purchase and Employment Agreements (Gay Depo at 129-130). Rather, given that the acquiring corporation was a New York corporation and that New York law was specified in the documents as governing their interpretation, John Gay was told that there was "[no] way that anything can happen in Ohio" (Gay Depo at 123.).

Unfortunately, a lot did happen in Ohio. Shortly after the agreements were signed, serious problems developed. McNulty's son, Tim, who had worked for PLS and been hired by ISI, abruptly quit, absconding with a leased truck and other equipment, and going into business himself in

---

[8] The Employment Agreement contained compensation incentives based upon McNulty's sales during the term of the Agreement as specified in section 4(b) of the Agreement entitled "Bonus." Basically, after adjustments reflecting base salary and reimbursable sales expenses, McNulty would receive a bonus equal to 5 % of the total sales he generated over $2,000,000. The retention of McNulty was somewhat based upon the belief that the company as acquired could not be successful in at least the Cleveland market unless McNulty stayed involved (Gay Depo at 87)

[9] Gay was told that PLS was not "worth crap" with a balance sheet that was "ugly" (Gay Depo at 84)

competition with ISI, taking employees with him.[10] McNulty himself apparently performed no services under the Employment Agreement; instead, he bad-mouthed ISI to PLS's former customers and sent them to Tim McNulty's new business. McNulty's personal vehicle was repossessed for non-payment of the lease, with McNulty falsely claiming that ISI was to pick up that obligation. McNulty also took an air compressor purchased by ISI nee PLSA and turned it over to another company to settle a personal debt (Gay Depo at 142, 151). Because of the Employment Agreement, ISA was unable to summarily dismiss McNulty for any or no reason. Section 8(a)(iv) provided for termination of the agreement and McNulty's employment for "Cause" only upon written notice to McNulty that ISA's Board of Directors had elected to do so. Section 8(b) defined "Cause" to include, among other things, any"willful misconduct or gross negligence"by McNulty in connection with his employment obligations, any "theft of [ISA's] money or other property" by McNulty, or generally, any "unsatisfactory job performance" as found by ISA's Board of Directors in its reasonable good faith judgment.

On June 1. 1999, barely six weeks into the new venture, John Gay personally suspended McNulty with pay, writing to McNulty as follows:

> As of today, June 1, 1999, you are suspended with pay until further notice. During the term of your suspension, the only employee of ISI Technologies, Inc. you are to discuss ISI matters with is Mr. Michael James. You are to cease representing ISI Technologies, Inc. and are no longer allowed to represent ISI Technologies, Inc. with any entity or person until further notice. Any violation of this notice may result in your termination. Please return all ISA Technologies property immediately (Rothenberg Aff Ex O).

Brooks initially attempted to interest the local prosecutor in pursuing the removal of equipment as a criminal matter (Sobel Depo at 25). This apparently did not go anywhere. Eventually, by letter dated July 26, 1999, to John Gay, McNulty sought clarification of the difficult situation existing between he and ISI:

---

[10] Jonathan F. Sobel, Brook's Ohio counsel, recalled the incident where, after April 16, 1999, someone from Brooks' organization went to the former McNulty now ISI shop to open up and found a vacuum truck missing and that Tim McNulty had tendered his resignation. Both developments were serious. The vacuum truck was one of only two working vehicles and Tim McNulty was the person who led the crews as they went out and did the work. (Sobel Depo at 17-18).

> I received a letter from your attorney dated May 28, 1999 indicating that the Board of Directors of ISI would meet to discuss me. I have received no notice whatsoever as it relates to the outcome of that meeting.
>
> Since you summarily suspended me on June 1, 1999, I have been prevented from working, and the opportunity to earning the lion's share of my income. Right now I have some questions to which I believe I am entitled to answers:
>
> (1) Is ISI going to return the vehicle it took from me?
>
> (2) Am I going to be permitted to work and earn bonuses agreed to in my Employment Contract? If not, am I free to pursue other employment opportunities? (Rothenberg Aff Ex P)

This letter was referred to Harter, Secrest. A letter was drafted from Harter, Secrest to McNulty responding to his July 26th letter as one of resignation and accepting the same. The draft was reviewed by a Harter, Secrest attorney concentrating in employment law. This attorney commented as follows in an internal memorandum dated August 2nd:

> I reviewed the letter to George McNulty accepting his "resignation." It really isn't much of a resignation, but if the client wants to give it a shot it may be the easiest way out. I'm not convinced it will work. I suspect that he will simply claim that he did not resign and that the Company has terminated him without following the process outlined in his employment agreement. If he challenges, then they should can him as set forth in the agreement. I'm not sure why they are letting this guy "hang-on" – I'm sure there is more to the situation than I know – but they can always try to negotiate a settlement agreement if he fights back.(Kelly Aff Ex P).

This analysis suggested that there was no real downside, at least initially, to treatment of McNulty's July 26th letter as a resignation or offer of resignation. If McNulty challenged this interpretation of the letter, Brooks would still have the opportunity to go through the contractual process of termination for cause or at least have the issue available as a chip in possible settlement negotiations.

With this legal and strategic perspective, and undoubtedly some client pressure, the next day - August 3rd - Harter, Secrest finalized and sent by certified mail its letter responding to McNulty's letter of July 26th. It read:

> We are in receipt of a copy of your letter dated July 26, 1999, to John Gay of ISI Technologies, Inc. ("ISI") regarding your employment status with ISI. In that letter you express your intention to "pursue other employment opportunities." Based on that statement of your intention and desire to pursue other opportunities, your resignation is hereby accepted, effective immediately. *Please be advised, however, that you remain bound by the provisions of your Employment Agreement, specifically*

Sections 9,10,11,12, and 14, which survive any termination of your employment or your Employment Agreement. You also remain bound by the provisions of the Asset Purchase Agreement, specifically Section 6.3.

ISI is under no obligation to provide you with a vehicle. Your statements to the contrary do not change this fact.

We regret that our arrangement did not turn out to be mutually beneficial, and we wish you success in the future. (emphasis in original) (Kelly Aff Ex F).

Unfortunately, this stratagem seriously underestimated McNulty and handed him the stake on which he would later impale Brooks Associates. The next month - September, 1999 - McNulty commenced suit in the Court of Common Pleas, Cuyahoga County, State of Ohio, seeking $700,000 in damages.[11] The history of the litigation in the trial court is recounted in McNulty v PLS Acquisition Corp, 2002 Ohio 7220 (Ct Appeals, 8th Dist 2002):

> On September 20, 1999, McNulty commenced this action against ISI, RBA, [John] Gay, Raymond Brooks, and Michael James ("James"), ISI's General Manager (collectively "defendants"). McNulty filed a seven-count complaint, fraud and unjust enrichment against all defendants and sought damages of $700,000.
>
> On October 2, 2000, defendants moved for summary judgment on all claims except McNulty's claims for damages against ISI for breach of the Employment Agreement. The trial court denied the motion without opinion and the case proceeded to trial on November 27, 2000.
>
> At the close of McNulty's case-in-chief, the court directed a verdict (1) in favor of McNulty and against ISI and Raymond Brooks on McNulty's claim for an accounting, (2) in favor of ISI and Raymond Brooks on McNulty's claims for fraud and intentional infliction of emotional harm, and (3) in favor of Gay and RBA on all claims. The case proceeded against ISI and Raymond Brooks solely on McNulty's claim for breach of the Employment Agreement. Interrogatories and verdict forms were submitted to the jury, which asked whether either ISI or Raymond Brooks breached the Employment Agreement, and whether those defendants were obligated to pay McNulty's legal fees. The jury found that both ISI and Raymond Brooks had breached the Employment Agreement and entered the amount of $250,000 on the general verdict form against each. Upon a finding that the defendants acted in bad faith, the trial court entered a judgment in favor or McNulty in the amount of $172,262 as an attorney fee award. The judge then ordered prejudgment interest to

---

[11] The entire complaint is attached as Exhibit H to the Kelly Affidavit. In paragraph 27, McNulty alleges that "on or about August 3, 1999, defendants terminated plaintiff's employment without cause and contrary to the terms of his employment contract."

McNulty upon the jury verdict from the date of the filing of the complaint.[12]

Both McNulty and the two defendants found liable appealed, and on December 26, 2002, the Ohio Court of Appeals for the Eighth District affirmed in part and reversed and remanded in part. The verdicts against ISI and Raymond Brooks were not disturbed; however, the claims against R. Brooks Associates and John Gay were revived. In doing so, the Court found "significant that the jury found a breach of the Employment Agreement." After looking at the specific dealings between and parties, the Court held,

> considering the totality of the evidence, and drawing, as we must, all inference favorable to McNulty, we think a jury could find a level or control that was substantial, and could be interpreted as sufficient domination to justify piercing the corporate veil to reach the assets of RBA or its managing partners John Gay and Raymond Brooks. (Kelly Aff Ex F).

Facing further liability and another trial, Brooks Associates, Ray Brooks, and John Gay entered into a settlement with McNulty. In November 2003, a settlement was signed, and McNulty received $850,000.

This malpractice action ensued against Harter, Secrest & Emery brought by R. Brooks Associates, the entity that paid the settlement amount to McNulty. Defendant Harter, Secrest now moves for summary judgment seeking dismissal of the action.

III. THE MOTION FOR SUMMARY JUDGMENT

Defendant Harter, Secrest moves for summary judgment pursuant to CPLR Rule 3212 dismissing plaintiff's complaint upon several grounds. The motion must be denied for the following reasons.

---

[12] The three interrogatories submitted to the jury asked:

1. Do you find that Plaintiff George McNulty proved by a preponderance [of the evidence] that Defendant PLS Acquisition Corp./ ISI Technologies, Inc. breached the employment contract?

2. If your answer to Interrogatory #1 was "YES," do you find that Plaintiff George McNulty proved by a preponderance of the evidence that the conduct of the breach by Defendant PLS Acquisition Corp./ISI Techologies, Inc. demonstrated bad faith and is such that the natural and probable consequences of the breach results in an award to Plaintiff of attorney's fees?

3. Do you find that George McNulty proved by a preponderance [of the evidence] that Defendant Ray Brooks breached the employment contract?

The jury unanimously answered affirmatively each interrogatory. (Kelly Aff Ex R).

First, it is no mere platitude to say that "[s]ummary judgment is a drastic remedy that should not be granted when there is any doubt as to the existence of a triable issue. In its analysis of such a motion, the court must construe the facts of the case in a light most favorable to the non-moving party so as not to deprive that party his or her day in court." *(Russell v A. Barton Hepburn Hosp.*, 546 NYS2d 239 [3rd Dept 1989][internal quotations omitted]).

Second, there are issues of fact whether the defendant is liable to plaintiff under a legal malpractice theory. "To establish a claim for legal malpractice, it [is] necessary for [a plaintiff] to establish the existence of an attorney-client relationship at the time of the alleged malpractice, and that the attorney was negligent, that the negligence as a proximate cause of the loss sustained and that plaintiff suffered actual and ascertainable damages." (Taber v Drake, 9 AD3d 606 [3d Dept 2004][quotation marks and citation omitted]). Defendant correctly argues that there is"no rule of law that a lawyer *must* ensure that an arbitration clause is included in any buy-sell agreement or employment agreement that he negotiates," nor "any rule of law or standard of professional practice that requires a lawyer to insist on venue selection clauses designating his client's home venue - nor could there be." But that does not mean, especially in international or interstate transactions, that such clauses should not be put before the client for him or her to decide whether such clauses should be included or the transaction forgone.

Third, there is an issue of fact whether the August 3, 1999, letter from Harter, Secrest to McNulty constituted, under the circumstances, legal malpractice. While, of course, it is not malpractice to take positions that are at least defensible for strategic reasons, the concern here is whether the client understood that there was a serious downside to forgoing the contractual termination for cause procedure under the theory that the August 3rd letter as a resignation.

Fourth, whether any of the alleged acts of malpractice constitute a proximate cause of the claimed damages is a question of fact for the finder of fact.

Fifth, the issue whether this action was commenced within the statutory limitations period likewise constitutes an issue of fact, inappropriate for resolution in the context of summary judgment.

Counsel for the plaintiff shall submit an order consistent with this decision.

Dated: January 18, 2011
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice