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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III Justice

PART 36

112185/2003

SITRANED COMMUNICATIONS SERVICE

v.

GOLDMAN, SACHS & CO.

001 DISC

INDEX NO. _____

MOTION DATE 5/27/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/26/04

RICHARD B. LOWE III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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SHARED COMMUNICATION SERVICES
OF ESR, INC.,

Plaintiff,

-against-

GOLDMAN SACHS & CO.,

Defendant.

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Index No. 112185/2003

RICHARD B. LOWE, III, J:

In this action, plaintiff Shared Communication Services of ESR, Inc. (SCS) seeks to recover damages of $1 million for defendant Goldman Sachs & Co.'s (Goldman Sachs) alleged tortious interference with contract and prospective business relations, and civil conspiracy. Goldman Sachs now moves to dismiss the two-count complaint as time-barred, and for failure to state a cause of action.

Facts

SCS, a provider of telecommunications services, is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. In September 1986, SCS entered into an agreement with non-party Swedesford Road Joint Venture I (Swedesford), whereby SCS was to be the exclusive provider of certain telecommunications services at Bay Colony, a suburban office park located in Chester County, Pennsylvania (Agreement). The services included, among other things, telephone, word processing and copier services. The complaint alleges that, relying upon the Agreement, SCS installed state-of-the-art telecommunications facilities at Bay Colony, undertook substantial contractual obligations, and began providing telecommunications services.

In keeping with the exclusive nature of the Agreement, the Agreement required the owner of Bay Colony to promote only the services of SCS to the tenants of Bay Colony, to use SCS's services in any offices maintained by the owner of Bay Colony, and, in general, to assist in the marketing of SCS's services to building tenants. Upon the sale of Bay Colony, the Agreement required that, as a condition to the sale, the purchaser assume the owner's obligations under the Agreement, unless released in writing by SCS.

SCS claims that Swedesford breached the Agreement in several respects, including the requirements concerning exclusivity, allegedly failing to advise Bay Colony tenants of SCS's services, and failing to provide SCS with information concerning prospective Bay Colony tenants. Consequently, in 1990, SCS commenced an action against Swedesford in Pennsylvania. Subsequently, Swedesford commenced bankruptcy proceedings, and, thereafter, SCS settled its claims with Swedesford.

In February 1994, non-party The Travelers Insurance Company (Travelers), a creditor of Swedesford, purchased Bay Colony from Swedesford. Travelers allegedly agreed to assume Swedesford's obligations under the Agreement. SCS alleges that Travelers failed to perform its obligations under the Agreement.

SCS maintains that Goldman Sachs formed non-party WHTR Real Estate Limited Partnership (WHTR) for the purpose of purchasing properties from Travelers, and that WHTR purchased Bay Colony from Travelers in September 1994. SCS claims that WHTR assumed Traveler's obligations under the Agreement. SCS avers that it was never notified of the sale, and that it did not find out that Bay Colony was transferred from Travelers to WHTR until 1997, when WHTR advised SCS to remove its equipment from Bay Colony.

SCS claims that WHTR maintained no employees or offices, and, therefore, retained non-party Archon Group L.P. (Archon) to act as its agent for all purposes relating to Bay Colony. SCS claims that Archon is wholly owned by Goldman Sachs. The complaint alleges that both WHTR and Achron breached the Agreement, by, among other things, failing to use SCS's services, failing to provide Bay Colony tenants with information about SCS, introducing Bay Colony tenants to other telecommunications service providers, and failing to provide SCS with information about Bay Colony tenants. Consequently, in 1998, SCS added WHTR as a defendant in the pending Pennsylvania action against Swedesford.[1]

Non-party Allied Riser Communications, Inc. (ARC) is a telecommunications service provider, allegedly formed in 1996 to provide high-speed data services to small and medium-sized businesses. SCS claims that ARC's initial public offering, in October 1999, was underwritten and managed by Goldman Sachs. Goldman Sachs allegedly invested millions of dollars in ARC prior to the IPO, and stood to earn millions of dollars in fees, and from the sale of ARC's stock, because Goldman Sachs was allegedly one of ARC's largest owners, owning approximately 3.5 million shares, or 6.3%, of ARC's stock. SCS maintains that Goldman Sachs, therefore, had an interest in ARC's success.

The complaint avers that Goldman Sachs, through WHTR and Archon, was the controlling force behind all management decisions involving Bay Colony while owned by WHTR. SCS maintains that, under the stewardship of Goldman Sachs, WHTR and Archon

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[1] At oral argument held on this motion on June 8, 2004, Goldman Sachs stated that SCS's breach of contract action against WHTR in Pennsylvania went to trial in 2000, but claims that the trial was never completed and that that case remains pending in Pennsylvania. Tr., at 4-5.

diverted the provision of telecommunications services at Bay Colony from SCS to ARC. According to SCS, Goldman Sachs engaged in this type of exclusionary conduct from 1997 through November 1999, when WHTR sold Bay Colony to non-party California State Teachers Retirement System (CalSTRS), allegedly a client of Goldman Sachs.

The complaint alleges that, as part of the agreement to sell Bay Colony to CalSTRS, WHTR represented that the Agreement was not binding upon the Bay Colony property, or upon CalSTRS as a subsequent purchaser. WHTR also allegedly agreed to indemnify CalSTRS against any claim made by SCS in connection with the Agreement. SCS claims that this conduct amounted to another breach of the Agreement, because WHTR failed to require CalSTRS, as a subsequent purchaser of Bay Colony, to assume the owner's obligations under the Agreement. SCS sued CalSTRS in Pennsylvania in 2001. CalSTRS is allegedly the current owner of Bay Colony.

SCS commenced this action in New York State Supreme Court in July 2003, by service of summons with notice. Subsequently, Goldman Sachs removed the case to the United States District Court for the Southern District of New York, because the summons with notice asserted violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). However, when the complaint was served, it did not include a RICO cause of action. SCS moved to remand the case back to the New York Supreme Court, arguing that, without the federal RICO claim, the District Court lacked subjected matter jurisdiction. Specifically, in its opening brief to the District Court, SCS asserted that the action should be remanded to the New York Supreme Court, "because the Complaint only alleges causes of action arising under the laws of the State of New York ... ." Fioccola Decl., Ex. H, at 1. The case was remanded to this court.

Discussion

Goldman Sachs moves to dismiss SCS's claims, arguing that SCS fails to state a cause of action under New York law. SCS does not respond to Goldman Sachs' argument that SCS fails to state a cause of action under New York law. Rather, SCS argues that Pennsylvania law governs its claims, and analyzes its claims only under Pennsylvania law.

SCS affirmatively argued before the District Court that "the [c]omplaint only alleges causes of action arising under the laws of the State of New York ... ." *Id.* SCS now claims that this statement was not meant to apply to the substantive laws of New York, but rather, urges the court to recognize the precept that its statement requires the application of New York conflict of law rules. SCS Opp. Mem. of Law, at 21. However, SCS fails to identify any legal authority to support its statement that such a precept exists, and the court is not aware of any such precept that is applicable to the interpretation of the statement made by SCS to the District Court. Indeed, the court can conceive of no other interpretation of SCS's statement than an outright acknowledgment that its causes of action were created by New York law. *See e.g. Provident Life & Acc. Ins. Co. v Waller*, 906 F2d 985, 988 (4th Cir 1990) ("[a] suit 'arises under' federal law if federal law creates the cause of action").

Having consented to, and, in fact, affirmatively argued, that its causes of action arise under New York law, the choice of law inquiry is concluded. *American Fuel Corp. v Utah Energy Dev. Co.*, 122 F3d 130, 134 (2d Cir 1997) ("where the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry"). Moreover, the statement made by counsel during the proceeding before the District Court in this action constitutes a binding judicial admission before this court. *Matter of the Liquidation of Union*

Indem. Ins. Co. of N.Y. v American Centennial Ins. Co., 89 NY2d 94, 103 (1996) (admission by counsel for liquidator in separate action constitutes informal judicial admission binding upon liquidator in instant action). For the foregoing reasons, New York law applies to the court's analysis of SCS's claims on Goldman Sachs' motion to dismiss.

To state a cause of action for tortious interference with contract under New York law, a plaintiff must allege: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993). A cause of action for tortious interference with contract must allege that the defendant's "conduct was motivated solely by malice." *Shapiro v Central Gen. Hospital, Inc.*, 251 AD2d 317, 318 (2d Dept 1998).

Here, the complaint does not allege that Goldman Sachs' conduct was motivated solely by malice. Rather, the complaint alleges that Goldman Sachs was motivated by its own economic interest in currying favor with SCS's competitor, ARC. Complaint, ¶¶ 97, 106-07, 125, 145, 151. Indeed, the complaint avers that WHTR's decision to breach the Agreement had "nothing to do with either SCS or the Agreement, and was bigger than just Bay Colony." *Id.*, ¶ 95. Thus, Goldman Sachs' conduct could not have been solely motivated by malice toward SCS. Therefore, SCS fails to state a cause of action for tortious interference with contract. Accordingly, Goldman Sachs' motion to dismiss that cause of action is granted.

To state a cause of action for tortious interference with prospective business relations under New York law, the plaintiff must allege that the defendant interfered with a business relationship, using unlawful or improper means, with the sole purpose of harming the plaintiff.

South Fourth St. Properties, Inc. v Muschel, 1 AD3d 347, 348 (2d Dept 2003). The plaintiff must also allege "that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations." *Matter of Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 (1st Dept 1993). The plaintiff must identify a prospective business relation that was impaired by the defendant's conduct. *Best Payphones, Inc. v Empire State Payphone Assoc.*, 272 AD2d 139, 140 (1st Dept 2000).

As discussed *supra*, the complaint does not allege that Goldman Sachs was motivated by malice, but rather, asserts that Goldman Sachs' conduct was motivated by its own economic self-interest. Moreover, the complaint fails to identify any prospective business relation that was impaired as a result of Goldman Sachs' alleged conduct. Therefore, the complaint fails to state a cause of action for tortious interference with prospective business relations. Accordingly, Goldman Sachs' motion to dismiss this cause of action is granted.

The complaint also asserts a claim for civil conspiracy. However, "conspiracy is not recognized as an independent tort in New York." *Bell v Alden Owners, Inc.*, 299 AD2d 207, 209 (1st Dept 2002). Therefore, SCS cannot state a cause of action for civil conspiracy. Accordingly, Goldman Sachs' motion to dismiss SCS's civil conspiracy cause of action is granted.

Because the complaint is dismissed for failure to state a cause of action, the court need not address Goldman Sachs' alternative ground for dismissal of the complaint as time-barred.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 26, 2004

ENTER:

J.S.C.