

**Mark v Comcast Cable Communications, Inc.**

2006 NY Slip Op 30269(U)

August 10, 2006

Supreme Court, New York County

Docket Number: 0600691/2005

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. RICHARD B. LOWE, III

PRESENT:  
Index Number : 600691/2005

PART 06

MARK, ANDREW

vs  
COMCAST CABLE COMMUNICATIONS

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. \_\_\_\_\_

MOTION DATE 3/31/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

HON. RICHARD B. LOWE, III

Dated: 8/10/04

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 56

-----X  
ANDREW MARK,

Plaintiff,

Index # 600691/05

-against-

COMCAST CABLE COMMUNICATIONS, INC.,  
LENFEST COMMUNICATIONS, INC., LENFEST-  
SMART TONE, INC., SMART TONE HOLDINGS, LLP,  
LENFEST HOLDINGS, LLC, H.F.LENFEST, BROOK J.  
LENFEST, H. CHASE LENFEST and DIANE LENFEST  
MEYER,

Defendants.  
-----X

**RICHARD B. LOWE III, J:**

Defendants move for an order of dismissal as to all defendants pursuant to CPLR 3211(a)(1) and 3211(a)(7); for dismissal of the action as to H.F. Lenfest and Diane Lenfest Myer ("Ms. Meyer") pursuant to CPLR 306-b, for failure to make timely service of process; for dismissal of H.C. Lenfest and Ms. Myer for lack of personal jurisdiction; and finally for entry of a protective order with respect to discovery requests that the plaintiff has made of defendants and of several non-parties.

**Background**

In the spring of 1996, Andrew Mark ("Mark") approached H.F. Lenfest, a principal of Lenfest Communications, Inc. ("LCI"). Mark was seeking funding for the development and commercial use of a methodology to allow for secure data transmission. Soon after Mark and Lenfest met, Mark set up Smart Tone, Inc. ("STI") and Smart Tone Authentication, Inc. ("STAI"), two Delaware corporations, for the purpose of implementing his development plan. Sometime in October, 1996 the parties reached an agreement whereby LCI agreed to provide

financing for Mark's ideas. Pursuant to a Note Purchase Agreement, LCI agreed to lend STAI up to \$1.675 million. So long as STAI met certain milestones, it was authorized to draw periodically against this credit line. Mark transferred patent applications and a service mark relating to the secure data transmissions to STI. STI transferred those rights to STAI and received a license for specific use of the technology. STAI pledged as security for the note the rights transferred by STI and its other assets. STAI issued a note to LCI, convertible into a maximum of 40% of STAI's equity. As protection of each of the parties' interests, the voting agreement provided, *inter alia*, that Mr. Lenfest and Mark, through LCI and STI respectively were entitled to select two of STAI's directors. Additionally they agreed that there would be approval of a jointly selected "independent" director before STAI could operate.

By the spring of 1998 STAI had exhausted \$1.675 million available pursuant to the Note Purchase Agreement. During 1998 Mark approached the Lenfest defendants seeking further funding. STAI and Lenfest Smart Tone, Inc., the transferee of the Note from LCI, entered into an agreement which amended the original Note Purchase Agreement to increase the available amount by \$250,000 and to allow that the Note could be converted into as much as 46% of STAI's equity. Then, a further modification in June, 1998, secured an increase of available funds increasing the principal amount of the note by \$500,000 and making the Note convertible into 60% of STAI's equity.

In January 1999, Mark, STI, STAI and Lenfest Smart Tone, Inc. entered into an Agreement and Plan of Merger. Mark executed the document three times, each in a different capacity. He executed the document as chief executive of STI, as chief executive of STAI, and in his own name individually. The Agreement and Plan of Merger initiated the implementation of

a series of transactions which ultimately resulted in further cash investments by the Lenfests in the merged entity, STI and an increase of their ownership to 85% of the equity of STI. Plaintiff complains that after the filing of the merger, the Lenfests caused STI to hire James Teicher as Chief Executive Officer who pursued a more limited version of plaintiff's concept. Plaintiff also alleges that when he refused to sign an acknowledgement that the Lenfest's owned 85% of STI, they made the decision to close down STI, despite the enormous infusions of funds into that entity.

A prior action was filed in 2002 against several of the defendants in the prior action. The claims in the prior action were predicated on substantially similar claims as this action. In the prior action, plaintiff sought damages on behalf of STI claiming that the Lenfest defendants had breached their fiduciary obligations or obligations of good faith dealing with regard to STI. He also sought a declaration by the court that the Lenfest defendants had no equity interest in STI and that the merger of STAI into STI was null and void. Those applications were denied in the prior action and the case was dismissed in its entirety. On the motion to dismiss in the earlier action, Honorable Ira Gammerman, JSC, characterized the claims of the plaintiff as "disingenuous at best" and relied upon documentary evidence when dismissing the action.

The decision was affirmed by the First Department, holding that the plaintiff "was estopped from denying the validity of agreements he had signed in both his representative and individual capacities, that similar equities barred his challenge to the merger agreement... and that his belated claim of economic duress in agreeing to the merger was insufficient." (*Mark v Lenfest*, 1 AD2d 239 [1<sup>st</sup> Dept 2003]). Specifically, despite Mark's argument to the contrary,

[\* 5 ]

the First Department specifically held that the merger of STAI into STI was valid and the Lenfest defendants were shareholders in the merged entity.

In this action, filed several years later, the plaintiff seeks to vacate the final judgment in the prior action. He alleges that in the prior action, the Lenfest defendants submitted falsified versions of two documents related to the merger. First, the agreement and plan of merger between STI, STAI, Mark, and Lenfest Smart Tone Inc. was allegedly falsified. Second, the first amendment to the agreement and plan of merger was false as well. He alleges, in this action, that he has newly discovered evidence that the court, in the prior action, received falsifications of the documents which he signed.

### Discussion

On the instant motion to dismiss, defendants make several arguments. First, the purported "newly discovered evidence", was available to the plaintiff in the prior action. Second, defendant argues laches bars the bringing of this action. Third, CPLR 5015 compels one who seeks to vacate a judgment to bring a motion in the prior action, rather than bringing a plenary action. Lastly, several defendants allege a failure to properly serve them with the complaint.

#### Newly Discovered Evidence

The plaintiff herein asserts claims of fraud in an effort to defeat precisely the same claims involving ownership, management and control of STI and STAI as were litigated and determined in the prior action. However, he has failed to sustain his burden herein in that he has not shown "the genuineness and materiality of new evidence and that despite due diligence [he] could not have discovered the same" during the prior action. (*H&Y Realty Co v Baron*, 193 AD2d 429, 430 [1<sup>st</sup> Dept 1993]).

Essentially, the plaintiff herein seeks to set aside the judgment in the prior action on the ground that the Lenfest defendants deliberately prepared and submitted to the court falsified versions of two documents, the Merger Agreement and the first amendment to that document. He claims that he first obtained the "authentic" documents after the conclusion of the prior actions and affirmance on appeal.

Allegedly, one month before commencement of the prior action, the plaintiff gave a computer used by STI and STAI to his secretary which contained the authentic documents. He now alleges that fourteen months before filing this action, he recovered possession of the computer and found the documents.

The computer was one used by STI and STAI and obviously could have served as a source of documents for use in the prior action, however it was, through the plaintiff's own actions, transferred out of the control of plaintiff, thus precluding its reasonable use during the prior litigation. Plaintiff should not now be permitted to use his own actions of transferring the computer as a shield in the prior action and as a sword in the present. Rather, his current claims of "newly discovered" documents that his very own prior actions precluded from use, should not be now allowed to serve as a basis for vacating the prior judgment.

Furthermore, in August 2001, the plaintiff sent a letter to one of the defendants which included a page from a document which he now claims is the authentic merger agreement. Thus, it appears that one way or another, he earlier possessed whatever documents he now claims are the authentic ones. Yet, he did not see fit to utilize the documents at the time. Rather, he waited until 2005 and instituted this new action. This court will not permit this type of litigation by a party.

Laches

Laches also must bar the current application. It is clear that , at least one month prior to the former litigation, the plaintiff had the relevant computer. Yet, due to his own actions, it was given away.

Allegedly, he then recovered it some fourteen months before the institution of this current action. There is no suggestion that he had no knowledge that materials were on the computer. Nor is there any suggestion that he could not have retrieved the documents earlier by a simple request to the secretary. Furthermore, it is clear that the plaintiff had possession of the documents in question for at least fourteen months before bringing this action, but failed to make use of them.

CPLR 5015

This new action claims that a fraud was perpetrated on the court. The proper vehicle by which to seek vacatur of a judgment which was secured by a fraud is a motion pursuant to CPLR 5015, a motion to vacate, rather than a new plenary action which attacks a judgment in a separate action (*Photo-Marker Corp v Penn-Keystone Realty Corp*, 19 AD2d 816 [1<sup>st</sup> Dept 1963]). The action here is plainly an effort to set aside the prior judgment. As such, a motion should have been brought in the prior action.

Moreover, it is clear that the proponent of a challenge to a judgment, properly made within an action, must demonstrate that the use of so-called authentic documents rather than purportedly false documents would have brought about a different result than that which was obtained. (See, eg, *Weinstock v Handler*, 251 AD2d 184 [1<sup>st</sup> Dept 1998].) However, there is no

demonstration here that the decision in the earlier action would have been other than it was, had the documents now claimed to be the “authentic” ones been used there.

Moreover, based upon the expert testimony offered in support of this motion to dismiss, plaintiff has failed to raise a genuine issue as to the documents authenticity. It appears that while Mr. Alcock, on behalf of the plaintiff, has raised some questions about the documents at issue, it is clear from the affidavit of Mr. McGowan that those questions fail to raise genuine issues as to the authenticity of the documents, specifically, there is no evidence of backdating, falsification or other alteration.

In sum it is clear that the current collateral attack on a judgment in a prior action is procedurally improper. The purported fraud was one exclusively within the prior action, and it is therefore improper to attack it except within the prior action. (*See, eg, Burbrooke Manufacturing Co v St George Textile Corp*, 283 AD 640 [1<sup>st</sup> Dept 1954].) Further, plaintiff has failed to carry his burden of establishing that he could not have discovered the alleged evidence earlier on and, by his own admissions, it was his own actions that precluded him from use of the “newly discovered documents”. Moreover, even if the self-same documents had been before the court in the prior action it does not appear that the result obtained would have been any different, that is, the merger would still have been found to be a valid merger. In light of plaintiff’s having induced the Lenfest defendants to invest in reliance on the validity of the merger, his current challenge is disingenuous, at best. In the prior action which was affirmed by the First Department, he was properly estopped from denying the validity of the agreements he had signed in his multiple capacities.

Lack of Jurisdiction

Finally, separate from the procedural infirmities of the current action the plaintiff has failed to challenge the showings that defendants H.C. Lenfest and Ms. Myer are not subject to personal jurisdiction in New York. These individuals were not parties to the prior action. Further, plaintiff does not contest that service of process was not effectuated on Ms. Myer. Plaintiff has offered nothing in response. Thus the action is dismissed as to Ms. Myer for lack of personal jurisdiction.

Insofar as H.F. Lenfest is concerned, plaintiff has failed to rebut his affidavit with regard to his not having maintained a place of business or residence at the location at which the plaintiff purports service was effectuated. Thus, with regard to H.F. Lenfest dismissal pursuant to CPLR 306-b is appropriate. The action is dismissed as against H.F. Lenfest.

Motion for a protective order

That part of the motion seeking a protective order is denied as moot based on this court's dismissal of the instant action.

**Conclusion**

Finally, in accordance with this decision, the amended verified complaint in the instant case is dismissed in its entirety with costs and disbursement to defendant as taxed by the Clerk of the Court; and it is further

Ordered that the motion for a protective order is denied as moot and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the court.

Dated: August 10, 2006

ENTER

JSC

HON. RICHARD B. LOWE, III

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be given to any person. To obtain entry, counsel or another interested party must appear in person at the Judgment Clerk's Desk (Room 141B).