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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 57

Shared Communications Services

INDEX NO. 112185/03

MOTION DATE 1/17/06

- v -

MOTION SEQ. NO. 002

Goldman Sachs & Co

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 [X] No

Upon the foregoing papers, it is ordered that this motion

FILED

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FEB 28 2006

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

Dated: 2/27/06

HON. RICHARD B. LOWE, III J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
SHARED COMMUNICATIONS SERVICES
OF ESR, INC.,

Plaintiff,

-against-

GOLDMAN, SACHS & CO.,
----------X

Hon. Richard B. Lowe, III:

Defendant Goldman, Sachs & Co. (GS) moves for (1) an order dismissing the complaint in its entirety pursuant to CPLR 3211(a)(5) on the ground that plaintiff Shared Communications Services of ESR, Inc.'s ("SCS") sole remaining claim is barred by the applicable statute of limitations, or (2) in the alternative, leave to renew GS's prior motion to dismiss, which sought an order dismissing the complaint in its entirety pursuant to CPLR 3211(a)(5), or (3) in the further alternative, an order staying this action pending final resolution of the claims asserted in a related action pending in Pennsylvania State Court.

BACKGROUND

The facts underlying this action are discussed in this court's decision dated October 26, 2004 and will not be discussed herein except as relevant to the instant motion.

Briefly, SCS alleges in 1986, it entered into a contract with Swedesford Road Joint Venure I ("Swedesford") whereby it was given exclusive rights to sell telecommunications services to tenants of an office park in Pennsylvania known as "Bay Colony". SCS asserts liability under the contract against an affiliate of GS, WHTR Real Estate Limited Partnership ("WHTR") because it was the successive owner of Bay Colony after Swedesford. Allegedly

WHTR breached the contract by introducing tenants of Bay Colony to other suppliers of telecommunications services and by failing to provided SCS with information about such tenants. In 1999, WHTR sold Bay Colony to an unrelated third party.

In its complaint, SCS alleges that GS caused WHTR to breach the 1986 contract. GS is alleged to have orchestrated the breach though Archon Group L.P. ("Archon") which SCS alleges was WHTR's agent for the Bay Colony property and also under the control and dominion of GS. GS's alleged motive for causing the breach is that it sought to curry favor with a competitor of SCS, Allied Riser Corporation ("Allied Riser"), from which GS hoped to obtain investment banking business, especially prior to October 1999, when Allied Riser's initial public offering took place.

SCS first sued in Pennsylvania in 1990 against a series of defendants. WHTR was added as a defendant in the Pennsylvania action in September 1998. SCS there alleged that WHTR, as owner of Bay Colony office park from 1994 to 1999 breached the contract, tortiously interfered with prospective business relations, and engaged in "civil conspiracy." (Complaint in *Shared Communications Services of ESR, Inc. v The Travelers Ins. Co.*, ¶¶ 46, 62, 79-81). In early 2000, the Pennsylvania court granted WHTR summary judgment on the tortious interference and conspiracy claims. The breach of contract claim is still pending against WHTR in Pennsylvania.

The 2003 complaint in this action originally asserted tortious interference and conspiracy claims, asserting that GS controlled WHTR and caused it to breach the contract. In 2004, GS moved to dismiss arguing that the complaint failed to state a cause of action and that the claims were barred by the relevant statute of limitations. In the October 2004 decision, the complaint was dismissed on the ground that no claim had been stated, and this court expressly did not rule

on the statute of limitations argument. On appeal, the Appellate Division, First Department affirmed the dismissal of the claims for civil conspiracy and for tortious interference with prospective business relations (*Shared Communications Services of ESR, Inc. v Goldman, Sachs & Co.*, 23 AD2d 162[1st Dept 2005).

The appellate court, however, reversed this Court's dismissal of plaintiff's tortious interference with an existing contract for failure to state a cause of action.

GS now moves to dismiss under CPLR § 3321(a)(5) on the ground not previously addressed by the court in this action, that it is time-barred. In the alternative, GS requests a stay of the proceedings pending final resolution in Pennsylvania on SCS' claim that GS's affiliate WHTR breached the underlying contract.

The plaintiff does not dispute that the statute of limitations has expired. However, it argues that it did not know of GS's involvement or scheme until 2003 and therefore, the statute of limitations should be tolled.

Specifically, the plaintiff argues that throughout the course of discovery in the Pennsylvania action, WHTR persistently failed to respond to interrogatories requesting any contracts, agreements, arrangements or understandings which pertained to any agreements between WHTR and any other entity other than SCS related to the provision of telecommunication services.

Plaintiff argues, however, that at a deposition of a non-party on February 14, 2003, a pile of documents were produced for inspection. It was during an initial review of these documents that plaintiff alleges a draft agreement between Allied Riser and WHTR which gave Allied Riser the ability to run wire in Bay Colony was found. This would support SCS's argument that GS

pulled strings in order to cause WHTR to breach the contract with SCS in order to curry favor with Allied Riser by giving it the contract. Therefore, arguably, this document was the piece of the puzzle that made it clear that GS was behind the breach by WTHR of the agreement with SCS.

An affidavit by plaintiff's attorney, Donald N. David, in the Pennsylvania action states that he looked through the documents produced by the non party and that is when he discovered the agreement between Allied Riser and WHTR.[1] He indicates that he asked the lawyers in the Pennsylvania action to make a photocopy of all the documents produced and that he received a copy. Mr. David then took the pile of documents to his office where they were bates stamped. The copy of the agreement between Allied Riser and WHTR then disappeared from that pile.

Mr. David requested the non-party to produce the document again, but was then told that it could not produce any further documents without the permission of WHTR, since it had acted as a managing agent for WHTR and therefore all documents in its possession were proprietary.

SCS requested discovery from GS in the Pennsylvania action, but was denied because the court held that the requested discovery was related to this instant action-not the Pennsylvania action-and therefore should be sought in New York.

Discussion

Choice of Law

The parties have agreed that under CPLR 202 where a cause of action has accrued outside New York, New York will apply the shorter of the New York Statute of Limitations or the statute

[1] The non-party has taken the position that the documents were produced as a courtesy, since the deposition was not a deposition of the non-party's employee, bur rather the deposition of a former employee (*Aff of David* ¶ *8,* December 20, 2005).

applicable in the jurisdiction where the cause of action accrued taking into account whatever tolling rules may be applicable. The parties also agree that whether you analyze the causes of action under New York's three year statute of limitations(CPLR §214(4); *see Mannix Indus., Inc., v Antonucci* 191 AD2d 482, 483 [2nd Dept 1993]) or Pennsylvania's two year statute of limitations (42 Pa. Cons. Stat. Ann. § 5524(7) [2005]; *see Bednar v Marino*, 646 A2d 573, 577 [Pa. Super. Ct. 1994]), the statute of limitations has run. Therefore, the court must address the arguments related to a tolling of the statute of limitations.

Tolling of the Statute of Limitations

The plaintiff argues that either under New York or Pennsylvania's tolling statutes, the stautute of limitations in this action should be tolled.

New York - Equitable Tolling

Plaintiff argues that if New York's limitations period applies, the doctrine of equitable tolling saves its claims. Equitable tolling is a rarely used doctrine which is occasionally applied to federally created causes of action and it has no New York counterpart (*Von Hoffman v Prudential Ins. Co.*, 202 F.Supp2d 252, 264 [SDNY 2002]). Nevertheless, in *Kotlyarksy v New York Post*, 195 Misc.2d 150 (N.Y.Sup.Ct. Kings Co. 2003) the court held that "equitable tolling is applicable under circumstances where the defendant has employed deception to conceal the presence of a viable suit from the plaintiff" (*Id* at 150). This appears to be the only New York decision recognizing equitable tolling. However, the case does not apply because in this matter, plaintiff has not made any allegations in its complaint that GS or WHTR took steps to conceal the cause of action. There are only conclusory allegations made that in the Pennsylvania action the defendants deliberately concealed the agreement between Allied Riser and WIITR.

Significantly, the "missing" document was never alleged to be in the possession of GS or WHTR. Further, there is no allegation of steps taken by GS or WHTR to conceal the document. The only allegation made is that the document was produced by a third party on a voluntary basis and it thereafter went missing. Furthermore, there is no allegation that GS took any steps to conceal or remove the document. Rather David's affidavit states that when he took it to his office, it disappeared.

Counsel to the third party in the Pennsylvania action have submitted affidavits contrary to plaintiff's assertion. In fact counsel states "[n]owhere in the documents produced . . .is there any document of the sort described" (Krentzman Aff, June 28, 2004). Counsel also affirms that a physical copy of the documents produced by the third party were received by SCS' lawyer and he took those documents, sending them back bates stamped (Kochkodin Aff June 28, 2004).

Plaintiff has fallen short of any allegation or evidence of misconduct or deception by GS or its affiliate WHTR which would compel this court to take the extraordinary measure of tolling the statute of limitations.

Pennsylvania Discovery Rule

Pennsylvania has a discovery rule that will toll a limitations period "when the existence of the injury is not known to the complaining party and such knowledge cannot be reasonably ascertained within the statutory period" (*McCauley v Owens-Corning Fiberglas Corp.*, 715 Ad 1125, 1127 [Pa. Super. Ct. 1998]).

> When the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the period prescribed in the limitations statute, the limitation period will not begin to run

> until the discovery of the injury is reasonably possible.

(*Citsay v Reich*, 551 A2d 1096, 1098 [Pa. Sup. Ct. 1998]). The burden rests on the plaintiff to show that tolling is appropriate (*Assumption of the Blessed Virgin Mary Church v PFS Corp.*, 2002 WL 1365578 at 2 [Pa. C.P. June 18 2002]).

Here there is no dispute that SCS knew in September 1998 of the injury upon which it bases its tortious interference claim against GS. SCS has sued WHTR for breach of contract and SCS' allegations against GS are based on the same alleged injury. The only allegation plaintiff makes in support of its claim that it could not know of its injury is the purported missing document which it seems to imply went missing due to GS' misconduct. This court has already found that plaintiff has failed to meet its burden to establish misconduct on the part of GS.

The Pennsylvania statute does not appear to require active concealment by a defendant, but only that there was no opportunity for the plaintiff to have known of its injury prior to the expiration of the statute of limitations. In the matter at bar, plaintiff has failed to show that it could not have discovered its claims against GS earlier. This court does not accept its assertion that absent the discovery of the agreement between Allied Riser and WHTR, plaintiff could not discover its claims. In fact, the record proves contrary.

First, SCS first knew of its injury in 1998, when it sued in Pennsylvania on the same breach of contract at issue in this action. Second, the dealings of WHTR, Archon, and Allied Riser with Goldman Sachs are all public. GS's investment banking relationship with Allied Riser has been public since Allied Riser's October 1999 IPO, in which GS acted as lead underwriter (Bates Decl, Ex. I). Further, plaintiff has known of WHTR's affiliation with GS

since at least March 3, 2000, when plaintiff's counsel elicited testimony on this point in the Pennsylvania case (Transcript of Proceedings in *Shared Communications Services of ESR, Inc. v WHTR Real Estate L.P.*, March 3, 2000, at 274-76 [Bates Decl. Ex. J]). Therefore, SCS could have linked GS to WHTR, and thus to Bay Colony and Archon, no later than March 3, 2000 – more than three years before bringing this action in July 2003.

SCS sole argument for tolling is based on the mysterious draft contract that it says it saw, but either did not copy or was misplaced. The court finds this allegation insufficient and the statute of limitations in this action should not be tolled either under New York orPennsylvania tolling provisions.

Conclusion

Accordingly, the motion to dismiss the remaining cause of action as time barred is granted and the request to the stay this action is denied as moot.

Therefore, the action is dismissed and the Clerk of Court is directed to enter judgment accordingly.

This shall constitute the order and decision of the court.

Dated: February 27, 2006

ENTER:

FEB 2006

HON. RICHARD C. [illegible]