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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 54

Index Number : 103805/2006
MARK, ANDREW
VS
DECHERT LLP
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE 2/14/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

[FILED]
JUN 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

DECISION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/12/07

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

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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ANDREW MARK, in his individual capacity and derivatively on behalf of both Smart Tone Authentication, Inc. And Smart Tone, Inc.; SMART TONE AUTHENTICATION, INC., and SMART TONE, INC.,

Plaintiffs,

Index # 103805/06

-against-

DECHERT LLP f/k/a DECHERT, PRICE & RHOADS, LLP,

Defendant.

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Hon. Richard B. Lowe, III:

In motion sequence 002, the Defendant moves to dismiss the Amended Complaint in this action; additionally the defendant seeks sanctions in the form of attorneys' fees and costs. In motion sequence 003, the defendant has moved for a protective order.

BACKGROUND

In the spring of 1996, Andrew Mark had approached H.F. Lenfest. Lenfest was 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. ("STA", previously denominated "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 STA up to $1.675 million. So long as STA 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 STA and received a license for specific use of the technology. STA pledged as security for the note the rights transferred by STI and its other assets. STA issued a note to LCI, convertible into a maximum of 40% of STA's equity. As protection of each of the parties' interests the voting agreement provided, *inter alia*, that Mr. Lenfest and Mr. Mark, through LCI and STI respectively were entitled to select two of STA's directors. Additionally they agreed that there would be approval of a jointly selected "independent" director before STA could operate.

By the Spring of 1998, STA had exhausted the $1.675 million available pursuant to the Note Purchase Agreement. During 1998 Mark approached the Lenfest defendants seeking further funding. STA 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 STA'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 STA's equity.

In January 1999, Mark, STI , STA and Lenfest Smart Tone, Inc. entered into an Agreement and Plan of Merger (Affirmation of Joel M. Miller, 12/21/06, Exh K). The January 28, 2000 executed copy of the document specifies that Notices, (if to Parent or Subsidiary) are to be sent c/o Andrew Mark with a copy to Testa Hurwitz & Thiebeault, LLP and (if to Lenfest) Attn: Brook Lenfest with a copy to the Dechert law firm. Thus, it is clear that the merger documents reflect named counsel for Mark, other than Dechert. Mark executed the document three times-as chief executive of STI, as chief executive of STA and in his own name.

The Agreement and Plan of Merger initiated the implementation of a series of transactions which ultimately resulted in further cash investment by the Lenfest's in the merged entity, STI and their ownership of 85% of the equity of STI. Plaintiff had complained that after the filing of the merger, the Lenfest's brought about the hire by STI of James Teicher as Chief Executive Officer and the pursuit of a more limited version of plaintiff's concept. Plaintiff also complained that when he refused to sign an acknowledgment that the Lenfest's owned 85% of STI, they made the decision to close down STI, despite their enormous infusions of funds into that entity.

The Lawsuits Filed

This appears to be the third action instituted by the plaintiff, Mr. Mark, each of which relates to the 1999 restructuring transaction. The Dechert law firm, the named defendant herein, had represented the "Lenfest" investors in the 1999 transaction. This group had invested in plaintiffs' business operations. Eventually, sometime in 2001, the business failed but not before the defendants had lost substantial amounts of money. Previously, in two separate actions, the plaintiffs sued the Lenfest defendants; the Dechert firm was not named in either of the actions.

The first action was instituted in 2002. That action was dismissed by the Honorable Justice Ira Gammerman on February 24, 2003 based on documentary evidence which demonstrated that the plaintiff had failed to state a cause of action. The decision was affirmed by the Appellate Division. (***Mark v Lenfest*** , 1 AD3d 239 [1st Dept 2003]).

In that action, plaintiff sought damages on behalf of STI claiming that the Lenfest's 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's had no equity interest in STI and that the

merger of STAI into STI was null and void. Those applications were denied and the case was dismissed in its entirety. The affirmance by the First Department, held 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.".

A second action was instituted in 2005. The amended complaint in that action was dismissed by the undersigned on August 10, 2006. The gravamen of the complaint in that action was a claim of fraud based on "newly discovered evidence". The decision qualified the 2005 action as no more than a veiled effort to vacate the judgment in the prior action.

Essentially the plaintiff in action two sought to set aside the judgment in the prior action on the ground that the Lenfest's deliberately prepared and submitted to the court falsified versions of two documents, the Merger Agreement and the first amendment to that document. He claimed that he first obtained the "authentic" documents after the conclusion of the prior actions and affirmance on appeal. However during August, 2001 the plaintiff had sent a letter to one of the defendants which had included a page from a document which he claimed was the authentic merger agreement. Thus, the undersigned concluded that the plaintiff had earlier on possessed whatever documents he claimed in the second action were authentic but did not utilize them in the prior action. Instead, he waited until 2005 and instituted a new action.

The plaintiff in the second action claimed that a fraud was perpetrated on the court. However, this court's decision held that pursuant to CPLR 5015, the proper vehicle by which to seek vacatur of a judgment which was secured by a fraud is a motion to vacate, rather than a new plenary action which attacks a judgment by a separate action (***Photo-Marker Corp v Penn-***

Keystone Realty Corp, 19 AD2d 816 [1st Dept 1963]). The second action was a disguised effort to set aside the prior judgment, brought before a judge, other than Justice Gammerman (now retired) whose ruling had previously been affirmed by the Appellate Division, First Department.

This third action instituted by the same counsel on behalf of the same individually named plaintiff was commenced in 2006. However, unlike the earlier actions it was brought only against the Dechert law firm, based on a claim of fraud by the law firm. The current action appears to have been instituted only after the law firm refused to turn over documents to the plaintiff. Indeed the law firm has moved for a protective order, an application which has been held in abeyance.

The current complaint makes a claim of "attorney disloyalty and side-switching fiduciaries". (Complaint, p2, ¶7) It also states that Dechert represented STA and a faction of interest in STA which included STI (the owner of STA which was owned by Mark and his colleagues Michael Katz, James Blakey and Jim Stubbs.) At p 6, ¶22 of the Complaint, it is acknowledged that Lenfest engaged Dechert, but on page 9 it is asserted that (contrary to the merger documents), Dechert was the attorney for all participants in the STI-STA merger. The first cause of action for relief asserts a breach of fiduciary duty. The next asserts legal malpractice and breach of contract. The third claim is a demand for a turnover of files "relevant to STI and STA which are in Dechert's possession."

The plaintiff herein asserts claims of fraud by the law firm in an effort to defeat precisely the same claims involving ownership, management and control of STI and STA as were litigated and determined in the two prior actions. However, the issue of whether plaintiff can sustain his burden herein, on the merits, need not be addressed since it is evident that the

applicable statute of limitation bars this claim.

It is plain that Dechert represented Lenfest in the merger of 1999 and that its last substantive act in connection with the merger was January, 2000, after which Lenfest engaged other counsel. In neither of the previous actions were claims asserted against Dechert. It was only when the court precluded discovery in the 2005 action that the plaintiff filed this separate action against the law firm. Indeed, it is plain that the plaintiff has persisted in seeking documents from the law firm since the preclusion in the 2005 action.

The current action is brought more than six years after Dechert's actions in connection with the merger. Those claims are obviously time-barred. The newfound assertion by the plaintiffs that Dechert had represented them is unsupported, and indeed it is contradicted by documentary evidence which lists another law firm (the Boston firm of Testa Hurwitz & Thiebeault, LLP) as counsel for the plaintiffs. Moreover, even if the plaintiffs could somehow sustain the claim that Dechert had represented them, and had a conflict, the statute of limitations based on the representation during the merger would have run since Dechert did not represent any of the parties after January 2000 when it filed the merger documents. CPLR 213(6) requires that a claim for legal malpractice or breach of fiduciary duty be brought within three years of the representation. That time has long passed.

To the extent the plaintiff asserts that the statute of limitations should be extended based on a letter which Dechert sent to the plaintiff on March 19, 2003, it is plain that the purpose of the letter was to deny the plaintiffs access to its files about the merger based on its not having represented the plaintiff; the letter in no way reflected a "continued representation" by the defendant law firm of the plaintiff. To the contrary, by its terms it denied that the firm had

represented the plaintiffs. Further, it is undisputed that Dechert had previously denied the plaintiff access to the merger files.

Reiteration of a request for files in 2003 cannot serve to extend the statute of limitations, particularly where, as here, the request is irrelevant to plaintiff's claims of malpractice and breach of fiduciary duty with respect to the merger which was completed in January, 2000. Thus, the claim that the statute should be extended based on the responsive letter from the firm which denies access to files in no way establishes a basis to extend the statute. Moreover, if there were a valid claim at all, it should have been asserted much earlier on. It was not a valid claim, it has no basis in law and it is unsupported by the facts.

Plaintiff has failed to assert a claim for legal malpractice in any event. In order to state a claim for legal malpractice, a plaintiff must allege the existence of an attorney-client relationship. (***Linden v Moskowitz***, 294 AD2d 114, 115 [1st Dept 2002]. Absent "fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence. ***Fredriksen v Fredriksen***, 30 AD3d 370, 371-2 [2d Dept 2006] In the absence of an attorney-client relationship there can be no claim of malpractice. This plaintiff faces an irreconcilable problem. If the attorney-client relationship could be shown to have existed in 1999-2000 as a basis for the claim of fraud by the attorney the statute of limitations has run. If there was no attorney-client relationship in 1999-2000 plaintiff has no claim.

In view of the fact that plaintiffs claims against Dechert are patently frivolous and that this is the third time that the plaintiffs have commenced an action based upon the same set of circumstances it is appropriate to impose sanctions. When Justice Gammerman dismissed the

first action he found that the claims of Mark and on behalf of STI were "disingenuous at best" (***Mark v Lenfest, et al***, NY Sup Ct, 2/24/03, *aff'd* ***Mark v Lenfest*** , 1 AD3d 239 [1st Dept 2003]) The undersigned dismissed a second action instituted by the plaintiff on August 10, 2006. The decision of dismissal in that action concluded that the action was a collateral attack on a judgment in a prior action, and if warranted, should have been brought within the prior action. This decision, ***Mark v Comcast, et al***, Index #600691/05, NY Sup Ct, 8/10/06, also found that the action was "disingenuous, at best" (at p7). Plainly the claims herein stem from the same transactions alleged in the two prior actions. And, were these claims viable at all they should have been brought in the earlier actions. These claims are inextricably interwoven with the claims in the earlier actions each of which has been dismissed.

The court may award a party sanctions for frivolous conduct. (22 NYCRR § 130-1.1[c]) Conduct is frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; is undertaken primarily to delay or prolong the resolution of the litigation, or is brought to harass or maliciously injure another; or it asserts material factual statements that are false.

Plaintiff's claims against Dechert herein are patently meritless. Repetitive actions in seeking access to legal files which Dechert has asserted are, at least in some instances confidential and privileged, and relate to their representation of a client, other than the plaintiff culminating in the institution of this action constitutes harassment. Based on the history here it is plain that this action was commenced for the illegitimate purpose of obtaining discovery from the law firm. This is an invalid basis for the commencement of an action. (*See eg*, ***Martian Entertainment, LLC v Harris***, 12 Misc2d 1190(A), 2006 WL 2167178 (NY Sup) (Cahn, J)

Thus the imposition of sanctions on that basis alone is appropriate. Herein, counsel, not unlike counsel in ***Martian***, should have been aware of the frivolous nature of the claims in this action; yet, he persisted and brought this third action. He, Eric Berry, Esq., having instituted this third action when he failed to secure documents that he sought, should be subject to sanctions, as against him, in the amount of $2500.00.

In accordance with this decision, it is hereby

ORDERED that the amended verified complaint in the instant case is dismissed in its entirety, and sanctions are imposed against counsel, payable to the Lawyers' Fund for Client Protection, 55 Elk Street, 3rd Floor, Albany, New York 12210 and it is further

ORDERED that within 30 days after service of a copy of this Order, written proof of payment of the sanctions shall be provided to the Clerk of Part 56 and to opposing counsel and it is further

ORDERED that the plaintiff is directed to reimburse the defendant for the costs and fees for making this motion. Defendant is directed to submit a bill of costs to the plaintiff which shall be payable within 20 days of its receipt and proof of such payment shall be submitted to the Clerk of Part 56 and it is further

ORDERED that the motion for a protective order is denied as moot.

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

Dated: June 12, 2007

ENTER:

JSC
HON. RICHARD B. LOWE, III