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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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RICHARD WILLIAM KATES,

Plaintiff,

-against-

GFI GROUP INC., GFINET INC., JERSEY PARTNERS, INC. and MICHAEL GOOCH,

Defendants..

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DECISION AND ORDER

Index No. 602384/2008

O. PETER SHERWOOD, J.:

This action involves plaintiff Richard William Kate's ("Kate" or "plaintiff") claim that he is owed a finder's fee for introducing defendants GFI Group, Inc. ("GFI Group"), GFInet, Inc. ("GFInet"), Jersey Partners, Inc. ("Jersey Partners") and Michael Gooch ("Gooch") (referred to collectively herein as "GFI" or "defendants") to an investor who later provided financing to GFInet. Defendants move for an order: (1) pursuant to CPLR § 3211 (a) (1) and (5) dismissing the complaint as barred by the applicable statute of limitations and by a release; and (2) pursuant to 22 NYCRR 130-1.1 granting sanctions against plaintiff, including attorney's fees and costs, for frivolous conduct in pursuing this litigation. Plaintiff opposes the motion and cross moves for an order imposing sanctions against defendants for engaging in misleading and frivolous conduct.[1]

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[1] The following papers were considered on defendants' motion and plaintiff's cross motion: notice of motion, dated October 15, 2008; affidavit of Scott Pintoff, Esq., GFI's General Counsel, sworn to on October 14, 2008, with exhibits "1" through "7"; affirmation of James A. Batson, Esq., with exhibits "A" through "M", defendants' memorandum of law, all in support of the motion; notice of cross motion, dated January 21, 2009; affidavit of plaintiff Richard Kates, sworn to on December 19, 2008; plaintiff's memorandum of law, all in opposition to the motion and in support of the cross motion; defendants' reply memorandum of law. The plaintiff's reply memorandum of law in further support of its cross motion has not been considered as it is in the nature of a sur-reply which is not permitted by CPLR § 2214. Moreover, the practice of filing sur-replies, particularly without the Court's permission, has been repudiated by the Appellate Division, First Department (*see, Garced v Clinton Arms Assocs.*, 58 AD3d 506 [1st Dept. 2009]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept. 1992]). Plaintiff has also failed to demonstrate "good cause" sufficient to warrant the Court's consideration of this additional document.

The facts as alleged in the complaint and as amplified by the documentary evidence annexed to the moving papers are as follows: In 1999, Kates founded and co-owned CommerEx.com ("CommerEx"), a publicly-held, NASDAQ-listed corporation for which he served as President, Chief Executive Officer (CEO) and Chairman from 1999 through September 2000, and, thereafter, as Chairman until March 19, 2001. During that same period, Kates was dually employed as a NASD registered representative of GFI Securities LLC ("GFI Securities") and CommerEx. Both GFI Securities and CommerEx were subsidiary businesses of GFI Group which "is an inter-dealer broker specializing in over-the-counter derivatives products and related securities and providing brokerage services and market data and analytics products to institutional clients in markets for a range of credit, financial, equity and commodity instruments" (Compl. ¶ 3) [2].

Defendant Michael Gooch founded GFI Group in 1987 and has since served as its Chairman of the Board and CEO. He is also President and majority shareholder of defendant Jersey Partners, the corporate parent and majority shareholder of GFI Group and its various subsidiaries including GFInet, and has served as Chairman, CEO and President of various GFI Group's entities including GFInet and GFI Securities (Compl. ¶ 5).

In or about June 1999, a fund raising campaign was commenced by GFI to obtain initial funding for GFInet (Compl. ¶ 8). Plaintiff alleges that Gooch agreed that if he (Kates) introduced an investor to GFI and such introduction resulted in financing for GFInet, Kates would be compensated "a customary investment banking finder's fee as a percentage of the overall net transaction" (Compl. ¶ 11). Plaintiff further alleges that such finder's fee would be conveyed to him "in the form of a warrant or stock options arrangement in GFInet, in an amount commensurate with customary securities industry practices" (Compl ¶ 12).

Kates allegedly introduced a potential investor, Geoffrey Kalish, and his private equity firm, Argonaut Partners LLC ("Argonaut"), to Gooch who allegedly reaffirmed that GFI would pay Kates a finder's fee in the event Argonaut provided financing for GFInet (Compl. ¶ 20). Thereafter, Argonaut provided a first round of financing for GFInet in the sum of $12.5 million and invested an additional $6 million in GFInet on June 3, 2002 (Compl. ¶¶ 21, 22).

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[2]A copy of the Complaint is attached as Exhibit "1" to the affidavit of Scott Pintoff, GFI's General Counsel, sworn to on October 14, 2008, in support of the motion to dismiss.

On April 18, 2000, Kates e-mailed Gooch attaching a letter in which he noted that since most of the first round of funding for GFInet was completed he thought that "[his] request to be compensated for introducing Argonaut and facilitating their investment in GFInet" should be revisited (Compl. ¶ 25). In response, Gooch sent two e-mails to Kates. In the first, sent that same date, Kates stated that "it may be nice to pay you something, however not a full investment banking fee" and in the second e-mail dated May 8, 2000, Gooch stated: "I have been authorized by [G]eoff [K]alish to offer you 125,000 $1 call options in GFInet for introducing Argonaut to GFInet" (Compl. ¶ 27).

In August 2000, GFInet extended a bridge loan of $1.25 million to Commerex. In connection with that loan, an Agreement, dated August 23, 2000, was entered into among GFInet, CommerEx and Kates, individually ("the Settlement Agreement") (Pintoff Aff. ¶ 3; Exhibit "2" to Pintoff Aff.). The Settlement Agreement indicated that certain disputes had arisen between the parties to the agreement relating to, *inter alia,* GFInet's investment in CommerEx. The purpose of the Settlement Agreement was to resolve outstanding issues existing between the parties without resorting to litigation. Among other items of consideration for the Settlement Agreement, GFInet granted CommerEx warrants to purchase 500,000 shares of GFInet's common stock at a $2.00 exercise price. Kates agreed to relinquish his President and CEO title and positions by September 1, 2000, assuming only the Chairman position in return for which GFInet agreed to vote favorably on an employment contract for Kates that would provide Kates with a minimum two-year contract at a minimum salary of $150,000. Paragraph 10 of the Settlement Agreement contained a release clause which provided, in pertinent part, as follows:

> [E]ach party hereto hereby releases and forever discharges the other party and its predecessors, successors, assigns, parents, subsidiaries, affiliated and related entities, past and/or present officers, directors, employees, agents and representatives (collectively, "the Releasees") from any and all claims, demands actions, causes of action, suits, debts, dues, accounts, reckonings, controversies, promises, obligations, losses, liabilities and costs of any and every kind and nature whatsoever, known or unknown, fixed or contingent, which each party hereto, or their respective predecessors, successors, assigns, parents, subsidiaries, affiliated and related entities, may now have or may hereafter have against the Releasees from the beginning of the world to the day of the date

> of this Agreement arising out of or relating to GFInet's investment in CommerEx or otherwise.

On March 19, 2001, Kates ceased being Chairman of CommerEx pursuant to an agreement by which he sold his ownership interest in CommerEx to GFInet so that GFInet could wind up the business of CommerEx in an orderly fashion ("the March 19, 2001 Agreement") (Pintoff Aff. ¶ 4; Exhibit "3" to Pintoff Aff.). According to Scott Pintoff, GFI Group's General Counsel, he specifically told Kates in the course of negotiating the March 19, 2001 Agreement that he would need to release GFInet, CommerEx and their respective officers and directors from all claims of every kind. Kates insisted upon a specific carve out from the release provision for the finder's fee which is the subject of the instant litigation. Paragraph 6 of the March 19, 2001 Agreement contains such a "carve out" from the general release contained therein and provides, in pertinent part, as follows:

> "You [Kates] agree to release, acquit and forever discharge each of CommerEx, GFInet and Jersey Partners Inc., and their respective directors, officers, employees, advisors, agents, affiliates and stockholders from and in respect of any and all demands or claims for employee benefits, compensation and other forms of remuneration arising out of your prior employment with CommerEx, your relationship with GFInet or any other services you might have provided GFInet, CommerEx or any of their respective affiliates through the date of this Agreement (whether or not accrued). Notwithstanding the foregoing, nothing in Paragraphs 6 or 7 hereof or in the letter of transmittal and acceptance agreement shall constitute a release or waiver of any claim with respect to, or preclude you from seeking and obtaining compensation from GFInet or any of its successors with respect to, any fundraising services you may have, or in fact, performed in connection with Argonaut Private Equity Management's investment in GFInet, provided you acknowledge (i) that nothing in this agreement constitutes an admittance or acknowledgement [sic] on behalf of GFInet or any of its affiliates or representatives that any such compensation is owed to you, (ii) that nothing in this agreement creates any obligation of GFInet or any of its affiliates or representatives to provide you with any such compensation and (iii) that any such compensation, if provided, is not part of and does not constitute a term of the Offer (Pintoff Aff. Exhibit "3").

Paragraph 7 of the March 19, 2001 Agreement contains a general release provision of "all claims existing, created, arising or accrued through the date of the execution * * * of this agreement."

On or about July 15, 2004, Kates wrote to Gooch advising him that Kates' current holding of 482,958 shares of GFI did not include the 125,000 shares "that were promised" to him for helping secure financing for GFInet and that he did not notice this shortfall until he "examined [his] holdings in light of the upcoming public offering" (Compl. ¶ 28; Opp. Affirm. James A. Batson, Exhibit "G").

GFI's General Counsel Pintoff responded by letter dated August 3, 2004, in which he stated that "GFI firmly disputes that you [Kates] are owed anything, including for any alleged introductions or other assistance you may claim to have provided GFInet" (Compl. ¶ 29). Pintoff reminded Kates that this issue had been raised in March 2001 at which time he claimed GFI disputed Kate's claim and pointed out that Kates had released GFInet of any such claim.

On May 5, 2006, Kates and his attorneys Liddle & Robinson LLP filed a statement of claim for arbitration against GFI Securities before the National Association of Securities Dealers (NASD) seeking essentially the same relief as is being sought in this proceeding, namely, the 125,000 options in GFInet as a "finder's fee" (Batson Affirm. Exhibit "I"; Pintoff Aff. ¶ 7). A hearing was held over two days before a three-member arbitration panel. During the course of his testimony, Kates acknowledged that in March 2001 in the course of negotiating the March 19, 2001 Agreement GFI was trying to renege on paying him the finder's fee he sought (Pintoff Aff. ¶ 8; Exhibits "6" and "7" to Pintoff Aff.). At the conclusion of the hearing testimony, GFI Securities moved to dismiss Kates' claims on several grounds including that Kates had failed to set forth a case against GFI Securities and that the claims were barred by a release (Pintoff Aff. ¶ 9). By decision dated October 18, 2007, the three-member arbitration panel granted GFI Securities' motion to dismiss Kates' claim in its entirety (Exhibit "7" to Pintoff Aff.).[3]

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[3] GFI Securities commenced a special proceeding in this Court seeking to stay the arbitration on the ground that Kates' claim for a finder's fee was not a dispute required to be submitted to arbitration under the arbitration agreement between GFI Securities and Kates. The Honorable Justice Edward H. Lerner, by decision and order dated November 9, 2006, denied the petition and directed the parties to proceed to arbitration citing the principle that "any doubts concerning the scope of arbitrable issues shall be resolved in favor of arbitration" (attached as Exhibit "K" to Batson Aff.).

Plaintiff then commenced the instant action by filing the summons and complaint on August 14, 2008. The complaint asserts four causes of action: (1) breach of contract; (2) breach of implied-in-fact contract; (3) *quantum meruit* and unjust enrichment; and (4) promissory estoppel. Plaintiff seeks damages in an amount not less than 125,000 $1 call options in GFInet translated into 13,157 options in GFI Group common stock, plus interest, costs and attorney's fees.

In lieu of answering, GFI has moved pursuant to CPLR § 3211 (1) and (5) for an order dismissing the complaint as barred by the statute of limitations and release and imposing sanctions against plaintiff. Plaintiff opposes the motion and cross moves for an imposition of sanctions against GFI.

Discussion

1. Statute of Limitations

GFI's first contention is that the causes of action for breach of contract, breach of implied contract, unjust enrichment and promissory estoppel are all time-barred. It is not disputed that each of these claims is subject to a six-year statute of limitations (*see* CPLR 213 (1), (2); *Insurance Co. of the State of Pennsylvania v HSBC Bank*, 37 AD3d 251, 254 [1st Dept. 2007] [unjust enrichment]; *L & L Plumbing & Heating v DePaulo*, 253 AD2d 517 [2d Dept. 1998]; *Lawyers' Fund for Client Protection of State of New York v Gateway State Bank*, 239 AD2d 826 [3d Dept. 1997] [contract and unjust enrichment]; *Superior Technical Resources v Lawson Software*, 17 Misc3d 1137 (A) [Sup. Ct. Erie Co. 2007] [promissory estoppel]). The statute of limitations begins to run when the cause of action accrues (CPLR 203 [a]). As a general rule, the cause of action accrues "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Casualty Co. v Nelson*, 67 NY2d 169, 175 [1986]; *see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Ca. & Surety Co.*, 89 NY2d 214, 221 [1996]). An action is commenced for limitations purposes when either the summons with notice or the summons and complaint is filed with the County Clerk (CPLR § 304). The Court will proceed to consider each of the causes of action *seriatim* with respect to the period of limitations.

A. Breach of Contract and Breach of Implied-In-Fact Contract

Defendants argue that plaintiff's causes of action for breach of contract and breach of implied contract accrued on May 8, 2000, when Gooch in an e-mail advised Kates that he was authorized to

offer him 125,00 $1 call options in GFInet for Kates' services in introducing Argonaut to Gooch. Defendants contend that it was at that time that plaintiff possessed the legal right to enforce the agreement to pay a finder's fee. Thus, plaintiff's failure to commence an action to recover damages for the breach of such agreement on or before May 8, 2006, renders such claims time-barred. Alternatively, defendants argue that at the latest the contract and implied contract causes of action accrued on March 19, 2001 when Kates entered into the March 19, 2001 Agreement which contained a carve out provision for his claim to a finder's fee. Defendants contend that at that point it was clear that Kates' claim was being disputed. In this regard, defendants point to Kates' testimony at the arbitration hearing in which he stated that at the time of the March 19, 2001 Agreement GFInet was trying to renege on paying him a finder's fee. On the basis of this accrual date, the limitations period expired on these claims on March 19, 2007, rendering the breach of contract claims asserted on the filing of the complaint on August 14, 2008 time-barred.

Plaintiff opposes the motion contending that the causes of action for breach of contract and breach of an implied-in-fact contract accrued only after both the breach of the contractual right and the resulting injury occurred. Plaintiff argues that the parties contemplated that the 125,000 stock options promised as a finder's fee would be delivered to him "prior to any liquidity event such as an initial public offering" (IPO) rather than on the date of May 8, 2000, when the promise was made to him. Plaintiff avers that the grant of stock options to him was "perpetual" with delivery due at a reasonable time prior to the occurrence of the IPO and, thus, he did not seek delivery until July 15, 2004. Plaintiff further avers that GFI did not dispute his entitlement to a finder's fee at the time of the March 19, 2001 Agreement containing the "carve out" provision. Rather, plaintiff contends that both the March 19, 2000 Agreement and his testimony at the arbitration hearing made clear that the parties were simply reserving their rights without taking any specific position as to the finder's fee. Thus, plaintiff argues that the cause of action for breach of contract arose on August 3, 2004, when GFI's General Counsel Scott Pintoff definitively stated that GFI disputed plaintiff's entitlement to a finder's fee and the claim interposed with the filing of the complaint on August 14, 2008 was timely.

Alternatively, plaintiff contends that even if the court were to find that Kates' claim accrued more than six years ago, the relation back doctrine served to toll the running of the limitations

period. Plaintiff claims that GFI and GFI Securities are affiliate businesses which are united in interest and, therefore, the claims asserted in the complaint should be deemed to have been asserted as of May 6, 2006, when Kates commenced the arbitration against GFI Securities.

In reply, defendants contend that actual damages are not an element of a breach of contract cause of action for statute of limitations purposes. Thus, defendants argue that plaintiff's claim with respect to the need for a liquidity event such as an IPO to trigger the running of the statute of limitations should be rejected. Defendants reassert their contention that the breach of contract claim accrued on May 8, 2000, when the stock options were first promised to Kates, but also its alternative claim that at the latest the claim accrued when the March 19, 2000 Agreement was executed. Defendants note that the carve out provision contained an acknowledgment by Kates that nothing in the Agreement constituted an admittance by GFI that he was owed a finder's fee and, on that basis, Kates was on notice that GFI did not intend to pay him any such compensation. Defendants further contend that the relation back doctrine is inapplicable and cannot serve to salvage plaintiff's time-barred breach of contract claims. In any event, even if the relation back doctrine were applicable, plaintiff could not meet its requirements particularly because plaintiff chose not to name the defendants herein in the arbitration despite knowing that they were potentially liable.

The court finds that the breach of contract and breach of implied-contract in the instant action are time-barred. The limitations period on a contract cause of action runs from the date of the breach regardless of when the damage is suffered (*see, Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). It "begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury" (*id.* at 403). When a contract is silent as to the time within which it is to be performed, performance is due within a reasonable time under the particular circumstances (*see, Boone Associates v Leibovitz*, 13 AD3d 267 [1st Dept 2004]). Here, GFI's performance would have consisted of paying the finder's fee in the form of the 125,000 $1 stock options. There was no indication in Gooch's e-mail as to when the payment would be made, but such performance could reasonably have been completed within a few months of the time of the offer. There is no indication in the record to support plaintiff's contention that the offer was "perpetual" or that performance was conditional upon a "liquidity" event. While the court finds that the statute of limitations did not begin to run immediately upon the offer, there

can be no serious dispute that the breach of contract claims accrued at the latest when the March 19, 2001 Agreement was executed. The acknowledgments and carve out provision in the Agreement, as well as other documentation concerning discussions of Kates' claim to a finder's fee raised at that time, can leave little doubt that GFI was contesting Kates' claim to a finder's fee and that the agreement thereto was breached. Thus, plaintiff's breach of contract claims were time barred at the time the action was commenced on August 14, 2008, unless plaintiff can succeed in establishing the applicability of the relation back doctrine.

Once defendants have established prima facie that the statute of limitations has elapsed, the burden shifts to the plaintiff to rebut the presumption by establishing the applicability of the relation-back doctrine (*see L & L Plumbing & Heating v DePalo*, 253 AD2d 517 [2d Dept. 1998]). Kates has failed to meet his burden. The relation-back doctrine codified in CPLR § 203 permits a plaintiff to amend a complaint to add a new defendant even though, at the time of the amendment, the statute of limitations would have expired. Here, plaintiff seeks to have the complaint against GFI relate back to the time of the arbitration against GFI Securities and, thereby, toll the statute of limitations. This is not the type of situation that the relation-back doctrine was intended to address. The claims against GFI Securities were presented in a different forum and had been dismissed at the time the instant complaint was filed. Thus, the breach of contract claims asserted in the complaint do not relate back to the time the statement of arbitration was filed. Without the tolling provisions of the relation back doctrine, the breach of contract causes of action are time barred.

B. ***Quantum Meruit and Unjust Enrichment***

A claim for unjust enrichment, which is based upon quasi-contract, accrues and the statute of limitations begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution (*see, Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]; *Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]). It "requires a showing that it would be contrary to equity and good conscience to permit defendant[s] to retain what [plaintiff] sought to * * * [recover]" (*Insurance Company of the State of Pennsylvania v HSBC Bank USA*, 37 AD3d 251, 256 [1st Dept 2007]). Therefore, the action commenced in August 2008 is also untimely with respect to the unjust enrichment cause of action as it clearly accrued at the latest on March 19, 2001 when the Agreement was executed and it became clear that GFI was disputing plaintiff's right to compensation. Such

conduct constituted the "wrongful act" and defendants failure to pay the finder's fee at that juncture may be deemed to have caused them to be "unjustly enriched."

C. *Promissory Estoppel*

The foregoing principles also serve to mandate dismissal of the promissory estoppel cause of action which, as previously noted, is governed by a six-year statute of limitations. The elements of a promissory estoppel cause of action are: (1) a clear and unambiguous promise; (2) reasonable and forseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on the promise (*see Braddock v Braddock*, 60 AD3d 84 [1st Dept 2009]; *Chatterjee Fund Management, LP v Dimensional Media Assocs*, 260 AD2d 159 [1st Dept 1999]). Kates again argues that the accrual date was not until August 3, 2004, or alternatively, that the relation back doctrine serves to rescue his otherwise untimely claim. The foregoing reasoning applies equally to this promissory estoppel cause of action and requires dismissal of the claim as time barred since it is clear that both the promise upon which Kates claims he reasonably relied and well as the breach of such promise occurred more than six years prior to the filing of the instant complaint.

2. Release of Claims

In light of the court's determination that the causes of action alleged in the complaint are untimely and must be dismissed, defendants' contention that the complaint should be dismissed because the claims alleged therein are the subject of the releases in the August 2000 and March 19, 2001 Agreements need not be addressed.

3. Sanctions

Defendants contend that plaintiff's counsel was aware that the claims raised in the instant action were stale and barred by a release and yet filed this "meritless" action to capitalize on the potential merger between GFI and a competitor Tullett Prebon. Such merger discussions have since ended. Defendants contend that the allegations of the complaint are misleading and inaccurate and that the drafting of such complaint constitutes "frivolous" and, therefore, sanctionable conduct.

Plaintiff continues to argue that his claims are timely and that it is defendants who have engaged in misleading conduct by failing to advise the court of its previous petition in this court to stay the arbitration against GFI Securities in which they sought to compel plaintiff to commence an action in that forum. On that basis, plaintiff cross moves to impose sanctions.

Part 130 of the rules of the Chief Administrator of the Courts (*see* 22 NYCRR) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1 [a]). Conduct is deemed to be frivolous if, *inter alia*, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c][1]). In considering whether conduct is frivolous, courts are required to examine, among other things, "whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent" (22 NYCRR 130-1.1 [c]; *see, Navin v Mosquera*, 30 AD3d 883 [3d Dept. 2006]; *Citibank [South Dakota] N.A. v Alotta*, 277 AD2d 547 [3d Dept. 2000]).

Upon review of the record, the Court does not find that either plaintiff or defendants has engaged in frivolous conduct within the meaning of Part 130. Although plaintiff's contentions in this proceeding have been unsuccessful, the Court does not find them to be completely without a factual or legal basis. Nor does the conduct of the defendants that plaintiff has described as misleading come within the parameters of such false and misleading conduct as might warrant the imposition of sanctions. Accordingly, those branches of the motion and the cross motion are denied.

Conclusion

Based upon the foregoing discussion, it is

ORDERED, that so much of defendants' motion as seeks dismissal of the complaint as time barred is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court. In all other respects the motion is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the plaintiff's cross motion to impose sanctions is denied.

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

DATED: May 7, 2009

ENTER,

O. PETER SHERWOOD
J.S.C.