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SHORT FORM ORDER

COPY

INDEX No. 11-26774

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-2-11
ADJ. DATE 2-29-12
Mot. Seq. # 001 - MD

DATATREASURY CORPORATION,	:	HERRICK FEINSTEIN, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	2 Park Avenue
	:	New York, New York 10016
-against-	:	
	:	ROBERT J. DEL COL, ESQ., ProSe
ROBERT J. DEL COL,	:	1038 West Jericho Turnpike
	:	Smithtown, New York 11787
Defendant.	:	

Upon the following papers numbered 1 to 102 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 68 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 69-102 ; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant for an order dismissing the complaint, sanctioning the plaintiff and the attorneys for the plaintiff, Scott Mollen, Esq. and Herrick Feinstein, LLP, and granting him attorney's fees in the amount of $10,000.00, is denied in its entirety; and it is further

ORDERED that the defendant is directed to serve his answer within thirty days of the date of this order; and it is further

ORDERED that the defendant shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Calendar Department, Supreme Court, Riverhead, within thirty days of the date of this order, and said Clerk is directed to set this matter down for a Preliminary Conference on notice to all parties.

This motion was brought pursuant to CPLR 3211 (a)(7) and was converted to a motion for summary judgment by order of this Court dated February 6, 2012 on notice to all parties, and adjourned to permit the parties to make an appropriate record. The defendant, however, has not proffered any further submission in support of the motion for summary judgment.

This action arises out of an action captioned ***Michael C. Trimarco v DataTreasury Corporation***, currently pending under Index No. 03-30324. Trimarco was an employee of Data Treasury, a closely held corporation. Pursuant to an employment agreement, Trimarco's compensation included an option to purchase shares of stock in DataTreasury Corporation for a period of ten years. In November 2003, when Trimarco left DataTreasury's employ, he sought to exercise the stock option. Data Treasury refused to tender the shares on the basis of Trimarco's alleged acts of disloyalty, fraud, and dishonesty during the course of his employment. Thereafter, Trimarco, who was represented by Robert Del Col, Esq., commenced the action against Data Treasury.

As is relevant to the instant action, Del Col, in an attorney affirmation dated January 20, 2011, submitted in support of applications for an order to show cause and a temporary restraining order (TRO) in the underlying case, affirmed that he was the attorney for Michael Trimarco and was seeking an ex parte order, without prior notice to defendant Data Treasury and nonparties Keith DeLuca, Shepard Lane, and Claudia Ballard, pursuant to 22 NYCRR §202.7 (f), on the basis that such notice would significantly prejudice Trimarco. The bases for prejudice to Trimarco, according to Del Col's affirmation, were that Data Treasury was fleeing the jurisdiction; that Data Treasury was in violation of court orders and secreting its assets; that Data Treasury had tampered with witnesses; and that Data Treasury would further obstruct and impair Trimarco's ability to recover if advance notice was given.

A TRO was thereafter granted ex parte by order dated January 21, 2011 (Gazzillo, J.). The order enjoined Data Treasury and nonparties DeLuca, Lane, and Ballard, the alleged principals of Data Treasury, among other things, from selling, disposing, transferring, and diluting personal property and corporate assets of Data Treasury. It also prohibited Nix, Patterson & Roach, a law firm in Texas, from dispersing any monies or things of value to Data Treasury or its principals pending further order of the Court. Thereafter, the Appellate Division, Second Department, vacated the temporary restraining order.

Subsequently, plaintiff Data Treasury commenced this action against Del Col seeking damages pursuant to Judiciary Law § 487 for attorney misconduct.

Defendant Del Col, acting *pro se*, now seeks dismissal of the instant action and the imposition of sanctions against counsel for plaintiff, Scott Mollen, Esq., and the law firm Herrick Feinstein, LLP. He asserts plaintiff cannot demonstrate that he intentionally deceived the court or that he engaged in a an extreme pattern of legal delinquency that caused plaintiff's alleged damages. Based upon a review of defendant's evidentiary submissions, it is determined that Del Col has not demonstrated prima facie entitlement to summary judgment dismissing the complaint. Additionally, the plaintiff has raised factual issues which preclude summary judgment from being granted to the defendant.

Judiciary Law § 487 provides as follows:

> An attorney or counselor who:
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> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Judiciary Law § 487 applies only to wrongful conduct by an attorney in an action that is actually pending (***Mahler v Campagna***, 60 AD3d 1009, 876 NYS2d 143 [2d Dept 2009]; *see* ***Tawil v Wasser***, 21 AD3d 948, 801 NYS2d 619 [2d Dept 2006]). Deception of a court is not confined to the actual appearance in court, but may include any statement, oral or written, made with regard to a proceeding brought or to be brought therein and communicated to the court with intent to deceive (***Cinao v Reers***, 27 Misc3d 195, 893 NYS2d 851 [Sup Ct Kings County 2010]). A violation of Judiciary Law § 487 permits the imposition of treble damages for certain attorney misconduct. Such violation may be established by either the defendant's deceit or by a chronic, extreme pattern of legal delinquency by the defendant (***Cinao v Reers***, *supra*). When a party commences an action grounded in a material misrepresentation of fact, the opposing party is obligated to defend or default and necessarily incurs legal expenses. As such, the party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation (***Amalfitano v Rosenberg***, 12 NY3d 8, 874 NYS2d 868 [2009]). An attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party, is guilty of a misdemeanor and is liable for treble damages to the party injured (***Amalfitano v Rosenberg***, *supra*). The elements of a deceit claim are essentially the same elements that constitute a cause of action for fraud, namely representation, fasity, scienter, deception and injury (***Morris v Rochdale Village, Inc.***, 2011 NY Slip Op 33315U [Sup Ct Queens County 2011]).

CPLR 6301 provides that a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had. Unlike a preliminary injunction, where an undertaking is mandated by statute (CPLR 6212[b]), the posting of an undertaking prior to issuance of a TRO is discretionary with the court (CPLR 6313[c]) (*see* ***Napolean Art & Production, Inc. and Code Films, Inc. v Laughlin***, 14 Misc3d 1226A, 836 NYS2d 494 [Sup. Ct. New York County 2007]). The granting of a TRO in an order to show cause without notice to the opposing party deprives the party of the opportunity to argue that an undertaking is warranted, neutralizing the defendant at the discretionary phase (***Napolean Art & Production, Inc. and Code Films, Inc. v Laughlin***, *supra*).

In the underlying action, Del Col's application for an order granting a TRO was brought by order to show cause, and is the basis for the instant action wherein the plaintiff alleges that Del Col violated Judiciary Law §487. It is noted that the application for the TRO sought to enjoin Data Treasury and nonparties from disposing of personal and corporate assets. Del Col's attorney affirmation, dated January 20, 2011, stated that the application was being made ex parte. 22 NYCRR 202.7 provides that such application shall be served on notice, unless there is a showing that such service would result in significant prejudice to the moving party.

In order to prevail on this motion for summary judgment dismissing the complaint, it is incumbent upon Del Col to establish that he did not commit misconduct and was justified in representing to the court in the underlying action that an ex parte application was necessary to prevent significant prejudice to Trimarco. His contentions therein that Data Treasury was fleeing the jurisdiction, was in violation of Court orders and secreting its assets, had tampered with witnesses, and it would further obstruct and impair plaintiff's ability to recover if advance notice were given are considered below.

(i) Data Treasury had fled or was fleeing the jurisdiction.

By order dated June 30, 2010, the parties' respective motions for summary judgment in the underlying case were each denied. Data Treasury filed a notice of appeal and Trimarco filed a cross-appeal from the order. The parties were attempting to file a joint record on appeal. Counsel for Data Treasury, Scott Mollen, telephoned Del Col to discuss a joint record on appeal on the evening of January 19, 2011. Thus, Del Col knew that Data Treasury was represented by the firm Herrick Feinstein, and that Data Treasury had not fled the jurisdiction. Del Col also knew that Data Treasury was still actively participating in the underlying action, and had subjected itself to the jurisdiction of the New York courts. Del Col sent Mollen an e-mail on January 19, 2011, advising that he was either available at that time, or the next day after 1:00 p.m., to discuss the matter. Counsel for Data Treasury affirms that Del Col was aware that Data Treasury was a viable corporation organized in the State of Delaware since February 11, 1993, and knew that Data Treasury's corporate headquarters had moved in 2006 from Melville, New York to Plano, Texas, and had been at its present office location since 2007. Data Treasury had no other offices in New York, and did not relocate any office or other facility out of New York after the move in 2006 from its Melville office. Data Treasury was also represented by various law offices in New York, including Herrick, McKenna, Long & Aldridge, LLP, and Bracken Margolin, Besunder, LLP, which could have timely responded to a notice of court appearance had Del Col served them with notice of the application for the temporary restraining order.

On January 11, 2011, a "supplemental request" for production of documents was served by Trimarco in the underlying action, well after the note of issue and certificate of readiness were served, and just nine days prior to Trimarco's ex parte application for a TRO, belying Del Col's statement that Data Treasury was fleeing the jurisdiction.

Upon a review of the foregoing evidentiary submissions, it is determined that Del Col has not established that at the time he filed the ex parte application for a TRO he had reason to believe Data Treasury had fled or was fleeing the jurisdiction. Instead, the admissible evidence establishes that Data Treasury was represented by counsel which was perfecting Data Treasury's appeal, and Data Treasury

had submitted to the jurisdiction of the New York courts. Thus, Del Col has not established entitlement to summary judgment dismissing the complaint on the basis that Data Treasury was fleeing the jurisdiction. The plaintiff has also raised factual issues to preclude summary judgment on this issue.

(ii) Data Treasury had violated Court orders and secreted its assets.

A discovery demand was served upon Data Treasury on March 23, 2004, demanding numerous records and materials. A hearing was conducted by Honorable Ralph Costello on August 8, 2007 concerning the discovery demands, and a disclosure order was issued on August 17, 2007. On appeal of that order, the Appellate Division affirmed Justice Costello's order directing the disclosure of information regarding defendant's Data Treasury's shareholders (*see* ***Trimarco v DataTreasury***, 59 AD3d 615, 873 NYS2d 701 [2d Dept 2009]). The Appellate Court noted that although Trimarco was seeking a finding of contempt for Data Treasury's failure to comply with discovery, Trimarco's submissions did not establish Data Treasury's noncompliance with a clear and unequivocal order directing them to supply all documents relating to its settlement of patent infringement cases. It continued that the hearing conducted by Justice Costello on August 8, 2007 concerned Data Treasury's obligation to produce a current list of shareholders, their addresses, and their holdings, which Data Treasury felt was privileged information. The Court further held that Justice Costello properly exercised his discretion in granting that branch of the motion which sought certain shareholder information in order to determine stock values, including a current list of shareholders with percentages of shares held by each, the dates that such shares were acquired, and the consideration paid for such shares. The order issued by Justice Costello also required Data Treasury to provide detailed descriptions of the classes and privileges of the share of stock, as well as the total number of outstanding shares in each class.

The note of issue and certificate of readiness in the underlying action was filed by Del Col on September 20, 2010, well before Trimarco's application for the TRO on January 21, 2011. In an order dated September 29, 2011, this Court denied an application by Trimarco to strike Data Treasury's answer, as Trimarco failed to support the motion with an affirmation by counsel that detailed a good faith effort to resolve the dispute regarding disclosure of shareholder information and settlement agreements regarding its patent infringement actions. It was determined that Trimarco's submissions did not establish that Data Treasury failed to comply with a clear and unequivocal order directing Data Treasury to supply plaintiff with all documents relating to the settlement of patent infringement. It was further determined that Trimarco waived his right to seek the imposition of sanctions under CPLR 3126 for alleged witness tampering and noncompliance with the August 27, 2007 disclosure order (Costello, J.) by filing the note of issue and certificate of readiness. The order of the undersigned, dated September 29, 2011, also denied Trimarco's application for an order punishing Data Treasury and its alleged principals, namely DeLuca, Lane, and Ballard, for criminal and civil contempt on the basis that they tampered with and intimidated witnesses, and failed to comply with a disclosure order dated August 17, 2007. Trimarco's application for an order of attachment against Data Treasury's property was also denied as Trimarco did not show Data Treasury intended to defraud creditors or to frustrate the enforcement of a judgment in favor of Trimarco, or that it was about to dispose of, encumber, or conceal property.

Data Treasury contends that Del Col, in making the ex parte application for a TRO, submitted a printout from the New York Secretary of State website for a wholly different and inactive entity known as Datatreasury Technology Corporation, which had no relation to Data Treasury. Data Treasury argues that although Del Col affirmed to the court that the corporation was in violation of a court order and was secreting its assets, there was no court order regarding Data Treasury's assets or any secretion thereof. Rather, the court order dated February 17, 2009 in the underlying action instructed Data Treasury to disclose certain shareholder information to determine stock values, and such order was complied with. Data Treasury contends that Del Col never disclosed Data Treasury's prior compliance with discovery and orders to the Court. Moreover, counsel for Data Treasury affirms that a previous TRO and injunction against Data Treasury was vacated, and such vacatur was not disclosed to the court by Del Col in seeking the ex parte order.

In view of the foregoing, defendant Del Col has not established that at the time he sought the exparte order for a TRO there was outstanding discovery, that Data Treasury violated Court orders, or that it was secreting assets.

(iii) Data Treasury had tampered with witnesses.

In support of the application for a TRO, Del Col submitted no evidence to demonstrate that Data Treasury was engaged in witness tampering. On March 24, 2009, Brian Blanchard submitted an affidavit wherein he stated that Richard Friedman, counsel for Data Treasury, used excerpts from the transcript of his deposition to establish that Infinity Payment Systems was a wholly owned subsidiary of Data Treasury, and that his testimony was not from his personal knowledge, but from information previously provided by Friedman. In the affidavit of Al Wanderlingh, a nonparty, Wanderlingh avers that on December 16, 2009, he took part in a conversation with Mark Holzwanger and Trimarco and was advised by Holzwanger that Friedman had contacted him many times and tried to influence his testimony or to obtain an affidavit averring that Infinity is a wholly owned subsidiary of Data Treasury. However, no evidentiary proof of the same was offered by movant concerning Wanderlingh's averment, or whether or not Infinity was a wholly owned subsidiary of Data Treasury. In an affirmation dated December 8, 2009, it is noted that Friedman set forth that on November 4, 2009, he had a conversation with Holzwanger concerning Infinity, and that Holzwanger knew that Infinity was affiliated with Data Treasury, but was not aware that it was owned by Data Treasury. A history of the relationship between various companies was set forth. Friedman affirmed that Holzwanger believed a merger would not occur between Infinity and Empire or Data Treasury as Holzwanger had access to Infinity corporate records and taxpayer identification number. He continued that Holwanger then advised him that he understood that Data Treasury has always been the sole owner of Infinity.

Thereafter, by way of notice of motion dated August 3, 2007, Trimarco moved to strike Data Treasury's answer, to disqualify Friedman as DataTreasury's counsel, and for sanctions based upon Friedman's alleged conversations with Martin Gelerman, a shareholder of Data Treasury, and Brian Blanchard, an independent contractor for a subsidiary of Data Treasury, Dynamic Systems Group. Trimarco alleged in such motion that during a break while Friedman was deposing Blanchard, Friedman advised Blanchard that if he testified favorably, "Data Treasury has plenty of money and will certainly compensate you." In the order dated September 29, 2011, this Court noted that Trimarco, by notice

dated March 29, 2009, withdrew with prejudice a motion for an order disqualifying Friedman and his law firm from representing Data Treasury on the basis that Friedman and Lane tampered with nonparty witnesses Blanchard and Gelerman. By order of this Court dated December 2, 2010, Trimarco's motion to disqualify Friedman and his firm, McKenna, Long & Aldridge, from representing Data Treasury was granted. However, by order dated January 17, 2012, the Appellate Division, Second Department, in ***Trimarco v DataTreasury Corp.***, 91AD3d, 756, 936 NYS2d 574, reversed the order of December 2, 2010, holding that Trimarco failed to demonstrate that the disqualification of Friedman and his law firm was warranted, as there was no showing that Friedman's testimony was necessary in the action, that Friedman had first-hand knowledge of material facts relevant to the case, or that Freidman's testimony would be prejudicial to Data Treasury.

It is noted that in the brief affidavit submitted in support of the instant application by Del Col, he asserts that the material allegations and contents contained in his Memorandum of Law are true to his knowledge except as to those matters stated to be alleged on information and belief. Del Col then sets forth in his Memorandum of Law that sanctions and attorney's fees should be awarded to him as he successfully argued to have Friedman disqualified from representing Data Treasury. However, Del Col fails to apprise the court in his moving papers that the Appellate Division, Second Department, reversed the order disqualifying Friedman and the law firm McKenna, Long & Aldridge.

Counsel for Data Treasury states that in 2006, Del Col withdrew with prejudice his prior motion for contempt concerning his allegation that Data Treasury tampered with witnesses, and did not disclose that the motion was withdrawn when he made his ex parte application for the TRO. In the order dated September 29, 2011, this court stated that Trimarco waived his right to seek the imposition of sanctions under CPLR 3126 for alleged witness tampering and noncompliance with the August 27, 2007 disclosure order (Costello, J.) when he filed the note of issue and certificate of readiness. The undersigned also denied Trimarco's application for an order punishing Data Treasury and its alleged principals, namely DeLuca, Lane, and Ballard, for criminal and civil contempt on the basis that they tampered with and intimidated witnesses and failed to comply with a disclosure order dated August 17, 2007 (Costello, J.).

The evidentiary submissions do not support Del Col's claim that he made the application for the ex parte TRO on the basis that there was a threat of witness tampering since the prior situation involving Friedman was resolved. Del Col filed his note of issue and certificate of readiness declaring that discovery was complete and did not demonstrate that there was any unusual occurrence after the note of issue was filed as a basis to vacate it. Accordingly, defendant Del Col has not demonstrated that there was witness tampering by Data Treasury to serve as a basis for application for an ex parte order for a TRO, and, thus, Del Col has not demonstrated prima facie entitlement to summary judgment dismissing the complaint of this action on that basis. In addition, the plaintiff's submissions raise factual issues to preclude summary judgment.

(iv) Data Treasury would further obstruct and impair Trimarco's ability to recover if advance notice were given.

In the order of this Court dated September 29, 2011, that part of Trimarco's application which sought an order of attachment against DataTreasury's property was denied, as Trimarco did not establish intent by Data Treasury to defraud creditors or to frustrate the enforcement of a judgment in favor of Trimarco, or that Data Treasury was about to dispose of, encumber, or conceal property. The court stated that Trimarco did not demonstrate that it would succeed on the merits, and that the moving papers contained no evidentiary facts, only conclusions and suspicions in support of the application. Trimarco also sought to have a temporary receiver appointed to oversee the business and assets of Data Treasury, which application was denied on the basis that Trimarco failed to show a likelihood of irreparable loss or material injury to Data Treasury or its assets if a receiver was not appointed. Trimarco's application for further disclosure from Data Treasury regarding its assets was also denied.

Del Col failed to submit evidentiary proof in support of the claim that Data Treasury would obstruct and impair Trimarco's ability to recover if advance notice of the application for a TRO was provided. In fact, Data Treasury, by the affidavits submitted in opposition to this application, has established that it is operating and conducting an ongoing business. Del Col has not demonstrated that there has been an occurrence or events since the order of September 29, 2011 order demonstrating an intent on the part of Data Treasury to defraud creditors, or to frustrate the enforcement of a judgment in favor of Trimarco. The Court also determined in the September 29, 2011 order that Trimarco did not demonstrate that Data Treasury was about to dispose of, encumber, or conceal property.

Based upon the foregoing, defendant Del Col has not demonstrated prima facie entitlement to summary dismissal of the complaint.

It is additionally determined that Del Col has not demonstrated a basis for sanctions against Scott Mollen, Esq. and Herrick Feinstein, LLP, or for attorney's fees, pursuant to 22 NYCRR 130.1-1.

Dated: 5 July 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION