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COURT OF APPEALS
STATE OF NEW YORK

CDR CRÉANCES S.A.S.,
Respondent,

-against-

MAURICE COHEN,
Appellants.

No. 81

CDR CRÉANCES S.A.S.,
Respondent,

-against-

LEON COHEN,
Appellants.

No. 81

20 Eagle Street
Albany, New York 12207
March 27, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 81, CDR.
2 Counselor, do you want some rebuttal time?

3 MR. PEGNO: Two minutes, please, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MR. PEGNO: Your Honor, this appeal raises
8 a question of first impression in this court, and an
9 important issue as to the proper administration of
10 justice, and that is the standard that is to be used
11 when a party makes - - -

12 CHIEF JUDGE LIPPMAN: What standard do you
13 want to use and where do you get it from?

14 MR. PEGNO: The - - - the standard that
15 should be used is if there is any bona fide dispute
16 as to the misconduct that is alleged - - -

17 JUDGE SMITH: Well, "bona fide" is sort of
18 a funny word to use about someone who's been
19 convicted of fraud of the court. You mean any
20 dispute at all, don't you?

21 MR. PEGNO: Any real factual dispute. In
22 essence, a summary judgment standard. The - - - the
23 previous - - -

24 CHIEF JUDGE LIPPMAN: Summary judgment
25 standard?

1 MR. PEGNO: In essence, the same standard.
2 The First Department's prior case law before this
3 case, the Melcher case, used the term that - - -

4 CHIEF JUDGE LIPPMAN: You're relying
5 basically on Melcher?

6 MR. PEGNO: I'm not relying on Melcher.
7 That - - - that is one of the cases that applies in
8 this case.

9 CHIEF JUDGE LIPPMAN: What are you relying
10 on?

11 MR. PEGNO: All of the cases that - - - the
12 courts consistently have held that where there's a
13 real dispute about the alleged misconduct at issue on
14 a - - - where there's - - -

15 CHIEF JUDGE LIPPMAN: Real, not any
16 dispute.

17 MR. PEGNO: Not any dis - - - not just - -
18 - not a fanciful - - -

19 CHIEF JUDGE LIPPMAN: Okay, go ahead; keep
20 going.

21 MR. PEGNO: Not a fanciful - - - not just -
22 - - it has to be a - - - a real dispute.

23 JUDGE GRAFFEO: So why was the - - - why
24 was the Supreme Court's determination that there was
25 a clear and convincing standard met here? Why - - -

1 why was the application of that inappropriate?

2 MR. PEGNO: Because clear and convincing
3 evidence should not be the appropriate standard. The
4 effects - - -

5 JUDGE READ: It's a higher standard?

6 JUDGE GRAFFEO: What you just told us is a
7 higher standard?

8 MR. PEGNO: I - - - there's a higher
9 standard then clear and convincing evidence, yes.

10 JUDGE READ: And it is what?

11 MR. PEGNO: It is that essentially there's
12 no real factual dispute.

13 JUDGE GRAFFEO: Well, that would - - -

14 MR. PEGNO: The conclu - - -

15 JUDGE GRAFFEO: So - - - so if the person
16 charged with having engaged in fraudulent conduct
17 denies everything, then how are you ever going to
18 reach that standard?

19 MR. PEGNO: Well, there certainly can be
20 circumstances where the - - - where the denial is
21 overcome by - - - by - - -

22 CHIEF JUDGE LIPPMAN: But in general, a bad
23 denial is sufficient?

24 MR. PEGNO: Not necessarily, Judge. You
25 have the case - - -

1 CHIEF JUDGE LIPPMAN: Then how do you get
2 to conclusively demonstrate it?

3 MR. PEGNO: For example, you have the
4 McMunn case that - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MR. PEGNO: - - - that we've cited, where a
7 party denied knowing one of the witnesses and denied
8 having certain credit cards - - - cards. They got
9 the credit card statements and there were - - - there
10 were - - - was video evidence showing, not only that
11 - - - that the person knew the - - - the witness in
12 question, but that she was cohabitating with him.

13 CHIEF JUDGE LIPPMAN: Let me ask you a
14 question. If it's clear and convincing, can you win?

15 MR. PEGNO: Yes, Your Honor, even - - -
16 even if it is clear and convincing evidence - - -

17 CHIEF JUDGE LIPPMAN: How do you win if
18 it's clear and convincing?

19 MR. PEGNO: Because the trial court's
20 decision here was, first of all, premised entire - -
21 - well, let me go back. CDR and appellants don't
22 agree on a lot of things. But one of the things we
23 do agree on, as set forth in the briefs, is that the
24 testimony of the - - - the two sisters, the Habib
25 sisters, was the lynchpin to the default in this

1 case. Their testimony that there was an alleged
2 agreement to testify falsely was key. Without that
3 testimony, there wouldn't - - - there wouldn't have
4 been no - - -

5 JUDGE SMITH: And they - - - they described
6 a meeting.

7 MR. PEGNO: They described a meeting at
8 which - - -

9 JUDGE SMITH: Did - - - did your clients
10 testify in any form about whether that meeting ever
11 happened?

12 MR. PEGNO: The - - - there - - - there was
13 testimony at the Cohen's criminal trial. They - - -
14 and they denied there being any such - - - any such
15 agreement. And there were sworn affidavits that were
16 submitted by two of the other defendants that - - -

17 JUDGE SMITH: I mean, did - - - I mean - -
18 - I mean, did they ever - - - that's what I wanted to
19 say - - - did they ever tell their side of the story?
20 They say, yeah, there was a meeting, but we were - -
21 - we were all working very hard to tell the truth, or
22 do they say there was no meeting? What - - - what's
23 - - - what's their story?

24 MR. PEGNO: Their - - - their story, what
25 the record reveals, is that they denied that there

1 was any agreement to testify falsely.

2 JUDGE SMITH: Yeah, I get that.

3 JUDGE PIGOTT: Why didn't they come in and
4 testify?

5 MR. PEGNO: I'm - - -

6 JUDGE PIGOTT: Why didn't they come in and
7 testify at the hearing?

8 MR. PEGNO: Well, Maurice and Leon Cohen
9 couldn't - - - could not have come and testified.
10 They - - - they were incarcerated, and they were - -
11 - and in fact, the trial court accepted - - -

12 JUDGE SMITH: What - - - what efforts did
13 you make to get their testimony for the hearing?

14 MR. PEGNO: They - - - they - - - we used
15 their criminal trial testimony, in which they denied.

16 JUDGE SMITH: I mean, it's not impossible
17 to get - - - to get people who are in jail to testify
18 when their testimony is needed.

19 MR. PEGNO: What - - - what the record
20 shows, Judge Smith, is that we advised the trial
21 court that they could not come for - - - for this
22 hearing.

23 JUDGE SMITH: But you can apply for the
24 good old habeas corpus ad testificandum, can't you?

25 MR. PEGNO: That was not something that was

1 - - - that was possible at the time, and the rec - -
2 -

3 JUDGE PIGOTT: Why not?

4 MR. PEGNO: - - - this is not the record -
5 - - it's not in the record. The - - - the federal
6 courts would not - - - again, this is not in the
7 record; you're asking me, so I'll answer you. The
8 federal courts will not move a prisoner prior to
9 sentencing. They have not - - - they - - -

10 JUDGE PIGOTT: But can they move? I mean,
11 can't the court move? I mean, can't you video tape -
12 - - I - - - it just struck me that you're - - -
13 you're confronted with this very serious testimony of
14 these - - - of these women, and there's nothing
15 there. I mean, a couple of affidavits, I get, but
16 you can't cross-examine an affidavit.

17 MR. PEGNO: Well, there was - - - their
18 testimony from the criminal trial in which they
19 denied that, and they were subject to cross-
20 examination on a similar - - -

21 JUDGE SMITH: But would anything stop you
22 from putting in an affidavit, saying, look, here's my
23 side of the story. They made up this meeting; there
24 never was a meeting. Those scripts that they said -
25 - - that script that they said they got, I've never

1 seen it before; I deny its authenticity. Nobody said
2 that.

3 MR. PEGNO: Well, implicit in the notion
4 that they denied that there was any agreement to
5 testify falsely is that the script - - -

6 JUDGE SMITH: When you're saying
7 "implicit", I mean, I'm thinking back on what you
8 said a minute ago when the dispute was fanciful.
9 It's beginning to sound like the dispute is fanciful
10 when you're saying, well, I deny - - - I deny my
11 guilt, good-bye; I don't want to talk to you anymore.

12 MR. PEGNO: Well, no, Your Honor, because
13 that's not the only thing that - - - that is - - - is
14 used to - - - to contradict the - - - the testimony
15 here. They had their own credibility - - - they had
16 previously made statements - - - these same witnesses
17 that were inconsistent with what they had testified
18 to. They - - - they were subject to impeachment.

19 JUDGE SMITH: Well - - - well, participants
20 in a criminal conspiracy were confessing to the
21 conspiracy. Often - - - there's often something to
22 impeach them with. That's sort of normal.

23 MR. PEGNO: But this is specific statements
24 that they had previously made contrary to what they
25 were testifying about.

1 JUDGE SMITH: Well, that was - - -

2 JUDGE PIGOTT: But wasn't that - - -

3 JUDGE SMITH: - - - that was the point. Of
4 course they were - - - it was a conspiracy to commit
5 perjury. Of course, they'd perjured themselves.

6 JUDGE PIGOTT: And wasn't - - - wasn't that
7 brought out. I mean, in cross-examination, I thought
8 they were impeached pretty well.

9 MR. PEGNO: They - - - they - - - that was
10 brought out on cross-examination.

11 JUDGE PIGOTT: But the court made its
12 decision and - - -

13 MR. PEGNO: Well, that's - - - that's
14 exactly the problem, Your Honor. You - - - when you
15 have a standard like that, where you have a clear and
16 convincing evidence standard that's - - - where the
17 deference is giving to the court's decision, then - -
18 - then you have a real possibility that you can have
19 a situation where a - - - one party says, you know
20 what? The - - - the witnesses on the other side of
21 this case, they're lying - - -

22 JUDGE PIGOTT: I think you've got - - -

23 MR. PEGNO: - - - and I've got - - - I've
24 got evidence to back it up.

25 JUDGE PIGOTT: I think you're right about

1 that, which is one of the reasons why I thought - - -
2 I mean, even a deposition - - - I mean, you can
3 always go down to the - - - Attica's in my
4 neighborhood, but you can go down to whatever prison
5 they're in, and take their deposition. And you can
6 video it.

7 MR. PEGNO: Well, Your Honor, again, they -
8 - - they were asked about this at their criminal
9 trial, and - - - and that - - -

10 CHIEF JUDGE LIPPMAN: Counsel, but you
11 already agreed that bare denial is not enough. And
12 my guess is what we're all asking is, what do you
13 have beyond bare denial?

14 MR. PEGNO: It's - - - it's not just that a
15 bare denial is not enough. It is that - - -

16 CHIEF JUDGE LIPPMAN: What is it?

17 MR. PEGNO: - - - it is not necessarily the
18 case that - - - that a - - - denying that you
19 testified falsely, denying you created a document is
20 sufficient.

21 CHIEF JUDGE LIPPMAN: Yeah, but you talked
22 about a real dispute being the test. What's real
23 about this dispute?

24 MR. PEGNO: There's - - - there certainly
25 is a real dispute. The testimony of the Habib

1 sisters was that Maurice Cohen owned and controlled
2 the Flatotel. He denied that consistently throughout
3 his testimony. What he testified to is that he was
4 head of the franchise at the Flatotel, and people
5 believed as a result of that - - - that perhaps he
6 was the owner.

7 So - - - so there - - - is real substance
8 to their denial about - - - about what - - -

9 JUDGE SMITH: Do they ever dispute - - -

10 MR. PEGNO: - - - the underlying facts.

11 JUDGE SMITH: What about - - - what about
12 the fictitious characters who the sisters say were
13 created, Mr. Cox (ph.) and what's his name. Did they
14 - - - do your people their side of that story?

15 MR. PEGNO: Your Honor, they - - - they
16 testified that those people were - - - were involved
17 in - - - in various ways. But - - - that - - -
18 that's what the testimony was. Allegría Aich, for
19 example, testified regarding the involvement of - - -
20 of the Cox gentleman in connection with the potential
21 sale of the Flatotel. She did testify to those
22 facts.

23 JUDGE SMITH: Maybe - - - maybe part of the
24 problem is the sequence. After the - - - after the
25 sisters had their change of heart and decided to tell

1 what your adversary says is the truth, did anyone
2 from your side come back with something to say, no,
3 no, they're making it all up; here's what really
4 happened?

5 MR. PEGNO: They had previously testified
6 as to - - - as to the facts - - -

7 JUDGE SMITH: That's a "no".

8 MR. PEGNO: After - - - no, Your Honor.
9 After - - - after they came forward, Robert Maraboeuf
10 was - - - was deposed in Paris, and CDR was free to
11 ask him quest - - - them questions. He testified
12 about all these issues, about all these allegations.
13 He testified that no one had told him what to say,
14 and he testified as to the substance of - - - of who
15 owned and who controlled the entities.

16 JUDGE SMITH: Do you think - - - did that
17 put Maraboeuf on a different footing from some of
18 your other clients?

19 MR. PEGNO: I think he's on a - - - well,
20 it's not a question about a different footing; it's a
21 question about what the evidentiary record is to
22 support the - - - the imposition of this ultimate
23 sanction. So it bolsters his case, as well as it
24 bolsters all the - - - the case of all the other
25 appellants.

1 JUDGE SMITH: Is a - - - speaking of
2 different footings, it occurs to me that maybe Mrs.
3 Cohen is on a different footing. Would you agree
4 that she - - - that her case is the strongest of your
5 - - - of your five?

6 MR. PEGNO: She - - - certainly, Your
7 Honor, as we set forth in our brief, I think the - -
8 - the default against her was emblematic of
9 everything that went wrong in the process below. The
10 - - - the complaints don't even state a claim against
11 her. They barely mention her. There wasn't a scrap
12 of evidence that she ever had any involvement in the
13 New York Flatotel, and the - - - the alleged
14 misconduct that - - - that she engaged in, related to
15 - - - to matters that were completely separate.

16 JUDGE SMITH: As I understand it, she was
17 not alleged by the sisters to have been at the famous
18 meeting with the script.

19 MR. PEGNO: That's exactly right.

20 JUDGE SMITH: The other - - - the other
21 four were.

22 MR. PEGNO: As a matter of fact, they
23 affirmatively have testified that she was not
24 present.

25 JUDGE SMITH: But they - - - they also

1 testified the other four were there.

2 MR. PEGNO: That's correct, Your Honor.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 MR. PEGNO: Thank you.

5 CHIEF JUDGE LIPPMAN: Thanks.

6 MR. KELLNER: May it please the court, my
7 name is Douglas Kellner, attorney for CDR Créances.
8 Virtually all discovery disputes turn on contested
9 facts, and the standard that the appellants propose
10 here would be completely unworkable for the court
11 system.

12 JUDGE PIGOTT: But isn't - - - isn't he
13 right in this sense. If you - - - if you just got a
14 basic auto accident case, and somebody comes in and
15 testifies the light was red, and - - - and she went
16 right through it, and it's flat-out not true. We
17 don't want people running into court saying, this a
18 fraud in the court, and now we want you to strike
19 their answer, and we want - - - you know, we want
20 judgment.

21 3126, it seems to me, provides, you know,
22 if you don't appear - - - you know, if you don't
23 answer, it - - - clearly objective things that can't
24 be disputed. But when you're into disputed facts,
25 how does that become a fraud on the court? It seems

1 to be it's a fraud on the party that you're suing or
2 being sued by, but - - -

3 MR. KELLNER: Well, you - - - you have both
4 things here, Judge. You have both an egregious fraud
5 on the court, not with isolated incidents, but a
6 repeated pattern of false presentations to the court,
7 including subordination of perjury and perjury
8 itself, and submitting fraudulent documents.

9 JUDGE PIGOTT: No, no, maybe I'm wrong.
10 It's - - - it's not to the court - - -

11 MR. KELLNER: Right.

12 JUDGE PIGOTT: - - - until it's offered in
13 court. In other words, you guys are doing
14 depositions and things like that and people are
15 lying, cheating, stealing, who knows what they're
16 doing, and that goes on.

17 MR. KELLNER: Yeah, but all - - - all of
18 this was submitted in terms of a motion practice. In
19 terms of compliance with discovery mainly, there were
20 also motions for summary judgment and other issues
21 that - - -

22 JUDGE PIGOTT: Yeah, but that's my point.
23 I mean, can you - - - can you do this? Can you go in
24 and say, Judge, you know these people lied, and so we
25 want to win our case based on that, when it's not in

1 court yet. You're still over in your pre-trial
2 stuff, and - - - and - - - if they came in and did
3 this - - -

4 MR. KELLNER: There comes a point when
5 parties so abuse the judicial process that it breaks
6 down the ability of the court to function properly
7 when they're lying at - - -

8 JUDGE SMITH: Suppose you have a case - - -

9 MR. KELLNER: - - - steps.

10 JUDGE SMITH: Suppose you've got a case, in
11 which the proverbial thirty bishops or whatever the
12 proverb is - - - I've forgotten it - - - are on one
13 side, all swearing, absolutely credibly, that the
14 plaintiff ran the red light. You've got the
15 plaintiff, the person of bad reputation who's been
16 convicted four times of - - - of faking automobile
17 accidents, swearing she didn't run the red light.
18 Can they - - - can her complaint be dismissed for
19 fraud on the court?

20 MR. KELLNER: That's not - - - that's not
21 the case here.

22 JUDGE SMITH: No, I know it's not. I'm
23 asking a hypothetical question.

24 MR. KELLNER: And - - - and no, because
25 that's the issue that needs to be determined on the

1 merits.

2 JUDGE SMITH: Why is this case different?

3 MR. KELLNER: Because you have a repeated
4 pattern of fraud. So for example, we have fraud in
5 vacating their first defaults for discovery
6 violations, which the Appellate Division had
7 initially found there were no objections to Judge
8 Tolub's 2008 rulings that they were in default on
9 their discovery obligations, but the court, based on
10 affidavits that were submitted in a motion for
11 reargument, which Judge Tolub in his - - -

12 JUDGE SMITH: The affidavits of merit,
13 essentially?

14 MR. KELLNER: The affidavits explaining
15 their default, which included key claims that - - -
16 that they had been paying the lawyer, and that the
17 lawyer hadn't been communicating with them, which
18 were refuted at the hearing here, and it was shown
19 that the affidavits to vacate the default were false.
20 And - - -

21 JUDGE PIGOTT: Well, didn't they - - -
22 didn't - - -

23 JUDGE SMITH: Yeah, so, usually when you
24 vacate a default, you have to put in something about
25 the merit of your defense. Did they put in something

1 about meritorious defenses?

2 MR. KELLNER: They did, and the Appellate
3 Division determined that there was a meritorious
4 defense.

5 JUDGE SMITH: Well, but of course, you
6 know, you say that they did that by lying, and that
7 was fraud on the court.

8 MR. KELLNER: The lies were with respect to
9 the reasons for the default, Your Honor.

10 JUDGE PIGOTT: But is that why - - -

11 MR. KELLNER: And in the Di Russo - - - I'm
12 sorry, Your Honor.

13 JUDGE PIGOTT: Well, I was going to - - -
14 is that why the judge dismissed it at this point? I
15 thought it was only on the Habibs' - - -

16 MR. KELLNER: In 2008, it was dismissed on
17 the basis of a - - - of noncompliance with discovery
18 orders, which at that time were relatively - - -

19 JUDGE PIGOTT: You see, that's a 3126, and
20 that seems to me pretty clear. But what I worry
21 about is the - - - is this fraud on the court,
22 because I - - - I can see a different judge in a
23 different jurisdiction just getting mad at a
24 litigant, and saying, you know what? You told me you
25 were going to be here at 10, and now it's 10:30, and

1 but your argument is the judge has the inherent power
2 to do that, but it is rare, right?

3 MR. KELLNER: That's right. And the stan -
4 - -

5 CHIEF JUDGE LIPPMAN: And he's doing it on
6 based from - - - your contention he's doing it, based
7 on a whole series of conduct, a pattern of conduct -
8 - -

9 MR. KELLNER: That's - - - that's correct.

10 CHIEF JUDGE LIPPMAN: - - - that would
11 warrant this rare exercise - - -

12 MR. KELLNER: That's correct, Your Honor.

13 CHIEF JUDGE LIPPMAN: Is that essentially
14 your argument?

15 MR. KELLNER: That's very much so, and I
16 think that Judge Yates got it right in terms of the -
17 - - both the standards and the burden of proof, which
18 are really separate issues. The standards that were
19 explained in detail in the Munn (sic) case, they
20 basically gave five standards that - - -

21 CHIEF JUDGE LIPPMAN: What else would they
22 have to do, to create what we've been calling a real
23 dispute? What else - - -

24 MR. KELLNER: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - should they

1 have done in terms of avoiding this rare imposition
2 of a finding of the fraud on the court?

3 MR. KELLNER: Well, as already alluded to
4 in the questioning here, they should have appeared,
5 and they should have given an alternative
6 explanation.

7 CHIEF JUDGE LIPPMAN: Well, he's saying
8 it's not so easy to get them to appear, your
9 adversary.

10 MR. KELLNER: If you look at the record,
11 it's very clear that Judge Yates scheduled the
12 hearings well in advance, so that they would have
13 that opportunity. Judge Yates specifically said, I
14 want witnesses to come in and testify. He
15 specifically said affidavits aren't going to be
16 admissible. And they made no application to Judge
17 Yates or any other efforts to have the witnesses to
18 come in and testify.

19 And of course, with Sonia Cohen, that's
20 very important. Of course, our brief indicates all
21 the factors in which Sonia Cohen did participate in
22 the conspiracy, and that was brought out. But Sonia
23 Cohen wasn't in prison, and she didn't come to
24 testify to refute the claims.

25 CHIEF JUDGE LIPPMAN: So nobody came to

1 testify.

2 JUDGE SMITH: What do you got to prove - -

3 -

4 MR. KELLNER: Pardon?

5 CHIEF JUDGE LIPPMAN: Nobody came to

6 testify.

7 MR. KELLNER: Nobody came, that's correct.

8 JUDGE SMITH: What do you got to - - - what
9 do you got to prove that Sonia Cohen participated in
10 a fraud on the court?

11 MR. KELLNER: The - - - the documentary
12 evidence showed that she lied when she said she
13 hadn't been signing financial documents and - - -

14 JUDGE SMITH: Okay, isn't this - - - but
15 our - - - isn't this - - - isn't this beginning to
16 sound like the lady who ran the red light earlier?
17 You can prove she lied. That's - - - every - - -
18 every - - - in every other case, one side thinks it
19 can prove the other is lying. Is that a fraud on the
20 court?

21 MR. KELLNER: Well, here, it's
22 uncontroverted in terms that she says that I didn't
23 sign documents. She didn't produce the documents in
24 discovery, and this is a discovery dispute.
25 Essentially, we're at the discovery phase here, and

1 we're arguing over fraud in the discovery process.
2 They used all of these lies as ways to conceal the
3 evidence, instead of complying with their discovery
4 obligations.

5 And that's a key distinction here. We
6 weren't trying to get a decision on the merits. We
7 were trying to show that they were fraudulently
8 concealing evidence and frustrating discovery, and -
9 - -

10 JUDGE SMITH: I guess what I'm getting at -
11 - - again Sonia Cohen, sure, your best evidence of a
12 real conspiracy to defraud the court is the sisters'
13 testimony and the document they brought with them.

14 MR. KELLNER: Sure - - -

15 JUDGE SMITH: And that - - - and that
16 doesn't - - -

17 MR. KELLNER: - - - yes, it's a smoking
18 gun.

19 JUDGE SMITH: And that doesn't implicate
20 Sonia Cohen at all, does it?

21 MR. KELLNER: That's true, Your Honor,
22 other than to - - - it has references about denying
23 participation. But - - - but Sonia Cohen in her
24 deposition shows that she was participating in that
25 by making the same lies that were on the script, also

1 showing - - - denying that she had documents where we
2 produced documents with her signature on the
3 documents so that she was not in compliance with the
4 discovery orders.

5 JUDGE PIGOTT: What is - - - isn't 3126
6 enough for you?

7 MR. KELLNER: It is, Your Honor.

8 JUDGE PIGOTT: Okay, so I mean, we - - -

9 MR. KELLNER: Either way.

10 JUDGE PIGOTT: Yeah - - -

11 JUDGE SMITH: I don't know, isn't - - - I
12 mean I - - - he may like 3126 better; I like fraud in
13 the court better, so you got a problem.

14 MR. KELLNER: Well, but I'm saying - - -
15 but, we're - - - but we're arguing both, and we argue
16 that we meet whatever standard, whether it's
17 preponderance, clear and convincing, or summary
18 judgment.

19 JUDGE GRAFFEO: I was just going to say, we
20 could go back to the beginning of the argument.
21 What's the standard that you're asking us to adopt?

22 MR. KELLNER: That standard for dismissal
23 should be the - - -

24 JUDGE GRAFFEO: Sufficient - - -

25 MR. KELLNER: - - - McMunn standard that

1 was set forth in McMunn v. Sloan-Kettering, five
2 factors: intentional, that it was prejudicial, that
3 there was a pattern, that the abusing party did not
4 do anything to correct the fraud on the court, and
5 that there was a likelihood that it would continue in
6 the future.

7 JUDGE PIGOTT: But the feds - - - that's a
8 fed - - -

9 JUDGE GRAFFEO: Does that mean the - - -

10 JUDGE PIGOTT: And I'm sorry.

11 JUDGE GRAFFEO: Can I just ask you, does
12 that mean the - - - you don't agree with the
13 Appellate Division's standard then, preponderance of
14 the evidence?

15 MR. KELLNER: Uh - - -

16 JUDGE GRAFFEO: I know that's a hard
17 question for you - - -

18 MR. KELLNER: The burden of proof - - -

19 JUDGE GRAFFEO: - - - because it means
20 saying that they were wrong.

21 MR. KELLNER: I think Judge Yates got it
22 right, the clear and convincing evidence. The
23 evidence here is clear and convincing. But even if
24 you - - -

25 CHIEF JUDGE LIPPMAN: Preponderance is too

1 low?

2 MR. KELLNER: Look, that's for you to
3 decide. That - - - but - - - but - - -

4 JUDGE READ: But what's your position as
5 between the two?

6 MR. KELLNER: But we met - - - we met not
7 even clear and convincing evidence, we met summary
8 judgment standard. The affidavits, if you actually
9 look at the affidavits they submitted in opposition,
10 are bare and conclusory and they - - -

11 JUDGE PIGOTT: But McMunn, you want to
12 bring - - -

13 MR. KELLNER: - - - don't address the
14 details.

15 JUDGE PIGOTT: You want to bring a federal
16 standard into this - - - into our courts.

17 MR. KELLNER: I'm suggesting that that's a
18 - - - if you're looking for a standard, that's a good
19 model to follow - - -

20 JUDGE SMITH: But if you met - - - if you
21 met summary judgment standards, well, couldn't you
22 have saved us all a lot of trouble by moving for
23 summary judgment?

24 MR. KELLNER: We met summary judgment
25 standards on the issue that they were - - - that they

1 were committing fraud on the court, and that they
2 were not complying with their discovery obligations,
3 and using the fraud on the court - - -

4 JUDGE SMITH: Well, it seems to me, if you
5 can prove the fraud on the court by a summary
6 judgment standard, you can prove liability in the
7 case, right? What's the problem? If all that - - -
8 you've proved all of their defenses are a pack of
9 lies?

10 MR. KELLNER: That - - - this court has
11 determined - - - as it turns out, maybe we could have
12 done that, but we didn't do it, Judge, in this case.
13 The issue here is whether - - - whether they were in
14 compliance with their discovery obligations or
15 whether they were committing an egregious fraud on
16 the court, repeatedly that was used to conceal the
17 evidence of the conspiracy to defraud.

18 JUDGE SMITH: Okay, and those are two
19 independent bases for the - - -

20 MR. KELLNER: Yes, Your Honor.

21 JUDGE SMITH: I - - - when you - - - when
22 you - - - isn't there some danger in saying that
23 every time somebody gives an untruthful answer at a
24 deposition it's a - - - or - - - or give - - - or
25 basically does something dishonest in discovery that

1 that's a 3126 disclosure problem?

2 MR. KELLNER: Well, that's why we're
3 suggesting the McMunn standard that it has to be a
4 pattern and - - - that's not corrected and that shows
5 that there's a likelihood that the fraud is going to
6 continue in - - -

7 JUDGE SMITH: But - - - but - - - but it
8 can be a pattern - - - a pattern - - - a pattern of
9 lying and discovery is enough to get - - - to get a
10 default judgment?

11 MR. KELLNER: It ought it be, Judge.

12 JUDGE PIGOTT: Well, in all - - -

13 CHIEF JUDGE LIPPMAN: It's your argument -
14 - -

15 MR. KELLNER: It's concealing discovery
16 documents.

17 CHIEF JUDGE LIPPMAN: Your argument is we
18 don't need to go there, right?

19 MR. KELLNER: That's right.

20 CHIEF JUDGE LIPPMAN: Your argument is
21 fraud on the court.

22 MR. KELLNER: Of course.

23 JUDGE PIGOTT: And your - - - and your - -
24 - and that McMunn standard that you want to use
25 requires a hearing?

1 MR. KELLNER: Uh - - -

2 JUDGE PIGOTT: Because they're - - -
3 they're arguing over a jur - - - they want a jury
4 trial on that, right?

5 MR. KELLNER: There's no jury trial when
6 you're committing a fraud or a contempt on the court.
7 That's long established - - -

8 JUDGE PIGOTT: Well, that was an
9 interesting thing, because I thought why didn't - - -
10 why didn't someone move for contempt here, rather
11 than this fraud on the court, which just seems like
12 a, you know, a foreign animal to - - -

13 MR. KELLNER: Well, in New York, the - - -
14 the sanction for contempt is - - -

15 JUDGE PIGOTT: Fine and imprisonment.

16 MR. KELLNER: A fine, right, which as - - -

17 JUDGE PIGOTT: You can go to jail.

18 MR. KELLNER: - - - which as Judge Yates
19 indicated, would have been meaningless in this case.

20 CHIEF JUDGE LIPPMAN: Okay, thanks,
21 counsel.

22 Counselor, rebuttal?

23 MR. PEGNO: Two points in my two minutes,
24 Your Honor. First of all, this - - - this issue
25 about the affidavits that were submitted to the

1 Appellate Division, this is - - - this is something
2 Justice Yates got wrong, and this is something the
3 Appellate Division got wrong.

4 There were a number of different statements
5 in those affidavits. One was about a payment of
6 attorneys' fees, and the other was about the fact
7 that their then-lawyer had never contacted them and
8 told them they had to comply with discovery.

9 The Appellate Division relied on the latter
10 statement in reversing the - - - the default. The
11 point about the payment of attorneys' fees, that's
12 the point in their affidavits that the - - - that the
13 Habib sisters said was - - - was not true. They - -
14 - they never recanted on the other - - - the other
15 part that was in their affidavit.

16 So it is absolutely false to say that the
17 prior default was vacated based on perjured
18 affidavits. It's - - - that's just not the case.
19 And in any event the other witnesses still contend
20 that the statements about attorneys' fees were
21 correct.

22 Now, on 3126, after that default was
23 vacated, we complied with discovery to beat the band.
24 Okay? We - - - these witnesses were to testify - - -

25 CHIEF JUDGE LIPPMAN: Does 3126 matter - -

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MR. PEGNO: 3126 - - -

CHIEF JUDGE LIPPMAN: - - - if you do it -
- - if there's a fraud on the court?

MR. PEGNO: 3126 - - - 3126 should not
provide the framework for a decision.

CHIEF JUDGE LIPPMAN: If there's a fraud on
the court, does it matter?

MR. PEGNO: Correct.

CHIEF JUDGE LIPPMAN: Does 3126 mater?

MR. PEGNO: Well, it doesn't apply, if
that's what Your Honor means.

CHIEF JUDGE LIPPMAN: That's what I mean.

MR. PEGNO: Yes, it does not apply.

CHIEF JUDGE LIPPMAN: Okay. Go ahead; I'm
sorry, continue.

MR. PEGNO: And - - - and there is no basis
for a default based on discovery violations. These
people came and testified for sixteen days, 2,200
pages of deposition testimony. They produced
hundreds of thousands of doc - - - of deposition
documents.

JUDGE SMITH: And your position is, even if
there's not a truthful word in those 2,200 pages,
that's not a 3126?

1 MR. PEGNO: That's not 3126, Your Honor,
2 correct.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. PEGNO: Thank you.

5 CHIEF JUDGE LIPPMAN: Thanks. Thank you
6 both; appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of CDR Créances S.A.S. v. Maurice Cohen; CDR Créances S.A.S. v. Leon Cohen, No. 81, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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