

**Trepanier v Larsson**

2007 NY Slip Op 34204(U)

December 17, 2007

Supreme Court, New York County

Docket Number: 0118326/2004

Judge: Karla Moskowitz

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. KARLA MOSKOWITZ PART 03**  
**Justice**

-----X  
**JOHN TREPANIER, CHRISTER'S L.P., and**  
**KNODEL, INC,**

**Plaintiffs,**

**-against-**

**CHRISTER LARSSON,**

**Defendant.**

**INDEX NO. 118326/2004**

**MOTION DATE \_\_\_\_\_**

**MOTION SEQ. NO. 001**

**MOTION CAL. NO. \_\_\_\_\_**

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JAN 02 2008

**NEW YORK  
COUNTY CLERK'S OFFICE**

**Cross-Motion:**  **Yes**  **No**

Upon the foregoing papers, It is

**ORDERED that this motion is decided in accordance with the accompanying Decision and Order.**

**Dated: December 17, 2007**



**KARLA MOSKOWITZ J.S.C.**

**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 3

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JOHN TREPANIER, CHRISTER'S L.P., and  
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Plaintiffs,

-against-

**DECISION and ORDER**

Index No. 118326/2004

CHRISTER LARSSON,

Defendant.

-----X

**MOSKOWITZ, J.:**

This action seeks to force defendant to contribute to the tax liability that two corporations failed to pay and for which the plaintiff John Trepanier ("Trepanier") is now responsible. Trepanier seek a declaration: (1) that defendant Christer Larsson (Larsson) is a responsible person pursuant to § 1133 of the New York State Sales Tax Law; (2) that Trepanier has paid more than his pro rata share of the sales tax, interest and penalties; and (3) that Larson is liable to Trepanier for any sales tax, interest and penalties that Trepanier paid in excess of his pro rata share. Trepanier has also sued for common law contribution and unjust enrichment.

By this motion, (seq. no 1), defendant Larsson moves, pursuant to CPLR 3212, for dismissal. Although Trepanier has not cross-moved, he has requested in his memorandum of law in opposition that the court search the record and hold the defendant liable. For the following reasons, the court denies defendant's motion and denies Trepanier's request.

**BACKGROUND**

The following facts are primarily from the complaint dated April 27, 2005 (the

Complaint) but also derive from the parties respective 19-a statements, affidavits and exhibits on this motion. Trepanier and defendant each owned 50% of the shares of stock of Christer's Inc. (Christer's) a corporation engaged in the food service and restaurant business. Christer's was the general partner of plaintiff Christer's L.P. and also held a 67.5% interest in Christer's L.P. On January 28, 2003, Christer's filed for bankruptcy protection. Knodel Inc. (Knodel) was another corporation involved in a food service business. Trepanier and defendant each had a 37% stake in Knodel. Trepanier's wife owned the remaining shares. Christer's also employed defendant as President and Executive Chef.

At some point relations between the defendant and Trepanier soured. Defendant claims he resigned on April 1, 2001, although he does not reveal from which company. Trepanier claims that defendant merely resigned from his position as Executive Chef at Christer's and that Larsson continued to receive a salary from Christer's until July 2001. (Affidavit of John Trepanier, sworn to September 26, 2007, [Trepanier Aff.] ¶ 22). Defendant admits he continued working and signing checks until July 2001. (Reply Affidavit of Christer Larsson, sworn to October 25, 2007 [Larsson Reply Aff.] at ¶ 5). On August 15, 2001, Trepanier sent defendant a letter claiming that defendant's operation of a competing business "precludes us from operating with you and Debra<sup>1</sup> as partners. Therefore you have been deleted as a signatory from each [Christer's and Knodel's] of the operating accounts." (Affidavit of Christer Larsson, [Larsson Aff.] sworn to April 6, 2007 Ex. 1). Trepanier claims that the reason he had to delete Larsson as signatory was not only because Larsson had set up a competing business, but also because Larsson had depleted the operating accounts of Knodel's and Christer's and was failing to

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<sup>1</sup> "Debra" is defendant's wife. She is not a party to this action.

perform his duties as a Christer's employee. (Trepanier Aff. ¶ 20).

Larsson continued to own his shares in both companies after August 15, 2001. Although the parties did discuss the sale of Larsson's shares, they were unable to agree on a price for them.

Immediately thereafter, beginning with the tax period September 1, 2001 through November 30, 2001, Christer's stopped paying sales tax to New York State. Trepanier claims that Christer's was unable to pay these taxes because Larsson's prior actions had "left Christer's with no operating capital and with over \$150,000 in debt. (Trepanier Aff. at ¶ 26).

Apparently, Knodel's also had difficulty paying sales tax. In June 2002 there was a meeting of Knodel's board of directors that Larsson attended in which he moved to have Knodel pay its sales tax. (Trepanier Aff. ¶ 27; Larsson Reply Aff. ¶ 14). However, Trepanier along with his wife, Barbara Chase, voted not to pay the sales tax because Knodel's owed large sums to third parties, such as the landlord. (Trepanier Aff. ¶ 27).

In January 2002, the New York State Department of Taxation and Finance (the "Department of Taxation") began to demand payment of the sales tax for both Christer's L.P. and Knodel. Trepanier claims that the "accrual of liability for the unpaid sales taxes began on June 1, 2001 for Knodel and began on September 1, 2001 for Christer's L.P." (Trepanier Aff. ¶ 22). When these taxes went unpaid, the Department of Taxation came after Trepanier individually. (Trepanier Aff. ¶ 18-19). Between March 5, 2004 and November 2004, Trepanier paid at least \$44,931.98 towards unpaid sales tax, interest and penalties, presumably for both Knodel and Christer's, pursuant to an income execution. (Trepanier Aff. ¶ 20). Although the Department of Taxation initially came after Larsson as well to satisfy the tax obligations, it withdrew the petition and issued a notice that the judgment was satisfied. (Larsson Aff. Exs. 4 and 5).

Trepanier claims that Larsson obtained his satisfaction notice under false pretenses by claiming that he was no longer involved in the business when he really was. (Trepanier Aff. ¶ 29-30).

According to Trepanier, there remains an unpaid balance of \$153,587.94 (Trepanier Aff. ¶ 35). Trepanier claims that Larsson is responsible, on a pro rata basis, according to his shareholder interest, for a portion of what Trepanier has paid and for what he considers to be Larsson's portion of the outstanding balance.

## DISCUSSION

Larsson has moved to dismiss, claiming that, as the Department of Taxation has already determined, he is not a "responsible person" under the tax law because he had no control over the business after August 2001. Trepanier argues that Larsson is a "responsible person" and that Larsson lied to the Department of Taxation to avoid paying his taxes. At oral argument on the motion on November 15, 2007, I dismissed the claims against Larsson to the extent that Christer's L.P. and Knodel, Inc were asserting them because, as Trepanier admitted at oral argument, these entities did not have a claim (See Transcript of Oral Argument, dated November 15, 2007, pg. 11). I took the rest of the motion on submission.

### I. Whether or Not Larsson Is a "Responsible Person" under the Tax Law Is Largely Irrelevant

Trepanier is not the Department of Taxation. Therefore, whether or not Larsson is a "responsible person" obligated to pay taxes to New York State is irrelevant. Also, any determination the taxing authorities may have made about defendant's responsibility for the taxes does not bind Trepanier who was not a party to those proceedings. (See, e.g., *Fromer et. al. v. Board of Assessors*, 40 AD3d 637, 648 [2d Dep't 2007])

## II. Unjust Enrichment

A successful claim for unjust enrichment involves: (1) that defendant was enriched; (2) at plaintiff's expense and (3) it is against equity and good conscience to permit defendant to retain that for which plaintiff is seeking recovery. (*See Lake Minnewaska Mountain Houses, Inc. v. Rekis*, 259 AD2d 797, 798 [3d Dep't 1999]). In general, courts examine: (1) whether defendant has received a benefit under mistake of fact or law, (2) if the benefit still remains with the defendant; (3) if the defendant has changed its position and (4) whether the defendant's conduct was tortious or fraudulent. (*Paramount Film Distrib. Corp v. State of New York*, 30 NY2d 415, 421 [1972]).

Depending upon the circumstances, another's payment of real estate taxes may unjustly enrich a party because it spares that party "a degree of expense or loss that he otherwise would have incurred." (*Id.*; *see also Midwest First Financial Limited Partnership III v. First American Title Insurance Company of New York*, 14 AD3d 497 [2d Dep't 2005]). However, where the plaintiff's sole motivation in making tax payments is to protect his or her own interests, there is no unjust enrichment. (*See Clark v. Daby*, 300 AD2d 732, 733 [3d Dep't 2002] [any benefit to defendant was "purely incidental" where plaintiff voluntarily paid the taxes to redeem the property from an impending tax sale thereby protecting its interests in an underlying lawsuit]).

The extent of the business relationship between the parties is currently an open question. If the parties were still partners or in some business relationship, such that the defendant was responsible for the taxes, Trepanier may have an equitable claim for unjust enrichment. In this regard, whether or not Larsson is a responsible person would enter into the analysis. Here, the record raises more questions than it answers about the relationship between the Trepanier and

Larsson and Larsson's role in the companies after August 2001. Although plaintiff Trepanier appears to have broken off any joint venture, partnership or other relationship in August of 2001, Larsson claims he resigned before that time. However, the extent of his resignation is unclear. Did he mean only to resign as executive Chef but keep an ownership interest in the corporations? What level of control did he have? He appeared at least at one Knodel's board meeting. Therefore, when Larsson's responsibilities ended with respect to these entities is an open issue at this juncture in the litigation.

However, the court need not reach the question of Larsson's responsibility under the tax laws. Trepanier alleges that Larsson siphoned off money from the companies for his personal gain rendering the companies unable to pay their tax liability. Larsson does little to refute these allegations and indeed admits that he made some checks out to "cash." (See Larsson Aff. at ¶ 20). If defendant did indeed strip the corporations of their operating funds rendering them unable to pay for expenses, including taxes, this may give rise to a claim for unjust enrichment by other owners/partners for the money that defendant wrongfully retained.

### III. Common Law Contribution

Because of the issues of fact apparent from the record on this motion, the court declines to dismiss the claim for common law contribution at this time. "[W]here one joint obligor pays more than his proportionate share of the common liability, he is entitled to contribution from other joint obligors." (*Falb v. Frankel* 73 AD2d 930; see also *First American Bank of New York*, 155 Misc. 2d 143, 144 [N.Y. Cty. 1992] [bank's release of guarantor for corporate debt did not also release guarantor from liability for contribution]).

IV. Declaratory Relief

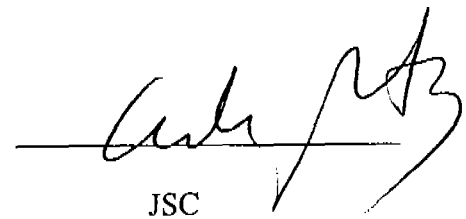
Because of the open issues, the court cannot at this time dismiss any portion of the request for declaratory relief.

Accordingly, it is

ORDERED THAT the motion of defendant Christer Larsson, pursuant to CPLR 3212, to dismiss is denied; and it is further

ORDERED THAT the parties are directed to attend a preliminary conference on February 26, 2007 at ten a.m. in the courtroom, room 248, 60 Centre Street.

Dated: December 17, 2007

  
JSC

**FILED**  
JAN 02 2008  
NEW YORK  
COUNTY CLERK'S OFFICE