

<b>CDR Créances S.A.S. v Cohen</b>
2008 NY Slip Op 31327(U)
May 7, 2008
Supreme Court, New York County
Docket Number: 0109565/2003
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

CDR CRÉANCES S.A.S as Successor to  
Société de Banque Occidentale,

INDEX NO. 108565 /2003

Plaintiff,

MOTION DATE 4/03/08

- v -

MAURICE COHEN, SUMMERSON INTERNATIONAL  
ESTABLISHMENT, BLUE OCEAN FINANCE, LTD.,  
WORLD BUSINESS CENTER, INC., and  
IDERVAL HOLDING, LTD.,

MOTION SEQ. NO. 009

Defendants.

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

Cross-Motion:  Yes  No

This motion is consolidated with motion sequence 010 and is decided in the accompanying memorandum decision.

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Dated: 5/9/08

[Signature]  
WALTER B. TOLUB, J.S.C.

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MIAE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
CDR CRÉANCES S.A.S., as Successor to  
Société de Banque Occidentale

Plaintiff,

Index No. 109565/03  
Mtn Seq. 009, 010

-against-

MAURICE COHEN, SUMMERSON INTERNATIONAL  
ESTABLISHMENT, BLUE OCEAN FINANCE, LTD.,  
WORLD BUSINESS CENTER, INC., and  
IDERVAL HOLDING, LTD.,

Defendants.<sup>1</sup>

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NEW YORK

WALTER B. TOLUB, J.:

Motion sequence 009 and 010, are consolidated and resolved  
in the accompanying memorandum decision.

Background

This rather complicated action arises out of the alleged  
breach of two Pledge Agreements ("the Pledge Agreements") issued  
in 1991 and now held by plaintiff, CDR Créances, S.A.S., as  
Successor to Société de Banque Occidentale ("CDR"). According to  
the complaint, in 1991, CDR's predecessor loaned over \$92 million  
dollars ("the loan") to Euro-American Lodging Corporation

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<sup>1</sup>The caption in this action includes only the remaining  
defendants. The causes of action asserted as against defendants  
EALC, Gama Lodging, LLC, and Simon Elias were dismissed by  
decision dated February 16, 2005 (See, Motion Sequence 001,  
2/16/2005 decision (James, J.)). The action was discontinued as  
against defendants Megainvest Trust Reg., Ospin International,  
Inc., and Atlantic Bank of New York by decision and order dated  
September 25, 2007 (see, decision, Motion Sequence 006, 9/25/2007  
decision (James, J.)).

("EALC") and its shareholders, Summerson International Establishment, a Liechtenstein trust, ("Summerson")<sup>2</sup> and Summersun International et Cie ("Summersun").<sup>3</sup> The monies were loaned for the purpose of acquiring property at 135 West 52<sup>nd</sup> Street in Manhattan ("the Flatotel"). All three of the companies responsible for repayment of the loan were controlled by defendant Maurice Cohen and his son.

As part of the consideration for the loan, CDR received a security interest in EALC's 1000 shares of authorized and issued stock, all of which was owned by Summerson and Summersun.<sup>4</sup> Pursuant to the terms of the Pledge Agreements, EALC's shares were not to be increased, sold, merged or consolidated (See Notice of Motion, Affirmation in Opposition (sequence 010), Ex. 3, *et seq.*). Plaintiff claims that following the execution of the Pledge Agreements, defendant Maurice Cohen orchestrated the unauthorized transfer and eventual sale of the original 1000 shares of EALC stock, and the issuance and eventual transfer of 9000 additional shares of EALC stock, thereby breaching the terms

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<sup>2</sup> At the time that the Pledge Agreement was made, Summerson was operating as Flatotel International Establishment, a Liechtenstein Trust.

<sup>3</sup> At the time of the Pledge Agreement, Summersun was operating as S.N.C. M. Coenson International et Cie., a French entity.

<sup>4</sup> Summerson and Summersun each held 500 shares of EALC's stock.

of the Pledge Agreements, and effectively defeating CDR's security interest. Plaintiff contends that to this date, despite orders from courts<sup>5</sup> located both in the United States and France, the loan remains largely unpaid.<sup>6</sup>

The Apparent Divestiture of the Security Interest

The chain of events surrounding the transfer of the EALC stock shares is incredibly complex. Briefly stated, plaintiff claims that in 1996, without CDR's notice and approval, Maurice Cohen caused EALC to amend its certificate of incorporation to create 9,000 additional shares of EALC stock, 900 of which were immediately issued to defendant, and Cohen company, Iderval Holding, Ltd. ("Iderval").<sup>7</sup> The remaining 8,100 shares were transferred to Iderval at some point thereafter. Plaintiff claims that there are no records indicating that EALC was ever paid for issuing any of the newly created shares (*id.*, Exhibits 4-7).

While this stock transfer was taking place, and again, without notice to CDR, Summersun, the French entity, transferred its 500 shares of EALC to Summerson, the Liechtenstein trust, in

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<sup>5</sup> CDR initially obtained judgment against EALC from the Paris Court of Appeal in 2003. This judgment has since been recognized in New York.

<sup>6</sup> As of July, 2007, the value of the defaulted 1991 loan was more than \$226 million dollars. Plaintiff claims that only \$105 million of this figure was paid. Defendants claim that the entire figure was paid in full. There are no documents which have been presented to this court substantiating either claim.

<sup>7</sup> Iderval is a British Virgin Islands entity.

derogation of the terms of the Pledge Agreement (id., Ex. 10). Again, there is no record of funds being paid by Summerson for the shares of EALC stock (id.). Soon after the transfer, the Tribunal de Commerce of Antibes, France, declared Summersun bankrupt (id., Ex. 11).

Following the Summersun declaration of bankruptcy, Summerson and Iderval, in 1999, issued options to Blue Ocean Finance Ltd. ("Blue Ocean").<sup>8</sup> The options allowed Blue Ocean, also a Cohen company, to acquire all of EALC's stock, which now included the 1000 pledged shares held by Summerson, and the 9000 additional shares issued to Iderval. The transfer and acquisition was accomplished without CDR's knowledge or permission (id., Ex. 12). A year later, Summerson, Iderval, and Blue Ocean transferred ownership and control of EALC and Macson Express USA, Inc. ("Macson"), to Ospin International, Inc. ("Ospin").<sup>9</sup> In exchange, Ospin wired \$33 million to Blue Ocean's Swiss bank account (id., Ex. 16, 17). Summerson and Iderval then assigned their right to receive \$5.6 million dollars from the transfer of ownership of EALC and Macson to yet another Cohen company, World Business Center, Inc., ("WBC") (id., Ex. 17). In 2002, EALC went out of existence, and Summerson, having failed to pay its taxes,

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<sup>8</sup> Blue Ocean is a Panamanian corporation.

<sup>9</sup> Ospin is a company incorporated under the laws of the Bahamas.

was terminated by Liechtenstein's tax authorities and stricken from the Liechtenstein Public Register (id., Ex. 12).

This action was commenced in 2003, and is comprised of five causes of action, most of which sound in tort. By motion sequence 010, defendant Maurice Cohen moves to dismiss the complaint pursuant to CPLR 3211(a)(7). By motion sequence 009, defendants Maurice Cohen and non-parties Sonia Cohen and Leon Cohen move for a protective order to suspend their now court-ordered depositions in this action. Inasmuch as the motion to dismiss affects the motion for the protective order, this court begins with its analysis and discussion of Motion Sequence 010.

#### Discussion

As with any motion to dismiss, the only inquiry made by the court is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiffs may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2007] §36.01 et seq.).

In support of his motion to dismiss, Maurice Cohen advances three primary arguments: (1) that he was not a signatory to the Pledge Agreements, and therefore cannot be held liable for any breach of contract claims; (2) that plaintiff suffered no damages because the debt was satisfied and the any claims it may have had

were transferred in July of 2007; and (3) that plaintiff's lack of damages nullifies the claims for breach of contract, fraud, and tortious interference.

As a preliminary matter, the parties concede that plaintiff transferred its rights and causes of action arising out of the underlying loan agreements to 135 West 52<sup>nd</sup> Street LLC (see, Reply Affidavit, Motion Sequence 010, Exhibit A). However, contrary to the arguments advanced by Maurice Cohen, this transfer did not divest plaintiff of its right to pursue claims in tort as against Maurice Cohen. Absent an explicit assignment of a claim for fraud, the cause of action, belongs to the assignor (see, Fox v. Hirshfeld, 157 AD 364 [1<sup>st</sup> Dept 1913]; Nearpark Realty Corp v. City Investing Co., 112 NYS2d 816, 817 (Sup. CT. NY Co. 1952); Banque Arabe et Internationale D'Investissement v Maryland National Bank, 57 F.3d 146, 151 [2<sup>nd</sup> Cir. 1995]). Since the transfer to 135 West 52<sup>nd</sup> Street LLC is devoid of explicit language transferring CDR's fraud claims against Maurice Cohen (see, Notice of Motion, Sequence 010, Exhibit B), CDR may continue to advance those claims.<sup>10</sup>

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<sup>10</sup> The court notes that not only is the transfer devoid of language transferring CDR's fraud claims, the EALC Disclosure Statement for Plan of Reorganization explicitly recognizes CDR's right to pursue its fraud claims as against the Cohen defendants (See, Notice of Motion, Sequence 010, Exhibit 23, p.9 and 10 ("C (iv). CDR would abandon pending litigation against the Debtor, Mascon and various of their affiliates and principals, but would continue its pending action against Maurice Cohen").

The balance of the arguments advanced by Maurice Cohen in support of the motion to dismiss are unavailing. Based on the oral arguments before this court on April 3, 2008, it is this court's determination that at present, the issue of whether CDR was or was not paid in full remains a question of unresolved fact. As such, there remains an open question as to whether plaintiff suffered damages, and to what extent. Lastly, Maurice Cohen's position as to his own liability is at best, misguided. Although Maurice Cohen may not have been a signatory to the Pledge Agreements at issue, based upon the complex relationships of the entities involved in this action, and the decisions issued by Justice James in this, and the related 2006 action (see, CDR Créances S.A.S. v Leon Cohen, Sup. CT. NY Co. Index no. 600448/2006), it is this court's opinion that with further discovery plaintiff may be able to succeed in piercing the corporate veil (see, Morris v. State Department of Taxation and Finance, 82 NY2d 135, 141 [1993]). As such, the motion to dismiss the complaint as to Maurice Cohen is denied.

The motion seeking a protective order suspending the depositions of Maurice Cohen and non-parties Sonia Cohen and Leon Cohen are also denied. This action is now roughly five years old and depositions of the Cohens have been evaded without sound reason for far too long. As such, in the absence of a mandate of


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the Appellate Division, the deposition of Maurice Cohen shall take place within 30 days of service of a copy of this decision with notice of entry. In the event that it is determined that Maurice Cohen is too ill to travel to New York, then his attorneys shall arrange to have Mr. Cohen deposed wherever he is presently residing. Furthermore, if plaintiffs are required to travel to another location to complete Mr. Cohen's deposition, then counsel for defendants shall also arrange to have Leon Cohen and Sonia Cohen appear at the same location, on consecutive days, to complete their depositions so as to minimize the stress on the parties, and on counsel.

Counsel for the parties shall appear for a Compliance Conference in this matter on June 11, 2008 at 11:00 a.m. in IA Part 15, Room 335, 60 Centre Street, New York, New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: *5/10/08*

  
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HON. WALTER B. TOLUB, J.S.C.

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