

CDR Creances S.A.S v Cohen
2008 NY Slip Op 32352(U)
August 7, 2008
Supreme Court, New York County
Docket Number: 0600448/2006
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

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

INDEX NO. 600448 /2006

Plaintiff,

MOTION DATE 5/09/08

- v -

LEON COHEN a/k/a LEON LEVY a/k/a LEON LEVY
COHEN a/k/a LEON COHEN LEVY a/k/a LEON
COHEN-LEVY a/k/a LEVY COHEN a/k/a LEVY LEO
COHEN a/k/a LEO COHEN LEVY a/k/a LEON COMEN;
MAURICE COHEN a/k/a MAURICIO ASSOR a/k/a
MAURICIO COHEN ASSOR a/k/a MAURICE ASSOR;
SONIA COHEN; IDERVAL HOLDING, LTD; BLUE
OCEAN FINANCE, LTD.; WORLD BUSINESS
CENTER, INC.; ROBERT MARABOEUF; EDOUARD
SONNENSCHIN; ROBERT HARRISON; ALLEGRIA
ACHOUR AICH; MICHELLE SENAT; CLARA LOPEZ;
JUDI YOUMANS; PATRICIA HABIB PETETIN;
MARTINE GALES; JOELLE HABIB; and
SUMMERSON INTERNATIONAL ESTABLISHMENT,
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

MOTION SEQ. NO. 013

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 _____

Cross-Motion: Yes No

FILED
AUG 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequences 013, 014, 015, 016 and 017 are consolidated and resolved in the accompanying memorandum decision.

Dated: 8/1/2008

Walter B. Tolub
WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

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

INDEX NO. 600448 /2006

Plaintiff,

- v -

MOTION DATE 6/27/08

LEON COHEN a/k/a LEON LEVY a/k/a LEON LEVY
COHEN a/k/a LEON COHEN LEVY a/k/a LEON
COHEN-LEVY a/k/a LEVY COHEN a/k/a LEVY LEO
COHEN a/k/a LEO COHEN LEVY a/k/a LEON COMEN;
MAURICE COHEN a/k/a MAURICIO ASSOR a/k/a
MAURICIO COHEN ASSOR a/k/a MAURICE ASSOR;
SONIA COHEN; IDERVAL HOLDING, LTD; BLUE
OCEAN FINANCE, LTD.; WORLD BUSINESS
CENTER, INC.; ROBERT MARABOEUF; EDOUARD
SONNENSCHNEIN; ROBERT HARRISON; ALLEGRIA
ACHOUR AICH; MICHELLE SENAT; CLARA LOPEZ;
JUDI YOUMANS; PATRICIA HABIB PETETIN;
MARTINE GALES; JOELLE HABIB; and
SUMMERSON INTERNATIONAL ESTABLISHMENT,
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

MOTION SEQ. NO. 014

Defendants.

MOTION CAL. NO. _____

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

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

Motion Sequences 013, 014, 015, 016 and 017 are consolidated and resolved in the memorandum decision accompanying the grey sheet for Motion Sequence 013.

Dated: 8/7/2008

WALTER B. TOLUB, 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 — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

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

INDEX NO. 600448 /2006

Plaintiff,

- v -

MOTION DATE 5/09/08

LEON COHEN a/k/a LEON LEVY a/k/a LEON LEVY
COHEN a/k/a LEON COHEN LEVY a/k/a LEON
COHEN-LEVY a/k/a LEVY COHEN a/k/a LEVY LEO
COHEN a/k/a LEO COHEN LEVY a/k/a LEON COMEN;
MAURICE COHEN a/k/a MAURICIO ASSOR a/k/a
MAURICIO COHEN ASSOR a/k/a MAURICE ASSOR;
SONIA COHEN; IDERVAL HOLDING, LTD; BLUE
OCEAN FINANCE, LTD.; WORLD BUSINESS
CENTER, INC.; ROBERT MARABOEUF; EDOUARD
SONNENSCHIN; ROBERT HARRISON; ALLEGRIA
ACHOUR AICH; MICHELLE SENAT; CLARA LOPEZ;
JUDI YOUMANS; PATRICIA HABIB PETETIN;
MARTINE GALES; JOELLE HABIB; and
SUMMERSON INTERNATIONAL ESTABLISHMENT,
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

MOTION SEQ. NO. 015

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

Motion Sequences 013, 014, 015, 016 and 017 are consolidated and resolved in the memorandum decision accompanying the grey sheet for Motion Sequence 013.

Dated: 8/2/2008

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

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

INDEX NO. 600448 /2006

Plaintiff,

- v -

MOTION DATE 6/06/08

LEON COHEN a/k/a LEON LEVY a/k/a LEON LEVY
COHEN a/k/a LEON COHEN LEVY a/k/a LEON
COHEN-LEVY a/k/a LEVY COHEN a/k/a LEVY LEO
COHEN a/k/a LEO COHEN LEVY a/k/a LEON COMEN;
MAURICE COHEN a/k/a MAURICIO ASSOR a/k/a
MAURICIO COHEN ASSOR a/k/a MAURICE ASSOR;
SONIA COHEN; IDERVAL HOLDING, LTD; BLUE
OCEAN FINANCE, LTD.; WORLD BUSINESS
CENTER, INC.; ROBERT MARABOEUF; EDOUARD
SONNENSCHNAIN; ROBERT HARRISON; ALLEGRIA
ACHOUR AICH; MICHELLE SENAT; CLARA LOPEZ;
JUDI YOUMANS; PATRICIA HABIB PETETIN;
MARTINE GALES; JOELLE HABIB; and
SUMMERSON INTERNATIONAL ESTABLISHMENT,
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

MOTION SEQ. NO. 016

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

Motion Sequences 013, 014, 015, 016 and 017 are consolidated and resolved in the memorandum decision accompanying the grey sheet for Motion Sequence 013.

Dated: 8/7/2008

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

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

INDEX NO. 600448 /2006

Plaintiff,

- v -

MOTION DATE 6/06/08

LEON COHEN a/k/a LEON LEVY a/k/a LEON LEVY
COHEN a/k/a LEON COHEN LEVY a/k/a LEON
COHEN-LEVY a/k/a LEVY COHEN a/k/a LEVY LEO
COHEN a/k/a LEO COHEN LEVY a/k/a LEON COMEN;
MAURICE COHEN a/k/a MAURICIO ASSOR a/k/a
MAURICIO COHEN ASSOR a/k/a MAURICE ASSOR;
SONIA COHEN; IDERVAL HOLDING, LTD; BLUE
OCEAN FINANCE, LTD.; WORLD BUSINESS
CENTER, INC.; ROBERT MARABOEUF; EDOUARD
SONNENSCHNEIN; ROBERT HARRISON; ALLEGRIA
ACHOUR AICH; MICHELLE SENAT; CLARA LOPEZ;
JUDI YOUMANS; PATRICIA HABIB PETETIN;
MARTINE GALES; JOELLE HABIB; and
SUMMERSON INTERNATIONAL ESTABLISHMENT,
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

MOTION SEQ. NO. 017

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

Motion Sequences 013, 014, 015, 016 and 017 are consolidated and resolved in the memorandum decision accompanying the grey sheet for Motion Sequence 013.

Dated: 8/7/2008

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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. 109565 /2003

Plaintiff,

MOTION DATE 5/09/08

- v -

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

MOTION SEQ. NO. 012

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

Motion Sequence 012 and 013 are consolidated and resolved in the accompanying memorandum decision.

Dated: 5/7/2008

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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. 109565 /2003

Plaintiff,

- v -

MOTION DATE 6/06/08

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

MOTION SEQ. NO. 013

Defendants.

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Motion Sequences 012 and 013 are consolidated and resolved in the memorandum decision attached to the grey sheet decision for Motion Sequence 012.

Dated: 8/1/2008

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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. 012, 013**

-against-

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

Defendants.

-----x

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

Plaintiff,

**Index No. 600448/06
Mtn Seq. 013, 014,
015, 016, 017**

-against-

LEON COHEN a/k/a LEON LEVY a/k/a LEON
LEVY COHEN a/k/a LEON COHEN LEVY a/k/a
LEON COHEN-LEVY a/k/a LEVY COHEN a/k/a
LEVY LEO COHEN a/k/a LEO COHEN LEVY a/k/a
LEON COMEN; MAURICE COHEN a/k/a MAURICIO
ASSOR a/k/a MAURICIO COHEN ASSOR a/k/a
MAURICE ASSOR; SONIA COHEN; IDERVAL
HOLDING, LTD.; BLUE OCEAN FINANCE, LTD.;
WORLD BUSINESS CENTER, INC., ROBERT
MARABOEUF; EDOUARD SONNENSCHNEIN; ROBERT
HARRISON; ALLEGRIA ACHOUR AICH; MICHELLE
SENAT; CLARA LOPEZ; JUDI YOUMANS; PATRICIA
HABIB PETETIN; MARTINE GALES; JOELLE HABIB
and SUMMERSON INTERNATIONAL ESTABLISHMENT
f/k/a FLATOTEL INTERNATIONAL ESTABLISHMENT,

Defendants.

-----x

WALTER B. TOLUB, J.:

Inasmuch as these two actions are inextricably intertwined,
the following memorandum decision consolidates and resolves

FILED

AUG 13 2008

**NEW YORK
COUNTY CLERK'S OFFICE**

motion sequences 012 and 013 in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Maurice Cohen,¹ et al. (Index No. 109565/03) (the "2003 action") as well as motion sequences 013, 014, 015, 016 and 017 in the action captioned CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) ("the 2006 Action").

Background

These two actions arise in connection with over a decade's worth of extremely complicated business transactions and two allegedly breached Pledge Agreements (the "Pledge Agreements"). These Pledge Agreements were issued in 1991 and are presently held by plaintiff, CDR Créances, S.A.S., as Successor to Société de Banque Occidentale ("CDR").

Although there are vast differences in the relief sought between the two actions,² the facts giving rise to both are

¹For simplicity, the court continues to include only those defendants remaining in the action commenced under Index No. 109565/03. A brief history of those defendants let out of this action can be found in this court's decision for motion sequence 009 and 010.

² The complaint in the 2003 action asserts five causes of action primarily sounding in tort. By contrast, the complaint in the 2006 action asserts thirty-eight causes of action over 522 paragraphs sounding primarily in breach of fiduciary duty, assertions of violations of multiple sections of the New York Uniform Fraudulent Conveyance Act, fraud, tortious interference of contract, replevin, unjust enrichment, constructive trust, conversion and misappropriation. Plaintiff additionally seeks a declaration that the Elias Entities/Atlantic Bank holds EALC

stock shares(see, Motion Sequence 010 Affirmation in Opposition, Ex. 3, *et seq.*). Both complaints allege 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 of the Pledge Agreements, and effectively defeating CDR's security interest. Notwithstanding orders of courts located both in France and the United States,⁶ the loan, which according to plaintiff is now valued at more than one quarter of a billion dollars,⁷ remains largely unpaid.

As this court noted in the 2003 Action, the chain of events surrounding the transfer of the EALC shares is incredibly complex.⁸ According to plaintiff, 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.

⁶ CDR initially obtained judgment against EALC from the Paris Court of Appeal in 2003. This judgment has since been recognized in New York.

⁷ This value comes from the plaintiff's papers submitted in Motion Sequence 010 and 011 for the 2003 action. Again, the court emphasizes that although defendants claim the entire figure was paid in full, no documents have been presented to this court substantiating this claim.

⁸ So complex was this transaction that in the interest of clarity and brevity, the facts set forth in this decision are derived from this court's decision issued in Motion sequence 009 and 010 (Index No. 109565/03) where complete references and citations may be found.

900 of the newly created stock shares were immediately issued to defendant Iderval Holding, Ltd. ("Iderval"), a Cohen company incorporated in the British Virgin Islands. Iderval later acquired the remaining 8,100 newly created shares. According to plaintiff, there are no records indicating that EALC was ever paid for this stock issuance (see, Motion Sequence 010 Affirmation in Opposition, Ex. 4-7).

Contemporaneously with this transaction, and again, without notice to CDR, Summersun, the French entity, transferred its 500 shares of EALC to Summerson, the Liechtenstein trust (id., Ex. 10). Again, there is no record of funds being paid by Summerson for the shares of EALC stock, the transfer of which was in derogation of the terms of the Pledge Agreements (id.). Shortly thereafter, Summersun was declared bankrupt by the Tribunal de Commerce of Antibes, France (id., Ex. 11).

Following Summersun's declaration of bankruptcy, Summerson and Iderval, in 1999, issued options to a Panamanian corporation and Cohen Company, Blue Ocean Finance Ltd. ("Blue Ocean"). The newly created options allowed Blue Ocean, without CDR's authorization or knowledge, to acquire all of EALC's stock, now comprised of the 1000 pledged shares held by Summerson and the additional unauthorized 9000 shares held by Iderval (id., Ex. 12). Roughly one year later, Summerson, Iderval, and Blue Ocean transferred ownership and control of EALC and Macson Express USA,

Inc. ("Macson"), to Ospin International, Inc. ("Ospin") a company incorporated under the laws of the Bahamas. Ospin, in exchange, promptly wired \$33 million dollars into Blue Ocean's Swiss bank account (id., Ex. 16, 17). Summerson and Iderval, which were to receive \$5.6 million dollars from the unauthorized transfer, immediately assigned their rights to yet another Cohen company, World Business Center, Inc., ("World Business") (id., Ex. 17). EALC ceased existence shortly thereafter (in 2002), and Summerson, having failed to pay its taxes, was terminated by Liechtenstein's tax authorities and stricken from the Liechtenstein Public Register (id., Ex. 12).

The two instant actions, commenced roughly three years apart, followed.

The Instant Motions

The bulk of the seven motions addressed by this decision are made in connection with the 2006 Action. The three motions advanced by defendant in the 2006 Action seek, among other things, protective orders and suspension of the court-ordered directive to complete depositions (Sequence 013), summary judgment (Sequence 014), and an order vacating the January 29, 2008 default judgment taken against defendants Robert Maraboeuf, Allegría Aich, and Patricia Petetin (Sequence 016). The two motions advanced by plaintiff in the 2006 action seek a default judgment against defendants Leon Cohen, Maurice Cohen, Sonia

Cohen Iderval, World Business, and Joelle Habib (Sequence 015)⁹ and an order allowing for the enlarging of the record made by plaintiff in Sequence 15 so as to be able to include additional facts supporting the claims advanced in that motion (Sequence 016). Defendants, in opposition to sequence 016, cross-move for an order dismissing the action pursuant to CPLR 3211(A)(2) on the grounds that CDR lacks standing to prosecute, and further seek a declaration pursuant to CPLR 3001 that CDR has been dissolved pursuant to CPLR 1017 as well as a protective order pursuant to CPLR 3103(a)(b) staying further depositions.

The remaining two motions under consideration, made by plaintiff in the 2003 action, seek a default judgment against the defendants pursuant to CPLR 3216 (Sequence 012), and ultimately, an order (1) allowing for the enlargement of the record; (2) directing a new deposition date for defendant Leon Cohen; and (3) clarifying this court's May 7, 2008 position respect to the status of defendants default as a result of their failure to answer interrogatories, and their remaining obligations (Sequence 013). Defendants, in opposition, again cross-move to motion sequence 013 for an order (1) dismissing the action pursuant to CPLR 3211(A)(2) on the grounds that CDR lacks standing to

⁹ The court notes that the same relief is sought by plaintiff in Motion Sequence 013 in the 2003 Action, and further notes that the supporting papers, referenced to in this sequence, are contained under the 2003 Action file.

prosecute; (2) declaring that pursuant to CPLR 3001, that plaintiff has been dissolved pursuant to CPLR 1017; and (3) staying defendants' depositions via the issuance of a protective order pursuant to CPLR 3013(a)(b).

Discussion

A. Challenges to Plaintiff's Standing (Cross Motions to Sequence 013, Index No. 10965/2003 and Sequence 016, Index No. 600448/2006)

As a preliminary matter, the court finds the defendants' claims that CDR lacks standing to commence these actions because CDR neither exists nor is the successor-in-interest to the loan in issue to be completely without merit. According to the Extrait du Registre du Commerce et des Sociétés, CDR, was, and remains a viable corporation, and, in the absence of an express decree otherwise, will not cease to exist until April 22, 2039 (Reply Affirmation, Motion Sequence 013, Index No. 109565/2003, Exhibit B). Furthermore, CDR was determined to be the successor-in-interest to the loan made by Société de Banque Occidentale in the February 12, 2003 judgment of the Paris Court of Appeal and the July 6, 2006 Antibes Commercial Court Judgment (id., Exhibits C, D). The portions of the two cross-motions advanced by defendants in motion sequence 016 of the 2006 Action and motion sequence 013 of the 2003 action, which both seek dismissal of the action pursuant to CPLR 3211 for lack of standing, are

therefore denied. The related declaratory relief sought within those cross-motions is similarly denied as moot.

B. Balance of the Motions presented in the 2003 Action

Having addressed the issue of CDR's standing, this court now turns to the balance of the motions advanced by plaintiff in the 2003 action (Index No. 109565/03). By motion sequence 012, plaintiff moves, pursuant to CPLR 3216 for a default judgment as against all remaining defendants. By motion sequence 013, plaintiff moves for an order (1) allowing for the expansion of the record to include additional evidence of defendants' repeated failure to provide discovery (2) directing a new date for the EBT of Leon Cohen; and (3) an order clarifying this court's position in the decision issued on May 7, 2008 (Sequence 11) with respect to defendants' discovery obligations. The balance of defendants' cross motion, made in opposition to motion sequence 013, seeks a protective order pursuant to CPLR 3103(a)(b) preventing defendants' depositions.

This court, in a series of decisions,¹⁰ orders,¹¹ and

¹⁰The decisions issued by this court in the 2003 Action on March 6, 2008, April 3, 2008 and May 7, 2008 all contained discovery deadlines. Defendants have violated all of these orders.

¹¹The first conferencing order, issued by Judge James on February 28, 2006, and directing the completion of depositions by June 15, 2006 was violated by the defendants. Defendants have also admittedly failed to comply with discovery orders issued by this court on March 4, 2008 and April 3, 2008 (see, Notice of Motion, Sequence 012, Index No. 109565/03, Exhibits B, C, D, L).

statements made to counsel on the record,¹² made it abundantly clear to defendants that no further discovery delays in either the 2003 or 2006 action would be tolerated. Defendants have repeatedly chosen to ignore these orders (the evidence of which is abundant in plaintiff's submissions for both motion sequences) and instead, have chosen to barrage this court with motion practice comprised of lengthy and predominately unsupported requests for relief. Defendants' long-standing patterns of default, lateness, and abject failure to comply with Court orders amounts to willful and contumacious conduct which not only warrants, but necessitates the striking of defendants' collective answer and an award of a default judgment (see, Merchants T&F Inc. v. Kase and Druker, 19 AD3d 134 [1st Dept 2005]).

Plaintiff's motion for a default judgment is therefore granted. The court additionally notes that the portion of plaintiff's motion seeking expansion of the record so as to include additional documentation supporting plaintiff's motion for the award of a default judgment against defendants (Sequence 013) is also granted, with the balance of that motion denied as moot.

¹²Not only did this court decline signature on at least one of the orders to show cause presented by defendants this Spring, on three distinct appearances in April, May, June of this year, counsel for defendants was informed on the record that not only would discovery delays no longer be tolerated, but discovery would not be stalled by motions seeking summary judgment (see, May 9, 2008; Record Tr. April 3, 2008; June 6, 2008). Inconceivably, notwithstanding these warnings, defendants continued to flout this court's prior orders.

The balance of defendant's cross-motion (sequence 013) is similarly denied as moot.

Balance of the Motions Presented in the 2006 Action

A. Vacatur of Default pursuant to CPLR 5015 (Sequence 016)

Turning to the 2006 Action, this court first addresses defendants' motions to vacate the January 29, 2008 default judgment entered against defendants Robert Maraboeuf, Allegría Aich and Patricia Petetin (Motion Sequence 016).

A necessary requirement for obtaining relief from judgment under CPLR 5015 is the demonstration of a valid excuse for the default and a meritorious defense (CPLR 5015). Although defendants' counsel has included a lengthy affirmation in support of the motion to vacate (See, Notice of Motion, Motion Sequence 016, Index No. 600448/2006), the motion is devoid of any affidavits from any of the defaulting defendants demonstrating that they have a meritorious defense to the action commenced against them¹³ (see, Pedone v. Avco Financial Services, 102 AD2d 885 [2nd Dept 1984]). Absent an affidavit of merit from *someone* with personal knowledge of the facts, the granting of defendants' motion would not only be inappropriate, it would be an abuse of

¹³The court notes that defendants claims of failure to properly serve defendants with the summons and complaint in accordance with applicable provisions of International Law is without merit. Plaintiff has annexed proof of service for each of the defaulting defendants (See, Affirmation In Opposition, Motion Sequence 016).

judicial discretion (see, Cooper v. Badruddin, 192 AD2d 997 [3rd Dept 1993]). The affidavit of an attorney, with no personal knowledge of the facts, offers no probative value (see, Yovannone v. Sibley's Department Store, 101 AD2d 1014 [4th Dept 1984]), and as such, does little to further defendants' motion. Motion sequence 016 is therefore denied.

B. Summary Judgment (Motion Sequence 014)

Defendants' motion for summary judgment in favor of defendants World Business Center, Inc. ("World Business"), Maurice Cohen, Sonia, Cohen, Leon Cohen, Iderval Holding, LTD ("Iderval"), Patricia Habib Petetin and Joelle Habib is also denied.

Motions for summary judgment limit this Court's role to finding issues, and not resolving them. To succeed, it is therefore incumbent upon the movant to provide the court with admissible evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92). The opposing party bears the burden of producing evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact

requiring trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 NY2d 557 [1980]), and, if there is any doubt that triable issues of fact exist, summary judgment will not be granted.

Setting aside defendants' apparent failure to annex all of the pleadings with their motion (see, CPLR 3212(b)), and the simple fact that discovery is nowhere near completed (see, CPLR 3212(f)), both of which would otherwise warrant denial of this motion, the court focuses its analysis on defendants' affidavits in support of their motion, or, in this case, the lack thereof.

Much like CPLR 5015, motions made seeking summary judgment pursuant to CPLR 3212 require affidavits from someone with personal knowledge of the facts. Affirmations made by attorneys who have no personal knowledge of the facts do not satisfy this requirement (see, Zuckerman, 49 NY2d 557 [1980]; Morales v. Coram Materials Group, 51 AD3d 86 [2nd Dept 2008]; Dinham v. Wagner, 48 AD3d 349 [1st Dept 2008]). While counsel's affirmation may serve "as the "vehicle" for the submission of "'evidentiary proof in admissible form'" (Van Alstyne v. Magique Discotheque Corp., 180 AD2d 453 [1st Dept 1992] (internal citations omitted)), no evidentiary proof has been annexed to the papers for submission. The motion for summary judgment motion, deficient on multiple

grounds,¹⁴ is therefore denied.

C. Motion for Default Judgment (Sequence 015), Motion to Expand the record for Sequence 015 (Sequence 017) and Motion for a protective order (Sequence 013)

This brings this court's analysis to the last three motions presented for consideration. Much like the 2003 Action, motion sequence 015, made by plaintiff, seeks the award of a default judgment against the defendants predicated upon defendants' failure to provide discovery. Motion sequence 017, also advanced by plaintiff, seeks expansion of the record for Sequence 015 so as to be able to include additional examples of defendants' continued practice of evading court ordered discovery. Motion sequence 013, brought by defendant, seeks a protective order and the suspension of discovery.

Additional discussion being unnecessary on the issue of the failure to comply with court-ordered discovery, plaintiff's motions are simply granted, save for the portion of motion Sequence 015 seeking the imposition of sanctions¹⁵ against defendants pursuant to NYCRR § 130-1. Defendants' motion (Sequence 013) is denied.

¹⁴ The court additionally notes that much of the purported arguments in support of the motion for summary judgment have already been rejected in one form or another in prior decisions of this court issued in both the 2006 and 2003 actions.

¹⁵ In this court's opinion, the greatest sanction, the awarding of a default judgment, has already been granted.

This matter shall now proceed to Inquest.

Accordingly, it is hereby

ORDERED that Motion Sequence 012, advanced by plaintiff in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Maurice Cohen, et al. (Index No. 109565/03), and seeking a default judgment against defendants is granted; and it is further

ORDERED that the portion of Motion Sequence 013, advanced by plaintiff in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Maurice Cohen, et al. (Index No. 109565/03), which seeks to expand the record to include additional evidence of defendants' failure to comply with discovery orders is granted; and the balance of the relief sought is denied; and it is further

ORDERED that the cross-motion advanced by defendants in Motion Sequence 013 in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Maurice Cohen, et al. (Index No. 109565/03) is denied in entirety; and it is further

ORDERED that Motion Sequence 013, advanced by defendants in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) seeking a protective order and suspension of this court's discovery directives is denied; and it is further

ORDERED that Motion Sequence 014, advanced by defendants in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) seeking summary judgment is denied; and it is further

ORDERED that the portion of Motion Sequence 015, advanced by plaintiff in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) seeking a default judgment pursuant to CPLR 3126 against defendants Leon Cohen, Maurice Cohen, Sonia Cohen, World Business, and Joelle Habib is granted, and the answer of these defendants is stricken; and it is further

ORDERED that the portion Motion Sequence 015, advanced by plaintiff in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) seeking the imposition of sanctions against defendants pursuant to NYCRR § 130-1 is denied; and it is further

ORDERED that Motion Sequence 016, advanced by defendants in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006), seeking to vacate the default judgment entered against defendants Robert Maraboeuf, Allegria Aich, and Patricia Petetin on January 29, 2008, is denied; and it is further

ORDERED that Motion Sequence 017, advanced by plaintiff in the action captioned, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) seeking expansion of the record in motion sequence 015 so as to include additional examples of defendants' continued failure to comply with discovery orders is granted; and it is further

ORDERED that in the absence of either an express directive of this court or a stay from the Appellate Division, First Department, these matters are referred to a Special Referee to determine damages; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.


FILED

AUG 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: *8/7/08*



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