

**Royal Crospin Corp. v Institut Sportswear, Inc.**

2008 NY Slip Op 33101(U)

October 22, 2008

Supreme Court, New York County

Docket Number: 600804/06

Judge: Lewis Bart Stone

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Contemp.

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

PRESENT: STONE  
Justice

PART 505

ROYAL CROSPIN CORP.

INDEX NO. 600804/06

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

- v -  
ERTAN SEYHUN,  
ETAL.

MOTION SEQ. NO. 08

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

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance  
with attached decisions &  
Final Order*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 21 Oct 2008

*Am. Paul Stee*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

-----X  
 ROYAL CROSPIN CORP., :  
 :  
 Petitioner, : DECISION,  
 : JUDGMENT AND  
 -against- : FINAL ORDER  
 :  
 INSTITUT SPORTSWEAR, INC., : INDEX NUMBER

600846/06  
60084

**UNFILED**  
**Respondents**  
 This judgment has not been entered by the County Clerk  
 and notice of entry cannot be served based hereon. To  
 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room  
 141B).

STONE, J:

Petitioner Royal Crospin Corp (“Royal”), having entered final judgment against Ertan Seyhun (“Seyhun”) in the New York County Clerk’s Office on July 1, 2005, in the amount of \$386,383.71, has been since diligently trying to collect on such judgment through supplementary proceedings. Except for a small amount seized from a bank account, the judgment remains unpaid. As a part of collection efforts, Royal moved this Court on March 14, 2006 for an order to compel Seyhun to make periodic payments of \$10,000 per month.

This Court held hearings on such motion on August 3, 2006, September 18, 2006, and September 28, 2006 (the “2006 Hearings”).

The 2006 Hearings were not completed by reason of Seyhun’s various delaying tactics to avoid finishing his testimony and producing records and witnesses relating to his interest in and earnings from a retail store named Institut Sportswear Inc.

("Institut"). Among the excuses for not completing his testimony was the alleged unavailability of Seyhun's accountant for medical reasons, Seyhun's absence from the country, and his alleged inability to return due to medical reasons.

Because hearings on Seyhun's earnings from his interest in Institut had not been completed, the Court issued an interim order (the "Interim Order") on January 26, 2007, ordering Seyhun to pay \$4000 per month against the judgment. As stated therein, the Interim Order expressly did "not take into account any periodic income arising from Seyhun's store," and considered, instead, Seyhun's undisputed commission earnings.

Seyhun moved to reargue the Interim Order which motion was denied by Decision and Order of this Court dated July 27, 2007, which effectively ordered Seyhun to begin his \$4000 payments in September 2007.

No periodic payments have been made on the Interim Order and neither Seyhun nor his accountant has made themselves available for any continuation of the hearing on Seyhun's earnings and interest from Institut.

On July 26, 2007, Royal moved for the appointment of a temporary receiver for Institut. Seyhun parried this motion by causing Institut to file for bankruptcy on or about January 9, 2008, thus staying all process of this Court as against Institut. On July 18, 2008, Royal moved to punish Seyhun for contempt for his failing to comply

with the Interim Order for periodic payments. On the return date of such motion, Seyhun's counsel appeared and asserted that because Seyhun was without assets, this Court, by reason of Judiciary Law §770, could not punish Seyhun for contempt. As required under the law, this Court accorded Seyhun an evidentiary hearing on such defense and hearings were held on September 5, 8 and 12, 2008 (the "2008 Hearings"), at which testimony under oath was taken. This Court permitted Seyhun, who asserted that was in Turkey and allegedly unable to travel, to testify by telephone.<sup>1</sup> Seyhun's accountant, Steven Schwartz ("Schwartz"), also testified. Royal offered no witnesses but cross-examined Seyhun's witnesses. Having heard the witnesses, this Court finds their testimony of questionable credibility, and a continuation of Seyhun's tactics to avoid the production of material subpoenaed by Royal in the supplementary proceeding.

The principle thrust of testimony offered by Seyhun is that as Institut is bankrupt he has no income. The problem with this approach is that the Interim Order was not based on Seyhun's income from Institut which Seyhun had, in his testimony at the 2006 Hearings claimed was minimal, but was based instead on Seyhun's

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<sup>1</sup> The Court notes that for over a year and a half Seyhun made no effort to complete his cross examination testimony on the supplementary proceeding by any method but suddenly, when it was beneficial to him, found it convenient to proffer telephonic testimony for the contempt hearing.

admitted earnings from commissions from third parties unrelated to Institut. Seyhun did not contest the existence of the commissions at the 2006 Hearings and did not address such earnings at the 2008 Hearings other than by general testimony that he had no income. He submitted neither testimony nor other proof as to when or why such commissions were no longer received by him nor submit any corroborating evidence from the source of these commissions that they were no longer paid or payable.

At the 2008 Hearing to support Seyhun's claim that he was destitute, both witnesses asserted that Seyhun was the sole owner of Institut. At the 2006 Hearings, however, when Seyhun attempted to exclude Institut as an asset which could be levied upon, Seyhun gave sworn testimony and submitted documentation to show that he was a minority shareholder, and that Institut had other owners, notwithstanding that Seyhun signed Institut's federal tax returns, whereby he asserted he was the 100% shareholder.

At the 2006 Hearings, Seyhun admitted he was unaware that his commissions, received from non-US sources, were part of his taxable income for Federal Income Tax purposes. At the 2008 Hearings, Schwartz testified that such commissions were "unavailable" to Seyhun for the payment of his obligations to Royal because he had used the funds to keep Institut afloat. If true, clearly Seyhun had violated this Court's

order by diverting to Institut funds received by him and in his hands rather than obeying the Interim Order and paying Royal. Further, as Schwartz testified he was fully familiar with all of Institut's financial matters, the diversions of these commissions would have been known by Schwartz at the time. If he was aware, Seyhun's earlier testimony that he had no idea he had to report the commission on his US tax returns and that he prepared Seyhun's returns and was an expert on tax law, leads to the conclusion that either Seyhun, Schwartz or both clearly lied to this Court in connection with this matter.

Schwartz also testified that cash payments for wages were made to employees of Institut and that no withholding or FICA payments were made, in violation of Federal Tax laws. He further testified that he brought this to Seyhun's attention and remonstrated him for not complying, although he did not report the violations. The Court will consider these actions by which both Seyhun and Schwartz put their own interests above those of society in evaluating their credibility.

At this hearing, Schwartz also testified as to how Institut's cash was used to pay vendors and employees. No records were produced to corroborate or sustain his contention, although Schwartz would have had possession of such records or would have known where to find such records if such records were in the possession of the bankruptcy trustee and in such event, to make copies. The failure to produce such

records allows this Court to infer that had they been produced, they would have not supported Seyhun's claims or otherwise enmeshed him in some other improper activity.

Seyhun has asserted his illness and presence in Turkey as reasons why he could not complete his testimony at the 2006 Hearings. Although he was directed at that time to complete such testimony on his return to the United States, he admitted at the 2008 Hearings that in the interim he returned to the United States to attend a family funeral and to execute documents for Institut's bankruptcy filing and never advised Royal or this Court of such return or appeared to complete his testimony. Such facts undermine Seyhun's excuses for his non-appearance. The same is true of Schwartz who asserted that he was ill when called to testify in 2006. When Schwartz testified at the 2008 Hearings to establish a basis for his knowledge of Institut's affairs, Schwartz testified that he was continually present at Institut every week and indicated no exception for the long period of ill health which Seyhun's counsel asserted was the reason Schwartz could not give testimony in the earlier 2008 Hearings.

Seyhun conceded that under Judiciary Law §770, the party seeking relief from a contempt finding has the burden of proving that he is unable to pay. Based on the Court's evaluation of the credibility of the witnesses produced by Seyhun, taking into account prior testimony and affidavits of Seyhun, his violation of tax laws and his

refractory behavior in avoiding completing the testimony in the supplementary proceeding, as such conduct may be considered in evaluating credibility, this Court finds that Seyhun has not met his burden of proof to establish that he may, under Judiciary Law §770, avoid his obligations under the Interim Order.

The contempt judgment in this matter shall not modify the Interim Order for payment of January 26, 2007 as modified by the July 24, 2007 order, the power of this Court to modify such order in the future on a proper showing for modification, or the power of this Court to issue a final order of periodic payment following the completion of testimony in the supplementary proceeding.

ORDERED AND ADJUDGED that the motion to find ERTAN SEYHUN in contempt of court is granted and that respondent-judgment debtor ERTAN SEYHUN be and hereby is declared guilty of contempt in having willfully disobeyed the Interim Order dated January 26, 2007, and it is further

ORDERED AND ADJUDGED that ERTAN SEYHUN having failed to satisfactorily excuse or explain said contempt and that such disobedience of said Interim Order was calculated to and did actually defeat impair, impede and prejudice the rights of petitioner judgement creditor Royal Crospin, it is further

ORDERED that the Court hereby order Seyhun to be imprisoned for a period of 90 days, and it is further

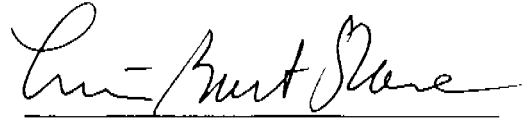
ORDERED, that the Sheriff of the City of New York or of any county within the State of New York, to whom a copy of this Order, certified by the Clerk of the Court, shall be delivered, shall forthwith on receipt thereof, and during such hours as t his Court may be in session, take the body of respondent-judgment debtor ERTAN SEYHUN and produce him forthwith before the Justice presiding at Part 39, 111 Centre Street, Room 687, New York County, and if that Court is otherwise engaged or no longer available, then to the Office of the Captain, 60 Centre Street, New York County, to be brought before a justice of this Court for a hearing pursuant to Section 772 et seq of the Judiciary Law, to determine whether he shall be committed to custody for contempt of Court or for such other disposition as the Court in its discretion shall direct, and it is further

ORDERED, that to the extent the ERTAN SEYHUN is not in the United States, the warrant will be enforceable upon his return, it is

ORDERED that said warrant of arrest for ERTAN SEYHUN shall be stayed for sixty (60) days following the service of Notice of Entry of this Judgment and Order upon counsel for Seyhun, to enable Seyhun to purge himself of contempt by paying \$52,000 being the ordered for September 2007 through September 2008 and to permit ERTAN SEYHUN otherwise to surrender voluntarily, to commence the above term of imprisonment.

This is the Decision, Judgment and Order of this Court.

DATED: OCTOBER 22, 2008  
NEW YORK, NEW YORK



Hon. Lewis Bart Stone  
Justice of the Supreme Court

**UNRECORDED**  
This judgment has not been recorded with the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).