

Komarov v L&L Intl. Import/Export, Inc.

2009 NY Slip Op 31624(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 602459/06

Judge: Eileen Bransten

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Judge Eileen Bransten

PART 3

Index Number : 602459/2006
KOMAROV, BORIS
vs.
L&L INTERNATIONAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 602459/06
MOTION DATE 3/26/09
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motlon/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

C

CD 15855

Dated: 7-16-09

Eileen Bransten
Judge Eileen Bransten, 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: PART THREE

-----X
BORIS KOMAROV, BOKOM INTERNATIONAL,
LTD.,

Plaintiffs,

-against-

Index No. 602459/06
Motion Date: 3/26/09
Motion Seq. No.: 001

L&L INTERNATIONAL IMPORT/EXPORT, INC.,
RUSSIAN BLACK PEARL, INC., LIA LEYBSON,
individually, LIA LEYBSON, AS EXECUTOR OF
THE ESTATE OF LEV LEYBSON, LIA LEYBSON,
AS ADMINISTRATOR OF THE ESTATE OF LEV
LEYBSON,

Defendants.

-----X

EILEEN BRANSTEN, J:

In this action alleging breach of an agreement to repay a debt of more than \$600,000, defendants Lia Leybson (“Lia”), individually, and Russian Black Pearl, Inc. (“RBP”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them. Plaintiffs, Boris Komarov (“Komarov”) and Bokom International, Ltd. (“Bokom”), cross move for summary judgment in their favor against Lia and RBP. In addition, plaintiffs request that the court enter a default judgment against defendant L&L International Import/Export, Inc. (“L&L”) based on its failure to appear in this action.

Background

Komarov, a Russian immigrant, is the sole proprietor of Bokom, a consulting company that provides financing and other services for businesses that import and export products between the United States and Russia. In June, 1996, Komarov loaned Lev Leybson, Lia's late husband, \$30,000 as seed money for L&L, a business that imported caviar and fish from Russia to the United States (Turret Aff., Ex. C).

In 1997, Lev married Lia and, thereafter, Lia became L&L's office manager. Throughout 1997 and 1998, Komarov continued to lend Lev and Lia money to purchase inventory for L&L and, it appears from the evidence, that during this time, Lia used her personal checking account to reimburse Komarov for some portion of his loans to L&L (Turret Aff., Ex. E).

Thereafter, in April, 1999, Lia incorporated RBP, a business that imports caviar and fish from Russia and other countries to the United States. Lia admits that Komarov provided seed money for this business (Shoemaker Aff. Ex. E, p. 55, ll 9-13).

The complaint alleges that, because of the close and cordial relationship that developed between Komarov and the Leybsons, the plaintiffs provided financing to the Leybsons' businesses on a running account basis without many of the customary business

formalities that are used in America¹. In fact, it appears from the evidence that Komarov, Lev and Lia considered L&L, RBP and Lev and Lia to be joint obligors on plaintiffs' debt, and that they used handwritten reconciliation statements and memos to memorialize their agreements. Moreover, Komarov, Lia and Lev signed the documents as individuals rather than in their representative capacities (Shoemaker Aff., Ex. C; Turret Aff., Exs. M & N).

The evidence demonstrates that Komarov continued to lend Lev and Lia money for their businesses and, because the amount of the debt became sizeable, in January 2002, Lia and Lev furnished Komarov with a list of L&L and RBP's joint inventory (January 3, 2002 inventory), that included an estimate of the joint inventory's value. The inventory states:

"From January 1, 2002 we request that you decrease the rate to 6% annually for 6 months, i.e. until July 1, 2002. We undertake to pay 6% on the amount of \$390,000 (on the first day of each month). We undertake to pay the balance of the interest on July 1, 2002. Signed Leybzon"

(Turret Aff. Ex. N, #016).

In an undated document titled "Calculation of Debt Repayment Leo Leybson and Lia Pletkach to Boris Komarov"² Lia and Lev set forth a formula of repayment of their \$390,000

¹ According to Komarov, Russians prepare memoranda in the nature of a promissory note to show indebtedness, and keep track via handwritten documents and schedules. (Komarov Aff., para 11). Lia and RBP do not dispute this assertion.

² Pletkach is Lia's maiden name and Lev often used the English name Leo.

On December 27, 2002, Komarov, Lia and Lev signed another document titled, "Payment Reconciliation Statement on the debt obligations of Lia and Leo Leybzon to Boris Komarov," which states that Lev and Lia owed \$890,000 to Komarov (Komarov Aff., Ex. N, #007). On May 1, 2003, Lev signed a memo written on RBP letterhead titled "Schedule of Repayment of Money to Boris Komarov" that sets forth a schedule for the repayment of Lev and Lia's remaining \$770,000 debt (Komarov Aff., Ex. N #006).

It appears that in February 2005, Lia and Lev made two additional payments of principal reducing the debt to \$607,000. (Komarov Aff., Ex. N #00100, 00101, Ex. M). There is no evidence that any of the defendants made additional payments of principal or interest to Komarov.

Lev died suddenly in January 2006, and despite Komarov's demands, Lia refused to acknowledge the defendants' debt. Later that year, Komarov instituted this action, alleging causes of action for breach of contract and account stated. In the third cause of action, Komarov alleges that the Lebysons have been unjustly enriched, because they used a portion of the money that plaintiffs loaned to the Lebysons to purchase a cooperative apartment on Manhattan's Upper East Side.

In support of the motion for summary judgment and in opposition to the cross-motion, Lia and RBP argue that there is no evidence that RBP borrowed any money from plaintiffs, or that it guaranteed any of L&L's purported debts. They claim that RBP and L&L were

separate entities with no overlap in functions, structure or operations; that RBP did not sign any loan documents and that none of the other documents were signed by Lia in her capacity as president of RBP. Lia contends that when she attended meetings with Lev and Komarov she was merely a scrivener who wrote what her husband told her to write and signed documents when he told her to sign. The moving defendants also argue that the statute of frauds bars plaintiffs' claims because Lia never signed an agreement to guaranty Lev or L&L's debts.

In opposition to Lia and RBP's motion for summary judgment dismissing the complaint and in support of the cross-motion for summary judgment for the amount sued for in the complaint, plaintiffs argue that the documentary evidence establishes that Lia, RBP, Lev and L&L, collectively, owed the plaintiffs \$607,000, and that Lia and RBP have failed to come forward with any evidence demonstrating that they repaid their debt, or any part of it. In addition, plaintiffs contend that Lia intentionally discarded L&L's relevant business records, including account statements, checks, receipts for payment and a notebook her husband kept evidencing the debt. They argue that this spoliation of relevant evidence is an independent ground for summary judgment. They also contend that Lia and RBP should be sanctioned for their failure to produce business records, in violation of an order of this court. Finally, plaintiffs argue that Lia and RBP's statute of frauds argument is irrelevant, because Lia and RBP are primary obligors, not guarantors, of the debt.

Analysis

The proponent of a summary-judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557,562 [1980]). The motion must be supported by “affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions. . . ” (CPLR 3212[b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue(CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 (1986); *Zuckerman v City of New York*, 49 NY2d at 560). Mere conclusory statements, expressions of hope or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

In this case, Lia and RBP have failed to come forward with any evidence to defeat plaintiffs’ *prima facie* showing that they are entitled to judgment as a matter of law. In

documents dated January 1, 2002, January 3, 2002, June 1, 2002 and December 27, 2002, Lev and Lia acknowledged their debt to Komarov. In addition, on May 1, 2003, Lev signed a schedule of repayment, written on RBP stationery, acknowledging that a balance of \$770,000 remained unpaid (Turret Aff., Exs. M & N). These documents in the form of letters, notes, accounts and inventories, signed by Lev and in some cases by Lia and Lev bear the titles “Debt Repayment Agreement between Lia and Lev and Boris,” “Calculation of Debt Repayment, Leo Leybzon and Lia Pletkach to Boris Komarov” and “Payment Reconciliation Statement of the debt obligations of Lia and Leo Leybzon to Boris Komarov.” These written acknowledgments of the debt are not contradicted by any other document. In fact, there is no documentation to suggest that the defendants disputed their obligation to make the payments (*see, e.g. Raj Jewelers . Dialuck Corp.*, 300 AD2d 124, 126 [1st Dept 2002]).

Lia’s assertion that she attended the meetings as a scrivener and signed documents without knowing what she was signing, or merely as a witness, is without merit. It is well settled that, “[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it” (*Guerra v Astoria Generating Co., L.P.*, 8 AD3d 617, 618 [2d Dept 2004] citing *DaSilva v Musso*, 53 NY2d 543, 550-551 [1981]; *Marine Midland Bank N.A. v Embassy East*, 160 AD2d 420 [1st Dept 1990]).

Moreover, Lia and RBP have failed to produce RBP's business records as directed by this court in a June 5, 2008 order (Turret Aff., Ex. P). In particular, defendants have not produced RBP's cash receipts and disbursement journal, bank statements for 1999-2001, general ledgers, invoices for the sale of caviar and related products, purchase orders for caviar and related products and inventories. In addition, the bank statements that were produced were incomplete (Turret Aff., Ex. R). "[W]here an adversary withholds evidence in his possession or control that would likely support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits" (*Noce v Kaufman*, 2 NY2d 347, 353 [1957]; *Gryphon Dom VI v APP Intl. Fin. Co.*, 18 AD3d 286,287 [1st Dept 2005][an adverse inference could be drawn from plaintiffs' failure to produce their own account statements, which documents were within their control]; *Fitzgerald v Tamola*, 199 AD2d 122, 123 [1st Dept 1993][where an adversary withholds evidence in his control that would be likely to support his version of the case, the strongest inferences against him which the opposing evidence permits may be drawn]).

In addition, on some unspecified date after Lev's death and after Lia had notice of Komarov's claim, Lia "threw out" L&L's account statements, checks, receipts for payment, purchase orders, sales invoices and the notebook that Lev kept regarding the Komarov debt (Shoemaker Aff., Ex. E, p. 32). Here, Lia was on notice of plaintiffs' claims and, accordingly, she should have maintained L&L's business records that were relevant to issues

regarding the unpaid loan (*see e.g. Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 44 AD3d 975, 976 [2d Dept 2007]).

“[U]nder the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading”

(*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007]).

However, when the missing evidence does not completely deprive the plaintiff of the ability to establish his or her case, a negative or adverse inference against the defendant is appropriate. (*Barnes v Paulin*, 52 AD3d 754,755 [2d Dept 2008]). Here, it appears that the plaintiffs have not been completely foreclosed from being able to establish the extent of their damages based on independently available evidence. Accordingly, an adverse inference is appropriate as to the amount of the debt that remains unpaid and the court determines that, based on the records produced by the plaintiffs that are not refuted by defendants’ proof, that Lia Leybson and RBP are indebted to the plaintiffs in the amount of \$607,000 (*see Komarov Aff.*, at ¶ 34 [acknowledging reduction of debt from \$770,00]).

Accordingly, it is ORDERED that Lia Leybson and Russian Black Pearl's motion for summary judgment dismissing the complaint as to them is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment against Lia Leybson, individually and Russian Black Pearl is granted; and it is further

ORDERED that the branch of the motion that seeks a default judgment against L&L International Import/Export, Inc. is granted without opposition; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against the defendants Lia Lebyson, individually and Russian Black Pearl and L&L International Import/Export, Inc. in the amount of \$607,000, together with interest as prayed for, allowable by law, as calculated by the Clerk, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

SETTLE JUDGMENT.

Dated: July 16, 2009

ENTER:



Hon. Eileen Bransten