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| CRD Creances S.A.S. v Cohen |
| 2009 NY Slip Op 33051(U) |
| November 24, 2009 |
| Supreme Court, New York County |
| Docket Number: 109565/03 |
| Judge: Walter B. 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.Ss Successor to
Société de Banque Occidentale,

INDEX NO. 109565/2003

Plaintiff,

MOTION DATE 09/11/09

- v -

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

MOTION SEQ. NO. 023

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 023 is consolidated with motion sequence 024 and 025, and is decided in accordance with the accompanying memorandum decision which addresses both this action, and motion sequences 030, 031, 032 and 033 advanced in the action styled, CDR Créances, S.A.S. v. Cohen, et al. (Index No. 600448/2006).

FILED

NOV 27 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/24/09

U
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

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

Plaintiff,

Index No. 109565/03
Mtn Seq. 023, 024
025

-against-

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

Defendants.¹

-----x

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

Plaintiff,

Index No. 600448/06
Mtn Seq. 030, 031,
032, 033

-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

FILED
NOV 27 2009
NEW YORK
COUNTY CLERK'S OFFICE

¹ For simplicity, the caption for this action includes only the remaining defendants. Causes of action asserted against defendants EALC, Gama Lodging, LLC, and Simon Elias were dismissed by decision dated February 16, 2005 (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 (James, J.).

WALTER B. TOLUB, J. :

Inasmuch as these two actions remain inextricably intertwined, the following memorandum decision consolidates and resolves motion sequences 023, 024, and 025 in the action styled, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Maurice Cohen, et al. (Index No. 109565/03) (the "2003 Action") as well as motion sequences 030, 031, 032, and 033 in its sibling action styled, CDR Créances S.A.S., as Successor to Société de Banque Occidentale v. Leon Cohen, et al. (Index No. 600448/2006) ("the 2006 Action").

These seven motions collectively represent the continuing litigation arising out of the alleged breach of two Pledge Agreements ("the Pledge Agreements") issued in 1991 and presently held by plaintiff, CDR Créances, S.A.S., as Successor to Société de Banque Occidentale ("CDR"). Plaintiff contends that to this date, despite orders from courts located both in the United States and France,² the loan remains largely unpaid.³

Background

The facts of this case are complex and have been unfolding

² CDR initially obtained judgment against EALC from the Paris Court of Appeal in 2003. This judgment has since been recognized in New York.

³ 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.

before the court in one way or another for the last seven years. Between the two actions, there have been four judges assigned to these cases at one point or another,⁴ and a total of fifty-one motions have been resolved. Despite the voluminous motion practice, much of the discovery in both actions remains incomplete. In addition, the court has been made aware of at least two related actions which are pending in the Florida Circuit Court (CDR Créances, S.A.S. v. Leon Cohen, et al., (08-50688 CA 32)), and the U.S. Bankruptcy Court for the Southern District of New York (In re Euro-American Lodging Corp v. World Business Center, Inc., Maurice Cohen, Sonia Cohen and Leon Cohen (Case No. 06-11325 (SMB))). Still other proceedings involving disputes arising out of this matter have been convened in Paris and Antibes.

The allegations in the two actions before this court stem from a 1991 loan in the amount of \$92 million dollars ("the loan") made by CDR's predecessor to Euro-American Lodging Corporation ("EALC") and its shareholders, Summerson International Establishment, a Liechtenstein trust,

⁴ These actions, and yet another sibling action before this court which is not part of these motions (CDR Creances, S.A.S. v. First Hotels and Resorts (NY County Index No 650084/2009)), will soon be transferred to a fifth judge due to retirement, which was not, contrary to what counsel might wish to believe, motivated by these litigants.

("Summerson")⁵ and Summersun International et Cie ("Summersun").⁶ The loan was made for the purpose of acquiring property located at 135 West 52nd Street in Manhattan ("the Flatotel"). The three companies bearing the responsibility of repaying 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, which were equally shared between the Cohen controlled companies, Summerson and Summersun. These 1000 shares, under the terms of the Pledge Agreements, were not to be increased, sold, merged or consolidated (see, Motion Sequence 010 Affirmation in Opposition, Ex. 3 et seq.).⁷

According to plaintiff, in 1996 and without CDR's notice and approval, defendant Maurice Cohen caused EALC to amend its certificate of incorporation so as to create 9,000 additional shares of EALC stock. Nine hundred of these newly created shares

⁵ At the time that the Pledge Agreement was made, Summerson was operating as Flatotel International Establishment, a Liechtenstein Trust.

⁶ At the time of the Pledge Agreement, Summersun was operating as S.N.C. M. Coenson International et Cie., a French entity.

⁷ For consistency, exhibit references in this section of the background facts are derived from the exhibits submitted as part of motion sequence 09 and 010 in the 2003 action (issued in May of 2008). These facts were referenced in this court's August 2008 decision for motion sequences 012 and 013 and the 2006 action and 013 through 017 in the 2006 action.

were then immediately issued to defendant, and Cohen's company, Iderval Holding, Ltd. ("Iderval"),⁸ which later acquired the balance of the newly created shares. Plaintiff claims that there are no records indicating that EALC received any consideration for issuing any of the newly created shares (see, Motion Sequence 010 Affirmation in Opposition, Ex. 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 derogation of the terms of the Pledge Agreement (*id.*, Ex. 10). Again, there are no records reflecting any payments made 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).

Shortly after the Summersun declaration of bankruptcy, Summerson and Iderval, in 1999, issued options to Blue Ocean Finance Ltd. ("Blue Ocean"), another Cohen company.⁹ The options enabled Blue Ocean to acquire all of EALC's stock, which now included the 1000 shares pledged as Security for the Loan under the Pledge Agreement, all of which were now held by Summerson, and the 9000 shares created in 1996 which had been issued to Iderval. Again, the transfer and acquisition of these shares of

⁸ Iderval is a British Virgin Islands entity.

⁹ Blue Ocean is a Panamanian corporation.

stock was accomplished without CDR's knowledge or permission (id., Ex. 12).

Approximately one year later, Summerson, Iderval, and Blue Ocean transferred ownership and control of EALC and another company, Macson Express USA, Inc. ("Macson"), to Ospin International, Inc. ("Ospin").¹⁰ 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., ("World Business Center") (id., Ex. 17). In 2002, EALC went out of existence, 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).

Plaintiff commenced the first of the two actions before this court in 2003 asserting six causes of action sounding primarily in tort. The second action, commenced in 2006, contains thirty-eight causes of action sounding in tort, and including claims of fraud, breach of fiduciary duty and unjust enrichment.

The Instant Motions

As previously touched upon, there are presently seven motions, three advanced within the 2003 action and four within

¹⁰ Ospin is a company incorporated under the laws of the Bahamas.

the 2006 action, which require resolution. All three of the motions advanced within the 2003 action seek this court's intervention on a myriad of yet unresolved discovery issues. By motion sequence 023, plaintiff moves pursuant to CPLR 3124 and 3126 for an order precluding defendants Maurice Cohen and World Business Center, Inc., from offering any testimony or other evidence relating to any matter or document that should have been provided in response to Plaintiff's First Set of Interrogatories and First Notice of Discovery and Inspection. In addition, plaintiff seeks an order re-instating the default judgments entered against defendant World Business Center on September 25, 2008; directing for the continued deposition of Leon Cohen and Maurice Cohen; and directing Leon and Maurice Cohen to answer those questions they refused to answer during depositions held between July 20 and 29 of 2009. Lastly, plaintiff seeks an order staying the due date for plaintiff's responses to defendants' discovery demands until such time as defendants comply with their outstanding obligations.

By motion sequence 024, plaintiff moves for the issuance of an order of civil contempt against defendant judgment-debtor Iderval Holding, Ltd. ("Iderval") and its attorneys, Gleason & Koatz, LLP ("Gleason & Koatz") and John Gleason, Esq. ("Mr. Gleason") for failing to comply with the turnover provisions of this Court's October 2, 2008 and November 21, 2008 orders.

Plaintiff further seeks issuance of an order of civil contempt against attorney John Gleason, Esq. due to his failure to comply with subpoenas issued by this court dated March 23, 2009. In opposition, attorney John P. Gleason cross-moves pursuant to CPLR 8301(a)(2), (b)(c) and (d) for attorneys fees.

By motion sequence 025, plaintiff moves for an order of civil contempt against nonparty HSBC Bank USA, NA for failing to comply with subpoenas dated September 22, 2008, March 27, 2009, April 17, 2009 and July 2, 2009, as well as this court's Orders dated January 23, 2009 and August 19, 2009.

The balance of the motions under consideration are advanced in the 2006 action. By motion sequence 030, defendants Maurice Cohen, Sonia Cohen and Leon Cohen (collectively, the "Cohen defendants"), joined by defendants Allegría Aich, Robert Maraboeuf, and Patricia Petetin (Benharbon),¹¹ move for summary judgment pursuant to CPLR 3212. By motion sequence 031, the Cohen defendants move pursuant to CPLR 3025(b) for an order allowing them to amend their answer to include, among other things, thirteen newly asserted affirmative defenses.

By motion sequence 032, plaintiff moves pursuant to CPLR 3124 and 3126 for an order precluding the Cohen defendants and World Business Center from offering any testimony or other

¹¹ To maintain consistency and avoid confusion in this court's decisions, this court has decided to continue to identify Ms. Benharbon as Ms. Petetin.

evidence relating to any matter that should have been provided in response to plaintiff's First set of Interrogatories, and precluding the aforementioned defendants along with defendants Robert Maraboeuf, Allegria Achour Aich, Patricia Petetin and Joelle Habib from offering any testimony or other evidence relating to any document that should have been provided in response to plaintiff's First Notice for Discovery and Inspection. Plaintiff further seeks an order reinstating the default judgments entered against World Business Center on September 25, 2008, or, alternatively, precluding defendant World Business Center from offering any testimony or other evidence relating to any document that should have been provided in response to plaintiff's First Set of Interrogatories. In addition, plaintiff seeks an order directing the continuation of the depositions of defendants Leon Cohen and Maurice Cohen, and an order directing them to respond to any questions they refused to answer during their depositions held between July 20 and 29, 2009. Lastly, plaintiff seeks an order directing the Cohen defendants and defendants World Business Center, Robert Maraboeuf, Allegria Achour Aich, Patricia Petetin and Joelle Habib to produce documents in response to plaintiff's First Notice of Discovery and Inspection, and for an order staying the due date for plaintiff's responses to defendants' discovery demands until such time as defendants comply with their

outstanding discovery obligations.

Lastly, by motion sequence 033, plaintiff seeks an order allowing for the expansion of the record of motion sequence 032. Plaintiff additionally seeks an order re-instating the default judgments entered against defendant Allegría Aich, Robert Maraboeuf, Patricia Petetin and Joelle Habib on account of their failure to appear for depositions as ordered by the court. Alternatively, plaintiff seeks an order directing defendant Allegría Aich to appear promptly in New York for the continuations of her deposition, and for the prompt appearance of Mr. Maraboeuf, Ms. Habib and Ms. Petetin for their respective depositions which shall continue day-to-day until completed.

Discussion

The 2008 Default Judgment

As a preliminary matter, this court first addresses the defaults taken against the defendants in 2008, and the current requests made by plaintiff in both actions to 'reinstate' the August 7, 2008 order issuing and September 25, 2009 judgment granting those defaults.

In June of 2008, this court heard arguments on seven motions made by the parties in these actions.¹² Among the relief sought by the parties in those motions, was an order vacating the

¹² The August 2008 decision covers motion sequences 012 and 013 in the 2003 Action and motion sequences 013 through 017 in the 2006 Action.

January 29, 2008 default judgment which had been taken against defendants Robert Maraboef, Allegria Aich, and Patricia Petetin (2006 Action, motion sequence 016) and an order sought by plaintiff, for a default judgment against the Cohen defendants, and defendants Iderval, World Business, and Joelle Habib (2006 Action, motion sequence 015; 2003 Action, motion sequence 013). This court, in its August 7, 2008 decision, denied the relief sought in motion sequence 016, and ultimately found that Robert Maraboef, Allegria Aich, Patricia Petetin, the Cohen defendants, Iderval, World Business, and Joelle Habib either remained, or had found themselves, in default.

The August 2008 decision, entered on August 29, 2008, was appealed. While the appeal was pending, judgment was entered against the defendants on September 25, 2008.

By decision dated May 21, 2009, the Appellate Division, First Department vacated the defaults taken by this court against each of the aforementioned defendants on August 7, 2008. The Appellate Division additionally vacated the ensuing September, 2008 order (see, CDR Créances S.A.S. v. Cohen, 62 AD3d 576 [1st Dept 2009]). This court therefore no longer has the authority to "reinstate" the default judgment as it is now bound by the decision of Appellate Division, First Department. As such, plaintiff's requests for reinstatement of the September 2008 default judgment, as advanced in the 2003 Action under motion

sequence 023, and in the 2006 action under motion sequences 032 and 033, must be, and are, denied.¹³

Summary Judgment and the Motion to Amend the Cohens' Answer

The court next addresses the motions advanced by the Cohen defendants for summary judgment (2006 action, motion sequence 030) and their contemporaneously advanced motion to amend their answer (2006 action, motion sequence 031). Both motions, advanced after three years of litigation, ten discovery conferences, and twenty-nine motions, are unsurprisingly accompanied only by the affidavits and affirmations of counsel.

The Cohen defendants, in their motion to amend, seek to expand their answer, and, among other things, add what this court has calculated as being thirteen new affirmative defenses. In support of the motion, counsel for the Cohen defendants argues that despite the age of this case, discovery is "just commencing" and the action is "just beginning" to be litigated on the merits (Memorandum of Law in Support of the Cohens' Motion to Amend Their Answer, p. 4). Counsel for the Cohen defendants, citing "ample legal precedent" for granting leave to amend pleadings following retention of new counsel and the liberal stance on granting leave to amend pleadings in this State, also argues that the addition of the affirmative defenses should be allowed

¹³ However, plaintiff, upon proper application, remains free to move for similar, if not identical relief, in the future.

because all of the arguments have been previously raised during the course of litigation in this action, and have been asserted as of right by co-defendants Robert Maraboeuf and Allegria Aich.

What the Cohen defendants fail to grasp however, is that while leave to amend a pleading is generally freely given (CPLR 3025), such requests need not be granted without appropriate substantiation (Brennan v. City of New York, 99 AD2d 445 [1st Dept 1984]). Once again, the only affirmations presented on motion are those of counsel which, under the law, lack the requisite probative value to establish that the newly advanced affirmative defenses have merit and should be allowed after a three year delay (Guzman v. Mike's Pipe Yard, 35 AD3d 266 [1st Dept 2006]).

Furthermore, even if the motion to amend were properly supported by affidavits of merit, review of the proposed answer reveal that the vast majority of the proposed affirmative defenses fail (See 2006 Action, Notice of Motion, Sequence 31, Exhibit A). For example, no amount of creative arguments will enable the Cohen defendants to be able to assert the affirmative defense of lack of personal jurisdiction (second proposed affirmative defense) because this defense was not raised by prior counsel when the Cohen defendants moved, pursuant to CPLR 3211(a), to dismiss the action in 2006 (Addesso v Shemtob, 70 NY2d 689 [1987]); See generally, Barr, Altman, Lipshie and

Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2009] §15:960-963)). They cannot assert the claim now.

Nor can the Cohen defendants blithely claim, after the expenditure of hundreds of hours of judicial resources and without any affidavits of merit, that they are improper parties to this action (first proposed affirmative defense), or that the court somehow, after twenty-nine motions, lacks subject matter jurisdiction. The proposed fifth through eighteenth proposed affirmative defenses have either been waived or lack merit. To hold otherwise after three years and the sheer volume of motion practice in this action, much of which has been generated as a direct result of the Cohen defendants' failure to comply with discovery demands and court orders, would be extremely prejudicial to the plaintiff (McGaulley v. Telling, Kelting, & Potter, P.C., 241 AD2d 669 [1997]) See generally, Barr, Altman, Lipshie and Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2009] §15:960-963)). For similar reasons, and because of the vagueness of pleading (CPLR 3018(b)), this court also rejects the proposed "reservation of defenses" catch-all provision which the Cohen defendants have added to their response.

Then there is the issue of plaintiff's claimed lack of standing. Counsel for the Cohens is indeed correct that these issues in particular were raised. They were raised in prior

motion practice (2003 Action, cross-motion to motion sequence 013; 2006 Action, motion sequence 016), and they were rejected. Moreover, since these rulings were not appealed as part of the appeal taken of the August 7, 2008 decision, they remain the law of the case.

Which leaves the court to consider the proposed fourth affirmative defense concerning the forum selection clause contained within the Loan Agreement giving rise to this action, and whether or not this court should now consider the argument that New York is the improper forum in which to advance these claims.

The claim also forms the basis of the motion for summary judgment advanced by the Cohens, and joined by defendants World Business Center, Allegrgia Aich, Patricia Petetin, Robert Maraboeuf and Joelle Habib (motion sequence 031). Simplified, the claim advanced by counsel for the Cohen defendants in the motion for summary judgment, is that the Loan Agreement giving rise to these two actions contains a forum selection clause which dictates that these actions may only be brought before the Commercial Court of Paris (motion sequence 030, Dewey Affirmation Ex. C. Article 980; (Memorandum in Support of the Cohen's Motion For Summary Judgment, pgs 5-6)). As such, according to Counsel for the Cohen defendants, the 2003 Action, now seven years old, and 2006 Action, now three years old, should not be allowed to

proceed, and require dismissal.

A close review of the Loan Agreement indeed reveals the existence of a forum selection clause at Art. 980. This document however, was not the only document involving the Loan Agreement containing a forum selection clause. When the CDR's predecessor-in-interest and Euro American Lodging Corporation ("EALC") entered into the Loan Agreement, the loan was secured by two mortgages and a Related Security Agreement (Dewey Affirmation, Exhibit C, Complaint ¶61). The security for the loan included Pledge Agreements which were executed by EALC's then two shareholders, Flatotel International Establishment (now Summerson International Establishment) and M. Coenson International et Cie. SNC (now Summersun International et Cie. SNC). Both entities pledged all of EALC's outstanding capital stock at the time of the mortgage loan transaction to plaintiff's predecessor-in-interest and delivered their share certificates to the lender (Dewey Affirmation, Exhibits D and E).

The terms of the Pledge Agreements state, in no uncertain terms, that they are to be governed and interpreted by the laws of the State of New York *irrespective* of whether the dispute arising out of the Pledge Agreements sound in tort, equity, or otherwise (id. Pledge Agreement paragraph 28). The Pledge Agreement choice of law provision recognized in the Loan Agreement in Article 980, and the Loan Agreement *acknowledges*

that the Paris Commercial Court would have no jurisdiction with respect to the bank's recourse against fixed and movable assets located in the United States and governed by United States Law (Dewey Affirmation, Exhibits D and E).

The thrust of the defendants' argument, is that the 2003 and 2006 Actions are based on the contractual relationship created under the Loan Agreement, and arise out of the breach of the Loan Agreement. Any actions to enforce the loan, according to defendants, must be governed by the Paris courts.

This court disagrees. The papers presented in this action do not support the notion that after the Paris Court of Appeals declared the loan to be in default in 2003, disputes arising out of the attempts to enforce those rights could only be governed by the Paris courts. The nature of the 2003 and 2006 actions are also not based on breach of contract. They are based on tort claims of fraud, where forum selection clauses generally have no application (see, Fantis Foods v. Standord Imorting Co., 63 AD2d 52 [1st Dept 1978], *reversed on other grounds*, 49 NY2d 317 [1980]). The proposed affirmative defense of improper forum based on the forum selection clause contained within the Loan Agreement therefore has no merit, and is rejected.

The summary judgment motion (motion sequence 030) advanced by the Cohen defendants and joined by defendants World Business Center, Allegría Aich, Patricia Petetin, Robert Maraboeuf and

Joelle Habib, is denied. Even if defendants' newest advanced arguments were viable, in the absence of an affidavit of merit from someone with personal knowledge of the facts, every single one of the arguments advanced by defendants continues to fail. Again, this court emphasizes a basic tenet of New York Practice: affidavits made by an attorney with no personal knowledge of the facts are of no probative value (see, Rudner v. New York Presbyterian Hospital, 42 AD3d 357 [1st Dept 2007]; Guzman v. Mike's Pipe Yard, 35 AD3d 266 [1st Dept 2006]; Yovannone v. Sibley's Department Store, 101 AD2d 1014 [4th Dept 1984]). A related tenet worth remembering is that affirmations made by attorneys who have no personal knowledge of the facts also do not satisfy the requirements of a summary judgment motion (see, Zuckerman v City of New York, 49 NY2d 557 [1980]; Morales v. Coram Materials Corp., 51 AD3d 86 [2nd Dept 2008]; Dinham v. Wagner, 48 AD3d 349 [1st Dept 2008]). An attorney'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)), but it cannot act to fill the void created by the failure to submit any supporting evidentiary proof. The motion for summary judgment is therefore denied.

Discovery Requirements and Responses

Turning to the discovery-related motions (2003 Action,

motion sequence 023; 2006 Action, motion sequence 032 and 033), with respect to plaintiff's request to stay their production of discovery, this court reiterates what it has said and/or implied on more than one recent occasion concerning these two Actions: plaintiff is under no obligation to provide discovery responses in either the 2003 Action or the 2006 Action until defendants have responded to the outstanding discovery demands and interrogatories. The relief sought by plaintiff with respect to the stay is therefore granted in motion sequence 023 (2003 Action) and motion sequence 032 and 033 (2006 Action).

With respect to the outstanding discovery and preclusion orders advanced in the aforementioned motion sequences, the court reminds each of the defendants who are named in each of these actions that they are under an obligation to respond to discovery demands and interrogatories. If, during the discovery process a defendant discovers that they lack documentation necessary to generate a meaningful response to the outstanding demands in either the 2003 or the 2006 Action, then it is their obligation to provide an affidavit from someone with knowledge attesting to the fact that a document does not exist or that the individual lacks the knowledge necessary to answer the question. If defendant feels that a document demand is "overbroad" then they should first write a letter to plaintiff's counsel and ask for clarification of what it is that they are looking for, and

plaintiff, within seven days of said request, shall reply with a more precise explanation of what that defendant should be producing before contacting the court.

Defendants in both Actions have until February 1, 2010 to accomplish this. In the event that a defendant decides not to accomplish this, or fails to accomplish this and fails to bring whatever difficulty they have in obtaining the documents to the attention of the court, that defendant will be precluded from offering evidence and/or testimony at trial on any and all issues to which they fail to responsively address. This portion of the decision addresses the outstanding discovery responses, and requests for orders of preclusion, which are as of now, conditional, as identified in motion sequence 023 in the 2003 Action and motion sequence 032 and 033 in the 2006 action.

Depositions of Maurice Cohen and Leon Cohen

Turning to the issue of outstanding depositions, the court first addresses the depositions of defendants Leon and Maurice Cohen. The court has reviewed the transcripts of the Cohens (and indeed, followed them on a daily basis during the time when the depositions were underway), and directs Leon Cohen and Maurice Cohen to provide responses to the questions that they refused to answer during their respective depositions conducted between July 20 and 29, 2009 in both Actions. This court additionally directs Leon and Maurice Cohen to appear for their continued depositions,

inasmuch as it appears there is more to learn from these parties. This portion of the decision pertains to motion sequence 023 in the 2003 Action and motion sequence 032 in the 2006 Action.

With respect to the depositions of defendants Robert Maraboeuf, Allegría Aich, Patricia Petetin, and Joelle Habib the court begins by emphasizing its disappointment. As of March 2008, these four individuals knew, or should have known that their depositions were required in this action. In fact, on March 26, 2008 these four defendants joined the action commenced by Maurice and Sonia Cohen in the Paris Commercial Court against CDR seeking to enjoin prosecution of the New York litigation (Order to Show Cause, Motion Sequence 033, Exhibit K). That action was dismissed by the Paris Commercial Court on December 17, 2008 (id. Exhibit L).

In April of 2008, John Gleason, Esq., who at the time was counsel for these four individuals, represented to this court that scheduling these depositions was not going to be a problem, and all but assured the court of his then clients' cooperation (id., Exhibit M). A month later, defendant Habib failed to appear at her scheduled May 15, 2008 deposition. Two weeks thereafter, Mr. Maraboeuf, Ms. Aich, Ms. Petetin, and Ms. Habib commenced a second action in the Paris Commercial Court seeking to enjoin prosecution of the actions before this court (id. Exhibit N). The second action was also dismissed by the Paris

Commercial Court (id., Exhibit L).

It was not until the middle of this year that depositions were finally rescheduled for these four defendants, and, as soon as it became apparent that the depositions would be scheduled, current counsel for these four defendants began advancing arguments for why these depositions should be held in France.

Since August of 2009, this court has maintained the position that if the documents bearing the respective signatures of the respective defendants were signed in the United States, then the depositions of those individuals shall be held in the United States. Since taking this position, this court has been barraged with a multitude of requests from counsel for the defendants, made both in-person and by letter, requesting that this court modify its position, and direct for depositions to be held in France. According to counsel, defendants Habib and Petetin have child-care and work-related issues,¹⁴ and in late summer/early

¹⁴ The court notes that Ms. Petetin's and Ms. Habib's despite claims of "non-involvement" in these matters, the documents submitted in connection with Motion Sequence 025 and 026 in the 2006 Action tell a vastly different story. Ms. Petetin was a director of EALC in 1996 and served as its secretary from 1994 through 2000. It is her signature which appears on the amendment to EALC's Certificate of Incorporation which authorized the issuance of the additional 9,000 stock shares claimed by plaintiff to further diminish CDR's security interest. Ms. Petetin also signed a document transferring 900 additional shares to Iderval - without any apparent exchange of consideration (see 2006 Action Affirmation in Opposition to Motion Sequence 025, 026 Exhibits E, T G). Ms. Habib's involvement appears to include the authorization of the transfer of ownership of Macson Express, USA, Inc., to the Elias controlled Ospin entity. These documents,

fall of 2009, defendant Maraboeuf claimed that his physician prohibits him to travel by plane due to medical conditions.¹⁵

The court notes that despite the requests made by counsel, not one of the defendants initially submitted any sworn statements, either from themselves, or from individuals and/or entities who could provide information supporting their claims of hardship, to the court. Notes from doctors presented to the court were unsworn and provided no detail of the diagnosis or when the diagnosis was first made, and offered no detail of prognosis. Unsworn statements made by the defendants themselves offered no explanation for why a deposition in France would not result in the same claimed hardships that would be suffered if conducted outside of France.

Then, there is the issue of the unfinished deposition of Ms. Aich,¹⁶ which was begun on October 8, 2009 and which she

written in French, were executed by Ms. Habib in New York in her capacity of President of Groupotel (id.).

¹⁵ Mr. Maraboeuf was the President of EALC from April 20, 1995 until February 14, 2000 and was elected as a director of EALC on May 7, 2006. His signature, along with the signature of Ms. Petetin, authorized the issuance of EALC shares to Iderval Holding in derogation of terms of the Pledge Agreements (see 2006 Action Affirmation in Opposition to Motion Sequence 025, 026 Exhibit G). Mr. Maraboeuf also signed documents effectuating the transfer of 500 original EALC shares from Summersun to Summerson (id.; Exhibit II).

¹⁶ Ms. Aich's signature appears on key documents written in French and executed in New York which allowed Blue Ocean Finance Ltd. to divert millions of dollars into a Swiss bank account (see 2006 Action Affirmation in Opposition to Motion Sequence 025, 026

unilaterally terminated on October 9, 2009. The deposition transcript spans a few hundred pages thus far, and is comprised mostly of 'non-answers', which curiously fall into categories of the "I don't know" and "I don't remember" variety. The court notes its curiosity simply because it is Ms. Aich's signature which appears on documents that succeeded in the diversion of millions of dollars between Cohen-owned companies.

Clearly, Ms. Aich will be returning to complete her deposition, which, as made crystal clear on November 13, 2009, is to be held as soon as possible in New York. Furthermore, Ms. Aich's deposition will be held on a day-to-day basis until it is completed. Depositions of Ms. Petetin, Ms. Habib and Mr. Maraboeuf are also to be held on a day-to-day basis until they too are completed.

Now, in light of the recent deposition transcripts submitted to this court for review, and the confusion expressed by defendants' respective counsel at recent oral arguments, "completed" for the purposes of the depositions of the defendants in these Actions, is now defined as the point when it is established that the deponent either actually knows something about their employment and the documents they signed while working in that capacity, or, until it becomes clear that they did not know who they worked for, or what they signed along the

(Summary Judgment) Exhibits I, K, L).

way. Documents to be used in these depositions which require translations into French, must be provided to counsel seven days in advance of the scheduled depositions.

As to the scheduling of these deposition, Ms. Aich is to return to New York before the end of January 2010 and complete her deposition. The depositions of Robert Maraboeuf, Patricia Petetin, and Joelle Habib are to be completed as expeditiously as possible, and prior to February 15, 2010. The depositions of defendants Leon Cohen and Maurice Cohen are to take place as soon as practicable, but no later than March 5, 2010. This portion of the decision addresses the balance of the relief sought in motion sequence 023 in the 2003 Action, and motion sequence 032 and 033 in the 2006 Action.

Motions for Civil Contempt

Finally, the court directs its attention at the 2003 Action and the two motions seeking issuance of orders of civil contempt.

By motion sequence 025, plaintiff moves for an order of civil contempt against nonparty HSBC Bank USA, NA for failing to comply with subpoenas dates September 22, 2008, March 27, 2009, April 17, 2009 and July 2, 2009, as well as this court's Orders dated January 23, 2009 and August 19, 2009. The court has reviewed the papers associated with this motion, and declines to grant the relief requested.

Motion Sequence 024 seeks an order of civil contempt against

defendant judgment-debtor Iderval Holding, Ltd. ("Iderval") and its attorneys, Gleason & Koatz, LLP ("Gleason & Koatz") and John Gleason, Esq. ("Mr. Gleason") for failing to comply with the turnover provisions of this Court's October 2, 2008 and November 21, 2008 orders. The motion also seeks the issuance of an order of civil contempt against attorney Mr. Gleason due to his failure to comply with subpoenas issued by this court dated March 23, 2009. In opposition, attorney John P. Gleason, Esq. cross-moves pursuant to CPIR 8301(a)(2), (b)(c) and (d) for attorneys fees.

Taking a step back into the history of this case, the court is reminded that at one time, Mr. Gleason represented the Cohen defendants, defendant World Business Center, defendant Iderval Holding, Ltd. (Iderval), and defendants Allegría Aich, Patricia Petetin, and Joelle Habib, and Robert Maraboeuf. At some point after the issuance of this Court's August 2008 decision, these defendants, opted to retain different counsel.¹⁷ In September of 2008, the Cohen defendants and defendants Allegría Aich, Patricia Petetin, and Joelle Habib, and Robert Maraboeuf all made motions and/or cross-motions through newly-retained counsel to reargue and renew the court's August 2008 decision (2006 Action, Motion Sequence 022, 025 and 026). The arguments in the motions and cross-motions advanced by these individuals, included claims of

¹⁷The court does not know what motivated this decision, or whether it was a collective or individual decision made by the respective defendants.

"law office failure" which was targeted at Mr. Gleason directly,¹⁸ and embarked on a litigation strategy which literally disavowed Mr. Gleason's representation of them.¹⁹

In addition to the decision issued for Motion Sequences 022, 025 and 026 in the 2006 Action, in November of 2008 this court also issued orders directing that defendant judgment-debtors Iderval, World Business Center, and their respective attorneys, disclose relevant documents to the receiver appointed in this action. In accordance with this court's November order, plaintiff served Gleason and Koatz with a subpoena demanding the relevant documents. Gleason and Koatz did not respond to the subpoena.

In order to find a party in civil contempt, it must be demonstrated that there first existed a lawful judicial order that was in effect and disobeyed, and it must be additionally

¹⁸ The court noted in the November 2008 decision that it was troubled by the allegations made against Mr. Gleason, who, never submitted any papers on his behalf notwithstanding the attacks made on his representation, or claims of lack thereof as advanced by defendants Allegria Aich, Patricia Petetin, Joelle Habib and Robert Maraboeuf who claim that while they that they each independently agreed to have Mr. Gleason represent them in this action and paid an undisclosed fee to him, they never actually spoke to him (see, the respective Affidavits of Allegria Aich, Patricia Petetin, Joelle Habib and Robert Maraboeuf contained in the Order to Show Cause for Motion Sequence 025 and 026, 2006 Action).

¹⁹ The court also noted in its November 2008 decision that these claims, though unsupported by any kind of supporting documentation, raised issues serious enough to be addressed, but not before this particular forum.

demonstrated that the failure to comply with that order prejudiced the rights of a party to the litigation (Garcia v. Great Atlantic and Pacific Tea Company, Inc., 231 AD2d 401 [1st Dept 1996]; McCain v. Dinkins, 84 NY2d 216 [1994]).

With respect to the instant motion for contempt, there is no question that this court issued at least one order to which Gleason and Koatz failed to respond. In opposition to the application, Mr. Gleason argues that his failure to respond was not because he was ignoring a direct mandate of the court, but because he, and Gleason and Koatz, had turned over the relevant legal files to attorneys Dewey & Pegno, LLP, the incoming attorneys on this case. The problem this court has with this argument however, is that as far as the court is concerned, and as far as this case is concerned, to date, there has been no consent to change attorney filed with the court with respect to defendant Iderval.²⁰ As such, Gleason and Koatz, and Mr. Gleason, remain responsible for the representation of defendant judgment-debtor Iderval. In failing to respond to the subpoena generated out of this court's unequivocal order, the law firm of Gleason and Koatz and Mr. Gleason are in contempt. Plaintiff's

²⁰ The Cohen defendants are presently represented by Dewey & Pegno, LLP. Bradley Simon, Esq. is currently representing defendants Allegría Aich, Patricia Petetin, Joelle Habib, and Robert Maraboeuf. The interests of defendant World Business Center are presently being represented by Mark Bogatin, Esq..

motion for the issuance of an order of contempt is therefore granted. The cross-motion advanced by Mr. Gleason is denied.

Inasmuch as these motions have now all, in turn, been addressed, it is

ORDERED that plaintiff's request for reinstatement of the September 25, 2008 default judgment taken as against defendant World Business Center, Inc., as advanced in motion sequence 023 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003) and in motion 032 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006); is denied; and it is further

ORDERED that plaintiff's request for reinstatement of the September 25, 2008 default judgment taken as against defendants Allegria Aich, Robert Maraboef, Patricia Petetin, and Joelle Habib, as advanced in motion sequence 023 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), is denied; and it is further

ORDERED that motion sequence 031, advanced by the Cohen defendants in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), seeking an order allowing for the amendment of their answer, is denied; and it is further

ORDERED that motion sequence 030, advanced by the Cohen defendants and joined by defendants Allegria Aich, Robert Maraboef, and Patricia Petetin in the action styled, CDR

Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), seeking summary judgment pursuant to CPLR 3212, is denied; and it is further

ORDERED that the plaintiff's request for a stay of discovery pending the production of defendants' outstanding discovery responses as advanced in as advanced in motion sequence 023 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003) and in motion 032 and 33 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), is granted in accordance with this decision; and it is further

ORDERED that defendants Maurice Cohen and World Business Center, Inc., are to produce any and all outstanding responses to Plaintiff's First Set of Interrogatories and First Notice of Discovery and Inspection advanced in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003). Said responses are to be provided by February 1, 2010. In the event that either defendant World Business Center or Maurice Cohen fails to respond to said discovery demands, as requested in motion sequence 023 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003), they will be precluded from offering any testimony or other evidence at trial on the unanswered issues; and it is further

ORDERED that defendants Leon Cohen, Maurice Cohen, Sonia Cohen, and World Business Center, Inc. are directed to produce

any and all outstanding responses to Plaintiff's First Set of Interrogatories and First Notice of Discovery and Inspection advanced in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006). Said responses are to be provided by February 1, 2010. In the event that either defendant Leon Cohen, Maurice Cohen, Sonia Cohen, and World Business Center, Inc. fails to respond to said discovery demands, as requested in motion sequence 032 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), they will be precluded from offering any testimony or other evidence at trial on the unanswered issues; and it is further;

ORDERED that defendants Allegría Aich, Patricia Petetin, Joelle Habib, and Robert Maraboeuf are directed to produce any and all outstanding responses to Plaintiff's First Notice of Discovery and Inspection advanced in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006). Said responses are to be provided by February 1, 2010. In the event that any or all of these defendants fail to respond to said discovery demands, as requested in motion sequence 032 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), they will be precluded from offering any testimony or other evidence at trial on the unanswered issues; and it is further

ORDERED that the portion of plaintiff's requests seeking the

continued deposition of Leon Cohen and Maurice Cohen, as well as a direction that Leon Cohen and Maurice Cohen provide responses to questions they refused to answer in their respective depositions taken between July 20 and 29 of 2009, as advanced in motion sequence 023 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003) and in motion sequence 032 in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), is granted; and it is

ORDERED that Leon Cohen and Maurice Cohen shall provide the aforementioned responses by February 1, 2010, and appear for their continued depositions take place as soon as practicable, but no later than February 19, 2010. Said depositions shall take place day-to-day as necessary until completed; and it is further

ORDERED that the portion of plaintiff's motion advanced in motion sequence 033 in action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 600448/2006), seeking an order directing the depositions of Allegria Aich, Patricia Petetin, Joelle Habib, and Robert Maraboeuf is granted in accordance with this court's decision; and it is further

ORDERED that the portion of motion sequence 033 seeking to expand the record for motion sequence 032 is granted; and it is further

ORDERED that the relief sought by plaintiff in motion sequence 025 in the in the action styled, CDR Créances, S.A.S. v.

Cohen et al. (Index No. 109565/2003) is denied; and it is further

ORDERED that the order of contempt sought by plaintiff in motion sequence 024 in the in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003) as against the Law Firm of Gleason & Koatz and John Gleason, Esq. is granted; and it is further

ORDERED that the cross-motion advanced by John Gleason, Esq. in motion sequence 024 in the in the action styled, CDR Créances, S.A.S. v. Cohen et al. (Index No. 109565/2003) is denied; and it is further

ORDERED that the clerk of court enter judgment accordingly.

In accordance with the directive of the Administrative Judge, these matters are referred to the Honorable James A. Yates in Part 49. All future applications are directed to Justice Yates.

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

Dated: 11/24/09

FILED

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

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