

**Gliklad v Cherney**

2014 NY Slip Op 30945(U)

March 26, 2014

Sup Ct, New York County

Docket Number: 602335/09

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK : PART 45

-----X  
 ALEXANDER GLIKLAD,

Plaintiff,

-against-

MICHAEL CHERNEY,

Defendant.  
 -----X

Index No. 602335/09

DECISION AND ORDER

Motion Sequence No. 027

**MELVIN L. SCHWEITZER, J.:**

In this action, plaintiff moves for summary judgment against defendant pursuant to CPLR 3212. For the reasons below, the court grants plaintiff's motion.

**Facts**

In 2009, Alexander Gliklad (Mr. Gliklad) filed a motion for summary judgment pursuant to CPLR 3213 to enforce a \$270 million promissory note (Note) signed by Michael Cherney (Mr. Cherney) in 2003. According to Mr. Gliklad, and consistent with the Note, and evidence provided by him, Mr. Cherney owes Mr. Gliklad \$270 million as consideration for Mr. Cherney's purchase from him of a 26.37% interest in KuzbassRazrezUgol (Kuzbass Coal). Mr. Cherney's attorneys prepared the Note, and it states that Mr. Cherney is the borrower. Mr. Cherney denies the validity of the Note.

Mr. Cherney has put forth numerous claims regarding the Note. He claims that the Note was intended to reflect that Mr. Gliklad owed *him* \$270 million, and that the Note mistakenly reflected *him* as the borrower. He claims that the Note was for a loan that he made to Mr. Gliklad in either 1997 or 1998 to finance the construction and development of a new railway system in Russia in conjunction with the Russian Ministry of Transportation. Mr. Cherney

alleges that this loan was made by a company under his control, Nash Investments Ltd., to two companies in which Mr. Gliklad had an interest, Vitapoint Ltd. and Otava.

In response, Mr. Gliklad has produced evidentiary support to show that he did in fact receive a loan from Mr. Cherney, and that he repaid that loan in full, long before the creation of the Note. Mr. Gliklad also has demonstrated that repayment of the 1998 loan was not the object of the Note.

In May 2005, Mr. Gliklad sought a declaratory judgment to enforce the Note in Israel. Mr. Cherney did not contend the merits of the case, nor did he make any counterclaims against Mr. Gliklad. It was not until 2009 that Mr. Cherney argued before a court that Mr. Gliklad owed him the amount of the Note.

On July 29, 2009, Mr. Gliklad initiated this suit. In 2011, after a year and a half of litigation, Mr. Cherney filed a lawsuit to collect the Note in Israel. The only important difference between the lawsuit here and that lawsuit was that Mr. Cherney sought equitable remedies for his claims in Israel, but seeks only money damages for his counterclaims in this court. The court found that Mr. Cherney was forum shopping and acting in bad faith. The court noted Mr. Cherney brought his suit in Israel only after the court indicated that its pending decision regarding personal jurisdiction would be adverse to him. The court granted Mr. Gliklad's motion for an anti-suit injunction pursuant to CPLR 6301. The court's decision was affirmed by the Appellate Division, First Department.

## Discussion

### Mr. Gliklad's Prima Facie Case

The court and the Appellate Division, First Department, have both determined that the Note is valid. In its order granting Mr. Gliklad's motion for an anti-suit injunction, dated July 14, 2011, the court determined that "the Note meets all of the requirements for a valid Promissory Note pursuant to NY UCC 3-104." That determination was affirmed by the Appellate Division, First Department. ("Plaintiff made a prima facie showing that his claim under the promissory note has merit." *Gliklad v Cherney*, 97 AD3d 401, 402, App Div, 1st Dept 2012.)

### Mr. Cherney's Affirmative Defenses

Mr. Cherney has not provided plausible evidence to establish any of his Affirmative Defenses. He has not raised a material issue of fact with respect to this motion.

Mr. Cherney has relied primarily on two Affirmative Defenses. First, he claimed that the Note was intended to reflect that Mr. Gliklad was the borrower, rather than the lender (First Affirmative Defense). To support this assertion, Mr. Cherney claimed that Mr. Gliklad owed him monies with respect to a loan given by Mr. Cherney's controlled entity (Nash Investments) to Mr. Gliklad's controlled entity (Vitapoint). However, Mr. Cherney did not produce key documents relating to this defense. The court found that because Mr. Cherney had failed to respond adequately to discovery requests that began three years prior, his failure to produce documents was willful and contumacious. The court struck Mr. Cherney's First Affirmative Defense and First Counterclaim pursuant to CPLR 3126.

The court preserved Mr. Cherney's Ninth Affirmative Defense. This defense is based on the proposition that Mr. Cherney already owned his 26.37% interest in Kuzbass Coal through a

joint venture at the date of the Note, and that the Note lacked consideration. Mr. Cherney failed to produce any documentation to corroborate his claim, and neglected to explain obvious contradictions that resulted from his numerous shifting positions.

The court ordered that Mr. Cherney be deposed to explain where any documentation relating to his Ninth Affirmative Defense could be found or explain why it was unavailable. Instead of any evidence to support his positions or credible excuses for his failure to produce the requested documents, the court found blatant contradictions in his testimony and struck his Ninth Affirmative Defense.

Having lost his two key Affirmative Defenses, Mr. Cherney relies primarily on the argument that Mr. Gliklad has not established his prima facie case. When convenient, Mr. Cherney has contended that the Note was complete. His First Affirmative Defense rested on the assumption that the Note was complete, because his contention was that the value of the Note was owed *to him*. In an attempt to prevent summary judgment, Mr. Cherney now contends that issues of material fact exist with respect to completeness. This court has given Mr. Cherney over four years to produce required documents and has been burdened with repeatedly dealing with his willful, obstructionist behavior. Mr. Cherney has contradicted himself multiple times, and has provided insufficient evidence to establish any of his Affirmative Defenses.

Mr. Gliklad has sufficiently established his prima facie case. Mr. Cherney's remaining Affirmative Defenses are all without merit, and Mr. Cherney has not raised a material issue of fact with respect to the basis for this motion. The court grants Mr. Gliklad's Motion for Summary Judgment.

### Conclusion

For the foregoing reasons, it is hereby

ORDERED that Mr. Gliklad's motion for summary judgment is granted; and it is further

ORDERED that Mr. Cherney's discovery motion is denied; and it is further

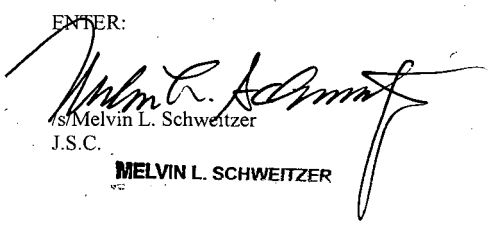
ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$270 million, together with interest at the rate of 9% per annum from the date of August 31, 2004 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

ORDERED that that portion of the plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: March 26, 2014

ENTER:

  
s/Melvin L. Schweitzer  
J.S.C.

**MELVIN L. SCHWEITZER**