| **Gliklad v Cherney** |
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| December 7, 2016 |
| Supreme Court, New York County |
| Docket Number: 602335/2009 |
| Judge: Anil C. Singh |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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ALEXANDER GLIKLAD,

Plaintiff,

-against-

MICHAEL CHERNEY,

Defendant.

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DECISION AND ORDER

Index No. 602335/2009

HON. ANIL C. SINGH, J.:

Defendant Michael Cherney moves pursuant to CPLR 5015(a)(2) and CPLR 5015(a)(3) to vacate an amended judgment, contending that newly discovered and previously unavailable evidence obtained from a government archive of bank records in Russia establishes that the judgment was obtained as a result of material misrepresentations of plaintiff Alexander Gliklad tantamount to a fraud on the court. Plaintiff opposes the motion.

The alleged newly discovered evidence tendered by Cherney are financial records of a defunct bank that were retrieved from archives maintained by an agency of the government of Russia. Kuzbassprombank was a bank headquartered in the Kemerovo region of Russia. It was registered with the Russian banking authorities in 1992. Its banking license was revoked by the Bank of Russia in

October 2000. It was declared bankrupt in January 2001 and was liquidated on November 12, 2002. The bank's records are now in the government archive.

Gliklad commenced the instant action in August 2009 to enforce a $270 million promissory note signed by Cherney in 2003. Cherney filed an answer asserting nine affirmative defenses, including lack of consideration.

On July 19, 2012, Justice Melvin Schweitzer issued an opinion and order striking Cherney's first counterclaim and first affirmative defense.

Subsequently, Gliklad moved pursuant to CPLR 3126 to strike Cherney's ninth affirmative defense, lack of consideration, as a sanction for failure to comply with discovery requests. In a memorandum opinion dated August 8, 2013, Justice Schweitzer granted the motion, writing:

> In light of Mr. Cherney's contradictory statements regarding funds given to Mr. Gliklad, his contradictory statements about the existence and availability of Kuzbass Coal documents, and his contradictory statements about the goodwill of the partners who may possess those documents, the court finds that Mr. Cherney's excuses and explanations for why he cannot provide any documents attesting to his alleged Kuzbass Coal investment ... are expedient and simply not credible.
>
> The court has given Mr. Cherney ample opportunity to produce these documents; documents that were the subject of discovery requests made over three years ago. After Mr. Gliklad first requested these documents, their production had been the subject of many meet and confers, but production by Mr. Cherney has not been forthcoming. The discovery process culminated in the court's January 31 Order, and the July 19 order giving Mr. Cherney one last chance to account for

> the missing Kuzbass Coal documents in a deposition. Since the deposition didn't provide any credible excuses for his failure to produce the requested documents, the court finds it to be a reasonable inference that Mr. Cherney's failure to furnish the aforementioned Kuzbass Coal documents is willful and contumacious. "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses. A party that permits discovery to trickle in with a cavalier attitude should not escape adverse consequences." Henderson-Jones v. City of New York, 87 AD3d 498, 504 [1st Dept., 2011]. Pursuant to CPLR 3126, the Court finds it just to strike Mr. Cherney's ninth affirmative defense.

(Gliklad v. Cherney, 2013 WL 7862260 [2013] (internal citation omitted)).

The Appellate Division affirmed in a unanimous opinion, writing:

> The court's finding that defendant's conduct in connection with certain discovery requests was willful and contumacious is supported by the record; thus, the court properly imposed the discovery sanction of striking defendant's first counterclaims and his first and ninth affirmative defenses as a result of that conduct.

(Gliklad v. Cherney, 113 A.D.3d 505, 506 [1st Dept., 2014]).

Justice Schweitzer awarded summary judgment in favor of Gliklad and against Cherney in a memorandum opinion dated March 26, 2014 (NYSCEF Doc. No. 928; Gliklad v. Cherney, 2014 WL 1398229). Regarding defendant's affirmative defense of lack of consideration, Justice Schweitzer wrote in pertinent part:

> This defense is based on the proposition that Mr. Cherney already owned his 26.73% 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 in 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 is 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 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.

(NYSCEF Doc. No. 928, pp. 3-4)(emphasis in original).

Judgment was entered on April 15, 2014.

In a memorandum opinion dated October 29, 2015, the Appellate Division modified the judgment for a recalculation of interest and affirmed the order awarding summary judgment in favor of Gliklad (Gliklad v. Cherney, 132 A.D.3d 601 [1st Dept., 2015]). The Appellate Division found that Gliklad submitted proof

of the incomplete executed promissory note containing an obligation to repay and the subsequent documentation that completed the note, and evidence that Cherney did not pay, and Cherney failed to raise a triable issue with respect to a bona fide defense.

The revised judgment based on a proper calculation of interest was entered on November 4, 2015.

Cherney filed a motion in the First Department for leave to appeal to the Court of Appeals, which was denied in a decision dated May 17, 2016.

Defendant Michael Cherney asserts in a sworn affidavit that the judgment should be vacated based upon bank records the were unavailable while the matter was in active litigation. Specifically, Cherney contends that the newly discovered evidence proves that Gliklad made repeated misrepresentations to the court that he purchased a block of shares in KuzbassRazrezUgol ("Kuzbass Coal") with a $15 million transfer of funds from an account of his company Otava Invest & Trade, Ltd., to an account of Kuzbassprombank at Credit Suisse First Boston. Gliklad made this representation as part of his claim that he sold this same block of stock to Cherney as consideration for the promissory note that he was suing Cherney to enforce. Cherney states that he submitted documents from Kuzbass Coal and affidavits from persons with knowledge of the ownership of the stock in that

company to prove that Gliklad never owned the particular block of stock that he claimed to have sold to Cherney or any other stock in Kuzbass Coal. In other words, Cherney maintains that Gliklad lied to the court about transferring $15 million to Kuzbassprombank to pay for the block of Kuzbass Coal stock that he claimed to have later sold to Cherney as consideration for the promissory note.

Cherney asserts that, prior to the entry of judgment, his only knowledge of Kuzbassprombank, the Russian bank to which Gliklad allegedly transferred the $15 million, was that it went out of business in the early 2000s. Cherney contends that he had no information as to what happened to its records or whether they were available.

Noting that judgment was entered against him in April 2014, Cherney asserts that in September or October of that same year, "I received information that some kind of court proceeding involving Kuzbassprombank was pending in Russia" (Cherney Affidavit, p. 2, para. 3). "This information prompted me to wonder if any records of Kuzbassprombank might still exist" (id., at para. 3).

Cherney retained lawyers in Russia to investigate whether the bank documents were still available. Subsequently, the lawyers informed Cherney that upon the bank's liquidation in 2002, all of the bank's records had been transferred to a government archive in the Kemerovo region of Russia, where the bank had

operated. Further, the lawyers had been granted access to the archive to review and copy bank records, and the lawyers, or someone acting on their instructions, visited the archive in 2015 and copied a few bank documents that were believed to be relevant to whether the transfer of funds described by Gliklad had taken place in the manner that Gliklad had represented to the court.

Cherney retained an accounting firm. Forensic accountants and Cherney's Russian and New York based legal teams worked together copying and reviewing thousands of pages of bank documents.

Cherney contends that the forensic accountants identified a series of loans to Kuzbassprombank from a Latvian bank named Bank Saules and a Lithuanian bank named Bank Snoras that took place in February 1998, shortly after Gliklad transferred $15 million to Kuzbassprombank. Cherney states that, although he does not have personal knowledge of whether the $15 million transfer funded these loans, he does have personal knowledge of Gliklad's financial involvement with Bank Snoras at that time based on several conversations he had with Gliklad about joining with him to purchase Bank Snoras beginning in late 1997 and continuing through 1998.

Cherney has submitted the sworn affidavit of Alexander Konstantinovich Simonov, an attorney in Russia, describing the steps he took on Cherney's behalf to

obtain the archived records. The attorney states that he learned from public internet sources that the bank's license had been revoked; it was declared bankrupt; and documents regarding the bank are stored at the Archive Department of the Kemorovo Region by the Governmental Institution of the Kemerovo Region State Archive. According to Mr. Simonov, pursuant to Russian Federal Law No. 125-FZ, archived documents and archived information may be received and used by legal entities or individuals requesting archived documents on legitimate grounds.

Cherney also exhibits the sworn affidavit of Yuri Makhonin, who states that he is a Senior Associate of Dechert Russia, LLC. Mr. Makhonin states that under Russian law, after a bank is liquidated, all of its documents shall become state property and are transferred for permanent storage at the Russian Federal Archive Agency. He states further that, based on the website of the Archive Department of the Kemerovo region, all documents regarding Kuzbassprombank are stored in the Kemerovo archive under archive No. P-439. Mr. Makhonin notes further that, under Russian law, an attorney at law is entitled to collect information and request documents from all Russian state and municipal archives if such information is needed to render legal aid to a client. Finally, Mr. Makhonin describes Mr. Simonov's access to a reading room of the Kemerovo archive, where he ordered 69 volumes of the archived files.

Next, Cherney exhibits the affirmation under penalty of perjury of Pavlina Eduardovna Kibes. Ms. Kibes states that she was employed at the bank from 1971 until it became subject to temporary administration in 1999, and she was Chairman of the Board from April 1997 through September 1999. Cherney's lawyers told Ms. Kibes that Gliklad had presented to the court a "debit advice" showing a transfer of $15 million on February 18, 1998, by a company named Otava Invest & Trade Corp. ("Otava") from its account at United European Bank to a Kusbassprombank account at Credit Suisse First Boston (the "Otava transfer").

Ms. Kibes states that she does not recall the $15 million wire transfer identified in the debit advice submitted by Gliklad to the court. She notes that the bank records that she reviewed do not include lists of existing account holders for the bank at any given time. Nevertheless, the records she reviewed show the bank's total balances on a monthly basis for the different types of accounts opened at the bank. Ms. Kibes contends that none of the records from February 1998 or later months show transactions involving the receipt by the bank or withdrawal from the bank of $15 million or a similar amount, except for certain transactions, which are not consistent with Gliklad's explanation for the transaction. Accordingly, Ms. Kibes states that she does not believe that the debit advice relates to a deposit of $15 million into an account at the bank by either Gliklad or Otava, or the

withdrawal of funds to purchase Kuzbass Coal.

Cherney asserts that this new evidence demonstrates conclusively that Gliklad lied when he represented to the court that he used the Otava transfer to purchase Kuzbass Coal stock that he later sold to Cherney. Further, he maintains that the new evidence exposes Gliklad's fraud in first obtaining the sanction order striking Cherney's lack of consideration defense and then being awarded summary judgment on his claim to enforce the note.

Discussion

At the outset, it is important to note that Michael Cherney is seeking to overturn a judgment that was rendered after years of contentious, protracted litigation. If the judgment were vacated today, the parties would be back to square one, and scarce judicial resources devoted to this matter would have been squandered needlessly and amount to naught.

Accordingly, "[w]hile a court under CPLR 5015(a) might possess some limited jurisdiction to vacate a final judgment – for example, where the court purporting to enter judgment lacked subject matter jurisdiction – that discretion must be sparingly exercised lest final judgments be subject to never-ending attack, undermining the sanctity and finality of judgments" (Nash v. Port Authority of New York and New Jersey, 131 A.D.3d 164, 166 [1st Dept., 2015]). An application to

vacate a judgment on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court; an appellate court will not interfere with the decision unless there has been an abuse of discretion (Nutmeg Financial Services, Inc. v. Richstone, 186 A.D.2d 58 [1st Dept., 1992]; National Hotel Management Corp. v. Shelton Towers Associates, 111 A.D.2d 154 [2nd Dept., 1985]).

CPLR 5015(a)(2) provides that the court which rendered a judgment may relieve a party from it upon such terms as may be just upon the ground of newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under CPLR 4404. "While a court of original jurisdiction may entertain a motion to renew or to vacate a prior judgment on the ground of newly discovered evidence even after an appellate court has affirmed the original order or judgment ... on a postappeal motion to renew or vacate the movant bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court in order to imbue the appellate decision with a degree of certainty" (Sealey v. Westend Gardens Housing Development Fund Co., Inc., 97 A.D.3d 653, 654-655 [2nd Dept., 2012] (internal quotation marks and citation omitted)).

Evidence only qualifies as "newly-discovered" if it was in existence at the time of the original order or judgment, but was undiscoverable with due diligence

(Coastal Sheet Metal Corp. v. RJR Mechanical Inc., 85 A.D.3d 420, 421 [1st Dept., 2011]). To succeed on a motion to vacate a judgment on the ground of newly-discovered evidence, the movant must establish, among other things, that the evidence could not have been discovered earlier through the exercise of due diligence (State Farm Ins. Co. v. Colangelo, 44 A.D.3d 868 [2nd Dept., 2007]). Further, the evidence must be of such a nature that in all probability, it would produce a different result if a new trial is had (Structural Concrete Corp. v. Campbell Assoc. Corp., 224 A.D.2d 516 [2nd Dept., 1996]).

The promissory note was executed in Russia in 2002. This lawsuit was commenced in 2009. During the discovery phase, Cherney should have cast a wide net to search for, unearth and gather evidence, including relevant bank records, wherever they might be. It would have been reasonable for Cherney to have made a search for publicly available records in Russia. Instead, as Justice Schweitzer found, Cherney obfuscated and took contradictory positions as to why the note lacked consideration.

It is important to note that this is not the first time Cherney has submitted purported "newly-discovered" evidence to delay satisfaction of the judgment. In June 2014, Gliklad commenced a proceeding pursuant to CPLR 5225(b), seeking to compel the turnover of Cherney's interest in certain assets. In opposition to the

turnover petition, Cherney submitted a purportedly "newly discovered" agreement dated March 2007, in which Cherney transferred his ownership of his interest in a company to his daughters. Cherney stated that the agreement was located in 2013, and had been locked in the Cypriot office of a deceased man who provided advisory and consulting services to the Cherney family.

In a memorandum opinion entered on or about October 10, 2014, Justice Schweitzer granted the turnover petition, concluding that the 2007 agreement "and the surrounding tale raises nothing but feigned issues of fact." The Appellate Division affirmed, agreeing with the motion court that Cherney raised feigned issues (Gliklad v. Chernoi, 129 A.D.3d 604 [1st Dept., 2015]). The Appellate Division wrote:

> We concur with the motion court's assessment that Cherney's story about the discovery of the 2007 agreement ... was highly dubious, and that no hearing was necessary on this issue. The 2007 document, which was produced for the first time in opposition to the turnover petition, predated the EagleRock action and the action that resulted in the $505 million judgment, and Cherney provides no explanation for why he did not raise the existence of the "agreement" in those actions.

Against this stark backdrop, we turn to Cherney's current allegations.

The threshold question before the court is whether the bank records from the archive fall within the definition of "newly discovered" evidence as defined by legal precedent applying CPLR 5015(a)(2).

Evidence which is a matter of public record is not, in general, deemed new evidence which could not have been discovered with due diligence before trial (Felix v. Law Offices of Thomas F. Liotti, 129 A.D.3d 773 [2nd Dept., 2015]; IMC Mortg. Co. v. Vetere, 142 A.D.3d 954 [2nd Dept., 2016]; In re Estate of Vosilla, 121 A.D.3d 1489 [3rd Dept., 2014]; Yellow Book of New York, L.P. v. Cataldo, 106 A.D.3d 1080 [2nd Dept., 2013]; A. Resnick Textile Co., Inc. v. Ramapo Trading Corp., 2003 WL 1748363 [App. Term, 1st Dept., 2003]).

For example, in Federated Conservationists of Westchester County, Inc. v. County of Westchester, 4 A.D.3d 326 [2nd Dept., 2004], a conservationist group commenced an action against a town and county, seeking a declaration that a new parking lot built by the town was located on land owned by the county. Following a non-jury trial at which the town produced documentary evidence showing that the State of New York was the owner of the parcel in issue, the Supreme Court issued an order and judgment declaring that the parcel was not owned by the county.

Approximately ten months later, the plaintiff moved pursuant to CPLR 5015(a)(2) to vacate on the ground of "newly discovered" evidence consisting entirely of public records. The Supreme Court denied the motion, finding that plaintiff failed to show that the documents were "newly discovered." The Appellate Division affirmed, holding that the documents, although old, were available before

trial. The Appellate Division stated that it was clear from the record that the only reason the conservationist group did not diligently look for the documents earlier was that the group expected to prevail at the trial.

Another case illustrating that a matter of public record cannot be treated as "newly discovered" evidence is Mully v. Drayn, 51 A.D.2d 660 [4th Dept., 1976]. Plaintiff appealed in 1974 from an order denying her motion to vacate a 1971 boundary line dispute on the basis of newly discovered evidence. The Appellate Division affirmed, writing:

> Appellant's application is based upon a 1923 State map, a public record which existed at the time of trial, was discoverable by ordinary diligence and was subject to subpoena. It is not evidence of the nature of which will warrant vacating the 1971 judgment.

The First Department addressed whether certain information from the New York City Department of Transportation could qualify as "newly discovered" evidence in Matter of Chatham Towers, Inc. v. Bloomberg, 39 A.D.3d 308 [1st Dept., 2007]). The First Department denied the application to vacate the judgment, noting that "the alleged newly discovered evidence is a matter of public record which, for purposes of CPLR 5015(a)(2), is generally not deemed new evidence which could not have been discovered with due diligence before trial" (internal quotation marks and citation omitted).

Cherney argues that the facts of the instant case are distinguishable and that

there is no case declaring an ironclad rule prohibiting the presentation of public records in support of a motion to vacate a judgment. Unlike the above cases, the records in issue in the instant matter are records of a Russian bank that was closed in 2002, which have been stored in an archive in Siberia for more than a decade. Cherney contends that it is a distortion of the law to equate the failure to be aware of and to present foreign records of this sort with the failure to find records of a New York City agency, as was the case in Chatham Towers.

The only case cited by Cherney to rebut the "public records" cases is Cizler v. Cizler, 19 A.D.2d 819 [1st Dept., 1963]. However, the facts of Cizler, which was an action for personal injuries and wrongful death resulting from an automobile accident, are readily distinguishable. The newly discovered evidence was that of an eyewitness, a doctor and casual traveler, who paused briefly to render medical assistance, remaining only until an ambulance arrived, when he spoke to the doctor or medical attendant, and then departed (Cizler, 19 A.D.2d at 819). In short, the case does not involve public records.

Here, it is clear that documents in a government archive are public records. As Cherney's own attorney acknowledged in a sworn affidavit, under Russian law, after a bank is liquidated, all of its documents become state property and are transferred for permanent storage at the Russian Archive Agency.

The fact that the records have been in storage in another country for several years is of no moment. In the age of the internet and globalization, it is possible for a litigant who exercises ordinary diligence to locate and obtain public records stored by a governmental agency.

Moreover, this dispute involves Russian dealings. It does not take much investigation to timely search for Russian bank records that may be material to Cherney's defense of lack of consideration.

In short, Cherney has failed to establish that the evidence submitted in support of the motion is newly discovered.

Nor has Cherney been reasonably diligent in obtaining this material. Cherney has not given a reasonable explanation as to why he failed to conduct even the most cursory search of the internet for the bank records during discovery. He has failed adequately to explain why the recently offered documents, which were available to him as of 2002, could not have been produced prior to the entry of the initial judgment.

Having determined that Cherney has not met his burden under CPLR 5015(a)(2), we turn to the issue of whether he has met his burden under CPLR 5015(a)(3).

CPLR 5015(a)(3) provides that the court which rendered a judgment may

relieve a party from it upon such terms as may be just upon the ground of fraud, misrepresentation, or other misconduct.

Cherney cites several cases where vacatur of an order or judgment was deemed appropriate under CPLR 5015(a)(3).

In Birsett v. General Accident Insurance Company of America, 241 A.D.2d 683 [3rd Dept., 1997], the plaintiff commenced an action against her insurance carrier for its refusal to defend plaintiff in an underlying personal injury action on the grounds that the policy had expired for nonpayment of premium prior to the accident. The trial court granted summary judgment in plaintiff's favor for $75,000. After the judgment was entered, the defendant discovered that plaintiff had settled an earlier action by a passenger in the vehicle for $12,000 and thereupon moved to vacate the judgment. The trial court vacated the judgment.

The Appellate Division held that the trial court did not abuse its discretion, stating:

> Supreme Court further opined that plaintiff clearly misrepresented the facts both to Supreme Court and to this Court, noting that plaintiff's counsel submitted carefully crafted papers to avoid making any false statements but plainly induced the court to believe that she was still liable for the outstanding judgment and therefore entitled to $75,000. The court also concluded that the facts misrepresented were material facts within the purview of CPLR 5015(a)(3), thereby requiring vacatur of the judgment. Supreme Court also opined that "had the settlement been disclosed to Supreme Court and the Appellate Division, summary judgment would not have been granted nor

affirmed in the amount awarded."

(Birsett, 241 A.D.2d at 684).

The second case cited by defendant is Gorman, Naim & Musa, M.D., P.C. v. ABJ Fire Protection, 195 A.D.2d 1063 [4th Dept., 1993]). In 1984, a water pipe ruptured in the basement vault area of a building. In separate actions, commenced by the owner of the building and the owner of the adjacent building, a power company was named as a defendant on the theory that the work that it had done in the vault area had compromised the integrity of the water pipe system, which was connected to the sprinkler system installed by a co-defendant in the action brought by the owner of the building (action No. 1). The complaint and cross-claim against the corporation in action No. 1 were dismissed upon a summary judgment motion.

After the actions had been consolidated, disclosure in action No. 2 revealed that, contrary to its prior representations, the power corporation had participated in the construction project in the vault area in 1982, a project that included installation of the sprinkler system. The trial court granted a motion to vacate the prior order and to reinstate the complaint and cross-claim in action No. 1 against the power corporation on the grounds of newly-discovered evidence and misrepresentation. The Appellate Division affirmed, writing:

> After the actions had been consolidated, disclosure in action No. 2 revealed that, contrary to its prior representations, Niagara Mohawk

> [the power corporation] had participated in a construction project in the vault area in the fall and winter of 1982, a project that included installation of the sprinkler system.
>
> . . .
>
> Pursuant to CPLR 5015(a)(3), a court ... has the discretion to vacate its prior order upon a showing of "misrepresentation or other misconduct." Although disclosure of its activity was requested only for the years 1983 and 1984, Niagara Mohawk was less than candid when it represented in its summary judgment motion that it could find no proof that it had performed work in the vault area on or before February 4, 1984, when the sprinkler pipes broke, leading ABJ and the owners of the Grange Building to discontinue further investigation and to consent to the discontinuance and dismissal of the complaint and cross claim against Niagara Mohawk. That was sufficient to constitute misrepresentation under CPLR 5015(a)(3).

(Gorman, 195 A.D.2d at 1064) (internal citations omitted).

The third case is Peterson v. Melchiona, 269 A.D.2d 375 [2nd Dept., 2000]. The trial court awarded summary judgment to the defendant in the personal injury action. Subsequently, the trial court vacated the judgment pursuant to CPLR 5015(a)(3). The Appellate Division affirmed, writing:

> The plaintiff offered evidence that the defendant ... had engaged in fraud, misrepresentation, or other misconduct, by making false statements in support of its prior motion ... for summary judgment dismissing the complaint insofar as asserted against it. The evidence was sufficient to warrant the vacatur of the order....

(Peterson, 269 A.D.2d at 375-376).

The fourth case is Tortorello v. Tortorello, 161 A.D.2d 633 [2nd Dept., 1990]. A hearing was held before a judicial hearing officer to determine the amount of

legal fees earned by a law firm for services rendered to a client in a matrimonial action. The hearing proceeded in the absence of the plaintiff and her representative. Based upon the retainer agreement between the parties and an affidavit of services and supporting time records, the law firm requested judgment in its favor in the principal sum of $69,266. The JHO acceded to the request, and a default judgment in favor of the law firm and against the plaintiff was entered. Subsequently, the JHO denied plaintiff's motion to vacate the judgment pursuant to CPLR 5015(a)(3).

The First Department reversed, holding that the hearing court should have vacated the judgment, writing:

> The misconduct present here occurred when the respondent law firm failed to appraise the hearing court of the existence of a modified retainer agreement in which the law firm agreed to accept an hourly fee which was substantially lower than the fee agreed upon pursuant to the original retainer agreement. The law firm's belief that it was no longer bound by the modified agreement because the plaintiff had breached it does not serve to excuse the law firm's failure to bring its existence to the attention of the hearing court. Given that the hearing court's determination was apparently influenced to a great degree by the fee arrangement in the original retainer agreement, vacatur of the default judgment is warranted.

(Tortorello, 161 A.D.2d at 634).

The fifth case is Matter of Travelers Insurance Co. v. Rogers, 84 A.D.3d 469 [1st Dept., 2011]. The trial court granted an insurance company's petition to permanently stay arbitration of an uninsured motorist claim and denied a

subsequent motion to vacate the order. The First Department reversed, writing:

> Vacatur should have been granted on the ground of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). A review of the record in this case reveals several potential instances of intentional and material misrepresentations of fact by petitioner, which, at least in part, may have formed the basis of Supreme Court's decision and order to permanently stay arbitration.

(Matter of Travelers, 84 A.D.3d at 469).

The present case is completely distinguishable. In the above cases, there was unambiguous, direct evidence of intentional fraud, misconduct or misrepresentation.

By contrast, Cherney relies on facts inferred indirectly from bank records. Unlike the cited cases, Cherney hired a handpicked team of lawyers and accountants to conduct an elaborate, subjective analysis of an incomplete fraction of voluminous bank records to support a preordained conclusion. Ultimately, it is unconvincing.

"While CPLR 5015(a) vests a court with discretionary power to relieve a party from its judgment or order, that discretion should not be exercised where, as here, the moving party has demonstrated a lack of good faith, or been dilatory" (Greenwich Sav. Bank v. JAJ Carpet Mart, 126 A.D.2d 451, 452 [1st Dept., 1987]). "Furthermore, where the moving party's claim is of dubious merit, as here, that discretionary power should be subordinated to the policy favoring the finality of

judgments" (id., at 453) (see also Diaz-Tirado v. Rivera, 169 A.D.2d 576, 577 [1st Dept., 1991]; Spodek v. Feibusch, 259 A.D.2d 693, 693 [2nd Dept., 1999]).

It is important to consider the totality of the circumstances. As a direct result of Cherney's willful and contumacious misconduct, Justice Schweitzer struck Cherney's defense of lack of consideration. Now, Cherney asserts that the court should simply ignore Justice Schweitzer's order and allow Cherney to resurrect the stricken defense. The gist of Cherney's argument is that newly discovered evidence of fraud, misrepresentation or misconduct by Gliklad trumps Cherney's own misconduct.

Justice Schweitzer described in great detail the misconduct of Cherney regarding discovery, as well as Cherney's shifting stories regarding execution of the promissory note that completely undermined Cherney's credibility in the eyes of the court. In short, the newly discovered evidence does nothing whatsoever to refute the fact that Cherney engaged in willful and contumacious misconduct and presented inconsistent stories. What he said and did cannot be undone.

After Gliklad made out his prima facie case by showing proof of the note and Cherney's failure to pay, the burden shifted to Cherney to present a legitimate defense to the valid note through competent evidence. At any point prior to the striking of his lack of consideration defense, Cherney could have raised the $15

million payment as an issue. Because he never raised the issue, it is clear that Justice Schweitzer's striking the lack of consideration defense and granting summary judgment had nothing to do with the $15 million payment. In this regard, it is noteworthy that Justice Schwetizer's decisions do not even mention the $15 million transfer by Gliklad to purchase his interest in Kuzbass Coal.

Moreover, after the lack of consideration defense was stricken, the defense was removed from the case entirely; Cherney was precluded from challenging Gliklad's allegations; and Gliklad's averments related to consideration were deemed admitted (Wilson v. Galicia Contracting & Restoration Corp., 10 N.Y.3d 827, 830 [2008]; G.M. Data Corp. v. Potato Farms, LLC, 95 A.D.3d 592, 594 [1st Dept., 2012]).

In addition, it is noteworthy that Gliklad exhibits evidence that was presented during the five years of litigation, including affidavits and deposition testimony, demonstrating his interest in Kuzbass Coal and consideration for the promissory note (Memorandum in Opp., exhibits 26-34).

Weighing the proven willful and contumacious misconduct of Cherney against the alleged misconduct of Gliklad, this Court in its discretion finds that Cherney has failed to meet his heavy burden of demonstrating sufficient grounds to necessitate vacatur of the judgment entered over two years ago. The new evidence

is yet another serving of shifting explanations as to why he should not be held liable upon a duly executed promissory note. Cherney had a full and fair opportunity to litigate this matter prior to the entry of judgment. Finally, Cherney has failed to meet his burden demonstrating that the evidence submitted on this motion would have probably changed the result.

Accordingly, it is

ORDERED that the motion made pursuant to CPLR 5015(a)(2) and CPLR 5015(a)(3) to vacate the amended judgment is denied.

Date: December 7, 2016
New York, New York

Anil C. Singh