

Shchukin House Ou v Iseev

2023 NY Slip Op 34615(U)

December 22, 2023

Supreme Court, New York County

Docket Number: Index No. 155936/2016

Judge: Paul A. Goetz

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

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

SHCHUKIN HOUSE OU,

INDEX NO. 155936/2016

Plaintiff,

- v -

RUSTAM ISEEV,

Defendant.

-----X

RUSTAM ISEEV,

Third-Party Plaintiff,

-v-

NIKOLAY SHCHUKIN and PAVEL ABRAMOV,

Third-Party Defendants.

-----X

In this action involving a loan for two million dollars and Russian fine art an inquest on damages was held on June 6, 2023 on the third-party complaint. The following documents were considered: NYSCEF Doc Nos 375 – 376, 384, and 417 – 430.

PROCEDURAL BACKGROUND

By decision and order dated October 28, 2019 plaintiff Shchukin House OU’s complaint and third-party defendant Nikolay Shchukin’s answer were stricken as sanctions pursuant to

OTHER ORDER – NON-MOTION

CPLR § 3126 for failing to comply with discovery orders (NYSCEF Doc No 272)¹. This decision was affirmed by the First Department (NYSCEF Doc No 320). By amended decision and order dated April 17, 2023 Iseev's motion for a default judgment on his third-party complaint as against third-party defendant Pavel Abramov was granted (NYSCEF Doc No 356). Defendant Iseev's verified answer/third party complaint naming Nikolay Shchukin (the principal of Shchukin House Ou) and Pavel Abramov as third-party defendants alleges that they failed to tender payment on a loan to them from Iseev in the amount of two million U.S. dollars and that the third-party defendants pledged the five pieces of artwork to secure the loan (third-party complaint, NYSCEF Doc No 101). In his third-party complaint Iseev asserts four causes of action against third-party defendants for breach of contract [first cause of action], implied indemnification [second cause of action], *prima facie* tort [third cause of action] and breach of implied warranty of title [fourth cause of action] (*id.*).

By amended scheduling order dated April 21, 2023 an inquest on Iseev's damages was set for June 6, 2023, the order also allows Iseev the option of submitting his proof on papers pursuant to 22 NYCRR § 202.46[b] (NYSCEF Doc No 361). The April 21, 2023 order further provides that pursuant to CPLR 3215(b) plaintiff/third-party defendants were to provide notice whether they intended to appear at the inquest to contest the amount of damages sought by Iseev (*id.*). Plaintiff/third-party defendant Shchukin by correspondence dated May 15, 2023 advised that he intended to appear at the inquest to contest damages (NYSCEF Doc No 369). Iseev

¹ This action was commenced by plaintiff, an art gallery located in Estonia dealing primarily in Russian fine art, against defendant Rustam Iseev, to recover five works of art. The five works of art are: (1) Kazimir Malevich, Suprematism, 1929; (2) Kazimir Malevich, Suprematism, 1929; (3) Kazimir Malevich, The Artist Klun Portrait, 1910s; (4) Natalia Gontcharova, Thunderstorm, 1911; and (5) Natalia Gontcharova, Soldier Washing Horses, 1910 (complaint, Ex 1; NYSCEF Doc No 1). According to plaintiff, the approximate value of the artwork is at least \$60,000,000. In its complaint, plaintiff asserts seven causes of action against defendant Rustam Iseev for conversion, breach of fiduciary duty, breach of the alleged consignment agreement, replevin, unjust enrichment, accounting and *prima facie* tort (*id.*).

submitted his proof of damages on papers and indicated he is seeking damages based on his breach of contract and indemnification claims under the Russian Civil Code and is not pursuing his claims for breach of implied warranty of title and *prima facie* tort (NYSCEF Doc No 384 p1). Iseev argues that he is entitled to interest based on Russian law. At the inquest on June 6, 2023 counsel presented arguments on the record but no testimony was taken.²

THE PARTIES' SUBMISSIONS

Iseev's Submissions

Iseev re-submits the affidavit he submitted in support of his motion (MS #7) for summary judgment dismissing the complaint (NYSCEF Doc No 384, Ex 1). Iseev states in his affidavit that on October 2, 2013 he entered into an agreement with third-party defendants Shchukin and Abramov to loan them the equivalent of two million U.S. dollars to be repaid no later than July 6, 2015 (*id.* ¶¶ 4-6). A copy of the loan agreement is attached to Iseev's affidavit as exhibit A (Doc No 384, pp 35-36). Iseev further states that Shchukin and Abramov agreed to pledge their ownership rights in fourteen artworks as collateral for the loan and entered into two pledge agreements with him (*id.* ¶ 7). The pledge agreements are annexed as exhibits B and C to his affidavit (Doc No 384, pp 42-44 & 49-51). Iseev avers that to prove ownership of the paintings, Shchukin and Abramov presented him with a copy of a joint purchase agreement wherein they agreed they were purchasing the paintings to re-sell at a higher price at a later date; however, the agreement is between the purported two purchasers, Shchukin and Abramov, not between the purchasers and the owner of the artworks (*id.* ¶ 8; purchase agreements annexed to Iseev's affidavit as Ex D [Doc No 384, pp 62-73]). Iseev does not include a document establishing that Shchukin and Abramov actually purchased the fourteen artworks.

² The parties were afforded an opportunity to make additional submissions by June 23, 2023.

According to Iseev on June 26, 2015 he entered into three additional pledge agreements with Abramov for three paintings by Kazimar Malveich, “Suprematism”, “Suprematist Composition With a Circle” and “The Artist Klun Portrait”(id. ¶ 9; copies of the pledge agreements are annexed to Iseev’s affd as Exs E, F & G [Doc No 384, pp 81-85, 92-96 & 103-106]). Iseev indicates that “Abramov told me that ownerships [sic] rights to ‘The Artist Klun, Portrait’ are based on a Purchase and Sale Agreement” (id. ¶ 10). The purchase and sale agreement Iseev refers to is annexed to his affidavit as exhibit H but the agreement is between “‘Shchukin House’ OU” “represented by its owner, Nikolay Shchukin” and “Alamano Management Ltd., Commonwealth Trust Limited, Drake Chambers, Tortola AO” “represented by its Director, Pavel Yurievich Abramov” (id. [Doc No 384, pp 110-111]). As to the other two artworks, Iseev avers that “[b]ased upon information and belief, ‘Suprematism’ and ‘Suprematist Composition With a Circle’ by Malevich were bought by Shchukin and Abramov pursuant to the [] Joint Purchase Agreements” (id. ¶ 11). The agreements that Iseev bases his information and belief on are annexed to his affidavit as exhibit I; however, again, the agreements are purportedly among now three purchasers, Shchukin, Abramov and Iseev not between the purchasers and the owner of the artworks (id., Ex I [Doc No 384, pp 116-118]). Iseev does not mention in his affidavit that he is purportedly one of the purchasers of the two artworks; indeed, he states explicitly that the owners of the two works of art are Shchukin and Abramov.

Iseev states that “[o]n July 6, 2015 [the date by which the loan was to be repaid], none [sic] of the debtors were able to repay even a portion of the debt” and that after contacting Shchukin and Abramov they “conceded that they were in default and did not have the financial resources to repay the loan” (id. ¶¶ 12 - 13). Iseev states that as a result of Shchukin and Abramov’s failure to repay the loan, on September 21, 2015, he, Shchukin and Abramov

executed pledge agreements for two paintings by Natalia Goncharova, “Storm” and “Soldier Washing Horses” (*id.* ¶ 15; copies of the pledge agreements are annexed to Iseev’s affd as Exs J & K). Iseev does not annex a copy of a purchase and sale agreement for these two paintings. Finally, Iseev states that Shchukin and Abramov have not repaid the two million U.S. dollars.

Third-party Defendants’ Submissions

Shchukin re-submitted the affidavit he submitted in opposition to Iseev’s motion for summary judgment (MS #7) and in support of his cross motion to disclose the location of the artworks (NYSCEF Doc No 375). Also, submitted was an affidavit from Dimitry Shchukin that was submitted in an Article 78 of the Civil Practice Law and Rules proceeding that Shchukin House OU (and its counsel and Shchukin Gallery Inc.) brought in the First Department against the undersigned and another justice of this court [Appeal No 14187, Case No 2021-01468] (NYSCEF Doc No 376). The Article 78 petition was denied (*Matter of Weingrad & Weingrad P.C. v Goetz*, 2021 NY Slip Op 04286 [1st Dept 2021]). Both of the Shchukin affidavits were submitted prior to Iseev’s submissions.³

DISCUSSION

Iseev’s Breach of Contract Claim

Iseev has established the amount of damages on his breach of contract cause of action through his affidavit wherein he states that Shchukin and Abramov failed to repay the two-million-dollar loan (NYSCEF Doc No 384, Ex 1, ¶ 17; *see Valenti v Going Grain, Inc.*, 159 A.D.3d 645 [1st Dept 2018]). There is nothing in the Shchukin affidavits contradicting Iseev’s statement that Shchukin and Abramov failed to repay the two million dollars. Indeed, the

³ The Shchukin affidavits were uploaded to NYSCEF and June 1, 2023 and Iseev’s submissions were uploaded to NYSCEF on June 6, 2023.

Shchukin affidavits resubmitted for the purposes of the inquest merely address issues previously considered and decided by this court and the First Department.

Accordingly, Iseev will be granted a judgment in the amount of two million dollars on his breach of contract claim.

Iseev's Implied Indemnification Claim

Iseev argues that under the Russian Civil Code he is entitled to a declaration that his damages are secured by the artworks under the pledge agreements (Iseev's Memo of Law; NYSCEF Doc No 384 p 8 – 9). However, this is not the relief Iseev seeks in his answer/third-party complaint wherein his second cause of action for implied indemnification seeks “a declaratory judgment requiring third-party defendants to indemnify him for any losses sustained in defending himself and pursuing any third-party claims in the instant action⁴” (NYSCEF Doc No 70 ¶ 63). Indeed, as previously noted in the decision and order dated September 4, 2018 on *inter alia* Iseev's motion for summary judgment, the court observed that “in his third-party complaint, defendant Iseev does not seek foreclosure nor a declaration from the court that he has a superior right to this artwork” (NYSCEF Doc No 202 p 3). Therefore, the court need not address whether the Russian Civil Code grants Iseev the right to a declaration that his damages are secured by the artworks under the pledge agreements because Iseev does not seek this relief in his answer/third-party complaint.

Interest

⁴ Indeed, labeling this cause of action implied indemnification is a misnomer since the principle of implied indemnification also known as common law indemnification (*Chapa v Bayles Props., Inc.* 2023 NY Slip Op 06025 [2nd Dept Nov 22, 2023]) is generally a concept applicable in a tort action where “the one seeking indemnity had committed no wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless held liable to the injured party” (*Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988][internal quotation marks omitted]).

Iseev argues that he is entitled to interest on the loan and pre-judgment interest from the date of Shchukin and Abramov's default, July 7, 2015 based upon Russian Federation law since the loan agreement explicitly states that it is governed by the law of the Russian Federation (loan agreement ¶ 8, NYSCEF Doc No 384, Ex A). Consequently, Iseev asks the court to take judicial notice of certain sections of the Civil Code of the Russian Federation he includes with his submission along with the English translations.

“Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction” and as long as it does not violate a “fundamental principle of justice” (*Welsbach Electric Corp. v MasTec North Am., Inc.*, 7 NY3d 624, 629 [2006]). A party requesting that the court take judicial notice of a foreign law is required to “furnish the court [with] sufficient information to enable it to comply with the request and [] give[] each adverse party notice of his intention to request it” (CPLR § 4511[b]). “Copies of statutes are prima facie evidence of the law when contained in publications generally admitted as evidence of the existing law of the jurisdiction where it is in force” (*Sea Trade Maritime Corp. v Coutsodontis*, 111 AD3d 483, 484 [1st Dept 2013]).

Iseev argues that it is apparent from the face of the parties' agreements “that they were all entered and performed in Moscow, Russia, [and] all parties are Russian citizens with residences in Moscow” (Iseev's Memo of Law; NYSCEF Doc No 384 p 3).

All the agreements are in Russian (and translated into English) and refer to the exchange rate of the Bank of Russia. There is no indication in the redacted versions submitted that the agreements were entered into in Russia nor that the parties are Russian citizens (the addresses and passport information are redacted on all the agreements submitted in support of the inquest). However, the verified answer/third-party complaint states that Iseev is a Russian citizen and

resident (NYSCEF Doc No 101, ¶ 3). Consequently, Russian law bears a reasonable relationship to the parties' agreements since the agreements are in Russian and refer to "the exchange rate of the Bank of Russia of USD 2,000,000" and require that the "[b]orrowers shall repay [or pledge] to the [l]ender the ruble equivalent of USC 2,000,000 . . . at the exchange rate of the Bank of Russia as of the date of repayment" (NYSCEF Doc No 384; Ex A, Loan Agreement ¶¶ 1 & 4; Ex B, Pledge Agreement) and Iseev acknowledges in his verified answer/third-party complaint that he is a citizen and resident of Russia (NYSCEF Doc No 101, ¶ 3). While third-party defendants argued on the record on June 6, 2023 that New York's CPLR should apply, they do not identify nor does the court discern a fundamental principle of justice that would be violated if Russian law as it pertains to interest were applied in this case. Moreover, on June 6, 2023 third-party defendants were afforded an opportunity to submit additional papers on the inquest but none of their submissions included an argument that applying Russian law as it pertains to interest would violate a fundamental principle of justice or that Iseev's submissions on Russian law are not from publications generally admitted as evidence of existing law in Russia. Finally, Iseev provided notice in his answer/third-party complaint that he intended to rely on Russian law (NYSCEF Doc No 101, ¶ 61) and in his June 6, 2023 submission (NYSCEF Doc No 384, p 233). Therefore, Russian law will be applied to calculate interest except as explained below.

Russia is a civil law country, meaning that its legal system is grounded in codes enacted by the Russian government (Dimitry Maleshin, *The Russian Style of Civil Procedure*, 21 Emory Int'l L. Rev. 543, 555-556 [2007]). In contrast to common law jurisdictions such as the United States, civil law countries do not place as much emphasis on legal precedents in applying the law (*id.*). However, Russian lower courts look to its highest tribunals - the Russian Federation Supreme Court and the Russian Federation Supreme Commercial Court – to determine how to

apply Russian codes (*id.* [“(e)ven though there is no formal rule that rejects or acknowledges judicial precedent, judicial precedent is not ignored by Russian judicial practice”]).

Russian Civil Code & Interest on the Loan

The loan agreement does not include a provision requiring third-party defendants to pay interest on the two million dollars they borrowed from Iseev (Ex A to Iseev’s *affd.*, NYSCEF Doc No 384, pp 35-36). However, pursuant to Russian Civil Code (RCC) Article 809 (1) “[i]n the absence in the contract of a term on the interest rate, the rate thereof shall be determined by the bank interest [or the refinancing rate] existing at the place of residence of the lender ... on the day of payment by the borrower of the amount of the debt” (Frolova *affm* Ex A, NYSCEF Doc No 384, p 243). And pursuant to RCC Article 809 (2) “[i]n the absence of another agreement, interest shall be paid monthly until the date of return of the amount of the loan” (*id.*). Here, Iseev, the lender, was a resident of Russia when repayment of the two million dollars became due (verified answer third-party complaint, NYSCEF Doc No 101, ¶ 3).

According to paragraph 51 of Resolution No. 6/8 of the Plenums of the Russian Federation Supreme Court and the Russian Federation Supreme Commercial Court of July 1, 1996, “the day the monetary obligations is performed” is “the day that the means are actually paid to the creditor” and “if an obligation has not been performed by the debtor by the time a judgment is issued, the court’s judgment... must list ... the amount of interest based on the rate of bank interest on the day the claim was filed or on the day the judgment was issued” (Frolova *affm* Ex D, NYSCEF Doc No 384, p 258). Pursuant to paragraph 52 of the Resolution “when a monetary obligation is denominated in foreign currency . . . and there is no official rate of bank interest for currency loans at the creditor’s location on the date the monetary obligation is performed, the amount of interest shall be calculated using publications in official information

sources about average bank interest rates for short-term currency loans granted at the creditor's location" (*id.*). Clause 8 of the Information Letter of the Presidium of the Russian Federation Supreme Commercial Court No. 70, dated November 4, 2002, reiterates application of paragraph 52 of the Resolution and suggests the Bank of Russia Bulletin "as one of the possible official sources of information on average bank interest rates for such short-term loans" (Frolova affm Ex C, NYSCEF Doc No 384, p 255).

Here, Iseev filed his verified answer/third-party complaint on March 2, 2017 (NYSCEF Doc No 101). According to a copy of a table of interest rates from the Bank of Russia website provided by Iseev's counsel, the interest rate on loans in US dollars for a two-year loan in March, 2017 was 9.31 percent (Frolova affm Ex 11, NYSCEF Doc No 384, p 196). Iseev and third-party defendants entered into the loan agreement on October 2, 2013 and under the loan agreement third-party defendants agreed to repay Iseev the two million dollars no later than July 6, 2015 (Iseev affd Ex A, ¶5, NYSCEF Doc No 384, p 35). Under RCC Article 809, therefore, third-party defendants are bound to pay Iseev interest at the rate of 9.31 percent on the two-million-dollar loan from the date of the loan, October 2, 2013 until the date of this decision/order/judgment.

Russian Civil Code & Pre-Judgment Interest

Prejudgment interest under Russian law is recoverable as a matter of right in an action for breach of contract accruing from the date of the breach. Pursuant to RCC Article 811(1), "in instances when the borrower does not return the amount of the loan on time, *interest shall be subject to payment on this amount at the rate provided by paragraph 1 Article 395 of the present Code from the day when it should have been returned until the day of its return to the lender,*

regardless of the payment of interest provided by paragraph 1 Article 809 of the present Code” (Frolova affm Ex A, NYSCEF Doc No 384, p 243 – 244 [emphasis provided]).

RCC Article 395 states: “for the use of another’s monetary means as a consequence of unlawful withholding, avoidance of the return thereof, other delay in the payment thereof or the unjustified receipt or savings thereof at the expense of another person interest shall be subject to payment on the amount of these means.” RCC Article 395 further provides that the applicable rate of prejudgment interest is determined by “the average rates of bank interest on deposits of natural persons which existed at the place of residence of the creditor... published by the Bank of Russia and which occurred at the respective periods” (Frolova affm Ex A, NYSCEF Doc No 384, p 240 – 241).

Attached as Exhibit 12 to Iseev’s counsel’s papers is a copy of a table she represents (in her Memorandum of Law, not in her affirmation) she obtained from the Bank of Russia’s website setting out the relevant monthly average rates on deposits of individuals in US dollars for the “Central Federal District of the Russian Federation – which is where Iseev resides” for the applicable time periods (NYSCEF Doc No 384, pp 9-10; pp 199-200).

However, the rates of interest in the chart are divided by Russian Federal Districts and as previously noted the exhibit that Iseev claims establishes he resides in Moscow does not because those portions of the document are redacted (NYSCEF Doc No 384, pp 199-200). Nor does Iseev’s affidavit state where he lives although it does indicate that it was sworn to in the City of Yekaterinburg which is in the Ural Federal District, not the Central Federal District (see https://www.nationsonline.org/oneworld/map/google_map_Yekaterinburg.htm).

Iseev’s counsel then represents that on July 3, 2016, the provision of RCC Article 395 establishing the applicable rate of prejudgment interest was amended and that starting on August

1, 2016, pre-judgment interest is determined by the key bank interest rate and for foreign currency loans, by the average interest rates on short-term loans in foreign currencies published on the website of Russia's Central Bank. Iseev's counsel represents (again in her Memorandum of Law, not in her affirmation) that an excerpt from the Russian Federal Law No. 41-FZ, dated March 8, 2015 amending RCC Article 395 is annexed to her papers as Exhibit B (NYSCEF Doc No 384, p 10). However, Exhibit B is Russian Federal Law No. 315-FZ dated July 3, 2016, not Russian Federal Law No. 41-FZ as represented by counsel (NYSCEF Doc 384, p 252). Iseev's counsel's failure to establish the Russian Federal District of Iseev's residence precludes applying RCC Article 395 prior to its amendment on July 6, 2016 to set pre-judgment interest. Iseev's counsel's failure to provide the July 6, 2016 amendment to RCC Article 395 precludes applying RCC Article 395 to set pre-judgment interest subsequent to July 6, 2016. In both instances Iseev has failed to furnish the court with sufficient information to enable the court to apply Russian law in order to determine pre-judgment interest (CPLR § 4511[b]). Therefore, as to pre-judgment interest New York law will be applied.

“Although the statutory rate of interest is usually imposed [***4] after maturity of the contract, i.e., the date of accrual of the cause of action” (*Marine Management, Inc. v Seco Management, Inc.*, 176 A.D.2d 252, 253 [2nd Dept 1991]) "when a contract provides for interest to be paid at a specified rate until [***2] the principal is paid, the contract rate of interest, rather than the legal rate set forth in CPLR 5004, governs until payment of the principal or until the contract is merged in a judgment" (*NYCTL 1998-2 Trust v Wagner*, 61 A.D.3d 728, 729 [2nd Dept 2009]). Here, since the contract is governed by Russian law as it pertains to interest on the loan and as shown above the applicable rate of interest under Russian law on the two-million-dollar loan is 9.31 percent , Iseev is entitled to recover from third-party defendants monthly

interest at 9.31 percent from the date his claim arose on July 7, 2015. While under RCC Article 811(1) Iseev would be entitled to recover interest on top of the interest awarded under RCC Article 809, because he failed to furnish the court with sufficient information to enable the court to apply RCC Article 811(1) the court cannot award Iseev the additional interest he would otherwise recover pursuant to RCC Article 811(1).

Accordingly, while Russian law may allow a lender to collect interest pursuant to both RCC Article 809 and 811(1) New York law does not allow for such a recovery, consequently Iseev will only recover 9.31 percent interest from the date of loan, October 2, 2013 until the date of the judgment and no additional interest will be awarded since the prejudgment interest is subsumed in the interest awarded pursuant to RCC Article 809.

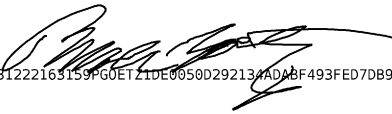
CONCLUSION

Based on the foregoing, it is

ADJUDGED that on defendant/third-party plaintiff Rustam Iseev's first cause of action for breach of contract he shall recover from third-party defendants Nikolay Shchukin and Pavel Abramov jointly and severally two million dollars (\$2,000,000.) plus interest at the rate of 9.31 percent from October 2, 2013 in the amount of \$1,904,341.37 for a total amount of \$3,904,341.37 plus costs and disbursements as taxed by the Clerk and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant/third-party plaintiff Rustam Iseev's remaining causes of action are dismissed; and it is further

ORDERED that defendant/third party plaintiff Rustam Iseev has execution therefor.



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DATE: 12/22/2023

PAUL A. GOETZ, JSC

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)