

**Skilled Inv., Inc. v Bank Julius Baer & Co., Ltd.**

2007 NY Slip Op 34485(U)

June 19, 2007

Sup Ct, NY County

Docket Number: 603818/03

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN  
*Justice*

PART 39

Skilled Investors, Inc.,

Plaintiff,

- v -

Bank Julius Baer & Co., Ltd. et al.,

Defendants

INDEX NO. 603818/03

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 015

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

Defendant Bank Julius Baer & Co., Ltd. (the "Bank") moves for summary judgment against co-defendants Baruch Ivcher and Waxfield Ltd. ("Waxfield") on certain claims that plaintiff Skilled Investors, Inc. ("Skilled") assigned to the Bank.<sup>1</sup> The Bank also moves for a default judgment, or in the alternative summary judgment, on its cross-claims against defendant Productos Paraiso del Peru ("Productos") to recover loan proceeds. Ivcher and Waxfield separately oppose the motion and cross-move for orders granting them partial summary judgment and dismissing the assigned claims against them. Waxfield also seeks an order compelling the Bank to arbitrate its claims. Finally, Productos opposes the Bank's motion and cross-moves for summary judgment on the ground that it overpaid on the amount it had borrowed from the Bank.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

<sup>1</sup>It is presumed that the reader is familiar with the full history of this action, which prior decisions set forth in detail. In particular, see Dec. & Ord. dated Sept. 1, 2005. This decision will only summarize the relevant history.

For the reasons set forth below, the Bank's motion for summary judgment against Waxfield and Baruch Ivcher is granted in part and denied in part, Waxfield's and Ivcher's summary judgment motions against the Bank are denied, Waxfield's motion to compel arbitration is denied, and both the Bank's motion for a default or summary judgment against Productos and Productos' cross-motion for summary judgment are denied.

*Assigned claims against Baruch Ivcher and Waxfield* – In July 2004, Skilled filed a complaint which, among other things, asserted various claims against Waxfield, Baruch Ivcher and the Bank to recover eight unauthorized withdrawals totaling \$ 4,825,274 that Yehuda Shiv had made from Skilled's account (the "Skilled Account") at the Bank between September 1999 and September 2000, using a Ivcher power of attorney that Skilled had granted Shiv. In the case of seven of the withdrawals, Shiv first transferred funds from the Skilled Account to the bank accounts of certain companies that Shiv controlled, and then transferred the funds from those accounts to various parties. These transfers from the Account included (1) a transfer of \$ 100,000 to Ivcher's account at Bank Leumi, (2) a transfer of \$ 470,000 to Baruch Ivcher's joint account with his wife at an Israeli bank, (3) three transfers totaling \$ 400,000 to the account of a company named Trustech, Ltd. ("Trustech"), (4) a transfer of \$ 2,464,174 to the account of a condominium building in Israel (the "Condominium"), and (5) a transfer of \$ 391,100 to the Bank Leumi account of a law firm that represented Ivcher in certain matters.

Shiv made the eighth withdrawal by transferring \$ 1 million directly from the Skilled Account to Waxfield's account at the Bank (the "Waxfield Account"). The complaint alleges that each of transfers benefited Baruch Ivcher and Waxfield and conferred no benefit to Skilled. Henceforth, the \$ 1 million transfer to the Waxfield Account will be referred to as the "Waxfield Transfer," the other seven will be referred to as the "Ivcher Transfers."

In August 2006, the Bank settled Skilled's claims against it. As part of the settlement

agreement, Skilled assigned its claims against Ivcher and Waxfield to the Bank via a Conveyance of Claims. The Bank now seeks summary judgment on the assigned claims for money had and received and unjust enrichment (the “Assigned Claims”).

The Bank contends that, as Skilled’s assignee, it has stepped into its shoes and can assert the same grounds for summary judgment that Skilled possessed before the assignment. As evidence of the merits, the Bank submits the affidavit of Skilled’s president, Aliza Huber, who states that (1) Skilled’s beneficial owners did not know of or approve the Waxfield and Ivcher Transfers beforehand, (2) Skilled and its owners never had any business dealings with Ivcher or Waxfield, and (3) the Waxfield and Ivcher Transfers were not made to repay any debt or to transact any other business by Skilled and its owners, and in fact were adverse to their interests and provided them with no benefit or value.

To prevail on a claim for money had and received, the plaintiff must show that (1) the defendant received money that belonged to the plaintiff, (2) the defendant benefited from the receipt of the money, and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money. *Bd. of Educ. of Cold Springs Harbor C. Sch. Dist. v. Rettaliata*, 164 A.D.2d 900, 900-01 (2d Dept. 1990). The defendant need not receive the money directly to benefit from it: the defendant also benefits if the money satisfies debt or saves expenses. *Mfrs. Hanover Trust Co. v. Chem. Bank*, 160 A.D.2d 113, 117-18 (1st Dept. 1990). The issue of whether the defendant’s possession of the plaintiff’s money was wrongful has no bearing on whether the defendant should return the money to plaintiff. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 89 (2d Dept. 1980). Summary judgment is available for the claim when there are no issues of fact. *See, e.g., Prudential Bache Secs., Inc. v. Golden Larch-Sequoia, Inc.*, 118 A.D.2d 487, 488 (1st Dept. 1986).

For the related claim of unjust enrichment, the plaintiff must show that the defendant was enriched at the plaintiff’s expense, and that “it is against equity and good conscience to permit

[the defendant] to retain what is sought to be recovered.” *Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481 (2d Dept. 2004) (quoting *Paramount Film Distrib. Corp. v. St. of N.Y.*, 30 N.Y.2d 415, 421 [1972]).

Waxfield acknowledges that \$ 1,000,000 was transferred from the Skilled Account into the Waxfield Account. Baruch Ivcher does not admit that he received or benefited from the Ivcher Transfers, but fails to rebut the Bank’s evidence that (1) \$ 570,000 was transferred from the Skilled Account to individual or joint bank accounts that Ivcher controlled, (2) \$ 400,000 from the Skilled Account was transferred to an controlled by Trustech to fund Ivcher’s “investment” in the company, (3) \$ 2,464,174 from the Skilled Account was transferred to the Condominium as payment towards Ivcher’s purchase of a unit in the building, and (4) \$ 391,000 was transferred from the Skilled Account to Ivcher’s attorneys to pay Ivcher’s legal fees and expenses. Accordingly, the Bank has established that Waxfield’s account received \$ 1 million of Skilled’s funds, and the remaining funds were either transferred directly into Ivcher’s accounts or into third-party accounts to pay Ivcher’s obligations to the third parties. Since the Transfers benefited Waxfield and Ivcher at Skilled’s expense, and Waxfield and Ivcher has no claim of right to the Funds, and accordingly equity demands that they return it.

In opposition, Baruch Ivcher and Waxfield first contend that the Bank cannot recover because it conspired with Shiv to defraud Skilled and thus has “unclean hands.” Specifically, they claim that Ivcher had directed the Bank and Shiv to transfer \$ 3,825,274 of the Funds (the total amount of the Ivcher Transfers) from the Waxfield Account, but the Bank and Shiv had disobeyed those directions and instead “with actual intent to defraud [Ivcher]” transferred the funds from the Skilled Account. According to Ivcher and Waxfield, Ivcher assumed that the Bank had carried out his directions and believed that the Funds came from the Waxfield Account. Moreover, Ivcher and Waxfield allege, the Bank conspired with Shiv to conceal the source of the Funds by doctoring the Waxfield Account statements. Waxfield and Ivcher further

allege that the Bank had conspired with Shiv to pledge the funds in the Waxfield Account to the Bank “as collateral security for tens of millions of dollars that [the Bank] loaned to unrelated third-parties.” They add that “[b]y transferring the funds from an account other than Waxfield, [the Bank] preserved the Waxfield Account as its perceived collateral.”

However, Ivcher and Waxfield cannot invoke the doctrine of unclean hands as a defense to the Bank’s claims. The doctrine can only be invoked when a plaintiff is guilty of immoral or unconscionable conduct that directly relates to its claim, and the party invoking the doctrine was injured by the misconduct. *Natl. Distillers & Chem. Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16 (1966). Ivcher and Waxfield allege that the Bank conspired with Shiv to wrongfully transfer the Funds from the Skilled Account instead of the Waxfield account, but receiving the Funds in no way injured Ivcher and Waxfield. Moreover, the Assigned Claims, which allege a benefit to Waxfield and Ivcher at Skilled’s expense, bear no direct relation to Waxfield’s and Ivcher’s claims that the Bank harmed Waxfield by wrongfully pledging the funds in the Waxfield Account and (2) deceived Ivcher into believing that the Funds had been withdrawn from the Waxfield Account.

Defendants contend that the Bank has not shown that Ivcher is liable for the Waxfield Transfer or that Waxfield is liable for the Ivcher Transfers, because Ivcher presumably is not Waxfield’s alter ego and the Bank has not shown why the corporate form should be disregarded. Regardless, Waxfield benefited from the Ivcher Transfers from the Skilled Account, because if Ivcher intended the transferees to receive funds from the Waxfield Account, then Waxfield was spared \$ 3,825,274 of expense. However, the Bank makes no showing that Ivcher benefited from the Waxfield Transfer.

The Bank claims that Waxfield and Ivcher admitted that they were jointly liable in the Proof of Claim that Waxfield filed in the bankruptcy proceeding for the “Sagam” companies that Shiv controlled. In the Proof of Claim, Waxfield lists six of the Ivcher Transfers as set-offs

against Waxfield's claim against the bankruptcy estates. However, Waxfield's position in the bankruptcy proceeding that the Ivcher Transfers reduce Waxfield's claim against the estates does not collaterally estop Waxfield from contending here that it bears no responsibility to Skilled for repaying the Ivcher Transfers. Moreover, the Proof of Claim has no bearing as to whether Ivcher is responsible for the Waxfield Transfer, and Waxfield's statements in the Proof of Claim cannot be imputed to Ivcher.

Ivcher further argues that he is not culpable because he never learned that the Funds came from the Skilled Account and was deceived into believing they came from the Waxfield Account. Similarly, Waxfield argues that it never requested the Waxfield Transfer. However, the question of whether Waxfield and Ivcher came by the Funds innocently has no bearing on whether they should be returned to Skilled. *See Friar*, 78 A.D.2d at 89.

Waxfield and Ivcher next contend that they need further discovery to determine the Bank's "share of the liability." However, the Bank stands in Skilled's shoes as plaintiff when asserting the Assigned Claims against Waxfield and Ivcher, and Skilled has released the Bank from all liability. In any event, the Bank did not receive or otherwise benefit from the Transfers from the Skilled Account.<sup>2</sup> Unresolved claims between the Bank and Waxfield and Ivcher may require additional disclosure, but both those claims and the disclosure they entail have no direct bearing on the Assigned Claims.

Accordingly, summary judgment is granted to the Bank in connection with Waxfield's liability for the Waxfield Transfer and the Ivcher Transfers, and Ivcher's liability for the Ivcher Transfers, but denied in connection with Ivcher's liability for the Waxfield transfer.

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<sup>2</sup>Waxfield and Ivcher imply that the Bank benefited from the Transfers because the funds in the Waxfield Account had been pledged, and Shiv improved the Bank's secured position by taking funds from the Skilled Account instead of the Waxfield account. That benefit is too indirect for purposes of claims for money had and received and unjust enrichment: Waxfield and Ivcher do not allege that the Bank received any of the Funds, or satisfied debt or saved expenses with them. *See Mfrs. Hanover Trust Co. v. Chem. Bank*, 160 A.D.2d at 117-18.

*Motion to compel arbitration* – Waxfield’s cross-motion to compel the Bank to arbitrate the claims against it is denied. Although direct claims between the Bank and Waxfield are subject to binding arbitration, the Assigned Claims formerly belonged to Skilled, who has no arbitration agreement with Waxfield.

*Cross-claims against Productos* – The Bank seeks a default judgment against Productos, who allegedly failed to answer the Bank’s cross-claims to recover loan proceeds. In the alternative, the Bank seeks summary judgment on its cross-claims.

The Bank submits evidence of the following: in November 1995, Ivcher opened an account at the Bank for Productos, which he controls. Productos also executed a General Banking and Security Agreement to obtain a credit line from the Bank. Waxfield ultimately pledged the funds in the Waxfield Account as collateral for Productos’ payment obligations. According to the Bank, Productos borrowed \$ 5 million in early 1996 and \$ 7,052,000 in 2002, and defaulted after Shiv’s fraud was discovered. The Bank claims that Productos’ total indebtedness to the Bank, including accrued interest, now totals more than \$ 8.55 million.

Productos first argues that the Bank did not properly serve the summons and cross-claim complaint pursuant to the General Banking and Security Agreement, under which Productos agreed to accept service by mail at “the address of [Productos] most recently provided in writing to [the Bank].” However, the Bank submits evidence that since August 2005 Productos has directed the Bank to mail correspondence to an address in Lima, Peru where Productos admits it received the summons and complaint. Accordingly, personal jurisdiction has been obtained over Productos.

In the alternative, Productos claims that its default should be excused because it has a meritorious defense and a reasonable excuse. In support, Productos submits affidavits from Baruch Ivcher and Eric Mendelsohn, a certified public accountant. Ivcher claims that the Bank only loaned Productos \$ 2 million (in Japanese yen), and that Productos repaid the loan and in



fact overpaid by \$ 287,206. He denies that the Bank loaned \$ 5 million of its own funds to Productos in early 1996; instead, Ivcher states, the Bank transferred the money from the Bank account of another company Ivcher controls called Rutland Enterprises Inc. A.V.V. ("Rutland"). Ivcher states that he did not realize that the money had come from the Rutland account due to the Bank's "extremely complicated account statements." Mendelsohn supports Ivcher and states that he reviewed the Bank's account statements and determined that the Bank did not fund the purported \$ 5 million loan to Productos, and instead took the money from Rutland's account at the Bank.

As an excuse for its default, Productos contends that it believed it did not need to answer because (1) the Bank failed to effect service, (2) the cross-claim lacked a demand for an answer pursuant to CPLR 3011, (3) the Bank should have asserted its claims in a third-party action, and (4) the Bank improperly cross-claimed against Productos in this action because Skilled's claims to recover money that Shiv transferred from its account bear no relation to the Bank's claims to recover loan proceeds. These excuses are unimpressive, but in the interests of justice the motion for a default judgment is denied, provided that Productos answer the complaint within ten days after the Bank serves it with a copy of this decision.

The motion and cross-motion for summary judgment on the cross-claims are also denied because the parties' submissions, including the affidavits from Ivcher and Mendelsohn, raise triable issues of fact as to whether the Bank funded the \$ 5 million loan or instead transferred money from the Rutland account, how much was loaned, and how much remains outstanding.

In sum, (1) the motion by the Bank for summary judgment against Waxfield and Ivcher is granted with respect to Waxfield's liability for both the Waxfield Transfer and the Ivcher Transfers, and Ivcher's liability for the Ivcher Transfers, but the motion is denied with respect to Ivcher's liability for the Waxfield Transfer, (2) Waxfield and Ivcher cross-motions for summary judgment against the Bank are denied, (3) Waxfield's motion to compel arbitration is denied, and

(4) the Bank's motion for a default or summary judgment against Productos and Productos' cross-motion for summary judgment against the Bank are both denied. Entry of judgment against Waxfield and Ivcher is stayed pending disposition of the remaining disputes among the Bank, Waxfield, and Ivcher and until further order of this Court.

Settle order.

Dated: June 19, 2007

  
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Helen E. Freedman, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST