

Gliklad v Cherney

2013 NY Slip Op 33334(U)

March 19, 2013

Sup Ct, New York County

Docket Number: 602335/09

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L SCHWEITZER
Justice

PART 45

ALEXANDER GLIKLAD

INDEX NO. 602335/09

-v-

MOTION DATE

MICHAEL CHERNEY

MOTION SEQ. NO. 026

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion by defendant for leave to renew is DENIED;

plaintiff's cross motion for leave to renew is DENIED;

defendant's motion to lift the stay of discovery is denied, all as per the attached Decision and Order.

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

Dated: March 19, 2013

Melvin L. Schweitzer, S.C.
MELVIN L. SCHWEITZER

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

In the Sanctions Order, the court struck Mr. Cherney's counterclaims and first affirmative defense based on his failure to produce certain financial and other business records of Nash Investments, Ltd., a Cyprus-based company, for 1998 and 1999 (the Previously Missing Documents). Mr. Cherney's Motion to Renew the Sanctions Motion is based on his counsel's receipt in October 2012 of these documents from Oleg Depripaska – Mr. Cherney's former adversary in a London litigation – and the production of them to Mr. Gliklad.

Mr. Cherney argues that his production of the Previously Missing Documents relieves any concern that the court might have that Mr. Gliklad will suffer prejudice in his ability to prosecute his claims or to defend against Mr. Cherney's counterclaims from the absence of these documents. He submits the court should renew its consideration of the Sanctions Motion and reinstate his counterclaims and defense.

The court is aware that its Sanction Order is severe, and it did not issue it without thorough consideration of all of the facts pertaining to the discovery matter at issue here. It was issued because Mr. Cherney repeatedly refused to comply with the rules of discovery which facilitate orderly litigation in New York State courts.

In order to camouflage his contumacious conduct, Mr. Cherney dissembled. In one instance, he told the court an incredible story about collecting evidence of monies lent but not evidence of their repayment. Mr. Cherney was caught up on the detail of his admission that he was collecting the information in connection with a corporate restructuring for which evidence of both was essential. This, and other unbelievable sworn statements made over an extended time period, formed the basis for the court's Sanctions Order.

Mr. Cherney now contends that he has produced the Previously Missing Documents promptly upon their coming into his possession, and that this demonstrates his adherence to the court's discovery rules. He also argues that they constitute evidence favorable to his side of the case.

The documents are said to have been spontaneously turned over to Mr. Cherney by Mr. Depripaska, after heated litigation. No reason is given for this post-litigation largess. Nor is any reason given as to why Mr. Depripaska's counsel in the case has spontaneously written a letter to the effect that Mr. Depripaska would not have consented to the production of these documents while the litigation was pending, and would have aggressively opposed any motion to the court seeking release of the documents. Such stilted volunteerism by a former foe is unconvincing.

Mr. Gliklad in his submissions shows that Mr. Depripaska's London counsel speaks in his opening statement about facts which show that both parties to the litigation had the Previously Missing Documents for years. Their content flatly contradicted a key sworn statement by Mr. Cherney to the court. This did not compel Mr. Cherney to come forward and alert the court to the falsity of the prior statement.

The court's opinion is that the Sanctions Order must remain in place as a response to Mr. Cherney's continuing contumacious, willful, and obstructionist behavior. The court has considered its severity, and that the Previously Missing Documents have now been produced.

The court's opinion is that Mr. Cherney's sworn statements to the court with respect to repayments of the loan in question were not true, and that he has known this for a long time, if

not at the time they were made. These statements go to the core of this case. They were a piece with the failure to produce the Previously Missing Documents.

If litigants can proceed in this fashion, be sanctioned for it when their willful behavior is detected, and then be unburdened of the sanctions by turning over documents long in their possession, court proceedings will be inefficient and disorderly. It is for this reason that Mr. Cherney's motion is denied

In the Sanctions Order the court denied Mr. Gliklad's request that it strike Mr. Cherney's Ninth Affirmative Defense for his failure to produce evidence with respect to his investment in Kuzbass Coal. It did so despite findings that Mr. Cherney had improperly resisted discovery, improperly interpreted (ignored) one of the court's orders, advanced conflicting stories with respect to ownership of an interest in Kuzbass Coal and had failed to produce evidence supporting either one of the stories.

The court ordered Mr. Cherney to make himself available for a deposition to answer questions relating to Mr. Cherney's contentions as to where any documents related to Kuzbass Coal are located and why they are not in his possession or control. The court said it would review the transcript of the deposition and decide whether to strike Mr. Cherney's Ninth Affirmative Defense.

Mr. Cherney's counsel has written a letter saying he does not object to Mr. Cherney being deposed, that Mr. Cherney will deny Mr. Gliklad's allegations and give marginally relevant testimony on his involvement with Kuzbass in the late 1990's. Mr. Gliklad's position is that the letter demonstrates that Mr. Cherney's "marginally relevant testimony" is not worth obtaining and that the court should now strike Mr. Cherney's Ninth Affirmative Defense.

The court disagrees. The court orders Mr. Cherney's deposition to proceed as previously ordered

Accordingly, it is

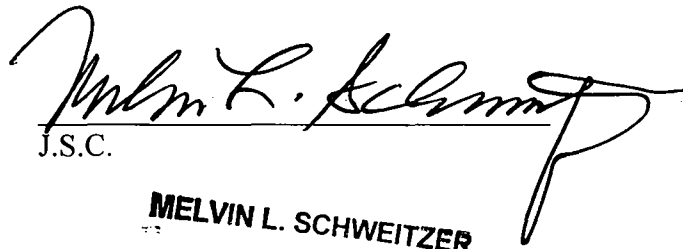
ORDERED that defendant's motion for leave to renew is denied; and it is further

ORDERED that plaintiff's cross-motion for leave to renew is denied; and it is further

ORDERED that defendant's motion to lift the stay of discovery is denied.

Dated: March 19, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER