

CDR Crfeances S.A.S. v Cohen
2012 NY Slip Op 09189 [104 AD3d 17]
December 27, 2012
Tom, J.
Appellate Division, First Department
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[*1]

**CDR CrÉances S.A.S., as Successor to Societe de Banque Occidentale, Respondent,
v
Maurice Cohen, Appellant, et al., Defendants.**

**CDR CrÉances, S.A.S., as Successor to Societe de Banque Occidentale,
Respondent, v Leon Cohen, Also Known as Leon Levy, et al., Appellants, et al.,
Defendants.**

First Department, December 27, 2012

CDR CrÉances S.A.S. v Cohen, 2011 NY Slip Op —(U), appeal dismissed.

APPEARANCES OF COUNSEL

Dewey Pegno & Kramarsky LLP, New York City (*David S. Pegno* of counsel), for appellants.

Kellner Herlihy Getty & Friedman LLP, New York City (*Douglas A. Kellner* of counsel), for respondent.

{**104 AD3d at 19} OPINION OF THE COURT

Tom, J.

This matter arises out of the diversion of the proceeds of a {**104 AD3d at 20} loan made by plaintiff's predecessor in interest to finance the renovation of a Manhattan property as a hotel. The conversion of the funds was accomplished by capital transfers to shell entities controlled by defendants Maurice Cohen and his son, Leon (collectively, the Cohens). [\[EN1\]](#) They were assisted in

this enterprise by Sonia Cohen, wife of Maurice Cohen, and two family employees, Robert Maraboeuf and Allegria Achour Aich (collectively, appellants). We agree with Supreme Court's overall conclusion that these defendants have exhibited no less dishonesty before the courts as in their dealings with business associates and the federal taxing authorities. Thus, in view of their well-documented acts of deceit and fraud committed to suborn the judicial process, this Court concludes that the sanction of striking their pleadings and entering judgment on default in the principal sum of \$135,359,331.39 with prejudgment interest, was entirely appropriate.

Plaintiff is the successor in interest to Societe de Banque Occidentale (SDBO), a wholly [*2] owned subsidiary of French bank Cr, dit Lyonnais. SDBO and SNC Coenson International et Cie (SNC) formed a partnership to develop the Flatotel hotel in Paris, part of a worldwide franchise of hotels. In 1990, SDBO and SNC became shareholders of Euro-American Lodging Corporation (EALC), whose purpose was to convert a Manhattan building into a Flatotel hotel. SDBO was to provide financing and SNC to provide expertise in the hotel industry. SNC nominally purchased SDBO's share in EALC for \$50,000 because SDBO, as a foreign bank operating in the United States, could not own shares in a nonbanking business. SDBO's financing, pursuant to a pledge agreement, was secured by a mortgage and security interest in all of EALC's outstanding stock. In 1991, the parties entered into a new loan agreement, governed by French law, under which SDBO was to provide financing of \$82,704,990 to the Manhattan Flatotel venture, to be disbursed as construction progressed, and EALC, among other things, was to pay taxes on the Manhattan property.

The relationship between the venture's participants began to deteriorate in 1992, when SDBO accused EALC, controlled by Maurice Cohen, of diverting funds, and as a result refused to provide further financing for the construction. A decade of litigation before the French courts began with EALC's filing an action {**104 AD3d at 21} to compel SDBO to distribute funds under the loan agreement and SDBO's counterclaim seeking to accelerate payment of the loan debt on account of EALC's default. In 2003, EALC was directed by the French court to repay the loan and \$13,923,311 in taxes it was to have paid to the City of New York. The French judgment was recognized in this jurisdiction and, in 2005, plaintiff was granted judgment in the principal sum of \$95,837,522 plus interest of \$112,159,088.41, which this Court affirmed ([CDR Cr,ances S.A. v Euro-American Lodging Corp., 40 AD3d 421](#) [1st Dept 2007]). Plaintiff also instituted a mortgage foreclosure action predicated on EALC's default on the same loan agreement ([CDR Cr,ances S.A. v Euro-American Lodging Corp., 43 AD3d 45](#) [1st Dept 2007]).

Also in 2003, plaintiff instituted a tort action asserting six causes of action and, in 2006, a second tort action asserting 38 causes of action—including fraud, fraudulent conveyance and conversion—against the Cohens, Sonia Cohen, various entities alleged to be controlled by them and certain of their employees. These actions were consolidated, and the first discovery conference was held in early March 2008. By way of an order entered August 13, 2008, Supreme Court struck the answers of the Cohen defendants and others for failure to comply with discovery demands, and judgment was entered against them later that month. This Court reversed the judgment, stating that due to the brief period that had elapsed from the initial discovery order and the granting of judgment by default, "reasonable latitude should have been afforded before imposing the ultimate sanction" (62 AD3d 576, 577 [1st Dept 2009]). Thereafter, defendants continued to resist discovery orders that this Court found to be generally within the exercise of Supreme Court's discretion (77 AD3d 489, 491 [1st Dept 2010] [upholding all directives except production of Maurice Cohen's personal tax returns]).

In April 2010, Maurice Cohen (also known as Mauricio Cohen Assor) and Leon Cohen (also known as Leon Cohen Levy) were arrested by federal authorities for conspiracy to defraud the United States government and subscription to false income tax returns. Joelle Habib and Patricia Habib Petetin Benharbon (Petetin), two sisters who had been in the employ of the Cohen family, [*3] entered into agreements with the Justice Department's tax division to provide information, respond to questions and testify before the grand jury and at trial in exchange for the government's promise not to prosecute them for activities in {**104 AD3d at 22} connection with their involvement with Maurice and Leon Cohen. The criminal case was heard in the United States District Court for the Southern District of Florida, and the jury returned a guilty verdict in early October 2010. The testimony given by the Habib sisters at trial revealed a coordinated pattern of deceit calculated to conceal the defendants' ownership of the New York property and the shell corporations to which the proceeds of its sale were transferred. It emerged that, in violation of the loan agreement with SDBO, the defendants had caused the New York property to be sold for some \$33 million and, using entities they controlled (both Panamanian), converted the proceeds to their own use and avoided paying taxes on the income derived from the sale by transferring the money first to the Swiss bank account of Blue Ocean Finance and then to the account of Carribean Business Fund, maintained at the same bank. [EN2]

At sentencing, the District Court found that the Cohens had engaged in criminal activity that "SPANNED THE BETTER PART OF A DECADE OR MORE, INVOLVED NUMEROUS FICTITIOUS ENTITIES, AN ELABORATE WEB OF SHELL CORPORATIONS, AND HEAVY

HANDED [treatment] OF A NUMBER [of] LESS SOPHISTICATED FINANCIALLY DEPENDENT EMPLOYEES IN THE SCHEME." The court further found "THAT THE DEFENDANTS MAURICIO COHEN ASSOR AND LEON COHEN LEVY COMMITTED PERJURY." The court noted that they gave false testimony concerning such matters as the ownership of the New York property, the events that transpired at the closing of its sale, the ownership of the shell corporations they controlled, the involvement of various relatives in the operation of those entities and "THE FORGING OF SIGNATURES ON A HOST OF DOCUMENTS."

After the extent of the defendants' misconduct before the courts became apparent as a result of the federal investigation, plaintiff brought the instant motion to strike appellants' pleadings in August 2010. Supreme Court held a full evidentiary hearing to assess whether appellants had perpetrated a fraud upon the court. Appellants elected not to testify, and Maurice and Leon Cohen chose to rely solely on the testimony they had given at their federal trial. Testimony was received from the Habib sisters, who described a coordinated effort to deceive the courts. After hearing the testimony and reviewing the documentary {**104 AD3d at 23} evidence, Supreme Court issued an 18-page, single-spaced decision, in which it concluded, on the basis of clear and convincing evidence, that appellants had committed a fraud on the court (2011 NY Slip Op 33636[U] [2011]). In the first order appealed from, the court granted plaintiff's motion, struck appellants' answers and directed that judgment be entered on default. Following resettlement, the second order appealed from, judgment was entered against appellants in the amount of \$135,359,331.39 with prejudgment interest from which appellants also appeal. [*4]

Appellants challenge the disposition on the grounds that the court applied the wrong standard of proof in holding that they committed a fraud directed at the court warranting the striking of their pleadings and, thus, abused its discretion in imposing the sanction of judgment by default. They further contend that the court erred in directing entry of judgment without conducting an inquest. The short answer to these assertions is that the proof elicited is more than sufficient to establish that appellants engaged in an extensive scheme to suborn perjury and subvert the judicial process; and calculation of the judgment, which is predicated on a foreign judgment recognized in this jurisdiction and affirmed by this Court, is a ministerial matter requiring only computation by the Clerk of the Court (CPLR 3215 [a]).

Appellants portray the primary issue on appeal as the evidentiary standard to be applied in deciding if a fraud on the court has been committed. The parties contest whether such misconduct

must be "conclusively demonstrated," as appellants contend (citing *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244 [1st Dept 2008]).

Appellants' discussion of *Melcher* places great weight on the statement that "[d]eceipt warranting the striking of the answer was not conclusively demonstrated" (52 AD3d at 245). However, a cursory examination of the context in which the statement was issued reveals that it does not purport to pronounce an evidentiary standard. Rather, the purpose was to distinguish the circumstances of the matter before us from the authority cited, *317 W. 87 Assoc. v Dannenberg* (159 AD2d 245, 245 [1st Dept 1990]), in which we concluded that sanctions were supported by "undisputed untruthfulness" on the record" (quoting *Smith v Malarczyk*, 118 AD2d 934, 935 [3d Dept 1986] ["undisputed untruthfulness of defendant's testimony at his examination before trial"]). The words "conclusively demonstrated" in *Melcher* refer to this Court's finding in *Dannenberg* (**104 AD3d at 24) concerning the proof of the defendant's misconduct and is not an evidentiary standard as urged by appellants. The holding of the case, insofar as pertinent to the issue before us, is contained in the sentence immediately following: "Whether the destruction of evidence was intentional or merely negligent presents an issue for the trier of fact" (*Melcher* at 245). The obvious implication is that the issue is appropriate for submission to a trier of fact, which should determine the question as a trier of fact decides most civil questions, by a preponderance of the evidence. Thus, to the extent that *Melcher* involves an issue to be decided in connection with striking the pleadings of a party responsible for destruction of evidence or withholding evidence, it indicates that the determination rests not on conclusive evidence but on a mere preponderance thereof.

As Supreme Court noted in its decision, "Actions for fraud upon the court are rare" (2011 NY Slip Op 33636[U], *9)—so rare that the court cited only a single New York case dealing with the subject, in which we stated, "The paramount concern of this Court is the preservation of the integrity of the judicial process" (*Koschak v Gates Constr. Corp.*, 225 AD2d 315, 316 [1st Dept 1996] [venue "designated as a result of duplicity . . . amounts to a fraud upon the court and will not be permitted to stand"]). In this jurisdiction, "fraud upon the court" is a term used to describe the perversion of the judicial process as a result of misconduct by a party or counsel (*see Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012], citing Black's Law Dictionary 686 [8th ed 2004]). With respect to the imposition of sanctions for failure to comply with discovery orders, the parties have cited no [*5] New York case that recognizes any such cause of action or, more precisely, requires that fraud on the court be established before pleadings may be stricken. Furthermore, appellants neither identify any basis for distinguishing the nature of the penalty assessed against

them from one authorized under CPLR 3126 nor set forth any reason why a greater quantum of proof should be required to support imposition of the penalty.

Based on the extensive evidence adduced in this matter, Supreme Court did not abuse its discretion in striking the answer ([Arts4All, Ltd. v Hancock, 54 AD3d 286](#) [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* 559 US —, 130 S Ct 1301 [2010]). The ample record is more than sufficient to demonstrate appellants' utter disregard for the judicial process, and while no finding of fraud on the court is necessary to warrant striking the pleadings, appellants' conduct is appropriately characterized as such. **{**104 AD3d at 25}**

As a result of the federal prosecution of the Cohens, it was learned that they had arranged for false testimony to be given by various deposition witnesses. The Habib sisters testified that the Cohens had suborned perjury by holding planning sessions on various dates, at which they provided the sisters, Robert Maraboeuf and Allegría Achour Aich with written scripts to follow in giving deposition testimony. The scripts specified false answers that were to be provided denying the Cohens' control of the various defendant shell entities, as well as fictitious names of persons who were purported to be in control of those entities ("Francois Lavalley," "Jim Cox," "Javier Schrimpf" and others) and the name of a person asserted to have paid the witnesses' legal fees (one "Dahan"). Although they were instructed to destroy the scripts, Joelle Habib retained her copy and furnished it to the court. She further testified that her 2008 affidavit in support of the motion to vacate the judgment against her on default (to which this Court alluded in vacating judgment) was false because Maurice Cohen had told her what to say. Furthermore, contrary to deposition testimony that the individual defendants were all paying their own lawyer, she stated that it was Maurice Cohen who paid the fees.

Testimony was also heard that appellants had submitted a forged document in opposition to a motion by plaintiff. Habib Levy Sibony (Levy), Maurice Cohen's brother-in-law, testified at both the criminal trial and a Florida civil action, in which plaintiff sought to encumber Florida real estate purchased with the proceeds of the sale of the New York property. Levy stated that an HSBC Bank letter portraying him as beneficial owner of Whitebury Shipping Ltd., an offshore bearer share entity used to conceal the proceeds of the original loan, had been forged. **[EN3]** He explained that, although his purported signature appeared on the document, he had never been asked whether his name could be used, he never gave Maurice Cohen or anyone else permission to use it, and he was never contacted by HSBC to verify his signature. Levy's disavowal of the signature was corroborated by recordings made in 2007 of his conversations with a bank officer, in which the

officer was heard to state that the signature did not appear to be Levy's. Nor did Levy's passport signature match the one on the letter. [*6]

The motion to strike appellants' answer and enter judgment by default was originally supported by evidence garnered from {**104 AD3d at 26} the federal criminal trial and the Florida civil trial: the Habib sisters' testimony regarding the subornation of perjured deposition testimony; false 2008 affidavits submitted in connection with the motion to vacate the default judgment against the Habib sisters, Aich and Maraboef (which, as noted, this Court had mentioned in reversing Supreme Court's 2008 default order); Levy's testimony concerning his forged signature; and invoices sent to Maurice Cohen for legal representation provided to appellants, thereby contradicting Aich's deposition testimony regarding the source of payment. This evidence was augmented as a result of the hearing conducted by the motion court. The Habib sisters gave testimony consistent with that given during the Florida federal criminal and civil proceedings. Plaintiff placed in evidence the Joelle Habib deposition script, the transcript of Levy's testimony, affidavits from the attorney who handled the closing of the New York property, as well as deposition transcripts, bank records and portions of the record in the Florida civil action. Maurice and Leon Cohen, who were incarcerated, relied on their testimony at their criminal trial, generally denying their ownership and control of the shell entities involved in the transfer of the funds from the sale of the New York property and alleging the intervention of persons purported to be in control of those entities.

The evidence is more than sufficient to support the dismissal of appellants' answer under criteria normally employed in this state (*see e.g. Zletz v Wetanson*, 67 NY2d 711, 713 [1986] ["conduct designed to yield one-sided disclosure"]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1st Dept 1997] [spoliation]). While the proof may not quite amount to "undisputed untruthfulness [on the record]" (*Smith*, 118 AD2d at 935), it is sufficient to constitute incontrovertible untruthfulness on the record.

Dismissal of the answer is supported by conduct that can fairly be described as "dilatory, evasive, obstructive and ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1990]), designed to frustrate the motion court's discovery orders and directives (CPLR 3124). The striking of pleadings is warranted where, as here, the conduct of the offending party "frustrates the disclosure scheme provided by the CPLR" (*Henry Rosenfeld, Inc.* at 375; *see also Pimental v City of New York*, 246 AD2d 467, 468 [1st Dept 1998], citing *Herrera v City of New York*, 238 AD2d 475, 476 [2d Dept 1997]). As a general principle, Supreme Court is "accorded wide {**104 AD3d at 27} latitude in determining appropriate sanctions for dilatory

conduct" (*Rafael Diamond Jewelry Import v Underwriters at Lloyds of London, England*, 189 AD2d 613, 613 [1st Dept 1993], citing *Sawh v Bridges*, 120 AD2d 74, 78 [2d Dept 1986], *appeal dismissed* 69 NY2d 852 [1987]). Dismissal of a pleading is within the exercise of discretion (CPLR 3126 [3]) and subject to reversal only for abuse thereof (*Zletz*, 67 NY2d at 713).

After this Court vacated the default judgment entered against appellants, Supreme Court issued an order, directing that appellants, inter alia, comply with all scheduled discovery, including the completion of depositions, and conditionally precluded all of the individual defendants unless they complied with plaintiff's document demands and interrogatories, directives that this Court held to have been proper with the exception of the production of [*7] Maurice Cohen's personal tax return (77 AD3d at 491). For the purpose of imposing a sanction for discovery violations in this matter (CPLR 3126), it need only be observed that conspiring to provide false testimony and to mislead the court did not comply with Supreme Court's directives, as affirmed by this Court. Thus, it is sufficient that appellant's misconduct constitutes a gross deviation from the orderly completion of discovery as directed by Supreme Court and envisioned by CPLR article 31 (*see 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245 [1990], *supra* [submission of back-dated document and false deposition testimony as to its validity]). Because a lesser sanction has proved to be ineffectual in deterring appellants from their obdurate obstruction of the judicial process, we deem striking the answer and entry of judgment by default to be both appropriate and necessary in order to promote respect for the judicial system and to preserve the integrity of its offices. Moreover, a lesser sanction would not ameliorate the substantial harm inflicted on plaintiff by appellants' pervasive misconduct.

Contrary to the dissent's position, the determination of credibility of the witnesses was within the province of the hearing court. Where, as here, an evidentiary hearing is conducted by the court, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1st Dept 1990]; *see also Kronish v Koffman*, 199 AD2d 136, 138 [1st Dept 1993]). Since it cannot be said that Supreme Court's {**104 AD3d at 28} evaluation of the evidence before it was unfair (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; [Hardwick v State of New York](#), 90 AD3d 540 [1st Dept 2011]), there is no basis to depart from its findings. While appellants contend that the cooperation agreements with the federal prosecutor afforded the Habib sisters motive to give testimony favorable to the federal authorities, the hearing court fully credited their testimony.

In contrast to the evidence amassed by plaintiff, appellants' opposition by way of affidavit was relatively sparse. Their contention, both on the motion and on appeal, is that their commission of fraud on the court has not been demonstrated by sufficient evidence. While there is no requirement that appellants' conduct in withholding or misrepresenting evidence amount to fraud on the court, we note that, unlike the circumstance of *Passlogix, Inc. v 2FA Tech., LLC* (708 F Supp 2d 378, 406 [SD NY 2010]), on which appellants rely, the testimony received from the Habib sisters and Levy was corroborated. In addition, while the extensive record does not warrant resort to the doctrine of collateral estoppel, Maurice and Leon Cohen were found, for the purpose of federal sentencing guidelines, to have committed perjury during the course of criminal proceedings in relation to the same transactions at issue in this action. Thus, appellants have certainly not demonstrated the existence of any contradiction in the findings reached in the respective tribunals.

Much of appellants' brief is devoted to disputing the trial court's factual findings. Their discourse arrives at the conclusion that a finding of default was particularly inappropriate in view of appellants' asserted meritorious defenses and lack of meaningful discovery. This argument in favor of reversal is remarkable because, as evinced by the record and appellate history, this litigation is notable for appellants' failure to comply with discovery orders which Supreme Court, [*8] in its 2008 order striking the answer, found to be willful and contumacious. In reversing, this Court did not dispute the motion court's assessment of appellants' misconduct, reasoning only that the sanction imposed was premature. We specifically noted that our vacatur of the default judgment entered against appellants was without prejudice to any other sanctions Supreme Court deemed appropriate (62 AD3d at 577). Furthermore, in light of the evidentiary hearing conducted by Supreme Court prior to granting the instant judgment, appellants will not be heard to complain that there is an insufficient factual basis for imposing the sanction. {**104 AD3d at 29} Finally, they are hardly in a position to argue that their own failure to cooperate with Supreme Court's attempts to regulate disclosure has resulted in the absence of meaningful discovery.

It is further contended that the default judgment entered against Maurice Cohen's wife, Sonia, should have been vacated for lack of evidence. There was no direct evidence to show that Sonia participated in the meetings regarding the false deposition testimony. However, contrary to Sonia's denial of knowledge of her husband's businesses, Petetin testified that Sonia took an active role in managing the Cohens' perfume store and that she lied about signing documents related to Maurice's business, about the ownership of family assets and about knowing Maraboef, who had managed her store. Sonia committed perjury and took part in hiding the transfer of family assets. Thus, the proof supports a finding that she participated in the effort to withhold from plaintiff evidence

necessary to the prosecution of its case, thereby warranting the sanction against her.

Appellants' arguments regarding liability were properly found to be foreclosed by their default (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). Supreme Court correctly awarded damages without conducting a hearing, correctly found plaintiff's claims against the individual defendants viable, and correctly excluded the offsets appellants sought. The court directed entry of judgment in the amount of \$135,359,331.39, together with interest from July 12, 2007 at the statutory rate, as computed by the Clerk.

The amount of damages was determinable by resorting to the judgments of the French court, as recognized in New York and as calculated first by Special Referee Marion Lewis and then by Special Referee Marilyn Dershowitz with respect to interest that accrued after April 2005 and October 2005.

The amount of tort damages against the individual defendants was properly based on the amount of the unpaid loan; notably, numerous causes of action against the individual defendants concerned the fraudulent conveyance of the loan proceeds. These claims were preserved in the 2007 settlement by a specific carve-out for tort claims against the Cohens and entities under their control; the court correctly agreed with plaintiff's argument distinguishing *Bailon v Guane Coach Corp.* (78 AD3d 608 [1st Dept 2010]), upon which appellants relied, as lacking a carve-out provision for liability against individuals who had settled with a corporation. {**104 AD3d at 30}

The court properly denied a setoff for the value of the Florida properties, which were held in receivership rather than transferred outright to plaintiff. Thus, the Florida judgment remains unsatisfied.

Finally, the court properly awarded prejudgment interest since the fraud and fraudulent conveyance causes of action are based on allegations that appellants attempted to impair [*9]plaintiff's right to recover on a loan (*see Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]).

Accordingly, the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered September 16, 2011, awarding plaintiff the principal sum of \$135,359,331.39, together with \$50,965,529.62 in prejudgment interest from July 12, 2007, should be affirmed, with costs. The appeals from the order of the same court (James A. Yates, J.), entered January 25, 2011, which, after a hearing, granted plaintiff's motion to strike the answers of defendants Maurice Cohen, Leon

Cohen, Sonia Cohen, Robert Maraboeuf and Allegria Aich and enter a default judgment against them, and from the resettled order of the same court (O. Peter Sherwood, J.), entered September 15, 2011, should be dismissed, without costs, as subsumed in the appeal from the judgment. The appeal from the order of the same court and Justice, entered February 24, 2011, should be dismissed, without costs, as abandoned.

Catterson, J. (dissenting). I must respectfully dissent. In my opinion, the motion court abused its discretion in granting the plaintiff's motion for a default judgment based on its finding that the defendants committed a fraud on the court. It is incomprehensible that the motion court was able to find fraud on the court simply by crediting only the testimony of two witnesses who essentially admitted that they had lied at every stage of this action. Moreover, because the defendants sharply dispute the testimony of those two witnesses and thereby raise material questions of fact, precedent mandates that the issue could only be resolved by a jury.

This case is but another chapter in the long-running saga of litigation arising out of a commercial real estate loan dating back to 1990. At that time, Societe de Banque Occidentale (hereinafter referred to as SDBO), plaintiff CDR's predecessor, became a shareholder of Euro-American Lodging Corporation (hereinafter referred to as EALC), whose purpose was to convert a Manhattan building into a Flatotel hotel, part of an international {**104 AD3d at 31} franchise. ([CDR Cr,ances S.A. v Euro-American Lodging Corp., 43 AD3d 45](#) [1st Dept 2007].) SDBO provided the financing pursuant to a 1991 loan agreement.

The relationship between SDBO and EALC soured in 1992, and SDBO refused to provide further financing for construction based on its claim that EALC was diverting funds. EALC sued in France to compel SDBO to perform, and SDBO counterclaimed to default EALC and accelerate the loan debt. In 2003, a French appeals court ordered EALC to repay the loan in the amount of \$82,704,990, with interest.

In May 2003, the plaintiff commenced the first of these two New York actions against EALC, Maurice Cohen and others, claiming breach of contract, fraud and other torts based on allegations that Cohen controlled EALC and effected a series of transfers to other entities controlled by him or by his nominees in order to conceal the proceeds of the loan and avoid repaying it. [*10]

In May 2006, the plaintiff commenced the second action, naming, inter alia, the other defendants herein, including Leon Cohen (Maurice's son), Sonia Cohen (Maurice's wife), Robert

Maraboeuf (former CEO of SNC) and Allegria Aich (signatory on several of the challenged asset transfers), as well as Joelle Habib (Maurice Cohen's longtime secretary) and Patricia Habib Petetin (Ms. Habib's sister).

In January 2008, a default was entered against Maraboeuf, Aich and Petetin, and in August 2008 judgment was entered against them for approximately \$264 million plus interest. On May 28, 2008, the plaintiff moved for a default judgment against Maurice Cohen based on his alleged failure to provide discovery. Maurice Cohen cross-moved for, inter alia, a protective order. On August 7, 2008, the motion court granted the plaintiff's motion for a default against both Cohens and struck the Cohens' answers, finding their noncompliance with discovery orders willful and contumacious.

On May 21, 2009, this Court reversed, and vacated the defaults, finding that the motion court had "improvidently exercised its discretion." (*CDR CrÉances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Discovery resumed, and in July 2009, the Cohens were deposed for seven days creating a record of 1,031 pages. Leon Cohen denied that he or any member of his family had any direct or indirect ownership interest in any of the entities that plaintiff alleged were controlled by the Cohens. Maurice Cohen denied involvement in the negotiations {**104 AD3d at 32} and sale of the Flatotel, and denied ownership of any of the defendant entities.

Maurice Cohen provided additional deposition testimony that concluded on April 14, 2010. Leon Cohen's deposition did not recommence because on April 15, 2010, Maurice and Leon Cohen were arrested in Florida. The federal indictment charged them with conspiracy to evade taxes on income from various corporate entities and alleged that, as part of the conspiracy, they had committed fraud on the New York court by forging documents and suborning perjury.

Habib and Petetin, who were also in the United States for depositions, entered into agreements with the Justice Department's tax division to testify against the Cohens in exchange for the government's promise not to prosecute them for activities in connection with their involvement with the Cohens. Habib and Petetin appeared at their depositions in New York on April 22 and 23, 2010, and asserted their Fifth Amendment rights. They also entered into a settlement agreement with the plaintiff in this case.

The tax case in Florida went to trial on September 16, 2010. Habib and Petetin testified for the government, and the Cohens were convicted of tax evasion on October 6, 2010. Habib and Petetin also testified against the Cohens in a Florida civil action where the court found that the Cohens' subornation of perjury and submission of a forged document in the New York actions was a fraud

on the court.

On October 20, 2010, the plaintiff moved to strike the defendants' answer in the New York actions and for a default judgment pursuant to CPLR 3124 and 3126 on the grounds that the defendants defaulted on their discovery obligations and committed a fraud on the court. The motion court ordered an evidentiary hearing over the objection of the defendants who argued that, because there was a factual dispute regarding the plaintiff's allegations, the drastic relief that the plaintiff sought was improper. [*11]

The evidentiary hearing was held November 29 through December 3, 2010. Habib and Petetin testified that after this Court vacated the defaults in 2009, they met with the Cohens, Aich and Maraboeuf, and were provided with written "questionnaires" to memorize in preparation for their depositions in the New York actions. They testified that the questionnaires contained false information. They further testified that they were instructed to state at their depositions that they did not {**104 AD3d at 33} work for the Cohens, and that the Cohens did not own Flatotels. They said that they were instructed not to tell their lawyers of the plan to give inaccurate testimony.

Habib testified that she was told to deny that the Cohens were behind any of the corporate entities involved in the alleged transfer of collateral, and instead to identify fictional representatives of the entities. Petetin testified that she was instructed to deny any relationship to the Cohens. Of course, ultimately the Habib sisters did not testify to any of these purported falsehoods at deposition because, as already noted, they both asserted their Fifth Amendment rights.

Habib and Petetin were impeached on cross-examination. They admitted that they had lied numerous times throughout this action including to their lawyers in France. Habib also admitted to making false statements to a French court, and failing to report a \$100,000 severance payment to French tax authorities that she testified she received from Maurice Cohen. Habib and Petetin testified that they lied in affidavits because the Cohens were paying their legal fees.

Habib and Petetin further acknowledged that, during the tax trial in Florida, they had settled with the plaintiff which agreed not to pursue its claims against them so long as they testified against the defendants. Habib and Petetin also admitted that the plaintiff had agreed to pay their legal fees and expenses.

The defendants submitted the sworn statements of Maurice and Leon Cohen, Aich, and Maraboeuf in which they expressly and emphatically denied that they were part of any agreement to

testify falsely. The Cohens also submitted affidavits and the defendants' testimony from the Florida criminal trial wherein they denied the allegations against them.

The motion court credited Habib's and Petetin's entire testimony and concluded that Aich and Maraboeuf "followed the perjurious scripts and repeated the Cohens' false directives in their depositions." (2011 NY Slip Op 33636[U], *13 [2011].) The court was "convinced that [the representatives of the entities] were conscious fabrications, created by the Cohens to meet the exigencies of the situation and to obstruct the Court's truth-finding process." (*Id.* at *12.)

The court concluded that "striking defendants' pleadings and dismissing the action is the appropriate sanction for the Cohens' bad faith and deliberate intent to deceive the Court." (*Id.* at *17.)

{**104 AD3d at 34} In my opinion, for the reasons set forth below, this was plain error. The motion court abused its discretion in granting the plaintiff's motion for a default judgment. As a threshold matter, it should be noted that the court referred to the evidentiary hearing as a *Melcher* hearing, citing to [Melcher v Apollo Med. Fund Mgt. L.L.C. \(52 AD3d 244 \[1st Dept 2008\].\)](#) However, the motion court then proceeded to ignore the standard set by this Court in that case, namely that "[d]ecept warranting the striking of the answer" must be "*conclusively* demonstrated." (52 AD3d at 245 [emphasis added].) Instead, the motion court adopted the "clear and convincing" standard set by some federal courts to find that the [*12] defendants perpetrated a fraud on the court. *Melcher's* requirement of a "conclusive" demonstration of deceit is mandated by precedent. (See *317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245 [1st Dept 1990]; see also *Smith v Malarczyk*, 118 AD2d 934 [3d Dept 1986].) In these cases, fraud and deceit on the court is established only because it is "undisputed" or "admitted." (See *Smith* at 935 ["(g)iven the *undisputed* untruthfulness of defendant's testimony at his examination before trial that there were no witnesses (to the accident), . . . the trial court's refusal to impose sanctions . . . constituted reversible error"] [emphasis added].) In *Dannenberg*, the "*undisputed* untruthfulness" involved offering a fraudulent document to the court under an affidavit, which fraudulence was subsequently "admitted" by the defendant. (159 AD2d at 245 [emphasis added].) Thus, *Melcher's* requirement of a "conclusive" demonstration of alleged deceit comports with a heightened standard of proof where, as the defendants assert, "conclusive" ordinarily means "putting an end to debate or question especially by reason of irrefutability."

More recently, in [Kasoff v KVL Audio Visual Servs., Inc. \(87 AD3d 944 \[1st Dept 2011\].\)](#), this Court determined that plaintiff's motion to strike should have been granted on the grounds that

"[t]he record *establishes* that defendants' counsel actively interfered with discovery . . . [and] [d]efendants also *admittedly* altered a commission report." (87 AD3d at 945 [emphasis added].) Hence, *Kasoff* also stands for the proposition that deceit must be admitted or undisputed when a plaintiff has moved to strike an answer rather than just for the proposition the majority propounds, namely, that it is an appropriate sanction when the fraudulent scheme is "extensive." In any event, the plaintiff here does not cite to any legal authority that supports the proposition that a motion to strike an answer or a motion {**104 AD3d at 35} for a default may be granted in a situation where the allegations of fraud and deceit on the court are the subject of a bona fide dispute.

Indeed, the facts of *Melcher* are instructive: In that case, the plaintiff moved to strike the defendants' answer for "spoliation of evidence and deceit related to such." (*Melcher v Apollo Med. Fund Mgt. LLC*, 2007 NY Slip Op 33803[U], *4 [Sup Ct, NY County 2007].) At issue was "key evidence" of a document that plaintiff alleged was destroyed intentionally by one of the defendants to prevent forensic ink testing which would have shown the document to be fraudulent. (*Id.*) The defendant disputed the allegation and asserted that the document was legitimate but "burned by accident, in his kitchen." (*Id.*)

The motion court denied the plaintiff's motion, and this Court affirmed holding that "[d]eceit warranting the striking of the answer was not conclusively demonstrated." (*Melcher*, 52 AD3d at 245.) Similarly, in this case, in my opinion, "deceit warranting the striking of the answer" or a default judgment was not conclusively demonstrated. The fraud on the court allegedly perpetrated by defendants did not go undisputed, and was certainly not admitted. On the contrary, the defendants strenuously denied the allegations of deceit and fraud in their entirety. They challenged the witnesses' motives for testifying against them; they asserted that the "scripts" about which Habib and Petetin testified could have served other purposes such as aiding in the preparation of depositions; they argued that Habib and Petetin had an incentive to offer false adverse testimony against the defendants. [*13]

Indeed, the record supports the defendants' contentions to the extent that Habib and Petetin acknowledged at the evidentiary hearing that they testified against the defendants in return for the federal prosecutors dropping charges against the sisters. In my opinion, this was sufficient to preclude a finding of fraud on the court as a matter of law.

As in *Melcher*, the defendants raised a question of material fact as to the fraudulent conduct alleged, and the issue should have been presented to a jury. (*Melcher*, 52 AD3d at 245 [whether defendant perpetrated a fraud on the court by destroying evidence and lying about it or "(w)hether

the destruction of evidence was . . . merely negligent presents an issue for the trier of fact"].)

Despite this clear precedent, the motion court emphasized that it had arrived at its finding of fraudulent conduct by crediting {**104 AD3d at 36} the testimony of the same two witnesses who admitted they had lied in this action before a French court; admitted they had lied to their lawyers; admitted to lying on affidavits for the court; acknowledged asserting their Fifth Amendment rights at depositions ordered by the motion court, and conceded they had testified against the defendants in Florida in return for a deal with the government.

In my view, therefore, the motion court clearly abused its discretion when it allowed the plaintiff to prevail on a motion for default under circumstances that would be insufficient to support a motion for summary judgment. Courts in other jurisdictions, in similar circumstances, have declined to grant a motion for default. (*See e.g. Gilbert v Eckerd Corp. of Fla., Inc.*, 34 So 3d 773, 776 [Fla Dist Ct App 2010] ["if the motion to dismiss for fraud would not likewise survive a motion for summary judgment, the trial court should presume the matter not subject to dismissal"]; *Rockdale Mgt. Co., Inc. v Shawmut Bank, N.A.*, 418 Mass 596, 601, 638 NE2d 29, 33 [1994, O'Connor, J., concurring] ["(t)he precious right of trial by jury is jeopardized (if a court can strike pleadings) . . . after measuring a party's credibility and without the benefit of an admission"].)

In light of the magnitude of the damages at issue in this case, and because I believe that the defendants succeeded in raising an issue of fact that must be resolved by a jury, I would reverse the January 25, 2011 order striking defendants' answers and granting a default judgment on liability, and remand for further proceedings.

Gonzalez, P.J., Renwick and Richter, JJ., concur with Tom, J.; Catterson, J., dissents in a separate opinion.

Judgment, Supreme Court, New York County, entered September 16, 2011, affirmed, with costs, and order, same court, entered January 25, 2011, and from the resettled order, same court, entered September 15, 2011, dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered February 24, 2011, dismissed, without costs, as abandoned.

Footnotes

Footnote 1: Maurice and Leon Cohen are presently serving respective 10-year sentences following conviction, after a jury trial, in connection with their failure to pay federal income taxes on the proceeds.

Footnote 2: A more detailed account of the transaction may be found in this Court's decision in *World Bus. Ctr. v Euro-American Lodging Corp.* (309 AD2d 166, 167-168 [1st Dept 2003]).

Footnote 3: The shares of a bearer share corporation are not registered, making its ownership particularly difficult to trace.