

## New York Commercial Division Round-Up Blog

News & Updates on Cases Decided in the Commercial Division of the New York State Supreme Court

Presented By **SheppardMullin**

# Defraud A Court? Compensatory Damages Are Okay But Not Punitive Damages

*October 13, 2011 by Mark E. McGrath*

In *CDR Créances S.A.S. v. Cohen*, Index Nos. 109565/2003 and 600448/2006 (Sup. Ct., NY County, Aug. 25, 2011) (the “August Decision”), the [Honorable O. Peter Sherwood](#) granted the motions of plaintiff CDR Créances S.A.S. (“CDR”) for an order directing entry of judgment on CDR’s compensatory damages but refused to award CDR punitive damages, despite a [January 25, 2011](#) decision (the “January Decision”) by former Justice James A. Yates that the defendants had repeatedly committed fraud upon the court.

The two actions arose out of CDR's claims that the defendants had defrauded CDR and disposed of and stole the assets of Euro-American Lodging Corporation (“EALC”) and its corporate shareholders, all of which were the alleged alter egos of defendant Maurice Cohen and his son, defendant Leon Cohen. EALC borrowed more than \$92 million from CDR to acquire and convert a building to a hotel operating as part of the Flatotel hotel franchise (the “New York Flatotel”), and EALC granted CDR a security interest in the shares of EALC. Approximately one year after the loan was made, CDR declared EALC in default. CDR and EALC became involved in long-drawn-out litigation that ultimately resulted in two judgment against EALC totaling more than \$226 million.

On July 12, 2007, CDR assigned the EALC's debt to 135 West 52nd Street LLC in exchange for a partial payment on the debt in the amount of \$105 million, but CDR reserved its rights and retained its tort claims against Maurice Cohen, his family members, and any companies in which he held a direct or indirect interest. That agreement was memorialized in a Debt Transfer Agreement.

After the [January Decision](#), CDR subsequently filed a motion seeking entry of judgment. Defendants argued that the Debt Transfer Agreement released them from damages. Justice Sherwood rejected that argument and distinguished [Bailon v. Guane Coach Corp.](#), 78 A.D.3d 608 (1st Dep't 2010), because the Debt Transfer Agreement specifically carved-out the tort claims against the defendants. Defendants also argued the amount of damages should be reduced by \$130 million, which was the amount that was paid to 135 West 52nd Street LLC in EALC's bankruptcy. Justice Sherwood held that CDR's damages would be reduced by the amount CDR received from 135 West 52nd Street LLC, not the amount its transferee received in EALC's bankruptcy.

CDR also sought an award of punitive damages. Justice Sherwood noted punitive damages serve two purposes -- punishment and deterrence. While punitive damages are not generally available for breach of contract, such damages are available "where the conduct constituting or associated with the breach of contract 'also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations' and such 'conduct was aimed at the public generally.'" [August Decision](#), at 9 (quoting [Rocanova v. Equitable Life Assurance Soc'y](#), 83 N.Y.2d 603 (1994) (further citations omitted)). Accordingly, Justice Sherwood noted that a plaintiff seeking punitive damages "must demonstrate: (1) the defendant's conduct is actionable as an independent tort for which compensatory damages are ordinarily available; (2) the tortious conduct is sufficiently egregious under the standard set forth in [Walker v. Sheldon](#), 10 N.Y.2d 401 (1961); (3) plaintiff is aggrieved by such tortious conduct; and (4) such conduct was part of a pattern directed at the public generally." [August](#)

[Decision](#), at 9 (citing [Rocanova](#), 83 N.Y.2d at 613; [New York Univ. v. Continental Ins. Co.](#), 87 N.Y.2d 308, 316 (1995)).

Justice Sherwood found that the defendants' conduct satisfied the first two prongs, but the Court did not find that the defendants' conduct was "aimed at the public generally." [August Decision](#), at 9 (quoting [Walker](#), 10 N.Y.2d at 405).

Justice Sherwood's decision hinged on the private nature of CDR's claims, namely, CDR's efforts to recover what it is owed. Even if punitive damages were available, Justice Sherwood refused to make such an award because the defendants had already been sanctioned for their conduct. Justice Sherwood noted that the striking the answers and entry of default judgment prevented the defendants from contesting liability, which resulted in an entry of a judgment in excess of \$135 million. The Court found that the amount of that judgment, coupled with "the fact that Justice Yates indicated in his decision and order that an award of monetary sanctions was not warranted, the purpose to be served by punitive damages, to wit, to punish the wrongdoer and deter future wrongdoing, has already been achieved." [August Decision](#), at 10.

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