

**UNITED STATES DISTRICT COURT
DISTRICT OF THE DISTRICT OF COLUMBIA**

JOHN HELMER

Plaintiff,

02 CV 460 (HHK)

v.

ELENA DOLETSKAYA,

Defendant.

NOTICE OF FILING

Plaintiff, John Helmer, hereby respectfully files the Second Declaration of Maria Grechishkina which supplements Declaration of Maria Grechishkina dated October 2, 2002 and sets forth the Russian law of *res judicata* and collateral estoppel and its application in this case in light of the recent development of the proceedings in Russia.

Respectfully submitted,

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SECOND DECLARATION OF MARIA GRECHISHKINA

I, Maria Grechishkina, declare the following pursuant to 28 U.S.C. §1746:

1. I submit this is further support of my first declaration dated October 2, 2002.

QUESTIONS PRESENTED

2. Does Russian law have the concepts of *res judicata* and/or collateral estoppel; if so, do they have any application in this case in light of the recent decision of the Moscow City Court ("Appellate Court") affirming the decision of the Tverskoy Intermunicipal Court ("Tverskoy Court").

SUMMARY OF CONCLUSIONS

3. Under the Russian law principle of *res judicata*, a court shall terminate proceedings in the case if it determines that there is a judicial act which was rendered in regard to a dispute between the same parties, concerning the same subject and the same cause of action, and which entered into legal force. (Article 220 of the 2003 Civil Procedural Code).

4. In the instant case, the decision of the Tverskoy Court, as affirmed by the Appellate Court, has no *res judicata* effect on the American proceeding because the subject of the complaint and the cause of action in the Russian proceeding are different from those in this proceeding.

5. The subject matter of the Russian proceeding was limited to a claim for possession of real property (an apartment) while the subject matter of this proceeding concerns money damages for breach of contract and fraud related to the apartment; in addition, the American action also seeks money damages related to personal loans and the use of credit cards which were not made in the Russian proceeding.

6. The cause of action in the Russian proceeding related to the apartment was limited to determination of the facts related to a claim for possession of real property while the cause of action in the American proceeding related to the apartment is based on claims for breach of contract and fraud; again, the American action also includes claims related to personal loans and the use of credit cards which were not made in the Russian proceeding.

7. Under the Russian law concept of collateral estoppel, parties are bound by the facts determined by a court in a prior decision.

8. In the instant case, the Russian collateral estoppel rule would have no application to the apartment claims because the Russian court decision was limited to a determination that there was no admissible written evidence executed by Doletskaya, the seller of the apartment or Helmer which would evidence that Helmer had a claim to title to the apartment; again, the American action includes claims related to personal loans and credit cards which were not made in the Russian proceeding.

QUALIFICATIONS

9. I am a citizen of the Russian Federation and I have the right to practice law in accordance with Russian law.

10. I received my law degree from The Moscow State University named after M.V. Lomonosov in 1998.

11. I also received an LLM from Temple University in 2000 and I am licensed to practice in the State of New York.

12. I gained my practical legal experience by working as an attorney for a foreign company doing business in Russia from 1997 to 1998 in Moscow, Russia and then as an attorney working for Marks & Sokolov, LLC as a Russian legal consultant from 1998 to date in the United States and Moscow.

13. In the course of my work with Marks & Sokolov, I have handled many matters involving Russian and American law, working in the firm's offices both in the United States and Moscow.

DOCUMENTS REVIEWED

14. In preparing my expert opinion, I have reviewed

- a. Plaintiff John Helmer's Complaint to the Tverskoy Court ("The Russian Complaint") on transfer of rights and obligations under the apartment purchase contract,¹
- b. the July 11, 2002 Tverskoy Court Decision,²
- c. the October 16, 2002 Russian Appellate Court Decision,³
- d. John Helmer's Complaint in the instant action,

- e. Second Declaration of John Helmer dated June 17, 2002, filed in support of Plaintiff's Opposition to Defendant's Motion to Dismiss.

RES JUDICATA

15. Russian law recognizes the principle of *res judicata*. This principle is set forth in Article 220 of the Civil Procedural Code of the Russian Federation of November 14, 2002 effective as of February 1, 2003 (hereinafter, the "2003 CPC") and the superceded Civil Procedural Code 1964, version of April 28, 1993 ("1993 CPC") which was in effect when all the relevant proceedings in the Russian court took place.⁴

16. Pursuant to Article 220 of the 2003 CPC, a court shall terminate proceedings in a case if it determines that:

...there is a judgment of a court which came into legal force, which was rendered in regard to the dispute between the same parties, concerning the same subject and the same cause of action, or a court order, terminating the proceedings due to court's accepting the plaintiff's withdrawal or approving the settlement agreement....

17. In order for the *res judicata* principle in Russian law to be applied, it is necessary that all of the following conditions are present simultaneously:

18. **Identity of parties to the dispute.** A judgment is defined as decision of a court of the first instance, which resolves the case on the merits. Parties to the dispute in the second case must be the same as in the first case.

19. **Identity of a subject of the complaint.** A subject of a complaint is a substantive law claim of the plaintiff against the defendant as set forth in the complaint. Such claim in the second case must be identical to the claim in the prior case where the decision entered into legal force. The subject of a complaint is mentioned as a part of the

complaint in Article 131(2)§4 of the 2003 CPC. *Res judicata* only applies to subjects which were actually decided in the prior proceeding.

20. **Identity of a cause of action.** A cause of action (or basis of the claim) is defined as circumstances on which the claims are based (Article 131(2)§5 of the 2003 CPC). A cause of action in the second case must be identical to the cause of action in the prior case where the decision entered into legal force. *Res judicata* only applies to the cause of action which was actually decided in the prior proceeding.

21. **The decision came into legal force.** The entering of a court decision into legal force is defined in Article 209 of the 2003 CPC. A decision comes into legal force only if it was not appealed within the term provided for appeal or the cassation appeal by the law. Pursuant to Article 367 of 2003 CPC the order of a cassation appeal court comes into legal force the moment it is rendered.

22. Thus, the principle of *res judicata* is known to Russian law and is applied when a court determines that there is a second case between the same parties, concerning the same subject and the same cause of action, with regard to which a decision was rendered and entered into legal force.

Application of Res Judicata in the Instant Case

23. In the complaint filed in the Tverskoy Court, John Helmer sought to establish title to the apartment in his name. He also asked the court to issue an order compelling the registration authorities to re-register the ownership right accordingly from Elena Doletskaya to himself.

24. In the instant US case, John Helmer has brought claims seeking money damages for breach of contract and fraud related to the apartment as well as to personal loans to and the use of his credit cards by Doletskaya.

Res Judicata And The Apartment Claim

25. First, under Russian law, the subject of the complaint seeking to establish title to real estate (i.e. the real estate itself) is different from the subject of the complaint for damages for breach of contract and fraud (i.e. money).

26. The fact that there is no identity of the subject of complaint is in itself enough to say that the decision in Russian proceeding cannot have a *res judicata* effect as to the present action in the US.

27. Second, a cause of action for possession of real estate (specific performance) is different from a claim for money damages for breach of contract or fraud related to real estate.

28. An analogy under American law would be a claim for foreclosure on real estate under a mortgage as compared to a claim to recover monies under a loan agreement related to the real estate. See D.C. Code § 42-816.

29. In addition, as explained in the collateral estoppel section of this Declaration, written proof is required to prove title to real property under Russian law; in contrast, oral testimony is sufficient to prove claims for breach of contract and fraud under American law.

30. The Tverskoy Court recognized the difference between a claim for real property under Russian law and a claim for money damages for fraud or breach of contract in its decision, explicitly stating:

The court established no reasons, as set forth in Article 235 of the RF Civil Code, for the termination of Ms. Doletskaya's ownership right in the disputed apartment. The said norm of law does not provide for the termination of the ownership right for the reason that monetary funds to acquire the apartment were provided by Mr. Helmer. Such person may only demand repayment of the amount so transferred, and only after he proves the fact of the transfer.

Tverskoy Court Decision at 5 (emphasis added).

31. Thus, the Russian case would have no *res judicata* effect on the American case under Russian law in regard to the claims related to the apartment.

Res Judicata and the Personal Loan and Credit Card Claims

32. The claim for the personal loan and credit card expenses was not made in the Russian action.

33. Thus, *res judicata* simply could not apply because both the subject matter and cause of action of these claims are clearly different than in the Russian action.

COLLATERAL ESTOPPEL

34. Russian law also recognizes a concept similar to collateral estoppel in American law.

35. Article 61(2) of 2003 CPC provides as follows:

*Circumstances determined by a court decision in an earlier case which came into legal force are binding upon the court. Such circumstances shall not be proved in the course of hearing of another case that involves the same persons.*⁵

36. Thus, under Russian law, circumstances are considered prejudicial and, consequently, binding upon a party in later proceedings if these circumstances were required to be proved with regard to the cause of action in the earlier proceeding, were

examined by the court in the earlier proceeding and reflected in its decision, and if these circumstances have legal significance for the later proceeding.

37. The rule only applies to the persons who were involved in a prior proceeding and the decision rendered in the prior proceeding must be in legal force at the time the later case is heard.

Collateral Estoppel And The Apartment Claim

38. Although the US case involves the same persons, i.e. Helmer and Doletskaya, and the decisions rendered in the Russian case came into legal force, the findings made in the Russian case would have no collateral estoppel effect on the American case under Russian law, because the circumstances, which the Russian courts determined for the purposes of establishing whether there was a valid claim for the title to the apartment, differ from circumstances that are to be determined in the American case in order to find whether a cause of action exists for breach of contract and fraud.

39. As explained below, the Russian proceeding only determined that (a) Doletskaya had legal title to the apartment because it was registered in her name; (b) Helmer had no standing to set aside the underlying transaction because he was not a party to this transaction; (c) Doletskaya did not act as Helmer's agent because there was no written power of attorney; and (d) there were no legal grounds to terminate her ownership of the apartment.

40. This is confirmed by the Tverskoy Court decision, where the court, in order to establish whether John Helmer has a title to the apartment in question, looked into determining the following issues.

41. First, the Court considered whether the ownership right of Doletskaya was established pursuant to the existing formalities pursuant to Art. 7 of the Law "On Property" entitled "Obtaining And Termination Of The Ownership Right."

42. The Court, having applied the Article 7 of the Law "On Property," found that Doletskaya became a rightful owner of the apartment in compliance with the law⁶ and that Doletskaya ownership was properly registered. Tverskoy Court Decision at 2.

43. Pursuant to Article 2 of the Law "On State Registration of Rights to the Real Property and Transactions with Such Property": "The state registration is the **only** (emphasis added) evidence of existence of the registered right."⁷ Article 2 further goes on saying that: "The registered right can only be challenged in court proceeding."

44. As explained in the commentary to the Law "The state registration established a presumption of legality of title holding by the title holder. ... State registration in case it fails to comply with the law and violates rights and legal interests of the interested persons, may be appealed in court by these persons and recognized invalid. ... In particular, the state registration may be invalidated if it was carried out with substantial violation of the provisions of the Law. ... Upon the claim of interested party, the substantive law grounds, which constituted grounds for the state registration, could be found invalid (illegal)".⁸

45. In order to determine whether the grounds for the state registration could be found invalid (illegal) the Court inquired into whether Helmer could establish title to the property by setting aside the transaction underlying the transfer of the title to the apartment to Doletskaya pursuant to Article 166 of the Russian Civil Code entitled "Void And Disputable Transactions."⁹

46. The Court found that pursuant to Article 166 of the Civil Code, Helmer simply had no standing to bring such claim because he was formally not a party to the sales transaction.

47. Third, the Court considered whether Doletskaya could be deemed Helmer's agent for the purchase of the property.

48. The Court found that Doletskaya could not have acted as Helmer's agent in the purchase of the apartment because a written power of attorney is required by Russian law.¹⁰

49. Fourth, because the court concluded that under Russian law Doletskaya was the owner of the apartment, the court looked into whether her right of ownership could be terminated pursuant to Article 235 of the Russian Civil Code, entitled "Grounds for Termination of Right of Ownership."¹¹

50. The Court held that there were no grounds provided for in the Article 235 of the Russian Civil Code for Doletskaya's right of ownership for the apartment to be terminated.

51. In reaching its decision, the Tverskoy Court expressly limited its determination as to whether Helmer established a right to terminate Doletskaya's possession under Russian law, as follows:

The court established no reasons, as set forth in Article 235 of the RF Civil Code, for the termination of Ms. Doletskaya's ownership right in the disputed apartment. The said norm of law does not provide for the termination of the ownership right for the reason that monetary funds to acquire the apartment were provided by Mr. Helmer. Such person may only demand repayment of the amount so transferred, and only after he proves the fact of the transfer.

Tverskoy Court Decision at 5 (emphasis added).

52. The Court expressly did not decide whether Helmer was entitled to money damages.

53. Similarly, the Appellate Court affirmed the trial court decision because “Mr. Helmer was neither a signatory to the apartment purchase agreement, dated November 19, 1993, nor a party to it.” Appellate Court Decision at 2. The Appellate Court also noted that there was no documentary evidence that Helmer “and Ms. Doletskaya concluded an agency agreement to enter into a purchase and sale agreement with respect to the above mentioned apartment. No power of attorney was issued by Mr. Helmer authorizing Ms. Doletskaya to enter into, or register, a purchase and sale agreement.” Appellate Court Decision at 2.

54. Thus, while Helmer may not have established that Doletskaya acted as his agent under Russian law in order to obtain title to the apartment because there was no written power of attorney, this is a different issue as to whether Helmer might recover monetary damages by proving the funds which Doletskaya used to purchase the apartment were obtained from him; this claim was not pleaded in the Russian court.

55. An analogy under American law would be that a claim for possession of real estate might be defeated if there was no written document signed by the defendant pursuant to a statute of frauds, while a claim for fraud or breach of contract for money damages might be proved through oral testimony. See D.C. Code § 28-3502.

Collateral Estoppel and The Personal Loan and Credit Card Claims

56. As stated above, the claims related to the personal loans and credit cards were not brought in Russia at all. Thus, any findings in the Russian case would have no collateral estoppel effect on the American case under Russian law on these claims.

I declare under the penalty of perjury that the foregoing is true to the best of my knowledge and belief.


Maria Grechishkina

Dated: April 24, 2003

¹ The Russian Complaint is on record with this court and was filed by Defendant, Elena Doletskaya, as Exhibit "A" to her Motion to Dismiss. It is also attached to this Declaration as Exhibit "1".

² The July 11, 2002 Tverskoy Court Decision ("Russian Court Decision") was filed by Defendant with this Court on July 30, 2002 and attached hereto as Exhibit "2".

³ The Appellate Court Decision was filed with this court by the Defendant on March 12, 2003. It is attached hereto as Exhibit "3".

⁴ All the relevant provisions of the 2003 CPC are attached collectively as Exhibit "4" hereto. All the similar provisions of the superceded 1993 CPC were attached as Exhibit "C" to Declaration of Maria Grechishkina dated October 2, 2002.

⁵ A similar provision was contained in Article 55 (part 2) of 1964 CPC.

⁶ The relevant portion of the law provides:

"1. Citizen or other person, if not otherwise provided for in the law or contract, obtain the right of ownership to property, which he acquired in a way not prohibited by law, to things, created or substantially altered by him, to products, fruits and other income gained through the use of property possessed by the person and also through the use of natural resources or other property, though not owned by this person, but transferred to this person for such purpose in accordance with law.

2. The right of ownership of the acquirer arises at the moment of the transfer of the thing, if not otherwise provided for by law of contract..."

⁷ The relevant Articles of the Law # 122-FZ "On State Registration of Rights to the Real Property and Transactions with Such Property" dated July 21, 1997 (with amendments) is attached hereto as Exhibit "5". Doletskaya's right to the apartment was registered before enactment of the Law # 122-FZ "On State Registration of the Rights to Real Property and Transactions Related to Such Property" dated July 21, 1997 (with amendments). Pursuant to the Article 6 such registration is valid. Specifically, Article 6 provides: "...State registration of the rights, used in practice in some subjects of the Russian Federation and municipal communities before the enactment of the present Federal Law, is deemed legally valid..."

As evidenced by the Tverskoy Court decision in was registered by Department of Municipal Housing which was the registering authority in Moscow at the relevant time. Tverskoy Court decision at 2.

⁸ Commentary to the Law # 122-FZ "On State Registration Of Real Property Rights And Transactions Related To Such Property" dated June 21, 1997, edited by Doctor of Jurisprudence, State Counselor of Justice, P.V. Krashennikov. Relevant part of this Commentary is attached hereto as Exhibit "6"

⁹ The relevant portion of the statute provides:

1. Transaction is invalid if court finds it invalid on the grounds provided for the in the present Code (disputable transaction) or [invalid] notwithstanding court finding (void transaction).
2. Claim to recognize that the disputable transaction invalid may be brought by a person, listed in the present Code.

Claim to apply consequences of invalidity of aq void transaction may be brought by any interested party. Court may apply such consequences at its initiative.

¹⁰ The Law of the RSFSR of December 24, 1990 "On Property in RSFSR" Law on Property in the Russian Federation"(with amendments) (does not refer to Articles of law regulating the relationship of agency. Such relationship are regulated by the Russian Civil Code. Pursuant to Art. 182 (1) "Transaction, entered into by one person (representative) on behalf of another person (represente) by virtue of authority, based on the power of attorney creates, modifies or terminates the civil rights and obligations of the represented..." Art. 185 (1) provides that "Power of attorney is a written authorization, issued by one person to another for the purposes of representation in relations with third persons...."

¹¹ The statute provides in relevant part:

1. The right of ownership shall terminate with the alienation of the property by its owner to other persons, with the owner's renouncement of his right of ownership, with the perish or the destruction of the property and with the loss of the right of ownership in cases provided for in the law.
2. The forcible taking of the property from the owner shall not be permitted, with the exceptions provided for in the law, as follows:
 - 1) collection on obligation upon the property (Article 237);
 - 2) the alienation of the property, which by virtue of law may not be owned by the given person (Article 238);
 - 3) the alienation of the real property in connection with the withdrawal of the land plot (Article 239);
 - 4) the redemption of the mismanaged cultural values and of domestic animals (Articles 240 and 241);

- 5) the requisition (Article 242);
- 6) the confiscation (Article 243);
- 7) the alienation of the property in the cases, stipulated by Article 252(4), Article 272(2), Articles 282, 285 and 293 of the present Code.

By decision of the owner and in conformity with the procedure, stipulated by laws on privatization, the property, which is in the state or in the municipal ownership, shall be alienated into the ownership of the citizens and of the legal entities.

The turning of the property into the state ownership, which is owned by citizens and legal entities (the nationalization), shall be effected in compliance with the law with reimbursement of the cost of this property and other losses as provided by the Article 306 of the present Code.