

Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc.

2005 NY Slip Op 30437(U)

January 10, 2005

Supreme Court, New York County

Docket Number: 603254/04

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 4am

Citicorp Leasing

INDEX NO. 603254/04

MOTION DATE 12/6/04

MOTION SEQ. NO. 001

- v -

U.S. Auto Leasing, Inc.

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

Upon the foregoing papers, It is ordered that this motion

**NOTED FOR THE COURT'S CONSIDERANCE
WITH A COPY OF THE COURT'S MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 1/10/05

Alex Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DATA ENTERED
COMMERCIAL DIVISION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 49

-----X
CITICORP LEASING, INC.,

Index No. 603254/04

Plaintiff,

-against-

U.S. AUTO LEASING, INC., U.S. AUTO
EXCHANGE GROUP, LTD., 1095 COMMONWEALTH
AVENUE CORP. and BAHIG F. BISHAY,

Defendants.

-----X

Cahn, J.:

Plaintiff Citicorp Leasing, Inc. (CLI) brings this action to recover collateral allegedly withheld by defendants in relation to loans made to defendant U.S. Auto Leasing, Inc. (U.S. Auto) for the purchase of motor vehicles.

Plaintiff now moves for a preliminary injunction ordering, *inter alia*, the release to plaintiff of all vehicles constituting the collateral; the remittance to plaintiff of all proceeds of the sale of such vehicles to U.S. Auto's lessees; and the remittance to plaintiff of sums due pursuant to the Loan and Security Agreement. Plaintiff also seeks an accounting of all monies received by U.S. Auto with respect to the collateral.

On November 29, 2004, this court issued a temporary restraining order (TRO) directing defendants to place all proceeds of the sales of vehicles constituting collateral in escrow; to maintain or cause the lessees to maintain insurance on such vehicles; and to maintain payments received by U.S. Auto on

such vehicles in escrow or a special account. The TRO also directed defendants to provide an accounting for all monies received by U.S. Auto in respect to CLI's Collateral, including sale proceeds, lessee payments and insurance proceeds, which accounting was to be served on plaintiff on or before December 10, 2004.

Background

On March 18, 1997, European American Bank (EAB) and U.S. Auto entered into a Loan and Security Agreement (the Security Agreement), which provided that EAB could make advances to U.S. Auto for all or part of the cost of motor vehicles to be purchased by U.S. Auto for lease to lessees. On that same day, defendants Bishay, U.S. Auto Exchange Group, LTD (Exchange) and 1095 Commonwealth Avenue, Corp. (1095) individually executed and delivered guaranties of prompt payment and full performance of all of U.S. Auto's obligations, to EAB.

On July 7, 2001, EAB and Citibank, N.A. (Citibank) merged, with Citibank being the surviving entity. On December 10, 2001, Citibank sold and assigned its motor vehicle lease financing portfolio to plaintiff CLI, its wholly owned subsidiary.

CLI and its predecessors, Citibank and EAB, made advances to U.S. Auto in accordance with the Security Agreement. Each advance was to be evidenced by a promissory note and lease assignment signed by U.S. Auto specifying the amount, terms of

payments and motor vehicles financed thereby. See Security Agreement, paragraph 1. As security for the advances, U.S. Auto granted EAB and, in turn, CLI¹:

"(a) purchase money security interest in, all Motor Vehicles and Leases in respect of which EAB shall make an Advance... and (b) a security interest in, general lien upon, and full right of setoff as to, all other personal property and fixtures of the Borrower...including the interest of Borrower in all other motor vehicles and leases, whether financed by EAB or others, the balance of all accounts and credits of Borrower held by EAB and all monies, securities and other property of Borrower delivered into the possession of EAB, and all other money, goods, inventory, equipment, instruments, securities, chattel paper, accounts receivable, contract rights, general intangibles, claims and credits, whether or not at any time in the possession of EAB, with full right of set-off; and all proceeds, products and accessions of all the foregoing; all the foregoing shall be Collateral hereunder [the Collateral]." Security Agreement, paragraph 2.

In accordance with the Security Agreement, U.S. Auto executed and delivered the original lease, an assignment of that lease and a promissary note to CLI and its predecessors. U.S. Auto also allegedly provided a vehicle title certificate evidencing the lien on the vehicle. After a lease was assigned and delivered, U.S. Auto provided written notice of the assignment to the lessee. See Amended Verified Complaint, Exhibit G. CLI allegedly billed and collected all payments due under the leases.

CLI and its predecessors allegedly perfected their security

¹ Pursuant to the Security Agreement, EAB was permitted to assign or transfer the whole or any part of any Instrument (promissory notes and lease assignments), Liabilities and/or Collateral. See Security Agreement, paragraph 13(b).

interest in each lease by taking possession of the original leases, and by having their lien noted on each vehicle title certificate. See Amended Verified Complaint, Exhibit F. EAB also perfected its security interest in the Collateral by filing Uniform Commercial Code financing statements in the Office of the Secretary of the Commonwealth of Massachusetts. See Amended Verified Complaint, Exhibit H.

Pursuant to the Security Agreement, U.S. Auto was not to sell or otherwise dispose of any motor vehicles as to which CLI and its predecessors had made or would make an advance. See Security Agreement, paragraph 4. Also, all the Collateral was to be kept at U.S. Auto's principal place of business and was not to be removed without the written consent of CLI and its predecessors. See Security Agreement, paragraph 4. U.S. Auto was also required to maintain or cause each lessee to maintain insurance on each vehicle in certain specified amounts. See Security Agreement, paragraph 4.

Plaintiff alleges that 173 leases have been in default for over sixty days and defendants have failed to pay the sums due with respect to those vehicles and/or account for them as required by the Security Agreement, paragraph 5. The Security Agreement, paragraph 5, provides that:

"if any lease is in default for any reason whatsoever for more than sixty days, or if [U.S. Auto] cannot give [CLI] on request the location of a Lessee or of a Motor Vehicle, or if a Motor Vehicle is returned or repossessed or ceases to

be held by Lessee for any reason, or if a Lessee fails to confirm delivery of a Motor Vehicle, [U.S. Auto] will notify [CLI] forthwith and pay [CLI] on demand the unpaid balance of [U.S. Auto's] Liabilities² in respect of such Motor Vehicle..."³

Pursuant to the Security Agreement, upon an event of default, plaintiff may also require that U.S. Auto assemble and make available the Collateral in its possession. CLI made such a demand and allegedly received no response. On October 4, 2004, CLI commenced this action for breach of contract and wrongful conversion.

Discussion

Defendant Bishay purports to act *pro se* on behalf of himself and the corporate defendants U.S. Auto and 1095. However, under CPLR 321 (a), a corporation must appear by attorney. Bishay has not made any showing that he is an attorney-at-law admitted to practice in this court and, thus, the defendants U.S. Auto and 1095 are in default. If the defendant corporations wish to further take part in this action, they must retain counsel within 30 days of the entry of this order.

A preliminary injunction may be granted upon a showing of three things: (1) the movant's likelihood of success on the

²The Security Agreement defines Liabilities as "All Advances and all other liabilities owed to [CLI] ... including principal, interest, prepayment fees and other fees and expenses under this Agreement ..." Security Agreement, Paragraph 1.

³The vehicles mentioned in this paragraph are referred to as the "Off Lease Vehicles" and "Lessor Direct Vehicles."

merits; (2) irreparable injury to movant in the absence of an injunction; and (3) the balance of equities in the movant's favor. *Aetna Ins. Co. v Capasso*, 75 NY2d 860 (1990).

CLI has shown a likelihood of success on the merits based on the affirmation of Thomas Rappazzo, its Vice President and Risk Manager, and supporting documentary evidence. As evidence of its perfected security interest, plaintiff presents a vehicle title certificate which lists its predecessor, EAB, as the first lien holder. See Amended Verified Complaint, Exhibit F. Plaintiff also submits letters from U.S. Auto to lessees informing the lessees of the lease assignments to EAB and directing that all payments under the lease be made to EAB. Further, in support of its claims for wrongful conversion and breach of contract, plaintiff submits faxes from lessees, who made lease payments to U.S. Auto that were never turned over to CLI, and faxes from lessees who made final payments on their leases to U.S. Auto, which were not received by CLI, and who now request the vehicle's title from CLI. As evidence of payment, the lessees included their returned checks cashed by U.S. Auto. See Amended Verified Complaint, Exhibits L-Q. While not conclusive, these documents are enough to evidence CLI's likelihood of success on the merits. Even when the facts are in dispute, a court can find that the movant "has a likelihood of success on the merits, from the evidence presented, though such evidence may not be

'conclusive.'" *Ma v Lien*, 198 AD2d 186, 187 (1st Dept 1993); See also *Four Times Square Assocs., L.L.C. v Cigna Invs., Inc.*, 306 AD2d 4 (1st Dept 2003).

Plaintiff must also show irreparable harm in the absence of an injunction. The court agrees with plaintiff's argument in that, if defendants convert or dissipate the Collateral while not paying other outstanding debt to CLI, the Collateral will diminish to a point where its value will be less than other outstanding debt allegedly owed. Although injunctive relief is usually not appropriate in actions involving breach of contract where there is an adequate remedy at law in monetary damages, it is appropriate to remedy the conversion of identifiable proceeds. See *Amity Loans, Inc. v Sterling National Bank and Trust Company of New York*, 177 AD2d 277 (1st Dept 1991); *Crocker Commercial Servs. v Davan, Enters.*, 88 AD2d 877 (1st Dept 1982). Such a case exists here.

Finally, movant must show that the balance of equities is in its favor. In balancing the equities, the court should consider factors such as whether plaintiff is guilty of unreasonable delay or whether plaintiff has unclean hands. *United for Peace and Justice v Bloomberg*, 2004 NY Slip Op 24389 (Sup Ct, NY County, Aug. 25, 2004). Although Bishay alleges that plaintiff has unclean hands, he does not support such allegations. Further, a court should also look to the relative prejudice to each party

accruing from a grant or denial of an injunction. *Ma v Lien*, 198 AD2d 186, *supra*. The court does not see any harm to defendants upon the granting of the injunction. Based on the documentary evidence submitted, the balance of equities favors plaintiff.

The function of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits."

Residential Bd. of Managers of Columbia Condominium v Alden, 178 AD2d 121, 124 (1st Dept 1991); *See also Jamie B. v Hernandez*, 274 AD2d 335 (1st Dept 2000). Thus, the monies placed in escrow, as directed in the temporary restraining order, shall remain in escrow, as well as all funds subsequently accumulated. The preliminary injunction is granted. It shall enjoin and restrain defendants U.S Auto Leasing, Inc. and Bahig Bishay and their agents, servants, employees and all other persons acting under their direction during the pendency of this action, from:

- (1) disbursing the proceeds of the sales to lessees, both at lease termination and at early termination, of vehicles which constitute the Collateral of Citicorp Leasing, Inc. and such proceeds shall be held in escrow; and
- (2) disbursing the proceeds of the sales of Off Lease Vehicles and Lessor Direct Vehicles which constitute the Collateral of Citicorp Leasing, Inc. and such proceeds shall be held in escrow.

Further, defendants are directed to maintain or cause the

lessees to maintain insurance policies designating Citicorp Leasing, Inc. as a loss payee with respect to vehicle and leases which constitute the Collateral of Citicorp Leasing, Inc. in accordance with the Security Agreement.

Further, defendants shall maintain the lessee payments received by U.S. Auto Leasing, Inc. on leases which constitute the Collateral of Citicorp Leasing, Inc. in escrow.

The order shall contain a provision for the setting up of an escrow account with a commercial bank having an office in New York City.

Defendants U.S. Auto Leasing, Inc. and 1095 Commonwealth Avenue, Corp. are directed to obtain counsel within 30 days of the entry of this order with notice of entry, in order to avoid default on the action.

Settle order.

Dated: January 10, 2005

ENTER:



J.S.C.