Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. ALLAN B. WEISS IA PART 2

CITY LINE AUTO. MALL, INC.,

Plaintiff,

-against -

CITICORP LEASING, INC., NATIONAL STAR FUNDING, LLC A/K/A A NATIONAL STAR FUNDING II, LLC, et al,

Defendants.

Index No: 6731/05

Motion Date: May 3,2006

Motion Cal. No:5

The following papers numbered 1 to 14 read on this motion by defendant Citicorp Leasing Inc. (CLI) for an order dismissing the complaint on the grounds of documentary evidence, lack of subject matter jurisdiction, lack of legal capacity to sue and prior action pending, and failure to state a cause of action, pursuant to CPLR 3211(a)(1)(2)(3)(4) and (7). Plaintiff City Line Auto Mall Inc., cross moves in opposition and seeks an order granting a default judgment on the issue of liability only, pursuant to CPLR 3015 (a-b), and setting the matter down for an assessment of damages; and granting leave to reargue the order of January 31, 2006 and renewing CLI's motion and City Line Auto Mall Inc.'s cross motion, and upon reargument or renewal, denying CLI's prior motion to extend its time to answer or otherwise move in response to plaintiff's complaint, and granting plaintiff's prior cross motion for a default judgment.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits(A-I)..	1-4
Notice of Cross Motion-Affirmation-Exhibits(1-22)	5-8
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Defendant's Memorandum of Law.....	

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Plaintiff, in its opposing papers, asserts that CLI's present motion to dismiss the complaint is untimely. This court in its order of January 31, 2006 granted defendant CLI's motion to the extent that its time to answer the complaint or otherwise move, was extended to 30 days after the date of entry of this order, and denied the plaintiff's motion for a default judgment. The order of January 31, 2006 was entered on February 2, 2006 and the 30 day extension granted to CLI expired on March 4, 2006, a Saturday. Therefore, the last day in which CLI could timely serve an answer or otherwise move was March 6, 2006(see General Construction Law § 25-a).

A motion on notice is made when notice of the motion is served(see CPLR 2211). On March 6, 2006, in the late afternoon, CLI deposited in the mail a motion to dismiss the complaint, which was addressed to plaintiff's counsel at an incorrect address. This motion was later returned to CLI's counsel, marked " addressee unknown". CLI' counsel, however, realized that an error had been made, and on March 6, 2006 his secretary prepared another envelope with the correct address, containing the within motion, which was left with the night staff to mail that evening. The motion was post marked and mailed on March 7, 2006, and was received by plaintiff on March 9, 2006. CLI, in its reply papers acknowledges that its motion was served one date late, and asserts that the court may correct its mistake in mailing the motion papers to an incorrect address pursuant to CPLR 2001, or to grant a one day extension so of the time in which to respond to the complaint, on good cause shown.

CPLR Section 2001, provides that "[a]t any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." Here, the failure to timely respond to the complaint, due to the failure to mail the motion to the proper address, cannot be excused pursuant to CPLR 2001, as it is undisputed that the March 6, 2006 mailing was never received by counsel for the plaintiff.

The court however, finds that as defendant CLI has established good cause for its delay, and as there has been no prejudice to the plaintiff, the request to extend by one day, nunc pro tunc, the time limit set forth in the order of January 31, 2006, is granted. Therefore, that branch of plaintiff's cross motion which seeks a default judgment on the issue of liability only, is denied.

That branch of plaintiff's cross motion which seeks leave to reargue the order of January 31, 2006 and leave to renew and to reargue its prior motion and defendant's cross motion, is denied. A motion for reargument is one "based upon matters of fact or law

allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2].) It is well settled that "[i]ts purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (Foley v Roche, 68 AD2d 558, 567-568 [1979].) A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain a reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[d][3][e][2][3].) The court finds that plaintiff has not established that the court overlooked or misapprehended any matters of fact or law, or that there are any new facts that would change the prior determination or that there has been a change in the law. Leave to reargue or to renew the parties' prior motion and cross motion which resulted in the order of January 31, 2006, therefore is denied.

This action arises out of the repossession of a motor vehicle. Ricardo Santana entered into a retail installment contract with Steel Wheels Auto Sales, on July 21, 2003 for the purchase of a 2000 Mercedes Benz S500. Pursuant to the terms of the contract, the seller was a secured creditor with a purchase money security interest in the vehicle, and the purchaser was a debtor. This contract was assigned by the seller to National Star Funding, who acquired all of the seller's interests and rights under the contract. Mr. Santana, thus was indebted to National Star for the purchase of the vehicle. At the time of the assignment CLI made a loan to National Star Funding in order to enable it to acquire the contract from Steel Wheels Auto Sales. National Star executed and delivered a promissory note dated July 24, 2003 to CLI, entitled "Promissory Note-Retail Installment Sale Agreement". National Star also executed and delivered to CLI an assignment of the contract of sale, as collateral for the loan, and collaterally assigned to CLI a security interest in the vehicle.

On March 19, 2004 City Line Auto Mall, Inc.(City Line), a registered a dealer, entered into an agreement with Mr. Santana whereby it acquired the subject vehicle from Mr. Santana, along with its pre-existing lien, in exchange for $6,000.00 and another vehicle. City Line asserts that the certificate of title named Santana as the owner and CLI as the sole lien holder. It is asserted that at the time of the City Line entered into the transaction with Mr. Santana, he fraudulently represented that his loan installment payments for the vehicle were current as of March 19, 2004, when in fact they were overdue. On March 26, 2004, defendant Exit Towing Inc. appeared at City Line's retail facility, and towed the vehicle, which had been displayed for

sale on the sidewalk and street in front of City Line's retail dealership facility. City Line thereafter reviewed the loan payment history with Mr. Santana, and discovered that the February 20, 2004 installment payment was past due. On March 29, 2004 City Line made a direct payment of this installment by check in the sum of $1,462.59 to CLI, requested certain documents pursuant to VTL § 2122, and sought to redeem the vehicle. Plaintiff asserts that although Citicorp negotiated this check, it ignored its demand for said documents and for redemption. National Star sold the subject vehicle to Planet Motor Cars Inc. on June 23, 2004.

City Line had filed for Chapter 11 bankruptcy on September 11, 2003. On June 14, 2004 City Line commenced an adversary proceeding in Bankruptcy Court in the Eastern District of New York, against National Star Funding LLC, Mark Levy, Exit Towing Inc., and Ricardo Santana, in which it sought declaratory relief, a cause of action for replevin, a cause of action to compel the named defendants to turn over the vehicle, damages for fraud and misrepresentation, and damages for unlawful seizure, impeding its right of redemption, trespass of personal property, and conversion, and damages for alleged violations of constitutional rights and 42 USC §1983. This action was dismissed by the Bankruptcy Court on December 7, 2004, and City Line's bankruptcy petition has also been dismissed.

On December 20, 2004 City Line commenced an action against CLI in the Civil Court, Queens County, Small Claims Part, a refund of the $1,462.59 it paid to CLI on March 29, 2004, and damages up to $5,000.00 arising out of CLI's alleged refusal to furnish it with the governing security agreement, pursuant to VTL §2122. City Line's motion for disclosure was adjourned to May 17, 2005, at which time the action was transferred to the Civil Court, Part 15. The action is presently marked off the calendar, due to City Line's failure to pay the appropriate fee and file a notice for trial. This action, however, has not been dismissed by the Civil Court.

City Line commenced the within action on March 25, 2005, and seeks to recover damages of $3,000,000.00. City Line alleges that CLI's alleged refusal to provide it with the security agreement, pursuant to VTL §2122, and its seizure and refusal to return the vehicle, renders CLI liable in damages for violating the automatic stay and for deceiving the bankruptcy court; that all of the defendants are liable for the tort of slander and defamation of its business reputation in the community based upon the physical repossession of the vehicle; and that all of the defendants acted as a debt collector and therefore are liable for unfair and improper debt collection practices. City Line

asserts additional claims against the co-defendants.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). The court is required to accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152; Morone v Morone, 50 NY2d 481, 484; Rovello v Orofino Realty Co., 40 NY2d 633, 634). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88, Matter of Casamassima v Casamassima, AD3d 2006 NY Slip Op 5011; 2006 N.Y. App. Div. LEXIS 8181 [decided June 20, 2006]).

Statutory dissolution by proclamation of the Secretary of State pursuant to Tax Law § 203-a is intended to encourage voluntary payment of franchise taxes (see Lorisa Capital Corp. v Gallo, 119 AD2d 99; Bowditch v 57 Laight St. Corp., 111 Misc 2d 255). A dissolved corporation "may sue or be sued ... in its corporate name, and process may be served by or upon it" (Business Corporation Law § 1006[a][4]; see Gutman v Club Mediterranee Int., 218 AD2d 640). However, while a corporate dissolution may not affect the corporation's right to carry on business for the purpose of winding up its affairs, new business is prohibited absent reinstatement by payment of back taxes (see Tax Law 203-a; Business Corporation Law §1005[a][1]; Metered Appliances v 75 Owners Corp., 225 AD2d 338; Lorisa Capital Corp. v Gallo, supra). It is apparent from the statutory scheme that the Legislature did not intend a delinquent corporation which has not sought reinstatement to enjoy the privileges of corporate existence, which includes the sale of shares of stock and the election of a Board of Directors (see generally, Metered Appliances v 75 Owners Corp., supra; Lorisa Capital Corp. v Gallo , supra). Upon dissolution, a corporation is legally dead, and has neither de facto nor de jure existence. (See Brandes Meat Corp. v Cromer, 146 AD2d 666; Lorisa Capital Corp. v Gallo, supra ; Imero Fiorentino Assocs., Inc. v Green, 85 AD2d 419; Puro Filter Corp. of America v Trembley, 266 App Div 750; Brady v State Tax Commn., 176 Misc 1053, 1055, affd 263 App Div 955; affd 289 NY 585). The documentary evidence submitted herein establishes that City Line was dissolved by proclamation on June 25, 2003 for the failure to pay corporate income tax. City Line, however, asserts that it is presently current with all of its tax obligations, and that if its corporate status has not yet been reinstated, this is due to administrative error. In support of its claim City Line has submitted documentary evidence which establishes that during the course of the bankruptcy action City

Line entered into a stipulation and order dated June 30, 2004, with the New York State Department of Taxation which settled and resolved all tax liabilities owed by City Line, prior to September 11, 2003. The stipulation requires City Line to make certain monthly payments to the Department of Taxation.

City Line's legal existence ended on June 25, 2003, and it was not entitled to thereafter conduct any new corporate business. The court notes that the transaction involving Mr. Santana occurred after June 25, 2003. In the absence of a showing that plaintiff's corporate status has been restored, plaintiff lacks the capacity to maintain this action. Contrary to plaintiff's assertions, defendant has properly and timely raised this defense in the within motion. Defendant CLI's motion to dismiss the complaint on the grounds of lack of capacity to sue, pursuant to CPLR 3211(a)(3), therefore, is granted.

The court finds that even assuming that City Line can establish that its legal status has been restored, plaintiff's claim to recover damages based upon its payment of installments due under the retail installment sale contract is the subject of the prior action commenced in the Civil Court. That action has not been dismissed, and had been marked inactive solely due to City Line's failure to pay the appropriate fee and to place the matter on the trial calendar. Therefore, as there is a prior action pending between the parties for the same relief, the within action for damages against CLI must be dismissed, pursuant to CPLR 3211(a)(4).

The court further finds that even if there were not a prior pending action between the parties, plaintiff's claims based upon an alleged agency relationship between CLI and National Star is refuted by the documentary evidence submitted herein. Rather, these documents establish that CLI held a security interest in the retail installment sale contract and the vehicle, and that it did not hold or own the loan between National Star and Mr. Santana. Thus, the relationship between CLI and National Star was that of creditor and debtor, and not that of principal and agent. Plaintiff acknowledges in its complaint that Exit Towing was dispatched by National Star. Its bare legal conclusion that these defendants action on behalf of CLI, based upon its status as a lien holder, however, is purely speculative. Plaintiff's claim against CLI arising out of the repossession of the vehicle based upon an alleged agency relationship between CLI and National Star or Exit Towing, therefore is dismissed.

The complaint also fails to state a claim against CLI based upon an alleged violation of VTL §2122. City Line concedes that VTL §2122 does not provide a party with a private right of action. Therefore, any claim based upon CLI's alleged failure to

provide it with documentation pursuant to VTL §2122 is dismissed. Furthermore, as City Line admittedly received the requested documents in November 2005, any such claim it may have asserted to obtain these documents is now moot.

Plaintiff's bare legal conclusions are insufficient to state a claim for unfair and improper debt collection practices, and are refuted by the documentary evidence submitted herein. Mr. Santana's retail installment contract expressly prohibited any sale or transfer of the vehicle, and expressly gave National Star the right to repossess the vehicle in the event that Mr. Santana sold the vehicle. It is undisputed that National Star repossessed the vehicle, and that CLI never possessed or controlled the vehicle. The fact that upon the repossession of the vehicle National Star was obligated to repay its loan to CLI does not give rise to any cause of action on behalf of City Line. Therefore as plaintiff has failed to state a cause of action for unfair and improper debt collection practices, this claim is dismissed.

To the extent that plaintiff seeks damages based upon CLI's alleged refusal to permit City Line to redeem the vehicle, this claim must also be dismissed. City Line's claim that it had any ownership rights in the subject is refuted by the express terms of the retail sale installment contract which prohibited Mr. Santana from selling the vehicle.

Plaintiff's bare legal conclusions are also insufficient to state a claim for slander and defamation. The tort of slander requires a communication (see 43A NY Jur2d Defamation and Privacy). The repossession of the vehicle, which was authorized under the terms of the retail installment sale agreement, is not the kind of an act that can give rise to the tort of slander. Therefore as the complaint fails to state a cause of action for slander and defamation, this claim is dismissed.

Finally, plaintiff's claims regarding the automatic stay in bankruptcy or statements allegedly made to the bankruptcy court, are dismissed. To the extent that National Star may have violated the stay by repossessing the vehicle, this act cannot be imputed to CLI. Furthermore, any claims based upon a violation of an automatic stay must be pursued in Bankruptcy Court. (See 11 USC §362[k].)

In view of the foregoing, defendant's motion to dismiss the complaint is granted, and plaintiff's cross motion is denied in its entirety.

Dated: July 19, 2006

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J.S.C.