

Randall v McGrath

2007 NY Slip Op 32832(U)

September 12, 2007

Supreme Court, Rensselaer County

Docket Number: 0210931/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

CHRISTINE RANDALL,

Plaintiff,

-against-

Index No.: 210931
RJI No.: 41-0691-2006

AUSTIN McGRATH,

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery of possession of a John Deere track loader. By decision and order dated June 8, 2007, this Court granted plaintiff summary judgment declaring that she is the lawful owner of the track loader and granting her immediate possession of the loader. The Court also granted defendant partial summary judgment on his counterclaim on the issue of liability for the increase in value

of the track loader attributable to the repairs he performed, and the value of services rendered to get it running, if not duplicative. Defendant's counterclaim seeking recovery of such sums has been withdrawn.

Defendant has now moved for an order designating an officer to take possession of the track loader pending appeal or fixing an undertaking pursuant to CPLR § 5519 (a) (4). Plaintiff has cross-moved to vacate any stay pursuant to CPLR § 5519 (c) to allow her to have immediate possession of the track loader.

The subject track loader is very large and requires heavy equipment to move it. It would also take up considerable storage space. CPLR § 5519 (a) (4) does not provide any procedure to be followed in appointing an "officer." It appears that the Court could appoint a receiver pursuant to CPLR § 5106 subject to the provisions of CPLR article 64, including the requirement that the receiver provide an undertaking. Defendant has not proposed any persons or businesses that would be willing to accept such responsibility and the Court is not aware of anyone who would be willing to accept such an appointment. Moreover, it appears that such an appointment would entail very significant costs for moving and storing the equipment, together with commissions and the costs associated with an undertaking. Accordingly, the Court declines to appoint an "officer" to take possession of the track loader.

Plaintiff has offered evidence that the track loader is worth somewhere between \$14,000 and \$18,000. While defendant's attorney has indicated that defendant would

have difficulty obtaining an undertaking in such amount, he has not shown good cause to reduce the amount of the undertaking required by CPLR § 5519 (a) (4) from an amount that will provide plaintiff proper protection pending the appeal. Accordingly, the amount of the undertaking required to effectuate the stay shall be \$15,000. Such undertaking must be filed within 14 days of the date hereof.

In the event defendant does not file such an undertaking, plaintiff's cross-motion will be academic, and she will be entitled to immediate possession of the track loader. If defendant does file the undertaking, thereby effectuating the automatic stay, such stay is subject to the discretion of the Court pursuant to CPLR § 5519 (c). Again, the statute does not set forth any of the considerations to be applied on such an application. The Court finds that plaintiff must meet a similar test to that applicable on an application for a preliminary injunction, that is, a showing of a likelihood of success on appeal (*see 64 B Venture v American Realty Co.*, 179 AD2d 374 [1st Dept 1992]), significant injury and a balancing of the equities in her favor. This Court has already found that plaintiff is entitled to immediate possession of the track loader. Defendant has not shown that the Court overlooked any relevant facts or misapplied any controlling principle of law. As such, it appears likely that the plaintiff will prevail on the appeal. Plaintiff has also shown that she has been deprived of the possession of the track loader and its use for approximately five years. She has shown that she has a need for the use of the loader, the monetary value of which can not be recovered in the event she prevails on the appeal.

Moreover, the equities clearly lie in her favor. As already determined, she is the rightful owner of the track loader and has represented that she will not sell or otherwise dispose of the loader. Furthermore, defendant has withdrawn all claims with respect to his equitable interest in the loader. As such, he has not shown any equitable interest in continued possession.

Therefore, in the event that defendant files the undertaking within the designated time, the automatic stay shall be vacated upon plaintiff's posting of a like undertaking in the amount of \$15,000. In addition, plaintiff shall be directed not to sell, transfer, encumber or otherwise dispose of the track loader or do anything which would significantly impair the value of the track loader during the pendency of the appeal. In the event plaintiff files such an undertaking, the defendant shall be entitled to the immediate and full return of the undertaking which he filed.

Accordingly it is

ORDERED that defendant's motion to appoint an officer to take possession of the track loader is hereby denied, and it is further

ORDERED that defendant's motion to fix an undertaking is hereby granted to the extent that defendant shall be required to post an undertaking in the amount of \$15,000 within 14 days of the date hereof, and it is further,

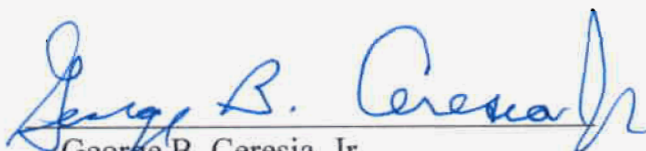
ORDERED that plaintiff's cross-motion to vacate the automatic stay is hereby granted on condition that plaintiff post an undertaking in the amount of \$15,000 within 14

days of notice of the defendant's filing of an undertaking and be enjoined from selling, transferring, encumbering or otherwise disposing of the track loader or doing anything which would significantly impair the value of the track loader during the pendency of the appeal, and it is further

ORDERED that defendant shall be entitled to an immediate return of his undertaking in the event plaintiff posts the required undertaking.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant, who are directed to enter this Decision/Order without notice and to serve counsel for plaintiff with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
September 12, 2007


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Order to Show Cause dated June 14, 2007; Affidavit of Austin McGrath sworn to June 13, 2007 with Exhibits A and B annexed;

Notice of Cross-Motion dated June 22, 2007; Affirmation of David J. Pollock, Esq. dated June 22, 2007;

Affidavit of Christine Randall sworn to June 25, 2007;

Affidavit of Eric Nathan sworn to June 25, 2007;

Affidavit of Henry Martinka sworn to June 25, 2007;

Affidavit of Daniel W. Hill sworn to June 25, 2007;

Reply Affidavit of Charles J. Wilcox, Esq. sworn to June 26, 2007.