

Matter of Ketchmore v New York State Dept. of Taxation & Fin.
2007 NY Slip Op 32883(U)
September 17, 2007
Supreme Court, Albany County
Docket Number: 0167007/2007
Judge: George B. Ceresia
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
MAXINE KETCHMORE,
Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, DON GUNDERMAN and JOSEPH FIANO,
Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7508 Index No. 1670-07

Appearances: Nicholas J. Grasso, Esq.
 Attorney For Petitioner
 751 State Street
 Schenectady, New York 12307

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(David Finkelstein,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner Maxine Ketchmore commenced this CPLR Article 78 proceeding to compel the respondent New York State Department of Taxation and Finance (NYSDTF) to return a 2000 Mercedes Benz (subject vehicle), which the petitioner contends was illegally seized by the NYSDTF. The petitioner also seeks, inter alia, an order restraining the NYSDTF from auctioning the subject vehicle. The NYSDTF opposes the petition, raising, inter alia, threshold issues of mootness, lack of personal jurisdiction, and lack of subject matter jurisdiction.

This proceeding arises from unsatisfied docketed tax warrants dating back to 2001 issued by the NYSDTF pursuant to Tax Law § 171-i against Gary Hicks, Sr. (Hicks) for child support arrears amounting to over \$27,000.¹ In 2005, NYSDTF agents observed the subject vehicle at Hicks' home and checked the Department of Motor Vehicle (DMV) database to ascertain its ownership. That check indicated that Hicks owned the subject vehicle (see Verified Answer, Exhibits 4-9).

After first observing the automobile, the agents were unable to locate it again until

¹ Tax Law § 171-i provides for the Department of Taxation and Finance to essentially collect support arrears under certain circumstances. Further, that statute specifically provides:

“Upon receipt of notification from the department of social services of an obligor’s eligibility for enforcement of support arrears by the department, the commissioner or his or her agent is authorized to initiate enforcement of such arrears. When such notification is made to the commissioner, the department shall be deemed to have obtained a judgment against such obligor for the full amount of the support arrears stated in such notice and any subsequent arrears which may become due. The department may enforce the judgment thereby obtained with like effect and in the same manner prescribed by this chapter for the collection of tax assessment eligible to be docketed under this chapter as a warrant . . .” (Tax Law § 171-i [4]).

December 28, 2006. At that time, the respondent Joseph Fiano – a NYSDTF agent – attempted to ascertain whether the subject vehicle could be seized. According to the NYSDTF, a search of the DMV database revealed that on January 10, 2006, Hicks had given the subject vehicle to his stepson, who, in turn, on November 8, 2006, gave the subject vehicle to the petitioner. Based on advice from counsel, NYSDTF agents seized the subject vehicle.

Thereafter, the petitioner demanded that the NYSDTF return the subject vehicle to her, which the NYSDTF declined to do. On February 23, 2006, the petitioner commenced this proceeding, seeking in part, a judgment (1) restraining the NYSDTF from auctioning the subject vehicle and (2) directing the NYSDTF to return the vehicle to the petitioner.

The petitioner claims that she purchased the subject vehicle from Keeler Motor Car Company on January 1, 2005 with settlement money she received from a wrongful death action concerning her son (Verified Petition at ¶ 7). To support this claim, the petitioner submits copies of two checks, one dated January 1, 2005 made payable to “Keeler Motor Car” in the amount of \$20,818.83 and the other dated January 7, 2005 made payable to “Keeler Mercedes Benz” in the amount of \$2,067.22 (Verified Petition, Exhibit B). The petitioner explains that, at the time she purchased the vehicle, she did not have a driver’s license. She further notes that, on December 6, 2006, the certificate of title to the subject vehicle was issued to her, submitting a copy of that title. The petitioner contends that the subject vehicle “was not purchased with any moneys owned by Gary Hicks, Sr. and the

vehicle was not owned by Gary Hick[s], Sr. at the time that the vehicle was seized” by the NYS DTF on December 28, 2006 (Verified Petition at ¶¶ 9, 6). The petitioner contends, therefore, that the NYS DTF should return the subject vehicle to her.

In response, the NYS DTF asserts that Hicks purchased the subject vehicle from the Keeler Motor Car Company at the time there were docketed tax warrants against him, which the NYS DTF contend are the equivalent of a money judgment. To support its contention that the Hicks purchased the subject vehicle, it submits a purchase agreement dated January 7, 2007 between Hicks and Keeler Motor Car Company for the subject vehicle (Verified Answer, Exhibit 3). In addition, the NYS DTF submitted, inter alia, a “Deal Form,” showing the title and registration was to be issued to Hicks; a temporary insurance identification card issued to Hicks; a “Retail Certificate of Sale” indicating Hicks as the purchaser; and the registration for the subject vehicle denoting Hicks as the registered owner (id., Exhibits 4-9).

Further, the NYS DTF contends that any subsequent conveyances of the title to the subject vehicle were fraudulent as they lacked fair consideration. Thus, the NYS DTF argues that it was entitled to disregard such conveyances especially since the petitioner is unable to demonstrate she purchased the subject vehicle for fair consideration without knowledge of the fraud. In support of this contention, the NYS DTF submits the “Statement of Transfer,” a Department of Motor Vehicle Form, dated January 10, 2006, from Hicks to his purported stepson, noting that the transfer was a gift from a parent to a “stepchild” (Verified Petition, Exhibit 15). The NYS DTF also submitted a “Statement of Transfer” dated November 8,

2006 from the stepson to the petitioner, indicating that the petitioner received the subject vehicle as a gift (id., Exhibit 16).

As a threshold matter, the NYS DTF argues that the petition should be dismissed as against the respondents Don Gunderman and Joseph Fiano for lack of personal jurisdiction. In an article 78 proceeding, “service of person must be made and proof of service filed after commencement” (Matter of Walker v New York State Dept. of Taxation and Fin., 300 AD3d 958, 959 [3d Dept 2002]). Here, both respondents Gunderman and Fiano aver, in separate affidavits, that they were never personally served with the Notice of Petition and Petition in this proceeding. The petitioner has neither replied to these averments nor submitted an affidavit of service demonstrating that these respondents were properly served. Accordingly, since there has been no showing that personal jurisdiction has been obtained over these respondents, the petition is dismissed as to them (see Matter of Maddox v State Univ. of NY, 32 AD3d 599, 600 [3d Dept 2006], lv denied and appeal dismissed 8 NY3d 803, 978 [2007]; Matter of Lamb v Mills, 296 AD2d 697, 699 [3d Dept 2002], lv denied 99 NY2d 501).

In addition, the NYS DTF argues that the portion of the petition seeking to restrain it from auctioning the subject vehicle should be dismissed as moot since the subject vehicle was auctioned prior to the commencement of this proceeding. The petitioner did not reply to this argument.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are

actually controverted in a particular case pending before the tribunal” (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 713 [1980]). Thus, a matter is moot “unless the rights of the parties will be directly affected by the determination of the [matter] and the interest of the parties is an immediate consequence of the judgment” (*id.* at 714; see Matter of Schulz v State of New York, 200 AD2d 936, 937 [3d Dept 1994]; appeal dismissed 83 NY2d 905).

Here, since the subject vehicle was auctioned on January 28, 2007 for \$11,000 (Verified Answer, Exhibit 1 at 11), the portion of the petition seeking a restraining order is moot (see Matter of Hearst Corp. v Clyne, *supra*; Matter of Schulz v State of New York, *supra*). Further, nothing in the record before this Court indicates that an exception to the mootness doctrine applies here (see Matter of Hearst Corp. v Clyne, *supra*; Matter of Schulz v State of New York, *supra*).

Otherwise, the NYSDTF argues that this Court lacks subject matter jurisdiction over this proceeding, since, in essence, the petitioner is seeking money damages as the subject vehicle has already been sold at auction. Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed (see Matter of Hamptons Hosp. & Med. Ctr., Inc. v Moore, 52 NY2d 88, 96 [1981]), to which the petitioner shows a “clear legal right” (Matter of Association of Sur & Sup Ct Reporters v Bartlett, 40 NY2d 571 [1976]; see Matter of Vicinanza v Best, 249 AD2d 739 [3d Dept 1998]; Matter of Stilsing Elec. Inc. v Albany County, 97 AD2d 631 [3d Dept 1983]). Generally, an article 78 proceeding in the nature of mandamus is an appropriate vehicle to

compel the return of property which has been seized (see Matter of Montecalvo v Columbia County, 274 AD2d 868, 869 [3d Dept 2000], lv denied 95 NY2d 767; Matter of Melmarkets, Inc. v Dillon, 80 AD2d 839, 839 [2d Dept 1981]). Where, however, a party seeks monetary damages against the state arising from a seizure of items, such a claim is within the jurisdiction of the Court of Claims (see Matter of Parkinson v Leahy, 277 AD2d 810, 811 [3d Dept 2000], lv denied 95 NY2d 801; see also Morell v Balaubramanian, 70 NY2d 297 [1981]; Olsen v New York State Dept. of Env't. Conservation, 307 AD2d 595 [3d Dept 2003]; lv denied 1 NY3d 502; Glendora v Cohen, 215 AD2d 529 [2d Dept 1995], lv denied 86 NY2d 706).

Here, dismissal of this proceeding is warranted. Notably, the NYSDTF asserts that the subject vehicle was sold at auction to presumably a good faith purchaser prior to the commencement of this action, which fact the petitioner does not contest. Thus, the NYSDTF is not in possession of the subject vehicle and, therefore, the relief sought by the petitioner – a judgment directing the NYSDTF to return the vehicle to her – is not available. To the extent that the petitioner seeks money damages from the NYSDTF under any claim that the seizure was improper, that claim must be brought in the Court of Claims (see Matter of Parkinson v Leahy, supra).

In any event, the petitioner has not demonstrated her clear legal right to the relief she seeks (see Matter of Association of Sur & Sup Ct Reporters v Bartlett, supra; Matter of Vicinanza v Best, supra). Although the petitioner claimed she bought the subject vehicle on January 1, 2005 from Keeler Motor Car Company, the NYSDTF submitted documentation showing that Hicks purchased the subject vehicle around that time. At the same time Hicks purchased the subject vehicle, he had outstanding tax warrants for approximately \$27,000 in child support arrears (see Tax Law §§ 171-i; 692 [d]). Thus, the NYSDTF was in a position to enforce the money judgment it had against Hicks

by virtue of the docketed warrants (see Tax Law § 692 [d]). Hicks then conveyed the subject vehicle to his stepson for less than fair consideration, especially since the affirmed transfer documents establish that the vehicle was a gift from Hicks to his stepson. In turn, the stepson gave the subject vehicle to the petitioner – again, a conveyance for less than fair consideration. Under these circumstances, the conveyance of the subject vehicle by Hicks was fraudulent as to the creditor – NYSDTF (see Debtor and Creditor Law § 273-a; see also Matter of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambia, LLP v Upstate Building Corp., 262 AD2d 981, 982 [4th Dept 1999]; Furlong v Storch, 132 AD2d 866, 867 [3d Dept 1987]).

Further, Debtor and Creditor Law § 278 [1] [b] provides: “Where a conveyance . . . is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, . . . [d]isregard the conveyance and attach or levy execution upon the property conveyed.” Thus, despite the conveyances to the stepson and the petitioner, the NYSDTF had the right to seize the subject vehicle in order to satisfy the judgment against Hicks for child support arrears (see Debtor and Creditor Law § 278 [1] [b]; Blue Giant Equip. Corp. v Tec-Ser, Inc., 92 AD2d 630, 631 [3d Dept 1983]). Therefore, the petitioner has failed to demonstrate her clear legal right to a judgment mandating the NYSDTF to return the subject vehicle to her.

Accordingly, it is

ORDERED and ADJUDGED, that the petition is dismissed as to the respondents Don Gunderman and Joseph Fiano for lack of personal jurisdiction; and it is further

ORDERED and ADJUDGED, that the portion of the petition seeking a restraining

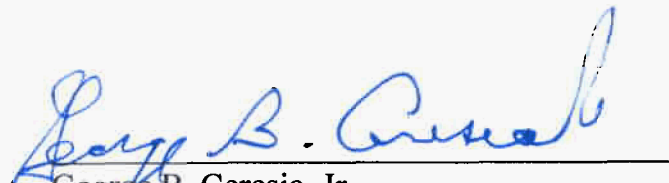
order is dismissed as moot; and it is further

ORDERED and ADJUDGED, the remaining portion of the petition is likewise dismissed, without costs.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: September 17, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated February 23, 2006 [sic];
2. Petition verified January 19, 2007, with accompanying Exhibits A-C;
3. Answer verified April 26, 2007, with accompanying Exhibits 1-16;
4. Affidavit of Joseph Fiano sworn to April 24, 2007, with accompanying Exhibit A;
5. Affidavit of Donald Gunderman sworn to April 24, 2007;
6. Affirmation of Paul Steve affirmed April 24, 2007, with accompanying Exhibits A-G;
7. Affidavit of Edward Brehm sworn to April 24, 2007, with accompanying Exhibits A-B.