

West Babylon Chevrolet, Geo, Inc. v Adkins
2007 NY Slip Op 33103(U)
September 26, 2007
Supreme Court, Suffolk County
Docket Number: 0028279/2004
Judge: Emily Pines
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Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:

Hon. Emily Pines
 Justice Supreme Court

Motion Date: 07-30-2007**Submit Date:** 07-30-2007**Motion No.:** 001 MG

_____ X
**WEST BABYLON CHEVROLET, GEO,
 INC., dba PALANKER CHEVROLET,**

Plaintiffs,**-against-**

WILLIAM ADKINS and PAULINE ADKINS,

Defendants.

_____ X

James O'Rourke & Associates
 235 Brookside Drive - Suite 300
 Hauppauge, New York 11788

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 400 Garden City Plaza Suite 310
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ORDERED, that the motion (motion sequence number 001) by plaintiff for partial summary judgment is granted on the issue of liability; and it is further

ORDERED, that a trial on damages is scheduled for October 24, 2007 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action for replevin and money damages by filing of a Summons and Verified Complaint dated December 8, 2004 and issue was joined by Defendants' service of a Verified Answer on or about April 1, 2005. The gravamen of the complaint is that Defendants, in the course of their employment and/or ownership interest in the Plaintiff corporation, had the use of certain vehicles owned by Plaintiff; to wit, a 2004 Cadillac CTS and a 2004 Chevrolet Trailblazer. Defendants ownership and employment rights were terminated on or about December 3, 2003 and defendants failed and refused to return the aforementioned vehicles.¹ Therefore, Plaintiff

¹Subsequent to the commencement of this action, Defendants did return the Chevrolet Trailblazer, thus this motion involves only the Cadillac.

commenced this action for replevin and money damages.

FACTUAL AND PROCEDURAL HISTORY

The submissions reflect that subsequent to Defendants' termination of ownership and employment rights in the Plaintiff corporation, they commenced a stockholder derivative and breach of fiduciary duty action against General Motors Corporation, General Motors Acceptance Corporation, Timothy Rinke, Paul Fields² and West Babylon Chevrolet-Geo, Inc. (referred to herein collectively as "General Motors") in the United States District Court for the Eastern District of New York (the "federal action"). The Court (SEYBERT, J.) granted the motion to dismiss by General Motors of the shareholder derivative claim, holding that Adkins had no legal title to any stock in the dealership as General Motors had exercised its option to purchase his shares on December 3, 2003. The Court denied the motion to dismiss the breach of fiduciary claim, it was tried before a jury, and a verdict rendered in favor of Adkins and damages awarded in excess of \$2,000,000.00.

General Motors appealed and the United States Court of Appeals for the Second Circuit vacated the jury verdict and reversed the lower court's denial of the motion to dismiss the breach of fiduciary duty claim. The Court affirmed the lower court's dismissal of the shareholder derivative claim. Adkins filed a petition for a writ of certiorari to the United States Supreme Court, such petition was denied on or about October 10, 2006 and the federal action has therefore been concluded.

THE MOTION FOR SUMMARY JUDGMENT

Plaintiff herein now moves for partial summary judgment on the issue of liability on the ground that there are no disputable issues of fact and the Court should grant judgment as a matter of law. In support of the motion, Plaintiff has submitted a **Rule 19** Statement pursuant to the Rules of the Commercial Division, an affidavit of Valerie Schuster, Officer and Director of Plaintiff, attorney affirmation and Memorandum of Law, a copy of the pleadings, a copy of the District Court and Court of Appeals decisions and the denial of the petition for certiorari, and a copy of the

²Rinke and Fields were members of the Board of Directors of West Babylon Chevrolet.

certificate of origin of the subject vehicle.

In her affidavit in support of the motion, Valerie Schuster (“Schuster”) states that the Plaintiff corporation was formed as a result of investment capital provided by General Motors to supplement the capital provided by defendants, based on a structured investment and buy-out plan for the purchase and operation of a retail motor vehicle General Motors franchise dealership. Defendants were employees and shareholders of the Plaintiff corporation until December 3, 2003 when their ownership interest was extinguished pursuant to a resolution of the Board of Directors. Schuster alleges that in conjunction with defendants’ employment, they had permission for temporary use and possession of the subject motor vehicles and that when their ownership and employment was terminated, the authority for the use of the vehicles was terminated as well. She further states that defendants were advised to return the vehicles, but have only returned the Chevrolet Trailblazer.

Plaintiff’s counsel submits an affirmation and memorandum of law in support of the motion for summary judgment. He argues that in their Verified Answer, defendants admit “that they were permitted to use the vehicles in question until the legal process had terminated in the Adkins federal Court case...”, that the federal case is now concluded and therefore, there is no question of fact that the subject vehicle must be returned. Therefore, he argues that Plaintiff has demonstrated that there is no issue of fact as to Defendants’ continued unlawful and improper use of the subject vehicle.

Defendants submit an affidavit by defendant William Adkins, affirmation of counsel, “CARFAX” vehicle history report, sales contract and title, and purported financial reports of the plaintiff. Defendant argues that genuine issues of material fact exist with regard to ownership of the subject vehicle. Defendant alleges that he purchased the vehicle from Crestmont Cadillac on September 30, 2003 and that “as stockholder, President, Dealer Principle and CEO, I had the right and privilege to purchase a vehicle for myself, which I did...”. He further claims that the subject vehicle was “written off to devalue my stock in West Babylon Chevrolet, GEO, Inc.” Finally, he argues that he was given permission to use the subject vehicle by a member of the Board of Directors “until all legal processes concluded.” Defendant claims that “upon information and belief there remain issues pending in Court as General Motors is currently seeking legal and other fees in Federal Court.” Defendants have not submitted any documentation regarding any remaining claim extant in District Court or otherwise.

In reply, Plaintiff argues that Defendants have not disputed the admission in their Verified

Answer that the permission to use the subject vehicle was terminated upon the termination of the federal action or that their rights as shareholder, director and/or employee of the Plaintiff corporation have been terminated. Additionally, Plaintiff argues that Defendant Adkins admitted in his affidavit in opposition that he purchased the subject vehicle in his capacity as a shareholder of plaintiff corporation and that once his stock interest was extinguished, so was his right to use and possess the vehicle. Finally, Plaintiff asserts that Defendants' claims that the vehicle was "written off" by the Plaintiff has no evidentiary value in that defendants no longer possess any rights to the vehicle. Therefore, Plaintiff argues that the Court should grant summary judgment on the issue of liability, direct a judgment of replevin and order an inquest on damages.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. *State Bank of Albany v. McAullife*, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983). The role of a Court in deciding a motion for summary judgment "is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist." *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992).

To establish a cause of action for replevin, Plaintiff must demonstrate that the Defendant is in possession of certain property of which Plaintiff claims to have a superior right. *Batsidis v. Batsidis*, 9 A.D.3d 342, 778 N.Y.S.2d 913 (2d Dept. 2004).

In the case *sub judice*, Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. Plaintiff has met its initial burden of demonstrating that there is no material issue of fact regarding the ownership of the subject vehicle, its superior right to the vehicle and Defendants' possession of the vehicle. In the federal action it was determined conclusively that Defendants no longer have an ownership interest in the Plaintiff corporation. Plaintiff demonstrated Defendants conceded they acquired the subject vehicle in conjunction with their ownership and/or

employment relationship with Plaintiff and they further admit that they were permitted the continued use of the vehicle only during the pendency of the federal action.

In opposition to the motion, Defendants were required to lay bare their proof and come forward with evidentiary proof in admissible form to demonstrate a genuine issue of fact. Defendants have failed to meet this burden. Rather, defendants admitted they purchased the subject vehicle in their capacity as a shareholder of the Plaintiff corporation, not in their individual personal capacity, and have not disputed that it has been determined in the federal action that they no longer hold legal title to any stock in the Plaintiff corporation. Although Defendants attempt to propound a theory that the subject vehicle was “written off” by the Plaintiff, such argument is wholly irrelevant to plaintiff’s claim to ownership of the vehicle. Finally, Defendants admit they were given permission to use the subject vehicle during the pendency of the federal action. Although they allege there is still some issue regarding attorneys’ fees pending in the federal action, Defendants have not come forward with any evidence to substantiate said allegation. Rather, according to the documentary evidence presented to the Court by Plaintiff, this matter ended with the denial of Defendants’ petition for a writ of certiorari by the United States Supreme Court.

Based upon the foregoing, Plaintiff’s motion for partial summary judgment is granted on the issue of liability only. Plaintiff is entitled to a Judgment of Replevin and the issue of money damages is set down for a trial on damages on October 24, 2007 at 9:30 a.m. before the undersigned.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

Submit Judgment on ten (10) days Notice of Settlement.

Dated: September 26, 2007
Riverhead, New York


EMILY PINES
J. S. C.