

County of Nassau v Edgar

2007 NY Slip Op 34115(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 1474-07/

Judge: James P. McCormack

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Amended Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

COUNTY OF NASSAU,

Plaintiff(s),

Index No. 1474/07

-against-

Motion Seq. No.: 001 & 002
Motion Submitted: 10/19/07

DANIELLE PRYOR EDGAR, DCFS TRUST and US
BANK AS COLL. AGT.,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Notice of Cross Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion pursuant to CPLR 3211[a][8] by the defendant Danielle Pryor Edgar for an order dismissing the plaintiff's complaint.

Cross motion pursuant to CPLR 3212 and 7109[b] for: (1) an order declaring the defendant DCFS Trust has a superior possessory right to a certain Mercedes Benz automobile; and (2) for further relief declaring that it is entitled to retain and liquidate said vehicle pursuant to the innocent owner-lienholder defense under Nassau County Administrative Code, § 8-7.0[g].

On February 16, 2007, the defendant Danielle Pryor Edgar pleaded guilty to operating her leased, Mercedes Benz automobile while intoxicated in October, 2006 (*see*, Penal Law § 1192.2).

In January of 2007, the plaintiff County of Nassau ["the County"] commenced the within civil forfeiture action and effected "nail and mail" service with respect to Edgar on April 10, 2007 (*see*, CPLR 308[4] *see generally*, *County of Nassau v. Kilcommons*, ___AD3d___, 845 NYS2d 127 [2nd Dept. 2007]).

Also named as a party to the action is codefendant DCFS Trust ["DCFS"], the entity which owns the subject vehicle and leased it to Edgar.

After her time to answer or move with respect to the complaint expired, Edgar noticed the instant motion, dated June 20, 2007, for dismissal of the complaint pursuant to CPLR 3211[a][8].

According to Edgar, the plaintiff's "nail and mail" service (CPLR 308[4]) was defective since, as of March 2006, she had allegedly moved from the Lloyd Harbor address where service had been attempted - although she concededly did not timely inform the Motor Vehicle Department of the change, as required by law (*see*, VTL § 505[5] *see*, *Velasquez v. Gallelli*, 44 AD3d 934; *Stillman v. City of New York*, 39 AD3d 301, 303).

DCFS now cross moves pursuant to CPLR 3212 and 7109[b] for an order: (1) releasing the subject vehicle from the forfeiture proceeding pursuant to the "innocent

owner-lienholder" defense (Nassau County Administrative Code § 8-7.0[g]); and (2) for further relief confirming its right to possession and control of the vehicle in accord with the terms of the lease (*see*, Meola Aff., ¶¶ 4-6; DCFS Ans., ¶¶ 4-11).

The County has joined in the cross motion and concedes that DCFS is entitled to possession of the vehicle. Edgar's motion should be denied. The cross motion is granted.

Putting aside the belated nature of Edgar's motion (*see*, CPLR 3211[e]; *Boswell v. Jiminy Peak*, 94 AD2d 782; *Smith v. Pach*, 30 AD2d 707 *cf.*, *White v. Daimler Chrysler Corp.*, 44 AD3d 651), the Court agrees that she should be estopped from contesting the propriety of the County's service, since she admittedly failed to apprise the Department of Motor Vehicles of her alleged change of residence within ten days thereof, as required by Vehicle and Traffic Law § 505[5] (*see*, *Billis v. Martz*, 259 AD2d 458; *Sherrill v. Pettiford*, 172 AD2d 512; *Hill v. Jones*, 113 AD2d 874; *Kramer v. Ryder Truck Rental, Inc.*, 112 AD2d 194, 195-196 *see also*, *Stillman v. City of New York*, *supra*; *Kandov v. Gondal*, 11 AD3d 516; *Gardner v. Tully*, 227 AD2d 587, 588; *Harrington v. Dickinson*, 159 AD2d 876)(Edgar Reply Aff., ¶ 12). Nor has Edgar indicated precisely where she lived after March, 2006.

Edgar's claim that she applied for and received a "conditional" license listing another address - at approximately the time when the County was attempting to effect personal service in March of 2007 - is not proper and timely notice to the DMV within the meaning of VTL § 505[5]. Moreover, the County's submissions indicate that the

subject vehicle is apparently still registered at the Dolphins Rise address (Cohn Opp. [Oct 12] Aff., ¶ 16; Exh., "D")(cf., VTL §401[3]; *Cruz v. Narisi, supra*, 32 AD3d 981; *Traore v. Nelson*, 277 AD2d 443, 444; *Hill v. Jones, supra*, at 875).

In any event, the plaintiff's submissions, including the affidavits of its process server, establish due diligence in accord with CPLR 308[4] by virtue of several service attempts at the Dolphins Rise address, including, *inter alia*, an attempt on a late weekday evening and an attempt on a Saturday morning (*see, County of Nassau v. Gallagher*, 43 AD3d 972, 973-974 *see generally, Akler v. Chisena*, 40 AD3d 559; *Lemberger v. Khan*, 18 AD3d 447, 448; *Johnson v. Waters*, 291 AD2d 481)(Pltff's Exh., "G").

With respect to the cross motion, DCFS has demonstrated its *prima facie* entitlement to judgment as a matter of law - and to possession of the subject vehicle - by submitting un rebutted proof that: (1) Edgar has been convicted of operating the subject vehicle in violation of VTL § 1192.2; (2) that it had no knowledge of the illegal manner in which the vehicle was being operated; and (3) that Edgar's criminal conduct constitutes a breach of the lease, thereby authorizing DCFS to terminate the agreement and recover possession of the vehicle (Lease, Exh., "A", ¶¶ 19, 24[a],[b]) (*see, County of Nassau v. Canestro*, 41 AD3d 760; *County of Nassau v. Rennert*, 39 AD3d 581; *County of Nassau v. Patel*, 10 Misc.3d 1052(A), 2005 WL 3134226 [Supreme Court, Nassau County 2005]).

Significantly, there is "nothing in the lease agreement which requires that any potential claims by another entity (in this case Nassau County) be successful prior to **

* [DCFS] being legally able to declare a default as defined in the * * * [lease] agreement”
(*County of Nassau v Santi*, ___Misc3d___ Index No.000360/06 at 5 [Supreme Court,
Nassau County, 2006] *see also, County of Nassau v Olcan*, ___Misc3d___ Index No.007907-
06 [Supreme Court, Nassau County, 2007]).

Notably, the County has conceded DCFS’s superior possessory right and entitlement to the vehicle and, moreover, Edgar’s opposing submissions do not address or defeat DFCS’ determinative claims that, *inter alia*, her conviction constitutes a breach of the operative lease termination provisions (*County of Nassau v. Rennert, supra see, County of Nassau v. Canestro, supra*, 41 AD3d 760; *County of Nassau v Santi, supra*).

The Court has considered Edgar’s remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED and declared that: (1) the codefendant DCFS Trust has a possessory right in the subject vehicle which is superior to any interest of codefendant Edgar; and (2) that DCFS Trust it is entitled possession of, and to receive the subject vehicle from, the plaintiff County of Nassau, and it is further,

ORDERED that the motion by the defendant Danielle Pryor Edgar for dismissal of the complaint pursuant to CPLR 3211[a][8], is denied.

The foregoing constitutes the decision and order of the Court.

Dated: December 13, 2007
Mineola, N.Y.

ENTERED
DEC 17 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. James P. McCormack, A. J. S. C.

