

**The Huntington Natl. Bank v Jonathan & Son
Auto Repair Inc.**

2008 NY Slip Op 31644(U)

June 4, 2008

Supreme Court, Nassau County

Docket Number: 9231-07/

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

THE HUNTINGTON NATIONAL BANK,

Plaintiff(s),

-against-

JONATHAN & SON AUTO REPAIR INC., JOSEPH RAGONESE, THE NEW YORK KAR STORE, INC., STEWART LIENS, INC., and "JANE DOE" as EXECUTRIX AND/OR ADMINISTRATRIX OF THE ESTATE OF GRACE C. VOROS, deceased, the name "Jane Doe" being fictitious and intending to designate the executrix or administratrix, if any, of the deceased's estate,

Defendant(s).

_____ x

Index No. 19231/07

Motion Submitted: 2/6/08

Motion Sequence: 001, 002

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion [Sequence 001], by Order to Show Cause by the plaintiff, The Huntington National Bank, for a judgment pursuant to Lien Law § 201-a canceling a garage keeper's lien filed by the defendant, Jonathan & Son Auto Repair, Inc., and converting this action from a plenary action to a special proceeding is granted.

A second motion [Sequence 002], by Order to Show Cause, by the plaintiff, The Huntington National Bank, served on defendants Jonathan & Son Auto Repair, Inc., Joseph Ragonese, The New York Kar Store, Inc., and Stewart Liens, Inc., for an Order declaring the sale of a 2007 Chevrolet Corvette, VIN number 1G1YY36U475128464 (the "subject vehicle") at an auction on December 31, 2007 void, is also granted.

This is an action for conversion in which plaintiff, The Huntington National Bank seeks immediate possession of the subject vehicle. The undisputed facts are as follows:

Plaintiff financed the purchase of a 2007 Chevrolet Corvette to Grace C. Voros by way of a certain loan agreement dated April 23, 2007 in the amount of \$62,465.88. The vehicle was brought into defendant, Jonathan & Son Auto Repair, Inc. ("Jonathan Auto") automotive shop for repairs, by her grandson Joe Ragonese on May 31, 2007. His name is on the repair order. The vehicle was brought in for repairs before any payments were made on the loan. It is alleged that Ms. Voros died on August 18, 2007. Defendant claimed a garage keeper's lien on the new vehicle for repairs and storage charges in excess of \$25,000.00. Plaintiff has apparently sought confirmation and substantiation of the alleged lien but defendant has failed to provide anything other than its repair order.

On October 26, 2007, plaintiff commenced this action for conversion seeking immediate possession of the subject vehicle. On December 5, 2007, defendant, Jonathan Auto, served its notice of garageman's lien and sale. Thereafter, on or about December 11, 2007, defendant served its answer to plaintiff's complaint denying the material allegations of the complaint except admitting that it refused to release the collateral in its possession. By the Order to Show Cause [Sequence 001], dated December 21, 2007 and returnable January 3, 2008, plaintiff moved for an Order seeking a judgment by this Court, pursuant to Lien Law § 201-a, canceling Jonathan Auto's lien over the vehicle and awarding plaintiff possession of the vehicle. On December 21, 2007, this Court granted the Order to Show Cause and issued a temporary restraining order staying the public auction and sale of the 2007 Chevrolet and staying any work to be performed on the vehicle, pending the hearing and determination of the motion.

The December 21, 2007 Order provided, in pertinent part, that a copy of same be served

"by personal service or overnight delivery service upon: the attorney for the defendant, Norman Kaplan, Esq., 111 Great Neck Road, Great Neck, NY 11021, Jonathan & Son Auto Repair Inc., 294 Great Neck Road, Great Neck, NY 11021, and upon Joe Ragonese, at 126 Syosset Woodbury Road, Syosset, NY 11791."

Defendant's attorney, Norman A. Kaplan, states in his affirmation in opposition to plaintiff's motions that the Order was sent on Friday December 21, 2007 and delivered to both defendant's auto repair shop and his office on Monday December 24, 2007 (*Aff. in Opp.*, ¶4). Counsel for defendant states in his affirmation in opposition:

I am informed that the papers sent to defendant were delivered by Federal Express to Carrie Cuebas, a part-time secretary, who put them in a desk drawer in the sealed envelope. The papers were not actually seen by anyone until after the sale took place on December 31. Although the copy sent to your affiant was received and seen prior to December 31, your affiant was unable to communicate with the management of defendant prior to the sale. Moreover, your affiant never met or spoke to and does not know the auctioneer and was unable to prevent the auction (*Aff in Opp.*, ¶4).

On December 31, 2007, the subject vehicle was sold by an auctioneer at an auction to a third party, namely, The New York Kar Store, Inc., for \$18,000.00 (*Aff in Opp.*, Ronnie Mori Affidavit).

On January 3, 2008 (the return date of the Order to Show Cause [Sequence 001]), defendant's attorney informed the Court that the vehicle had been sold to The New York Kar Store, Inc. As a result of this sale, plaintiff, on January 7, 2008, pursuant to CPLR § 1003, served a supplemental summons and complaint on the defendants, Jonathan & Son Auto Repair, Inc., Joseph Ragonese, The New York Kar Store, Inc., and Stewart Liens, Inc. By a second motion herein [Sequence 002], plaintiff urges this Court, to declare the auction void, to reverse the sale of said vehicle, to return any funds, which it received from the sale of the vehicle and pay for any expenses incurred by the auctioneer and the buyer of the vehicle due to its violation of the stay, to deposit with this Court any funds it has received from the auction of the 2007 Chevrolet, to stay The New York Kar Store, Inc. from selling or otherwise disturbing the status quo of the 2007 Chevrolet and to void the sale of the vehicle in its entirety.

Defendant, Jonathan & Son, opposes the motions and submits that "[p]laintiff's counsel elected not to serve or notify the auctioneer that there was an action or a stay of the sale. Plaintiff's counsel also elected to serve by 'overnight delivery service' rather than personal service, which would have provided actual notice to defendant of the prospective sale" (*Aff in Opp.*, ¶3). Defendant claims that it had no notice of the stay order and thus, plaintiff's Order to Show Cause to declare the auction void [Sequence 002] is moot and must be denied. Based upon a plain and simple reading of the December 21st Order however, it is abundantly clear that plaintiff was not *required* to notify the auctioneer or provide personal service to the defendant, defendant's counsel and Joe Ragonese.

Defendant's argument that plaintiff's application to stay the sale is moot because the sale is complete (*Aff in Opp*, ¶11), is equally unavailing. "A proceeding pursuant to Lien Law § 201-a may be used to determine the validity of a lien, including the entitlement to the lien as well as the amount thereof. Such issues do not become moot simply because the property that is the subject of the lien has been sold. The propriety of the sale itself depends on the validity of the lien" (*Nachman v. Crawford*, 114 A.D. 2d 672, 673, 494 N.Y.S.2d 493 [3rd Dept., 1985]).

In arguing that the sale was proper, defendant submits that Lien Law § 201-a was fully complied with in that the sale was properly conducted "within 10 days after service of the notice of sale." Defendant argues that the Notice of Lien and Sale was served on December 5, 2007. According to the statute, the special proceeding was required to have been brought within ten days after service of the notice of sale. The Stay Order [Sequence 001] however is dated December 21, 2007, which is more than ten days after the date of service of the required notice. Thus, the defendant argues, the application for the stay was untimely and the stay was improper.

While it is true that a proceeding to determine the validity of liens must be brought within ten days after service of the notice of sale, it cannot be overlooked that the stay in this case was granted in the plenary action. The provision contained in Lien Law §201-a, regarding the commencement of a special proceeding to determine the validity of a lien, is permissive and not mandatory (*Champion v. Wilsey*, 114 A.D.2d 630, 495 N.Y.S.2d 222 (3d Dept., 1985); *El Adawy v. New York Automotive Ctr.*, 131 A.D.2d 722, 516 N.Y.S.2d 911 [2d Dept., 1987]). Thus, plaintiff is not *required* at this juncture to commence a special proceeding to determine the validity of the defendant's lien. In this case, plaintiff had already commenced a plenary action for conversion on October 26, 2007 - over one month before defendant served its notice of lien and sale. Thus, since plaintiff commenced this action prior to defendant's service of its Notice of Lien and Sale, plaintiff herein sought relief by way of Order to Show Cause in place and instead of bringing a special proceeding. By Order to Show Cause dated December 27, 2007 [Sequence 001], this Court granted a stay in the plenary action. Thus, the Order to Show Cause not only timely stayed the sale under the Notice of Lien and Sale pending its determination, but it was also valid under section 201-a of the Lien Law (*Nachman v. Crawford*, *supra*; *see also CBS Transp. Inc. v. Borderline Collision, Inc.*, 231 A.D.2d 715, 648 N.Y.S.2d 45 [2d Dept., 1996]).

The Order to Show Cause dated December 27, 2007 in this plenary action timely stayed the sale under the Notice of Lien and Sale pending the determination of the Order to Show Cause. Accordingly, this Court finds that the defendant clearly violated the stay by conducting the sale and thus the sale is herewith set aside.

Plaintiff's motion by Order to Show Cause dated January 8, 2008 [Sequence 002] for an Order declaring the prior auction sale void is granted. Notably, despite being served a supplemental summons and complaint, and the plaintiff's second motion by Order to Show Cause, the remaining defendants including Joseph Ragonese, The New York Kar Store, Inc., and Stewart Liens, Inc. Accordingly, as the purchaser of the subject vehicle, The New York Kar Store, Inc., is directed to return the subject vehicle to the plaintiff herein, The Huntington National Bank.

With respect to defendant The New York Kar Store, Inc.'s oral argument that it was a bona fide purchaser for value, it did not establish that title to the subject vehicle was perfected prior to its purchase. (See VTL § 2113(c); *Kaminsky v. Karmin*, 187 A.D.2d 488, 589 N.Y.S.2d 588 [2d Dept., 1992]).

Turning to the merits of plaintiff's application [Sequence 001] for a judgment cancelling the garage keeper's lien and converting the action from a plenary action to a special proceeding under Lien Law § 201-a to determine the validity of the lien, plaintiff's motion is granted and the lien is cancelled.

Pursuant to Lien Law §201, a lienholder who fails to give notice to a debtor before selling the debtor's property is liable for conversion (*Ingram, Jr. v. Machel and Jr. Auto Repair, Inc.*, 148 A.D.2d 324, 538 N.Y.S.539 [1st Dept., 1989]). Inasmuch as Grace Voros died on August 18, 2007, the lienholder failed to properly serve her, and service by mail was not effective.

It is undisputed in this case that the deceased, Grace Voros and/or her representatives defaulted in the terms and conditions of the loan agreement entered into by the plaintiff and Grace Voros. There is no evidence in this case that any proceedings were commenced in the Surrogate's Court with regard to the probate or administration of an estate for Grace Voros. Since there is a clear default in the terms and conditions of the Personal Loan Agreement, plaintiff is entitled to possession of the subject vehicle, which is the collateral for said agreement. As such, plaintiff submits that defendant's lien is without any basis in law or fact, is invalid, is not substantiated and/or is excessive and exaggerated.

Plaintiff argues that it never consented to the estimated amount of the repairs, which are alleged to be excessive and unreasonable. Plaintiff submits that the work was performed without the owner's, Grace C. Voros, consent and therefore the lien is invalid pursuant to Lien Law §184 and § 201-a.

Commonly known as a garage keeper's lien, Lien Law § 184(1) provides, in pertinent part, that a person keeping a registered motor vehicle repair shop or garage

and who in connection therewith tows, stores, maintains, keeps or repairs any motor vehicle . . . at the request or with the consent of the owner . . . has a lien upon such motor vehicle . . . for the sum due for such [services] . . . and may detain such motor vehicle . . . at any time it may be lawfully in his possession until such sum is paid.

The purpose of the enactment is “to accord a form of security for personal credit extended by the vendor of service and supplies enhancing the value of the specified vehicle” (*Matter of National Union Fire Ins. Co. v. Eland Motor Car Co.*, 85 N.Y.2d 725, 729-730 (1995) quoting *Slank v. Dell's Dodge Corp.*, 46 A.D.2d 445, 448 [4th Dept., 1975]).

However, in order to have a valid garageman’s lien, it is integral that the repairs must be done “. . . at the request or with the consent of the owner . . .” (Lien Law §184). The authority must be lawfully derived “from the owner” (*Manufacturers Trust Company v. Stehle*, 1 A.D.2d 471 [1st Dept., 1956]). In this case, it is undisputed that the vehicle was not brought in by the registered owner of the vehicle, Grace Voros. The vehicle was brought in by Joe Ragonese, as set forth on the repair order of the defendant. Defendant has failed to provide any proof that it performed its repairs “at the request or with the consent of the owner” as required under the Lien Law § 184. Thus, absent any proof that the work was done at the owner, Grace Voros’s request or consent, the lien is clearly invalid.

Pursuant to Lien Law § 201-a:

If the owner or any such person shall show that the lienor is not entitled to claim a lien in the property, or that all or part of the amount claimed by the lienor has not been properly charged to the account of such owner or such person, or, as the case may be, that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court shall direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly If the lien is cancelled, the judgment shall provide that, upon service of a copy of the judgment together with notice of entry thereof upon the lienor, the owner or person shall be entitled to possession of the property.

In accordance therewith, this Court directs the entry of judgment cancelling the defendant, Jonathan & Son Auto Repair, Inc.’s garage keeper’s lien.

Upon service of a copy of the judgment together with notice of entry thereof upon the defendants Jonathan & Son Auto Repair, Inc., Joseph Ragonese, The New York Kar Store, Inc., Stewart Liens, Inc., and the Public Administrator of Nassau County John W. Sinon

on behalf of the Estate of Grace C. Voros, deceased, plaintiff is entitled to possession of the subject vehicle - namely, the 2007 Chevrolet Corvette, VIN number 1G1YY36U475158464.

While the conduct of defendant Jonathan & Son Auto Repair, Inc. and its counsel Norman A. Kaplan, Esq., may be contemptuous in nature, an application to punish for contempt is not properly before this Court. (See *Judiciary Law § 756*).

The foregoing constitutes the Order of this Court.

Dated: June 4, 2008
Mineola, N.Y.


J. S. C.

ENTERED

JUN 10 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**