

Daimler Chrysler Fin. Servs. Am. LLC v Longchamps
2008 NY Slip Op 31958(U)
June 23, 2008
Supreme Court, Nassau County
Docket Number: 0503-07/
Judge: William R. LaMarca
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**DAIMLER CHRYSLER FINANCIAL SERVICES
AMERICAS LLC,**

**Motion Sequence #1
Submitted March 7, 2008**

Plaintiff,

-against-

INDEX NO: 503/07

MARC R. LONGCHAMPS,

Defendant.

The following papers were read on this motion:

Notice of Motion/Order to Show Cause	1
Affirmation in Opposition.....	2
Reply Affidavit	3

Requested Relief

Defendant, MARC R. LONGCHAMPS (hereinafter referred to as "LONGCHAMPS"), moves for an order vacating and setting aside the default judgment entered herein, on June 20, 2007, in favor of the plaintiff, DAIMLER CHRYSLER FINANCIAL SERVICES AMERICAS LLC., and against defendant, LONGCHAMPS, in the alleged sum of \$32,638.76. A copy of the judgment has not been provided to the Court. It is LONGCHAMPS position that he was not properly served with the action and that he has a meritorious defense. Plaintiff opposes the motion, which is determined as follows:

Background

In an affidavit, LONGCHAMPS states that he leased a Mercedes Benz ML430 from Lakeview Auto Sales & Service, Inc on July 18, 2000. He relates that he became involved in an accident in August 2002 and, after the car was taken to a GEICO Claim Department in Merrick, New York, he took the car to Autotech Collision at 6 Millburn Place, Baldwin, New York (hereinafter referred to as "Autotech"), for repair. He states that the owner of Autotech, Ms. Lorraine Pilitz, acknowledged receipt of his vehicle and advised that GEICO would come and give final approval of her estimate for repairs. LONGCHAMPS states that he received two (2) checks from GEICO totaling approximately \$2,200.00, but no information is given as to the disposition of said checks. Although LONGCHAMPS states that he was told the repair would take five (5) days, he claims that on September 28, 2002, approximately three (3) weeks after he dropped off the car, he went to Autotech to inquire about the status of the repair and found no one there. He asserts that he made numerous attempts to contact Autotech and asked for the assistance of the Police Department and the Nassau County District Attorney's office. He states that he eventually located Autotech, in June 2003 (nine [9] months later) at their new location in Rockville Centre, New York, and, accompanied by the police, he went to the new location and was told by the owner, Ms. Pilitz, that everything was 'OK', that his car was repaired and that she would arrange for delivery. LONGCHAMPS contends that he was later told that he owed Autotech \$18,030.00 for repairs and storage, as Ms. Pilitz claimed that she sent LONGCHAMPS a letter advising him that he would be responsible for storage charges, that the shop had moved and that he refused to pick up the car.

Ultimately, it appears that Ms. Pilitz refused to return the car to LONGCHAMPS and he claims he later learned that DAIMLER picked up the car from Autotech. He states that DAIMLER refused his request to pick up the car because he still owed Autotech monies. Thereafter, Autotech was successful in obtaining a judgment against LONGCHAMPS in District Court for the storage fees. Moreover, in a previous Court action, under Index No. 20422/02, DAIMLER obtained an Order of Seizure, dated April 7, 2003, against LONGCHAMPS for a prior default in the payment of the lease. LONGCHAMPS claims that said action was settled by Stipulation of Settlement, dated May 7, 2003, in which he agreed to pay arrears in the sum of \$2,856.07 on or before May 15, 2003, and the regular monthly payments of \$617.52 until the termination of the lease in October 2003. Said Stipulation provided that if LONGCHAMPS defaulted in any payment when due, and failed to cure said default within seven (7) days, he would immediately tender possession of the vehicle to DAIMLER, and that judgment in the sum of \$39,619.33, plus interest, legal fees and costs, minus any payments made pursuant to the Stipulation, could be entered against him.

On the instant application, LONGCHAMPS claims that he was never successful in retrieving his vehicle, which was repossessed by DAIMLER and which resulted in a deficiency judgment which defendant now seeks to vacate. It is LONGCHAMPS position that DAIMLER and Autotech were working together to deprive him of his car, that DAIMLER failed to live up to the terms and conditions of the Stipulation of Settlement previously entered into and that service of process upon him was defective. He asserts that the Affidavit of Service is suspect because he does not live in "North Baldwin, New York", that no one was at his home to accept service for him on February 6, 2007, and that

no mailing of the pleadings were ever received by him as required by CPLR §308(2) when service is made upon a person of suitable age and discretion. The Affidavit of Service reflects service upon "JANE DOE (REFUSED NAME CO-TENANT)", at 1230 St. Paul's Street, North Baldwin, NY 11510 on February 6, 2007, with follow up mailing to the same address on February 8, 2007.

In opposition to the motion, counsel for DAIMLER points out that the official website of the United States Postal Service places the 1230 St. Paul's Street address in North Baldwin and not in Baldwin as LONGCHAMPS claims. Moreover, counsel states that defendant does not have a meritorious defense because he does not state that he made payments to DAIMLER pursuant to the Stipulation of Settlement in the prior replevin action. Counsel for DAIMLER asserts that LONGCHAMPS defaulted on the lease prior to the replevin action, that he was given an opportunity to reinstate the lease, and that he defaulted again. DAIMLER urges that the motion be denied as the alleged malfeasance of a third-party, Autotech, is irrelevant to plaintiff's cause of action.

The Law

"It is well settled that where service of process has been improperly effected, any resulting default judgment is a nullity. This is so even where the defendant had actual notice of the lawsuit, and no meritorious defense, for in such case, the court never had personal jurisdiction over the defendant". *DeMartino v Rivera*, 148 AD2d 568, 539 NYS2d 38 (2nd Dept. 1989); *see also, Laurenzano v Laurenzano*, 222 AD2d 560, 635 NYS2d 668 (2nd Dept. 1995). Once it is shown that service was not properly effected, the judgment must be unconditionally vacated. CPLR §5015(a)(4); *Chase Manhattan Bank, N.A. v*

Carlson, 113 AD2d 734, 493 NYS2d 339 (2nd Dept. 1985). Whether or not the defendant has a meritorious defense is irrelevant to the question of whether the judgment should be vacated for lack of personal jurisdiction. *Steele v Hempstead Pub Taxi*, 305 AD2d 403, 760 NYS2d 188 (2nd Dept. 2003); *Shaw v Shaw*, 97 AD2d 403, 467 NYS2d 231 (2nd Dept. 1983). The existence of a meritorious defense only becomes significant in determining whether to open a default once it is clear that service was properly made. *Shaw v Shaw*, *supra*; *Mayers v Cadman Towers, Inc.* 89 AD2d 844, 453 NYS2d 25 (2nd Dept. 1982).

Moreover, a judgment entered in the course of a proceeding without obtaining personal jurisdiction over the defendant is a nullity and the “person purportedly served may ignore the judgment, resist it or assert its invalidity at any and all times”. *McMullen v Amone*, 79 AD2d 496, 437 NYS2d 373 (2nd Dept. 1981).

Pursuant to CPLR §308(2), service of process shall be made by delivering the summons to a person of suitable age and discretion “at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other...”

After a careful reading of the submissions herein, it appears to the Court that an evidentiary hearing is required to determine whether effective service of the summons and

complaint has been obtained. It is the judgment of the Court that LONGCHAMPS has raised sufficient challenges to the presumption of proper service. Accordingly, it is hereby

ORDERED, that this matter is specifically referred to the Calendar Control Part for a traverse hearing and shall appear on the calendar of CCP on October 21, 2008 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

ORDERED, that defendant, LONGCHAMPS shall file a Note of Issue within ninety (90) days from the date of this order and shall serve plaintiff's counsel a copy of same by certified mail, return receipt requested; and it is further

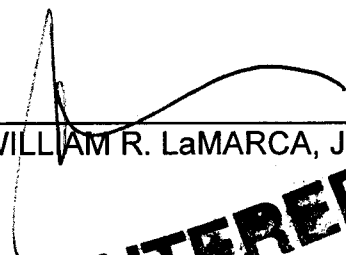
ORDERED, that the failure to file a Note of Issue as directed may be deemed an abandonment of the claims giving rise to the traverse hearing; and it is further

ORDERED, that in the event that jurisdiction over the defendant is found, leave to renew the motion to vacate the default judgment is granted and, within thirty (30) days of said finding, the parties shall submit papers as to their respective positions concerning a meritorious defense to the action as required by both CPLR §317 and §5015.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 23, 2008


WILLIAM R. LaMARCA, J.S.C.
ENTERED
JUL 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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