

**Kaufman v Village of Freeport**

2008 NY Slip Op 32371(U)

August 21, 2008

Supreme Court, Nassau County

Docket Number: 8224-07/

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

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**SEYMOUR KAUFMAN,**

**Plaintiff,**

**-against-**

**VILLAGE OF FREEPORT; MARINE SALES, INC.,  
FRANK HUNTER, LAWRENCE A. COVAR;  
ROSE V. COVAR, and AL GROVERS MARINA,**

**Defendants.**

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**TRIAL TERM PART 48**

**INDEX NO.: 018224/07**

**MOTION DATE: 6-16-08  
SUBMIT DATE: 8-11-08  
SEQ. NUMBER - 003**

**MOTION DATE: 6-30-08  
SUBMIT DATE: 8-11-08  
SEQ. NUMBER - 004**

**MOTION DATE: 7-14-08  
SUBMIT DATE: 8-11-08  
SEQ. NUMBER - 005**

**The following papers have been read on this motion:**

- Notice of Motion, dated 5-30-08.....1**
- Affidavit in Support, dated 5-22-08.....2**
- Memorandum of Law in Support, dated 5-27-08.....3**
- Notice of Cross Motion, dated 6-20-08.....4**
- Affirmation in Opposition, dated 6-20-08.....5**
- Notice of Motion, dated 7-7-08.....6**

Plaintiff's motion for summary judgment on its First Cause of Action (Seq. 3) for a declaratory judgment that it is the owner of a 1999 Sea Swirl boat, hull identification number BRCB036EB999 (the Boat), is granted. The cross motion of defendants Village of Freeport

(Village) and Al Grovers Marina (Grovers) (Seq. 4) for summary judgment dismissing the complaint is denied and plaintiff's motion (Seq. 5), for leave to file a late notice of claim against defendant Village (and presumably an amended complaint), is granted. Plaintiff is directed to submit a judgment in conformance with this decision and order which shall *inter alia* direct the Village and Grovers to allow plaintiff to enter upon their property during normal business hours, on reasonable advance oral or written notice to take custody possession and control of the Boat.

The action shall continue as to the remaining causes.

The Covars, residents of Pennsylvania and owners of the Boat, left it in the custody of Marine Sales Inc., and Hunter (hereinafter collectively referred to as Hunter) for the purpose of sale. Plaintiff purchased the Boat for \$16,000.00 from the Covars through Hunter as the disclosed agent of the Covars. The Boat was left at the boat yard for additional work to be performed at the expense of plaintiff and ultimately possession thereof was given to plaintiff who continued to store the Boat at the boat yard.

The boat yard, out of which Hunter operated, was owned by the Village and had been leased to Hunter or one of his entities by the Village. Hunter was evicted from the boat yard in August 13, 2007, and the Village engaged defendant Grovers to assist in the disposal of various boats and other property found to be located at the boat yard, including the subject Boat.

The Village attempted to contact the owners of the boats and other property and established a procedure by which owners could make a claim for the return of their property

and plaintiff dutifully filed a claim for the return of the Boat to him. The Boat was not delivered to plaintiff because plaintiff could not produce evidence of title thereto and this action ensued.

Title to the Boat had been issued to the Covars in Pennsylvania and plaintiff was told by Hunter that it would take a while to obtain a transfer of title from Pennsylvania to New York, however, prior to this action, plaintiff did register the Boat in New York.

Although Plaintiff received a New York State registration for the Boat, he has never received a New York State Certificate of Title and the previous Certificate of Title, issued to the Covars by the State of Pennsylvania, does not reflect the sale of the Boat to the Covars. The Village has refused to release the Boat to plaintiff because although plaintiff has a New York registration, he does not have a certificate of title in his name.

The Covars and Hunter have defaulted, thereby admitting all of the allegations of the complaint, however, Lawrence Covar sent a letter to the Court in March 2008 (copies of which were given to all appearing parties) in which he admits that he left the Boat with Hunter for Hunter to sell.

The First Cause of Action, for which summary judgment is sought by this motion, seeks a declaratory judgment against Hunter and the Covars that plaintiff is the owner of the Boat and is entitled to possession and custody thereof. The answering defendants do not oppose this request for relief and the Hunter and Covar defendants have defaulted in answering. By not answering a defendant is deemed to have admitted all traversable allegations in the complaint including the basic allegations of liability. *Rokina Optical Co.*,

*Inc., v. Camera King, Inc.*, 63 NY2d 728 (1984); *Al Fayed v. Barak*, 39 AD3d 371 (1<sup>st</sup> Dept. 2007).

Although Mr. Covar sent a letter to the Court, he does not deny the essential allegations that he left his Boat with Hunter to sell, or that he gave Hunter his approval of the transaction. Hence, his letter cannot be deemed a request to vacate his default in answering. In any event, by having entrusted the Boat to Hunter, the latter became the disclosed agent of the Covars and they became bound by Hunter's actions. Hunter had the apparent and actual authority to sell the Boat on behalf of Covars. *Hallock v. State of New York*, 64 NY2d 224 (1984); *Advance Magazine Publishers, Inc., v. Mastour Galleries, Inc.*, 19 Misc 3d 1120A (N.Y.City Civ. Ct. 2008).

Having vested in Hunter the authority to sell the Boat, it is the Covars who must bear the responsibility for any misfeasance on the part of their agent Hunter and they are relegated to seek relief from their agent for any damages to them caused by his conduct.

The Village is correct that as to the Second Cause of action for wrongful detention and seizure of personal property against the Village and its agent, a notice of claim should have been filed pursuant to GML §50(e). *Smith v. Scott*, 294 AD2d 11 (2d Dept. 2002), however, plaintiff has also moved for leave to file a late notice of claim and presumably an amended complaint alleging such filing.

This action was commenced only a matter of weeks after the events related, the Village was involved in all aspects of its development, plaintiff filed a claim for return of the Boat with the Village and the motion to file a late notice has not been delayed. Moreover, failure to file a notice of claim was never pleaded by defendant, there is no claim for

prejudice, and no motion thereon was made, except in response to plaintiff's present motion. Permission to file a late notice of claim and amended complaint reflecting such filing is granted. *Blair v. Pleasantville Union Free School Dist.*, 52 AD3d 827 (2d Dept. 2008); *Bussey v. City of New York*, 50 AD3d 938 (2d Dept. 2008). The notice of claim and amended complaint shall be served no later than September 12, 2008.

The Village may, if it so chooses, conduct a hearing on the claim pursuant to the GML and plaintiff is directed to appear at a GML §50-h hearing which may be scheduled on not less than 10 days notice to his counsel provided said notice is served and the date selected is not later than October 3, 2008. Until that date, all proceedings against the Village and Grovers are stayed.

The remaining prongs of the summary judgment cross motions by the Village and Grovers are denied. The basis for so moving is the contention that as a landlord, evicting a tenant, the Village acted appropriately in dealing with the Boat. However, the Court does not agree that as a matter of law there would be no basis for a finding to the contrary by the trier of fact and summary judgment on this issue is not appropriate.

All parties are reminded (notwithstanding the above stay) of the certification conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on September 8, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).


Based on the foregoing, plaintiff's motion for summary judgment on his First Cause of Action against the Covars and Hunter is granted, the cross motion of the Village and

Grover for summary judgment is denied and the motion of plaintiff for leave to file a notice of claim and an amended complaint is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 21, 2008

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Charles A. Singer, Esq.  
Ilana L. Deutsch, Esq.  
Attorney for Plaintiff  
500 Bi-County Blvd., Ste. 112N  
Farmingdale, NY 11735**

**ENTERED**

AUG 25 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

**Harrison J. Edwards  
Village Attorney  
By: Howard Colton, Esq.  
Attorney for Village of Freeport and Al Grovers Marina  
46 North Ocean Avenue  
Freeport, NY 11520**

**John E. Molinari, Esq.  
Martin & Molinari, Esqs, LLP  
Attorneys for Defendants Marine Sales Inc., and Frank Hunter  
148 S. Long Beach Avenue  
Freeport, NY 11520**

**Rose Covar  
Defendant Pro Se  
143 Locust Drive  
Milford, PA 18337**

**Lawrence Covar  
Defendant Pro Se  
143 Locust Drive  
Milford, PA 18337**