

GMAC v Ilhan Aydagul
2008 NY Slip Op 32542(U)
September 11, 2008
Suprme Court, Nassau County
Docket Number: 2555-08/
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

GMAC,

Plaintiff,

- against -

ILHAN AYDAGUL,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 2555/08

Motion Sequence No. 001 & 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order pursuant to CPLR 7102 ordering, directing and authorizing the Sheriff of Nassau County or of any other County to seize the 2005 Cadillac Escalade vehicle, VIN #3GYFK66N35C245737 which is the subject of this proceeding; ordering, directing and authorizing the Sheriff of Nassau County or of any other County to take all steps necessary to seize the 2005 Cadillac Escalade vehicle, VIN #3GYFK66N35C245737, and execute this mandate, including if this vehicle is not delivered to the Sheriff of Nassau County or of any other County, breaking open, entering and searching of the premises, place, building or structure where or in which this vehicle

may be located or breaking a lock to enter the premises, place, building or structure, or removing an obstacle or obstacles which may be blocking the vehicle; and ordering and directing the plaintiff is entitled to the immediate possession of the vehicle, the defendant is to immediately advise Paul R. Ades, PLLC, 181 West Main Street, Suite 103, P.O. Box 790, Babylon, New York 11702, plaintiff's attorneys, of the whereabouts and location of the vehicle, and the defendant is to immediately deliver the vehicle to a representative of the plaintiff at 1600 Stewart Avenue, Suite 306, Westbury, New York, and approving as to form and sufficiency the \$85,800.00 undertaking of Motors Insurance Corporation. The defendant opposes this motion, and cross moves for an order denying the plaintiff's order to show cause, and granting an order dismissing the entire action pursuant to CPLR 3211 (a) (2) and CPLR 3211 (a) (8) based upon lack of jurisdiction. The underlying proceeding seeks to recover the subject vehicle where the plaintiff holds a security interest because the defendant's account is past due since September 16, 2007. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to the motion and cross motion.

The plaintiff's attorney states, in a supporting affirmation dated February 7, 2008, the defendant purchased the vehicle pursuant to a retail instalment contract assigned to the plaintiff. The plaintiff's attorney points to the affidavit dated January 31, 2008, by the plaintiff's authorized agent which explains the circumstances for the commencement of this lawsuit, and the plaintiff's entitlement to the immediate possession of the vehicle.

The plaintiff's attorney notes the defendant has not surrendered the vehicle which is depreciating in value, and has concealed the vehicle from the plaintiff. The plaintiff's attorney avers a temporary restraining order is essential avoid the vehicle being unavailable for seizure, and substantial prejudice to the plaintiff if the motion is not granted. The plaintiff's attorney contends it is necessary for the Sheriff of Nassau County or of any other County to seize the vehicle because of the defendant's nonpayment, and lack of vehicle surrender.

The defense attorney concedes, in an opposing affirmation dated March 10, 2008, and in support of the defendant's cross motion, the defendant purchased the subject vehicle from Vera Cadillac-Hummer, in Florida, on or about September 2005 pursuant to an agreement with that Florida dealership, not the plaintiff. The defense attorney contends the Court lacks personal jurisdiction in light of the plaintiff's failure to adequately serve the defendant. The defense attorney submits the Court also lacks subject jurisdiction because the vehicle is located in Florida, and not in New York. The defense attorney asserts service of the order to show cause here was not effectuated as required under CPLR 308, and even assuming proper service, the court order improperly directed the waiver of the ten day completion of service under CPLR 308 (2). The defense attorney also avers the plaintiff commenced the instant proceeding by order to show cause as opposed to a summons and complaint, and hindered the defendant from answering the plaintiff's alleged complaint, including asserting any counterclaims and affirmative

defenses. The defense attorney claims the defendant is an elderly person who is ill, and rarely, if at all, is able to leave home, so the plaintiff could have serve the defendant at home. The defense attorney maintains the plaintiff never made a demand for the vehicle, never apprised the defendant of the default in payment, and failed to notify the defendant when the plaintiff acquired the assignment of the agreement with Vera Cadillac-Hummer, in Florida. The defense attorney states the plaintiff lacks legal capacity to commence and maintain this action since the defendant challenges the disputed assignment. The defense attorney submits the Court should not proceed in the absence of a person or entity who should be clearly a party pursuant to CPLR 3211 (10), and states the defendant was unaware of the plaintiff's interest in the agreement. The defense attorney requests, in the alternative, the Court deny this motion, and permit disclosure pursuant to CPLR 3211 (d), as there are facts the defendant opposes which warrant additional time to assert, and the defendant would be prejudiced should the plaintiff's motion be granted.

The plaintiff's attorney states, in a reply affirmation dated June 10, 2008, the defendant was properly served, and points to the affidavits of service dated February 26, 2008, by John Savage, copies of the order to show cause and summons and complaint filed with the Nassau County Clerk's Office on February 8, 2008. The plaintiff's attorney submits the cross motion should be denied in all respects because the defendant fails to establish lack of service, and lack of subject matter jurisdiction. The plaintiff's attorney contends the plaintiff's motion should be granted because the defendant is in breach of

the contract dated August 1, 2005, with a total sale financed price of \$78,288.00 for this \$70,909.82 vehicle which the defendant possesses, and refuses to surrender or advise the plaintiff of its whereabouts despite demand where the plaintiff has superior rights to it. The plaintiff's attorney points out the defendant's cross motion is supported only by the defense attorney's affirmation, and counters the defense assertions as untrue and unsubstantiated.

The Second Department holds:

The affidavit of defendant's attorney, the only paper submitted in opposition to the motion, contains bald conclusions without any evidentiary facts to substantiate a defense or to refute plaintiff's claims. Since it does not appear that defendant's attorney has any personal knowledge of the facts, his affidavit has no probative value and should be disregarded (*Cohen v. Pannia*, 7 A D 2d 886; *Barnet v. Horwitz*, 278 App. Div. 700).

Defendant having failed to show either by his own affidavit or by the affidavit of a person with knowledge that he (the defendant) has a bona fide defense to the third and fourth causes of action, summary judgment should be granted to plaintiff thereon (CPLR 3212; *Schillinger v. North Hills Realty Corp.*, 15 A D 2d 539, *affd.* 11 N Y 2d 1044; *Kramer v. Harris*, 9 A D 2d 282; *Dwan v. Massarene*, 199 App. Div. 872)

Israelson v. Rubin, 20 A.D.2d 668, 247 N.Y.S.2d 85, [2nd Dept., 1964].

The defendant's cross motion here is supported only by defense counsel's affirmation.

The defense attorney here does not have personal knowledge of the facts, so that sworn statement has no probative value with respect to the motion and cross motion.

Savage, who is over the age of 18 and not a party to this action, served the defendant at 34 Gilfoy Street, Glen Cove, New York 11542, to wit the defendant's residence, by (1) delivering a true copy of the summons and complaint, the index number

of the underlying action and the date filed with endorsement and by (2) delivering a true copy of the order to show cause, summons and complaint, the bond, supporting documents and the request for judicial intervention to the defendant's wife, a person of suitable age and discretion. Savage describes the wife as approximately 36 to 50 years, weighing approximately 131 to 160 pounds, approximately five foot four inches to five foot eight inches tall, white skin color with dark blonde hair. Savage spoke to the defendant's spouse, and asked the wife whether the defendant was presently in the military service of the United States Government or on active duty in the military service in the State of New York. Savage states the wife said the defendant was not in such service, and told the process server she knew the defendant to be the person mentioned and described in the legal papers. Savage states completing service of (1) copies of the summons and complaint, the index number of the underlying action and the date filed with endorsement on February 25, 2008 to the defendant at 34 Gilfoy Street, Glen Cove, New York 11542, and (2) copies of the order to show cause, summons and complaint, the bond, supporting documents and the request for judicial intervention on February 23, 2008 to the defendant at 34 Gilfoy Street, Glen Cove, New York 11542 by depositing copies of those documents, respectively on those dates, in postpaid, properly addressed plain envelopes each marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Postal Service in the State of New York.

CPLR 308 (2) authorizes service, inter alia, by delivery of the summons and complaint within the State to a person of suitable age and discretion at the defendant's dwelling place and mailing the summons to the defendant's last known residence. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process (*see Frankel v. Schilling*, 149 A.D.2d 657, 659, 540 N.Y.S.2d 469). A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2)

Bankers Trust Co. of California, N.A. v. Tsoukas, 303 A.D.2d 343, 343-344, 756 N.Y.S.2d 92.

The Court finds this defendant fails to rebut the *prima facie* evidence of proper service created by Savage's affidavit (*see 425 East 26th Street Owners Corp. v. Beaton*, 50 A.D.3d 845, 858 N.Y.S.2d 188 [2nd Dept., 2008]; *Household Finance Realty Corp. of New York v. Brown*, 13 A.D.3d 340, 785 N.Y.S.2d 742 [2nd Dept., 2004]).

The plaintiff has shown the defendant purchased the vehicle for \$78,288.00 pursuant to a written retail instalment contract, and the defendant agreed to pay that amount in 60 monthly installments of \$1,304.80 commencing September 16, 2005. That contract provided, if the defendant defaulted in any payment, the plaintiff, as creditor could take possession of the vehicle, including any equipment and accessories. The plaintiff showed the defendant accepted delivery of the vehicle; the contract was assigned to the plaintiff; the plaintiff's security interest in the vehicle was perfected in New York; and the defendant is in default under the contract since September 16, 2007, which leaves a balance due and owing to the plaintiff of \$48,815.80.

CPLR 7102 (d) provides:

1. Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order. 2. Upon a motion for an order of seizure, the court, without notice to the defendant, may grant a temporary restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien until further order of the court. Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as a contempt of court. 3. An order as provided in paragraph one of this subdivision may be granted without notice only if, in addition to the other prerequisites for the granting of the order, the court finds that unless such order is granted without notice it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value. 4. An order of seizure granted without notice shall provide that the plaintiff shall move for an order confirming the order of seizure on such notice to the defendant and sheriff and within such period, not to exceed five days after seizure, as the court shall direct. Unless the motion is made within such period, the order of seizure shall have no further effect and shall be vacated on motion and any chattel seized thereunder shall be returned forthwith to the defendant. Upon the motion to confirm, the plaintiff shall have the burden of establishing the grounds for confirmation.

CPLR 7102 (e) provides:

The undertaking shall be executed by sufficient surety, acceptable to the court. The condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit, for the return of the chattel to any person to whom possession is awarded by the judgment, and for payment of any sum awarded by the judgment against the person giving the undertaking. A person claiming only a lien on or security interest in the chattel may except to the plaintiff's surety.

This Court finds the plaintiff has met the burden of establishing the grounds for the order. This Court has been presented with an affidavit and undertaking by the plaintiff, and finds it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit.

Accordingly, the motion is granted in all respects. Submit order.

So ordered.

Dated: **September 11, 2008**

ENTER:

ENTERED



SEP 16 2008 J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

NASSAU COUNTY
COUNTY CLERK'S OFFICE

BOB. ANTONIO I. BRANDVERM