

Soverign Bank v Crazy Freddy's Motorsports, Inc.

2009 NY Slip Op 31340(U)

June 10, 2009

Supreme Court, Nassau County

Docket Number: 005118/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

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

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

SOVEREIGN BANK,

Plaintiff,

INDEX NO.: 005118/2009
MOTION DATE: 03/31/2009
MOTION SEQUENCE: 001

-against-

CRAZY FREDDY'S MOTORSPORTS, INC.,
FREDERICK L. IPPOLITO, SOUTH SHORE
MOTORSPORTS, LLC, FATHER AND SON 170
ATLANTIC AVENUE CAR CORP., GUCCI
SERVICES, INC., HEROLD MOTOR CARS, INC.,
AUTOEXPO ENT. INC., d/b/a GREAT NECK
SUZUKI, RALLYE AUTOPLAZA, INC., BAY
RIDGE SUZUKI, BARD WHOLESALERS, INC.,
DEALERS LEASING CORP., BARON AUTO
OUTLET, INC., AUTO WORLD KIA SUZUKI
and JOHN DOES 1-10 being fictitious and
unknown to plaintiff, the person or parties
intended being those in possession of, or claiming
an interest in, if any the collateral described in
the complaint,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavits & Exhibits Annexed	1
Summons and Complaint & Exhibits Annexed	2
Memorandum of Law in Support of Order to Show Cause	3

Affidavit in Opposition of Frederick L. Ippolito	4
Affidavit in Opposition of Marc L. Treiber & Exhibits Annexed	5
Affidavit in Opposition of Omid Elyahou, Affirmation in Opposition of Craig Feldherr & Exhibits Annexed	6
Affidavit in Opposition of Edward Mkrtychian & Exhibits Annexed	7
Memorandum of Law in Opposition of Kenneth C. Henry, Jr., P.C.	8
Memorandum of Law of Feldherr & Feldherr, Esqs.	9
Supplemental Affidavit of Lee J. Mendelson & Exhibit Annexed	10

PRELIMINARY STATEMENT

The Plaintiff moves, by Order to Show Cause, for an Order enjoining the Defendants, pending final judgment, from converting monies paid for sales or leases of vehicles identified on Schedule A, the Vehicle Collateral; from transferring, accepting or encumbering or selling any of the Vehicle Collateral; from interfering with Sovereign's efforts to safeguard and preserve its Vehicle Collateral; and directing them to turn over to Sovereign monies paid, or to be paid on account of any Vehicle Collateral; and identifying the location of any of the Vehicle Collateral sold, leased or otherwise transferred.

Plaintiff further requests that Defendant Crazy Freddy's be directed to comply with the affirmative covenants in the Master Demand Note, Dealer Floor Plan Agreement, and Security Agreement (the "Floor Plan Documents"), that is to make records and books of account regarding the Vehicle Collateral available for inspection and copying.

In addition, the motion seeks an Order directing the Sheriff of any county on New York in which Vehicle Collateral is found, to seize that which is not voluntarily delivered to the Sheriff, and permission to break open, enter and search the premises of each of the Defendants, or such other locations at which the Vehicle Collateral is be determined to be. In furtherance of this authority, the Plaintiff seeks a determination that the Defendants identify the person or entity in possession of the Vehicle Collateral, identify

the owner of the premises at which it is located, and take all steps reasonably necessary to allow Sovereign to take possession of the Vehicle Collateral. It further requests that the Defendants be enjoined from the sale, disposition and/or transfer of the Vehicle Collateral.

BACKGROUND

The Plaintiff entered into a Floor Planning Agreement with the Defendant, Crazy Freddy's. These documents include a Master Demand Note, Dealer Floor Plan Agreement, Security Agreement, and Personal Guaranty by Defendant Ippolito.¹ These "Floor Plan Documents" were executed on September 18, 2007. By letter dated March 12, 2009, Crazy Freddy's terminated the Financing Agreement.²

According to the Verified Complaint, the Plaintiff advanced to Crazy Freddy's \$2,000,000 of the \$3,500,000 authorized under the Floor Plan Documents. As a consequence, the Plaintiff claims a security interest in 114 vehicles which the Plaintiff alleges were sold other than in the ordinary course of business, and out of trust, thereby entitling the Plaintiff to approximately \$2,000,000. The Plaintiff claims, among other remedies, the right to take possession of the Vehicle Collateral.

The Plaintiff alleges the following Eight Causes of Action in the Complaint:

<u>Cause of Action</u>	<u>Nature of the Claim</u>	<u>Defendants</u>
First	Breach of Floor Plan Agreements	Crazy Freddy's
Second	Costs and Expenses as per Floor Plan Agreement	Crazy Freddy's
Third	Possession of Vehicle Collateral	Crazy Freddy's
Fourth	Accounting for Whereabout of Vehicles	All Defendants
Fifth	Possession of Vehicle Collateral	Dealer Defendants

¹ Exhs. "B" — "E" respectively, attached to Order to Show Cause.

² Exh. "F" to Order to Show Cause.

Sixth	Unjust Enrichment	Dealer Defendants
Seventh	Personal Guaranty	Ippolito
Eighth	Plaintiffs Costs per Guaranty	Ippolito

In opposition to the motion, the Dealer Defendants acknowledge that the Plaintiff filed a UCC-1 in connection with the Floor Plan Agreement, but deny that they were not purchasers in the ordinary course of business. They further argue that the Plaintiff is not entitled to injunctive relief against them because they cannot establish irreparable injury, likelihood of success on the merits, or that the balance of equities is in its favor.

DISCUSSION

The Plaintiff's motion for a preliminary injunction against the Dealer Defendants is denied. "To establish entitlement to a preliminary injunction, the movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balancing of the equities in favor of granting the injunction."³ The Plaintiff fails on all three elements.

The Plaintiff is not likely to succeed on the merits against the Dealer Defendants. The fact that the Plaintiff may have perfected its lien by filing of the UCC-1 does not preclude the sale of the collateralized property in the ordinary course of business.⁴ *Castle* involved the sale of a vehicle subject to a perfected lien under a floor plan agreement. The sale of a vehicle by one dealer to another did not constitute a sale outside the ordinary course of business, and such a purchaser takes free from the security interest, with the sole exclusion of a pawnbroker.⁵

³ *Winzelberg v. 1319 50th Realty Corp., et al.*, 52 A.D.3d 700, 701 (2nd Dept. 2008).

⁴ *Bank of Utica v. Castle Ford, Inc.*, 36 A.D.2d 6 (4th Dept. 1971); see also *Sindone v. Farber, M-P Auto Salvage, Inc., et al.*, 105 Misc.2d 634 (Sup. Ct. Nassau Co., 1980 [Spatt, J.]).

⁵ *Id.* at 8, citing Uniform Commercial Code § 2-403.

UCC 9-320 provides in pertinent part as follows:

§ 9-320. Buyer of Goods

(a) Buyer in ordinary course of business. Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

There is no evidentiary showing, other than the alleged admission of Crazy Freddy's, that any of the vehicles were sold for less than fair value, or that Crazy Freddy's did not sell vehicles to other dealers, as a wholesaler, as part of the ordinary course of his business. The Court in *Castle* expressly rejected the contention that a purchaser who fails to investigate official records of financing statements cannot acquire the status of a good-faith purchaser.⁶ In fact, the recorded UCC-1, annexed to the Supplemental Affidavit of Lee J. Mendelson, simply indicates a filing against Crazy Freddy's. It gives no indication as to whether or not the lien applies to any particular vehicle, only that vehicles purchased by Crazy Freddy's with loan proceeds from Sovereign Bank are subject to a lien. This does not mean that every car in Crazy Freddy's possession is affected, and it does not put a person who searches the official records any evidence to the contrary. The Plaintiff was authorized to retain possession of the manufacturer's certificate of origin, title certificate, or other evidence of ownership⁷

Even if it did, however, the language of UCC 9-320 would exempt a purchaser in the ordinary course of business.

Neither does the Plaintiff overcome the burden of establishing irrevocable injury in the absence of injunctive relief. The Plaintiff is seeking monetary damages from both the

⁶ *Id.* at 9.

⁷ Exh. "C" to Order to Show Cause at ¶ 2.06.

Dealer Defendants, as well as Crazy Freddy's and Ippolito, the guarantor. The claimed damages are readily ascertainable, since the Schedule "A" annexed to the Complaint, sets forth the individual amount payable on account of each individual vehicle.

Lastly, although somewhat of a closer call, the equities do not favor the Plaintiff. The Plaintiff could have insisted on holding certificates of title, or having the lien of the Floor Planning Agreement appear on the face of the certificate, or both. Under such circumstances, they could have effectively precluded the transfer of title without payment under the Floor Plan Agreement, except for the perpetration of outright fraud.⁸

To the extent relevant, the relief sought against Crazy Freddy's and Ippolito is granted. They are directed to produce an inventory as to the location of each vehicle, the owner of the property at which located, and the person in custody of the vehicles, even though it appears that the Plaintiff has already received such information on at least 110 of them. The application to preclude the sale of the vehicles by Crazy Freddy's in the ordinary course of business is denied.

This constitutes the Decision and Order of the Court.

Dated: June 10, 2009


J.S.C.

ENTERED
JUN 15 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

⁸ See, for example *Genesee Regional Bank v. Palumbo*, 9 Misc.3d 823 (Sup. Ct., Monroe Co. 2005).