SHORT FORM ORDER

INDEX NUMBER: 07409-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 03-12-2009
Motion Submit Date: 05-01-2009
Motion Sequence No's.: 002 MG

X

GMAC, LLC,

Plaintiff,

-against-

RAMP CHEVROLET, INC., CHARLES R. RAMPONE, JOHN P. RAMPONE, RAMPAGE PERFORMANCE, INC., RAMP HUMMER, INC., and AUTOMOTIVE-REALTY ASSOCIATES, INC.,

Defendants.
X

Attorney for Plaintiff
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New York, New York 10022

Attorney for Defendant
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CORRECTED DECISION

ORDERED, that the motion (motion sequence number200) brought on by Order to Show Cause (BAISLEY, J.) dated February 24, 2009, for an Order of Seizure pursuant to CPLR Article 71 is granted as set forth herein below.

Plaintiff commenced this action for breach of contract, recovery under certain personal guarantees and replevin by the filing of a Summons and Verified Complaint simultaneous with the service of the Order to Show Cause which is currently before the Court. The action arises out of the relationship between the parties wherein plaintiff extended a line of credit to defendant, Ramp Chevrolet, Inc. ("Ramp"), a motor vehicle dealership, to finance Ramp's acquisition of vehicles for sale to the public. In conjunction with such loan, defendants executed various documents, including a Wholesale Security Agreement, dated December 9, 1988, wherein Ramp agreed to repay plaintiff the amount

advanced and further agreed that as security for said payment, plaintiff had a security interest in the vehicles and proceeds of sale thereof. The Wholesale Security Agreement further provided that in the even Ramp defaulted, plaintiff was entitled to take "immediate possession of said vehicles, without demand or further notice and without legal process."[1] On the same date, December 9, 1988, defendant, Charles Rampone, Jr., executed a Guaranty of all indebtedness of Ramp. Plaintiff alleges that pursuant to the Wholesale Security Agreement, a sum in excess of $12 million dollars was advanced to Ramp.

Subsequently, on or about November 24, 2004, plaintiff entered into a "Guaranty, Cross Default and Cross Collateralization Agreement" with defendants, Ramp, Automotive Realty Associates, Inc. ("Automotive Realty"), Rampage Performance, Inc. ("Rampage"), RHI, Charles Rampone, Jr. and John Rampone, for the explicit purpose of inducing plaintiff to continue to extend credit to defendants. Pursuant to the terms of this agreement, Ramp, Charles Rampone and John Rampone agreed to be jointly and severally liable for all of the obligations and defaults of any party thereto. Further, on November 24, 2004, Ramp executed a promissory note, guaranteed by Charles and John Rampone, in favor of GMAC in the amount of $262,500.00, payable in 59 monthly installments, commencing January 1, 2005. On April 27, 2006, Ramp entered into a further "General Security Agreement" with plaintiff whereby Ramp granted plaintiff a security interest in all of the following property: "inventory, equipment, fixtures, accounts receivable, contract rights, securities, cash, general intangibles, documents, instruments, chattel paper, investment property and commercial tort claims." Finally, by mortgage dated September 21, 2006, Automotive Realty granted plaintiff a collateral mortgage on property owned by Ramp.

Plaintiff states that in April of 2007 Ramp defaulted under its obligations under the finance agreements discussed above and continued in default through January of 2009. As a result thereof, on or about January 12, 2009, Ramp, Charles Rampone entered into a "Forbearance Agreement" wherein Ramp acknowledged (1) that it owed plaintiff the principal amount of $13,510,255.49, plus interest and other charges; (2) that plaintiff had a perfected security interest in the assets of Ramp, which were guaranteed; and (3) that Ramp was in default under the Wholesale Security Agreement based upon its failure to pay the amount listed in number "1" herein. Based on such representations, plaintiff agreed to forbear from exercising its rights under the collective loan documents. Additionally, defendants agreed to certain conditions, including but not limited to paying plaintiff $750 per day for a representative of plaintiff to remain on the defendants' premises to ensure compliance with the agreements; notifying plaintiff of all vehicle sales, to a payment schedule of all proceeds received by

[1] These vehicles include the vehicles found at Ramp's location at 1395 Route 112, Port Jefferson Station and defendant, Ramp Hummer, Inc. ("RHI"), location at 587 E. Jericho Turnpike, St. James.

defendants; increase the total cash collateral to $1,225,000.00 by the infusion of additional cash to plaintiff; and pay $40,000.00 per month to be applied toward outstanding balances. Simultaneously, defendants executed a "Voluntary Surrender of Collateral Agreement" which granted plaintiff the right to the return of possession of all collateral in which it held a security interest. At the about the same time, Ramp also executed a "Credit Balance Agreement" wherein it agreed to maintain a credit balance with plaintiff in the amount of $1,225,000.00. Finally, John Rampone, Charles Rampone and Automotive Realty executed continuing guarantees of payment by Ramp.

Upon Ramp's alleged failure to comply with the Forbearance Agreement, on February 12, 2009, a demand for immediate payment was sent to Charles Rampone in the full amount extended, plus interest and other charges, totaling $13,204,926.77. The within action ensued.

Plaintiff now moves by Order to Show Cause (BAISLEY, J.) for an Order of Seizure pursuant to CPLR Article 71, directing the Sheriff of Suffolk County, or any County in which relevant property is located, to seize from defendants, Ramp and any other entities with property subject to plaintiff's security interest, all collateral belonging to defendants located at the premises at 1395 Route 112, Port Jefferson Station, New York, 587 E. Jericho Turnpike, Saint James or wherever else such property may be found. Plaintiffs also sought injunctive relief and an accounting of receivables, but same was resolved by a stipulation between the parties, wherein defendants agreed, *inter alia,* that they would be restrained and enjoined from transferring or selling any vehicle except in the ordinary course of business and that the proceeds therewith would be delivered to plaintiff; that they would be enjoined from pledging or otherwise disposing of the collateral of the motor vehicles except in the ordinary course of business; that they would be enjoined from transferring or disposing of any accounts of collection or cash, checks or other monies except in the ordinary course of business and used to pay wages but not to pay any loans other than to plaintiff; to allow plaintiff to maintain an employee or designee of plaintiff at the dealership premises who will have custody of the motor vehicle keys and certificates of origin; and agreed to provide immediate access to and copies of all accounting, operating and financial records.

In support of the motion for an Order of Seizure, plaintiff submits an affidavit by David Roskin, ("Roskin"), Portfolio Manager of plaintiff, an attorney affirmation, copies of all of the financing and security documents described above and the Summons and Complaint. In sum, plaintiff argues that defendants are in violation of the financing and security agreements, including the forbearance agreement, and thus, it is entitled to an Order of Seizure. Plaintiff asserts that Ramp has sold vehicles that are part of its collateral and failed to remit the proceeds to plaintiff. Plaintiff argues that this

amounts to conversion of the collateral, which violates both the financing agreements and could also amount to a criminal offense under the Penal Law. Roskin explains that by defendants' failure to remit the proceeds from the sale of the vehicle financed by plaintiff, defendants are "out of trust" to the extent of $557,917.82, at the time of the making of the within application. Moreover, Roskin notes that defendants executed the Forbearance and Voluntary Surrender of Collateral Agreements which provide for the surrender of the collateral in the event of a default, without even the necessity of Court intervention. Based upon defendants' failure to comply with the terms of the collective financing agreements, plaintiffs demanded repayment of the total amount due and owing, $13,204,926.77. Plaintiff asserts that it is entitled to an Order of Seizure and that actually, pursuant to the terms of the parties' agreements, they are entitled to repossession even without Court intervention.

Defendants oppose the motion by affidavit of defendant John Rampone, president of Ramp and memorandum of law. The gravamen of defendants' opposition is that the financial downturn in the economy has negatively impacted the car dealership business and caused them to experience financial difficulties, leaving them unable to fulfill their obligations to plaintiff for a period of time. In essence, defendants admit they executed the financing and forbearance agreements and were unable to make payments according to their terms for a period of time, but have repaid most of the out of trust amounts, which they assert is only down to approximately $27,000.00. Defendants argue that they have demonstrated a good faith defense to plaintiff's claims and that the request for an Order of Seizure should be denied.

In reply, plaintiff reiterates that defendants converted the proceeds of the sale of the vehicles in violation of the parties' agreements and that defendants have a long history of defaults, beginning in June of 2007. Plaintiff asserts that defendants' claim that plaintiff has adequate security (the $1,225,000.00), is erroneous.

It has been repeatedly recognized that an agreement which is clear and unambiguous on its face must be enforced according to its terms. ***Greenfield v. Philles Records, Inc.***, 98 N.Y.2d 562, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002); ***Salerno v. Odoardi,***41 A.D.3d 574, 838 N.Y.S.2d 156 (2d Dept. 2007); ***Norma Reynolds Realty, Inc. v. Edelman,*** 29 A.D.3d 969, 817 N.Y.S.2d 85 (2d Dept. 2006).

CPLR §7101 authorizes plaintiff to bring an action for the recovery of chattel held by defendants. CPLR §7102 provides that upon an application for an Order of Seizure, plaintiff must include an

affidavit demonstrating its right to possession of the chattel, that the chattel is being wrongfully held by defendants and there is no defense known to plaintiff. The issue is which party has a superior right to possession of the chattel. ***Scutti Pontiac, Inc. v. Rund,* 92 Misc.2d 881, 402 N.Y.S.2d 144** (Supreme Ct. Monroe Co. 1978).

In the case before the Court, plaintiff has submitted to the Court the several agreements executed by defendants obligating them to pay and the personal guarantees of the individual defendants. Plaintiff has also submitted an affidavit from its Portfolio Manager, Roskin, demonstrating defendants' history of default and current default. The financing and security agreements evidence plaintiff's right to possession of the chattel described in those documents. In opposition, defendants do not challenge any of these documents, nor their repeated defaults. Although defendants claim they are no longer out of trust to the extent alleged by plaintiff in the moving papers, same is of no moment. Defendants agreed, most recently in the Forbearance Agreement, that in the event of a default in payment, plaintiff would be entitled to possession of the collateral without further Court intervention. Although the Court is not unsympathetic to defendants' plight during this downturn in the economy, it is without power to disregard the agreements entered into between the parties.

Based on the foregoing, plaintiff's application for an Order of Seizure is granted. Plaintiff shall submit an Order, with an undertaking in accordance with CPLR §7102 on ten (10) days notice of Settlement.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 1, 2009
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.