

MCAS Beaufort Fed. Credit Union v Aimes Towing & Collision

2009 NY Slip Op 32761(U)

November 16, 2009

Supreme Court, Nassau County

Docket Number: 010526/09

Judge: Daniel R. Palmieri

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SC

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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MCAS BEAUFORT FEDERAL CREDIT UNION,

TRIAL TERM PART: 47

Petitioner,

INDEX NO.:010526/09

-against-

**MOTION DATE:8-26-09
SUBMIT DATE:11-12-09
SEQ. NUMBER - 002**

**AIMES TOWING & COLLISION,
RAPID LIENS, INC., MICHAEL MONIZ,**

Respondents.

-----x

The following papers have been read on this motion:

- Order to Show Cause, dated 8-14-09.....1**
- Affirmation in Opposition, dated 7-17-09.....2**
- Affirmation in Opposition, dated 9-15-09.....3**
- Affirmation in Reply, dated 9-21-09.....4**

The petition to invalidate a mechanics lien pursuant to Lien Law §201-a and to obtain possession of a vehicle cannot be determined on the papers submitted and hence a trial is necessary. Although not attached to the petition, this Court has previously issued a decision dated June 26, 2009, which denied a previous application and which granted petitioner leave to submit an amended petition.

According to the papers, petitioner claims to have made a loan to John Moniz who has recently filed for bankruptcy and was given as collateral, a security interest in a 1977

Chevrolet Corvette by Michael Moniz, the vehicle's owner, who is John's father.

Respondent Aimes Towing & Collision (Aimes) claims a lien on the vehicle for repair and restoration work and has scheduled a sale thereof to be held under the auspices of respondent, Rapid Liens, Inc. (who has not responded).

The petition is supported by the affirmation of an attorney who does not profess to have any personal knowledge of the underlying facts of the loan and security agreement but who does have personal knowledge of his recent contacts with Aimes and an affidavit from an employee of petitioner.

The petition is opposed by Aimes and by Moniz who both agree that the work performed was appropriate, agreed upon and necessary. More importantly, Moniz claims that he never granted a security interest on the vehicle to petitioner and that the security agreement upon which petitioner relies is a forgery, not signed by him.

As noted in the Court's prior decision, the application seeks a summary determination and thus must be treated in the same manner as a motion for summary judgment. CPLR §3212.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which

have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d

Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Lien Law §184 governs the lien of a bailee of a motor vehicle. Lien Law §201 establishes the procedure for a sale of the vehicle that is subject to the lien and describes the persons to whom notice must be given. Lien Law §201-a permits a person entitled to notice of a sale pursuant to Section 201 to commence a special proceeding to determine the validity of the lien. A person who has a perfected security interest in the vehicle by having filed a financing statement pursuant to the Uniform Commercial Code or who is listed as a lien holder upon the certificate of title is entitled to notice and thus may dispute the lien pursuant to Lien Law §201-a. Here, the petitioner is listed as a lienholder on a mostly illegible copy of a South Carolina Certificate of Title.

Lien Law §204 sets forth the procedure for the disposition of the proceeds of the sale and provides that the lienor conducting the sale is first in priority and any balance remaining after satisfaction of the lien is to be paid to those entitled to notice of sale.

It is plain from the foregoing that summary disposition is inappropriate because there are material questions of fact including but not limited to whether petitioner obtained a security interest in the vehicle, whether such security interest, if obtained, was perfected or if not, was perfection required or waived. As to Aimes and Moniz, there are factual questions as to whether Aimes has a lien at all and if so, in what amount.

Based on the foregoing, a trial is required.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of CCP on December 7, 2009, at 9:30 a.m.

A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the trial.

The directive with respect to a trial is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee as he or she deems appropriate.

Petitioner's request for discovery made for the first time in the reply submission of its attorney is denied since such request was not part of the original application and respondents have not been afforded an opportunity to respond. Since this is a special proceeding, leave of Court is required in order to obtain discovery. CPLR §408. The Court notes that in a conference order dated September 24, 2009, the parties agreed to defer discovery pending settlement discussions.

In view of the foregoing, the conference presently scheduled for November 30, 2009 is cancelled.

Pending further order, the temporary restraints contained in the order to show cause dated October 14, 2009, shall remain in full force and effect.

This shall constitute the Decision and Order of this Court

ENTERED

NOV 18 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

ENTER

DATED: November 16, 2009



HON. DANIEL PALMIERI
Acting Supreme Court Justice