

**Matter of Lewitin v Manhattan Mini Stor.**

2010 NY Slip Op 30923(U)

April 9, 2010

Supreme Court, NY County

Docket Number: 112593/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon John A. Malley  
Justice

PART 11

Lewittin  
Manhattan Mini Storage  
-v-

INDEX NO. 112593/09  
MOTION DATE 11-16-09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this petition motion to/for vacate lcv.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the attached memorandum decision + order

**FILED**  
APR 20 2010  
NEW YORK  
COUNTY CLERKS OFFICE

RECEIVED  
APR 16 2010  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

*Handwritten signature*

Dated: April 9, 2010

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
In the Matter of the Application of  
MARGUERITE A. LEWITIN,

Index No. 112593/09

Petitioner,

-against-

MANHATTAN MINI STORAGE AND  
"JOHN" OR "JANE DOE"

Respondents.  
-----X

JOAN A. MADDEN, J.:

**FILED**  
APR 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner moves to vacate the sale of her personal property stored in respondent's storage facility or for a judgment against respondent for the value of her property. Respondent opposes the petition, which is granted to the extent set forth below.

Background

Petitioner Marguerite A. L. Lewitin ("Lewitin") entered into a contract with respondent Manhattan Mini Storage ("MMS") on October 23, 2004. Under the contract, Lewitin stored her personal property with MMS in exchange for a monthly fee of \$802. From May to August of 2009, Lewitin failed to pay the monthly fee. MMS sent a notice to Lewitin dated June 26, 2009, stating that an outstanding balance was due and failure to pay the balance would result in the sale of her property on August 26, 2009.

In his affidavit, Johnny Tam, a manager at MMS, stated that he attempted to contact Lewitin on the phone on five separate occasions in August 2009 to settle the outstanding balance and that messages were left but no timely responses were received. The sale of Lewitin's property was conducted on August 26, 2009 and was sold to a "Joe P" for the sum of \$2,900.

Lewitin contends that she never received a notice of sale from MMS and admits to receiving only one phone call from MMS on August 30, 2009, which she returned on September

2, 2009. At that time, she was informed that her property had been sold but not yet transferred to the purchaser. Lewitin immediately filed an Order to Show Cause to vacate the sale pursuant to section 7-210 of the Uniform Commercial Code and served it upon MMS on September 3, 2009. The Order to Show Cause stayed the transfer or removal of Lewitin's property. Lewitin's attorney subsequently informed, however, that her property had been turned over to the purchaser.

MMS opposes the application, asserting that as self-service storage facility as defined under section 182(1)(a) of New York's Lien Law, it had a lien of Lewitin's property under Lien Law section 182(6)<sup>1</sup> due to Lewitin's failure to pay monthly occupancy charges. Additionally, MMS asserts that it properly enforced the lien by a public sale and provided proper notice to Lewitin by certified mail in accordance with section 15 of the contract and section 182 of Lien Law. In support of this position, MMS attaches a copy of the notice sent to Lewitin and an electronic return receipt indicating that the delivery was made by certified mail to Lewitin's address and delivered on July 17, 2009.<sup>2</sup>

In response, Lewitin argues that she was not properly notified of the sale of her personal property. Lewitin cites Lien Law § 182 which states that a notice of sale must be "personally

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<sup>1</sup>Section 182(6) provides that:

The owner of a self-storage facility has a lien upon all personal property stored at a self-service storage facility for occupancy fees or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to law and any other charges pursuant to the occupancy agreement. The lien provided for in this section is superior to any other lien or security interest. The lien attaches as of the date the personal property is brought to the self-service storage facility.

<sup>2</sup>MMS also argues that this proceeding is not one for the enforcement of a warehouseman's lien under section 7-210 of the UCC as alleged in the petition and Lewitin does not refute this position.

[\*4]

delivered . . . or sent by registered mail or certified mail, return receipt requested.” She also notes that section 15 of her contract with MMS provides for service of notices by certified mail, return receipt requested. Lewitin argues that while MMS sent the mail via certified mail, it did not request the return receipt as required by statute. Furthermore, Lewitin notes that MMS’s document showing proof of delivery shows that the item was marked “delivered” to a zip code different from her own.

In its supplemental response, MMS argues that the notice of sale was addressed correctly and sent properly via certified mail. MMS asserts that service by mail is complete regardless of delivery where the mailing itself complies with all requisites, citing 14 Second Ave. Realty Corp. v. Szalay, 16 A.D.2d 919 (1<sup>st</sup> Dept. 1962). MMS also contends that service is not invalidated if the intended recipient fails to claim a certified letter, Saffold v. Fellows, 219 A.D. 865 (4<sup>th</sup> Dept. 1927) or claims that the mailing was not received. Engel by Engel v. Lichterman, 62 N.Y.2d 943 (1984).

### Discussion

Lien Law § 182 governs liens held by self-storage facilities, like MMS, on property stored by occupants, such as Lewitin. Here, there is no dispute that MMS had a lien on Lewitin’s property and that Lewitin owed MMS for unpaid occupancy fees. At issue here is whether Lewitin was properly served with notice under section 182(7)<sup>3</sup> which provides for the

<sup>3</sup> Lien Law section 182(7), entitled, Enforcement of lien, provides that:

An owner’s lien may be enforced by public or private sale of the goods that have been removed from the storage space at a self-service storage facility, in block, or in parcel at any time or place and on any terms which are commercially reasonable after notice to all persons known to claim an interest in the goods. The notice shall include an itemized statement of the amount due, the description of the property subject to the lien, the nature of the proposed sale, a demand for payment within a specified time not less than ten days from receipt of notification and a conspicuous statement that unless the claimant pays within that time the goods will be advertised for sale and sold at a public or private sale in a commercially reasonable manner. The notice shall further include the time and place of any public or private sale and it shall state that any

[\* 5]

enforcement of a lien upon stored property upon notice. That provision requires, in relevant part, that the notice “be personally delivered to the occupant or sent by registered or certified mail, return receipt requested, to the occupant at the last address provided by the occupant, pursuant to the occupancy agreement.”

Here, the record is clear that MMS failed to comply with the mailing requirements set forth in Lien Law § 182. While the notice of sale was sent via certified mail, it was not sent return receipt requested. The return receipt function allows the sender to obtain a copy of the signature of the addressee or addressee’s agent, date delivered and the address of delivery. L&J Plumbing & Heating Co., v. Gateway Demolition Corp., 176 Misc. 2d 277, 278 (NY Sup Ct 1998). MMS has submitted proof of delivery in what appears to be an electronic return receipt, but this document lacks the signature of the addressee and indicates that the mailing was delivered to a different zip code. There is no indication that Lewitin would have received such a mailing.

When, as here, a storage facility fails to comply with notice requirements, but the sale of the property has already occurred and a motion to vacate a lien is therefore rendered academic, an occupier of a storage facility is entitled to seek damages resulting from the improper sale of his or her property. see Matter of Anderson v. Pods, Inc., 70 AD3d 820 (2<sup>nd</sup> Dept 2010) (where the sale of petitioner’s goods was not properly noticed under Lien Law § 187, defendant was liable for damages resulting from said sale). The court notes, however, that any damages proven by Lewitin can be offset by the any amounts she still owes to the storage facility.

Finally, the cases relied on by MMS to argue that service was proper are not dispositive

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person claiming an interest in the goods is entitled to bring a proceeding hereunder within ten days of the service of the notice if he disputes the validity of the lien, or the amount claimed. The notice shall be personally delivered to the occupant, or sent by registered or certified mail, return receipt requested, to the occupant to the last address provided by the occupant, pursuant to the occupancy agreement.

as these cases do not address the issue here which concerns failure to comply with statutory requirements for service.

Conclusion

In view of the above, it is

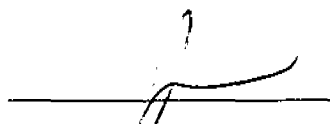
ORDERED that the petition is granted to the extent of referring the issue of the amount of damages that Lewitin incurred as a result of the improper sale, less any amount she still owes in storage fees, to a Special Referee to hear and report with recommendations, except that in the event of a proper filing of a stipulation as permitted by CPLR 4317, the Special Referee or other person designated as a referee shall determine such issue; and it is further

ORDERED that the amount of damages to which Lewitin is entitled shall be determined by the court upon receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or based on the determination of the Special Referee or the designated Referee; and it is further

ORDERED that on or before May 6, 2010, counsel for Lewitin shall serve a copy of this order with notice of entry on the Clerk of the Motion Support Office (Room 119) at 60 Centre Street who is directed to place this matter on the calendar of the Special Referee Part (Part 50R) for the earliest convenient date.

The court is mailing a copy of this decision and order to counsel for the parties.

DATED: April 9, 2010

  
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J.S.C.

**FILED**  
APR 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE