

Weiss v North Shore Motor Group, Inc.

2010 NY Slip Op 32535(U)

September 13, 2010

Supreme Court, Nassau County

Docket Number: 012622-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
MICHAEL S. WEISS and JONATHAN M. WEISS,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiffs,

Index No: 012622-10

- against -

Motion Seq. No: 1

Submission Date: 8/27/10

**NORTH SHORE MOTOR GROUP, INC.,
R.A. COHEN a/k/a RICK COHEN, BANK OF AMERICA,
DCFS USA LLC d/b/a MERCEDES-BENZ FINANCIAL,
DAIMLER FINANCIAL SERVICES, DAIMLER
FINANCIAL and/or DAIMLER TRUCK FINANCIAL,
GENERAL MOTORS ACCEPTANCE CORP. d/b/a
GMAC FINANCIAL SERVICES, BMW FINANCIAL
SERVICES N.A. LLC d/b/a BMW BANK OF NORTH
AMERICA and VW CREDIT, INC. d/b/a VOLKSWAGEN
CREDIT, INC., AUDI FINANCIAL SERVICES and/or
BENTLEY FINANCIAL SERVICES,**

Defendants.
-----X

The following papers have been read on this Order to Show Cause:

- Order to Show Cause, Affirmation in Support,**
- Affidavits in Support and Exhibits.....X**
- Emergency Affirmation in Support and Exhibit.....X**
- Affidavit in Opposition of S. Ruiz and Exhibits.....X**
- Affirmation in Opposition of P. Warmuth and Exhibit.....X**
- Affirmation in Opposition of M. Wellman and Exhibits.....X**
- Correspondence dated August 12, 2010 and Enclosures.....X**
- Affirmation of M. Rosenberg.....X**
- Affirmation in Opposition of J. McGovern and Exhibits.....X**

Correspondence dated August 27, 2010 and Enclosure.....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiffs Michael S. Weiss (“Michael”) and Jonathan M. Weiss (“Jonathan”) (collectively “Plaintiffs”) on July 1, 2010 and submitted on August 27, 2010, seeking certain injunctive relief. In their August 27, 2010 letter to the Court, Plaintiffs advised the Court that the Order to Show Cause has been resolved as to certain vehicles at issue, and others are expected to be resolved, at which time Plaintiffs will withdraw their Order to Show Cause as to those vehicles, without prejudice. Plaintiffs’ letter included a copy of a stipulation between counsel for Plaintiffs and counsel for Defendants NSMG and Cohen that the Court so-ordered on August 8, 2010. Pursuant to that stipulation, Plaintiff withdrew its Order to Show Cause as against NSMG and Cohen.

In light of agreements reached between Plaintiffs and several Defendants regarding some of the vehicles at issue in the Order to Show Cause, and Plaintiff’s representation to the Court that tentative agreements have been reached regarding other vehicles at issue in the Order to Show Cause, the Court’s decision only addresses Plaintiffs’ applications for relief regarding: 1) the 2010 Audi automobile, Vehicle Identification Number (“VIN”) WAUVVAFR9AA009551 (“2010 Audi”) addressed in paragraphs (b) and (l) of the Order to Show Cause, and 2) the 2005 Mercedes Benz S500 4matic, VIN WDBNG84JX5A455246 (“2005 Mercedes”) addressed in paragraphs (c), (d) and (l) of the Order to Show Cause. In Plaintiffs’ August 27, 2010 letter to the Court, Plaintiffs advised the Court that the parties have been unable to resolve the issues regarding the 2010 Audi and 2005 Mercedes and asked that the Court determine the relief sought in 1) paragraphs (a), (b), and (l) as to the 2010 Audi, and 2) paragraphs (a), (c), (d) and (l) as to the 2005 Mercedes. Given, however, that paragraph (a) of the Order to Show Cause addresses only a 2010 Mercedes, and that Plaintiffs advised the Court that the parties have reached an agreement regarding the 2010 Mercedes, the Court will not address paragraph (a) of the Order to Show Cause.

For the reasons set forth below, the Court denies Plaintiffs’ Order to Show Cause insofar as it seeks relief with respect to the 2005 Mercedes and 2010 Audi, and vacates the TRO only as it applies to those vehicles.

BACKGROUND

A. Relief Sought

Plaintiffs seek an Order 1) enjoining and restraining Defendants or anyone acting on their behalf from attempting to repossess or take possession of the 2010 Audi until this action is resolved; 2) compelling Defendants to return the 2005 Mercedes to Plaintiff Michael; 3) enjoining and restraining Defendants or their agents from selling, conveying or transferring ownership of the 2005 Mercedes or, if the 2005 Mercedes has already been sold, enjoining Defendants from transferring or distributing such proceeds until this action has been resolved; and 4) enjoining Defendants or their agents from attempting to enforce any finance agreements purportedly entered into on behalf of Plaintiffs regarding the 2005 Mercedes and 2010 Audi, including finding Plaintiffs in default under these agreements or from notifying any credit reporting company that these loans are in default.

The Court issued a temporary restraining order (“TRO”) which, insofar as the 2005 Mercedes and 2010 Audi are concerned, ordered that, pending the hearing of this motion, 1) Defendants or anyone acting on their behalf are restrained from attempting to repossess or take possession of the 2010 Audi; 2) Defendants or anyone acting on their behalf are restrained from selling, conveying or transferring ownership of the 2005 Mercedes or, if the 2005 Mercedes has already been sold, Defendants are restrained from transferring or distributing such proceeds; 3) Defendants or anyone acting on their behalf are restrained from obtaining financing on behalf of Plaintiffs for these vehicles; and 4) Defendants or anyone acting on their behalf are restrained from attempting to enforce any finance agreements purportedly entered into on behalf of Plaintiffs in relation to the 2005 Mercedes and 2010 Audi, including finding Plaintiffs in default under these agreements or from notifying any credit reporting company that these loans are in default, ~~except that Defendants may attempt to repossess the 2005 Mercedes in accordance with~~ all governing laws and Bank of America may hold the vehicle until further order of the Court.

In the Complaint, Plaintiffs allege certain improprieties by Defendants in connection with Plaintiffs’ leasing and purchase of certain vehicles including but not limited to 1) submitting forged documents; and 2) entering into agreements, purportedly on behalf of Plaintiffs, without Plaintiffs’ consent or authority. The first through tenth causes of action are asserted against

Defendants Cohen and NSMG only. In the eleventh cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that there are no monies due and owing from Michael on the 2005 Mercedes. In the twelfth cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that Jonathan is the lawful owner of the 2010 Audi.

B. The Parties' History

In his Affidavit in Support, Michael S. Weiss ("Michael") affirms as follows:

On or about February 2005, Michael leased the 2005 Mercedes automobile ("2005 Mercedes") from Rallye Motors, LLC ("Rallye"). Pursuant to this agreement, he entered into a lease agreement with DCFS USA LCC d/b/a Mercedes-Benz Financial ("Mercedes-Benz Financial") (Ex. A to Michael Aff.). In or about September of 2007, he entered into an agreement with Defendant R.A. Cohen a/k/a Rick Cohen ("Cohen") of North Shore Motor Group, Inc. ("NSMG") to purchase a 2008 Mercedes automobile ("2008 Mercedes") from NSMG.¹ As part of this agreement, NSMG was to immediately pay off the remaining balance due under the lease for the 2005 Mercedes and return the 2005 Mercedes to Mercedes-Benz Financial. At the time that Michael traded the 2005 Mercedes to NSMG, there were approximately five (5) lease payments still due on the 2005 Mercedes totaling approximately \$7,545.75, and the loan was current.

According to Mercedes-Benz Financial, despite NSMG's agreement to pay off the existing financing on the 2005 Mercedes, there is \$2,397.14 outstanding on the loan for that vehicle, and the account has been referred to collection. Mercedes-Benz Financial also advised Michael that the address for the loan on the 2005 Mercedes is 175 East Shore Road, Great Neck, New York which is the address of Cohen's office ("Cohen Address"). Michael has made no lease payments on the 2005 Mercedes since trading that vehicle to NSMG and has not authorized anyone to make payments on his behalf. He also never authorized anyone to change the address on the account to the Cohen Address.

On or about September 7, 2007, through NSMG, Michael entered into an agreement (Ex. B to Michael Aff.) to purchase a 2008 Mercedes automobile ("2008 Mercedes") from Silver Star

¹ The Complaint alleges that Cohen is the Chief Executive Officer of NSMG whose principal place of business is located at 175 East Shore Road, Great Neck, New York.

Auto Resources, LLC (“Silver Star”). Pursuant to this agreement, Michael agreed to finance \$120,800.03 for the purchase of the 2008 Mercedes, and the financing was obtained through Bank of America (“BOA”). Pursuant to his agreement with NSMG, the total sale price of the vehicle, with finance charges, was \$158,300.00, less a \$3,500.00 deposit that he paid to NSMG. Thus, Michael financed \$154,800 for the purchase of the 2008 Mercedes.

In or around June of 2009, Cohen advised Michael that he had a customer interested in purchasing the 2008 Mercedes, and Cohen wanted to sell Michael a 2009 Mercedes automobile (“2009 Mercedes”). Michael agreed to sell the 2008 Mercedes to NSMG in exchange for NSMG’s agreement to pay off the entire loan balance on that vehicle, which was approximately \$85,551.62. Despite that agreement, as of June of 2010, BOA is still owed approximately \$63,645.48 with respect to the 2008 Mercedes. Cohen has made no payments on the 2008 Mercedes since June of 2009 and has not authorized anyone to make payments on his behalf. Michael and NSMG had agreed that NSMG would immediately pay off the existing financing on this vehicle, and Michael did not authorize NSMG to continue making payments as if Michael were still the owner of the 2008 Mercedes.

In June of 2009, Michael also agreed to purchase the 2009 Mercedes from NSMG, agreeing to pay a purchase price of approximately \$148,00.00, and obtaining financing for this purchase through Mercedes-Benz Financial. In or around April of 2010, Cohen advised Michael that he had a customer who was interested in purchasing the 2009 Mercedes from Michael, and Cohen wanted to sell Michael a 2010 Mercedes automobile (“2010 Mercedes”).

In April of 2010, Michael agreed to sell the 2009 Mercedes to NSMG in exchange for NSMG’s agreement to pay off the loan balance due to Mercedes-Benz Financing on the 2009 Mercedes, which was approximately \$122,533.66. Michael subsequently learned that NSMG did not satisfy this outstanding balance.

Also in April of 2010, Michael entered into an agreement to purchase the 2010 Mercedes from NSMG for \$123,255.00. He paid NSMG a \$50,000 down payment, consisting of a \$40,000 check (Ex. C to Michael Aff.) and \$10,000 in cash, and agreed to pay the balance of the purchase price directly to NSMG via monthly payments of \$1,200. Michael affirms that he never executed any documents memorializing his agreement to finance his purchase of the 2010 Mercedes.

Michael paid \$1,200 to NSMG in April, May and June of 2010 towards the 2010 Mercedes. Michael affirms that he recently learned that Daimler Financial Services (“DFS”) is taking the position that he financed the 2010 Mercedes pursuant to an agreement with DFS, and that DFS is currently owed \$126,499.84 on this loan, which is now in default. Michael avers that he never agreed to finance the 2010 Mercedes with DFS, and never executed any documents with DFS for the purchase of the 2010 Mercedes. Michael submits that any documents purporting to memorialize such an agreement were forged.

Michael affirms that, upon information and belief, NSMG and/or Cohen 1) sold the 2005 Mercedes, 2008 Mercedes and 2009 Mercedes and failed to pay off the existing financing as agreed; 2) fraudulently obtained financing with DFS, on Michael’s behalf, without his consent; and 3) failed to apply Michael’s \$50,000 down payment or subsequent monthly payments towards the purchase of the 2010 Mercedes and, instead, misappropriated those funds for their own use. In addition, although Michael no longer possesses the 2005, 2008 and 2009 Mercedes, the records of certain finance companies reflect that he still owes money towards these vehicles.

In his Affidavit in Support, Jonathan M. Weiss (“Jonathan”) affirms as follows:

Jonathan was the owner of a 2001 Cadillac Escalade (“Cadillac”) that he purchased with financing through General Motors Acceptance Corporation (“GMAC”). On or about June of 2009, Jonathan entered into an agreement with NSMG pursuant to which Jonathan agreed to trade the Cadillac to NSMG and NSMG agreed to pay off the existing financing on the Cadillac which was approximately \$5,000. Pursuant to this agreement, Jonathan delivered the Cadillac to NSMG and executed documents to effect the transfer of ownership to NSMG.

Jonathan recently learned that NSMG failed to pay off the existing financing on the Cadillac and there remains a balance of \$3,730.00 owed to GMAC. In addition, the GMAC invoices are being sent to the Cohen Address. Jonathan affirms that he never lived or received mail at the Cohen Address and never authorized anyone to send mail to him at that Address. In addition, the contact telephone number that GMAC has for this account is a cellular telephone number that is assigned to Cohen.

As part of the agreement regarding the Cadillac, Jonathan agreed to purchase a 2010 Audi S5 (“2010 Audi”) from NSMG. NSMG, however, could not immediately locate the 2010 Audi

and agreed, instead, to lend the 2009 BMW to Jonathan in the interim. Although Jonathan never agreed to purchase the 2009 BMW or to obtain a loan with BMW Financial Services NA, LLC d/b/a BMW Bank of North America (“BMW Financial Services”), the records of BMW Financial Services reflect that Jonathan obtained a loan with that institution to pay for the purchase of the 2009 BMW. Jonathan also avers that he never signed any finance documents with BMW Financial, or any other finance company, for the purchase of the 2009 BMW. According to the BMW Financial, this loan is now in default.

NSMG located the 2010 Audi which Jonathan agreed to purchase from NSMG for approximately \$48,000. Jonathan paid NSMG in full for the 2010 Audi by check (Ex. D to Jonathan Aff.) and returned the loaned 2009 BMW to NSMG.

Subsequently, VW Credit, Inc. d/b/a Volkswagen Credit, Inc. (“VW Credit”) notified Jonathan that he had obtained a loan with VW Credit to pay for the purchase of the 2010 Audi. According to VW Credit, there is \$59,696.80 due on this loan, as reflected by the June 22, 2010 pay-off letter (Ex. E to Jonathan Aff.) that VW Credit provided to Jonathan at his request. It is VW Credit’s position that this loan is in default. Jonathan affirms, however, that he never signed any loan documents with VW Credit, or any other finance company, for the purchase of the 2010 Audi. Moreover, the billing address on this loan is a location in Jericho, New York where Jonathan has never lived, received mail or authorized anyone to send him mail.

Jonathan submits that 1) NSMG and/or Cohen failed to pay off the existing loan on the Cadillac; 2) NSMG and/or Cohen fraudulently obtained financing, on behalf of Jonathan, with GMAC, BMW Financial and VW Credit without Jonathan’s consent or authority; and 3) NSMG and/or Cohen have failed to use the money he paid for the 2010 Audi to pay for that vehicle.

No party has submitted opposition to Plaintiffs’ application with respect to the 2005 Mercedes.

Counsel for VW Credit (“Counsel”) has submitted an opposition to Plaintiffs’ application with respect to the 2010 Audi in which he affirms as follows:

In the twelfth cause of action in the Complaint, Plaintiffs allege that Jonathan paid all that is due and owing for the 2010 Audi and seek a judicial declaration, *inter alia*, that Jonathan is the lawful owner of the 2010 Audi. VW Credit, however, has not yet interposed an Answer to the

Complaint but will submit an Answer in which it denies the allegations in this cause of action.

Counsel provides a copy of the retail sales installment contract for the 2010 Audi (Ex. A to McGovern Aff.) which is between Jonathan, as buyer, and Audi Storm Motors, as seller. Pursuant to this contract: 1) VW Credit provided \$65,594.47 in financing; 2) the buyer was to make 60 monthly payments in the amount of \$1,322.88; and 3) VW Credit has a security interest in the 2010 Audi.

Counsel notes, further, that Plaintiffs do not allege that VW Credit participated in the allegedly fraudulent conduct of Cohen and NSMG. VW Credit submits that Plaintiffs now seek to benefit from that alleged fraud by “seeking the court’s permission to retain what can amount to no more than ill-gotten goods” (McGovern Aff. at ¶ 8). VW Credit also contends that, if the alleged fraud in fact occurred, then Plaintiffs have not acquired any right or title to the subject vehicles.

Finally, Counsel notes that Plaintiffs have not provided any sales contracts, proof of registration or titles with respect to the vehicles at issue and, therefore, the Court should deny their application because they have failed to present competent proof of ownership of the vehicles at issue. Moreover, Counsel affirms, VW Credit has been damaged because \$40,670.05 remains outstanding on the loan for the 2010 Audi.

C. The Parties’ Positions

Plaintiffs submit that they have demonstrated their right to injunctive relief. First, Plaintiffs contend that they have shown a likelihood of success on the merits by demonstrating that 1) Plaintiffs fulfilled their obligations under the various contract with NSMG and Cohen; 2) with respect to the 2010 Audi, NSMG obtained financing in Jonathan’s name without Jonathan’s permission; and 3) the loan on the 2010 Audi is currently in default.

Plaintiffs also submit that they will suffer irreparable injury without the requested injunctive relief because, as a result of NSMG and Cohen’s allegedly improper conduct, Plaintiffs are now the subject of collection efforts for the vehicles at issue. In addition, injunctive relief will ensure that NSMG and/or Cohen do not further dissipate any monies wrongfully obtained as a result of their allegedly improper financing activities.

Finally, Plaintiffs argue that the balance of the equities favor them because Plaintiffs have

spent large sums of money on the vehicles at issue, and are now subject to collection activities as a result of Defendant NSMG and/or Cohen's improper conduct. Plaintiffs also argue that the requested injunctive relief will not unduly burden Defendants.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged

injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Application of these Principles to the Instant Action

The Court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits insofar as the 2005 Mercedes and 2010 Audi are concerned and, accordingly, denies Plaintiffs' application with respect to those vehicles. The Court notes that the only causes of action in the Complaint against Defendants, other than NSMG and Cohen, involve requests for declaratory judgment as to the ownership and obligations regarding the 2005 Mercedes and 2010 Audi. Plaintiffs have not alleged that the financing companies at issue, other than NSMG, have engaged in improper conduct and the fact that Plaintiffs have requested declaratory judgments suggests their recognition that there are factual issues in dispute that require the Court's resolution. Moreover, VW Credit has properly directed the Court's attention to the fact that 1) many of the assertions by Plaintiffs in their Affidavits in Support are hearsay statements; and 2) Plaintiffs have not presented facts from which the Court may conclude that VW Credit had knowledge of the allegedly improper conduct of Defendants Cohen and NSMG.

In addition, the Court concludes that most of the relief sought by Plaintiffs, including 1) enjoining and restraining Defendants from attempting to repossess or take possession of the 2010 Audi until this action is resolved; and 2) compelling Defendants to return the 2005 Mercedes to Plaintiff Michael, are compensable by money damages. Thus, Plaintiffs have not demonstrated irreparable harm without the requested injunctive relief.

The Court is aware that no opposition has been submitted with respect to Plaintiffs' application regarding the 2005 Mercedes. Notwithstanding that lack of opposition, for the reasons outlined above, the Court finds that Plaintiffs have not demonstrated their right to injunctive relief as to that vehicle.

In light of the foregoing, the Court 1) denies Plaintiff's Order to Show Cause with respect to the 2005 Mercedes and 2010 Audi; and 2) vacates those portions of the TRO applicable to the 2005 Mercedes and 2010 Audi.

All matters not decided herein are hereby denied.

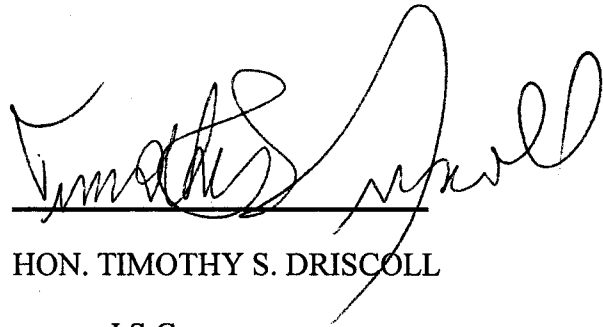
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on September 28, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 13, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

SEP 15 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE