

**First Natl. Community Bancorp, Inc. v Dybvig**

2010 NY Slip Op 32618(U)

September 8, 2010

Supreme Court, New York County

Docket Number: 103895/10

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

First National Community Bancorp  
+ RoseK  
- v -  
Dy BV19

INDEX NO. 103895/10  
MOTION DATE 5/17/10  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided by the answer by  
memorandum decision and order.

NB PC 10/18/10 at 11 AM

set at end

**FILED**  
SEP 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

NYS SUPREME COURT  
RECEIVED  
SEP 08 2010  
MOTION SUPPORT OFFICE

Dated: 9/8/10

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----X  
FIRST NATIONAL COMMUNITY BANCORP,  
INC. and MICHAEL A. ROSEN,

Index No.: 103895/10

Plaintiffs,

DECISION & ORDER

-against-

NED DYBVIG,

Defendant.

-----X

**FILED**

SEP 15 2010

**NEW YORK  
COUNTY CLERK'S OFFICE**

JANE S. SOLOMON, J.:

This action for replevin of a motor vehicle, was commenced by Plaintiffs First National Community Bancorp, Inc. ("FNCB") and Michael A. Rosen (Rosen) by service of the summons and complaint together with an order to show cause for a preliminary injunction pursuant to CPLR § 6301 and for an order of seizure pursuant to CPLR § 7102. The motion is decided as follows.

FACTS

On March 7, 2008, Rosen purchased a new 2008 Audi for \$67,760 from a car dealership in Pennsylvania. The purchase was financed with a loan from FNCB, which retained the title for the 2008 Audi as collateral for the loan to Rosen. Rosen made all loan payments to FNCB through April 2009. On March 21, 2009, Rosen purchased a new 2009 Audi for \$78,495.78 from Riverside Audi (Riverside), a car dealership located in New Jersey. Rosen and Riverside executed a purchase and trade-in agreement ("Rosen Agreement") whereby Rosen agreed to trade in the 2008 Audi as

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partial payment on the new 2009 model (Purchase Agreement, annexed to Affidavit of Michael Rosen as Ex. C). Riverside agreed to pay the outstanding balance remaining on FNCB's loan to Rosen. Rosen signed a power of attorney to Riverside, giving it the right to sign title over to a new purchaser (Affirmation in Support, Ex. C). Despite FNCB and Rosen's repeated demands, Riverside never paid FNCB. On August 14, 2009, Riverside filed a petition for chapter 11 bankruptcy relief.

At Riverside, the 2008 Audi was displayed for sale as a Certified Pre-Owned vehicle. Dybvig, who was interested in purchasing an Audi, negotiated with Riverside over the price and, on April 4, 2009, he purchased the car for \$59,622.88. Riverside provided Dybvig with temporary plates and registration for the car and promised that it would mail him the title document in a couple of weeks. He paid for the car with a cashier's check and drove it home to New York. Over the next few months, Dybvig repeatedly contacted Riverside requesting title to the car and was told that commonplace logistical problems were holding up the transfer of title (Dybvig Affidavit, page 4). Despite Riverside's promises, Dybvig never received a title in his name.

The parties seem to agree that, pursuant to an agreement dated September 21, 2009, subsequently approved by a bankruptcy court, Riverside Audi sold its business and substantially all of its assets (Purchase and Sale Agreement,

annexed to Affidavit of Michael Rosen as Ex. F), free and clear of liens. As is common in that field, presumably the lien of FNCB should have attached to the proceeds of that sale. Nevertheless, FNCB does not explain the status of any claim it should have made in the bankruptcy case.

In October 2009, an agent from a repossession company hired by FNCB contacted Dybvig claiming that FNCB had an ownership interest in the car. Dybvig emailed the collection company a copy of the purchase order and did not hear from them again. Dybvig received a written demand from Plaintiffs for possession of the car on March 21, 2010 and this action was thereafter commenced as indicated. The order to show cause temporarily restrained Dybvig from disposing of the car of removing it from the state.

#### CLAIMS

Plaintiffs claim that Dybvig is wrongfully retaining possession of the 2008 Audi on the grounds that Rosen is the titled owner of the car, while FNCB has a lien on it and possession of the title document. Plaintiffs together seek an order enjoining Dybvig from selling or disposing of the 2008 Audi and directing Dybvig to turn over possession of the car.

An order of seizure may be granted pursuant to CPLR § 7102(d) when the court finds "that it is probable the plaintiff will succeed on the merits and the facts are as stated in the

affidavit . . . ." An application for an order of seizure "may be defeated by a showing of a good-faith defense to movant's claim" (*East Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 102 AD2d 157, 161 [1st Dep't 1984]).

A preliminary injunction may be granted pursuant to CPLR § 6301 when the party seeking the injunction "demonstrate[s] a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

#### DISCUSSION

Plaintiffs argue that Dybvig does not have good title because he acquired the Audi from a thief, namely Riverside. Dybvig counters that under New Jersey law he is a bona fide good faith purchaser who purchased a vehicle in the ordinary course of business. Plaintiffs respond that New York law applies and, under it, Dybvig does not have good title because he was not a bona fide purchaser; that he never made a reasonable attempt to determine who held proper title; and that Plaintiffs did not entrust the Audi to Riverside.

##### A. Choice of Law

New York law dictates that the law of the state in which the subject property was located at the time of transfer will govern that transaction (*Meyer v. Heymann*, 62 AD3d 133, 136

[1<sup>st</sup> Dept, 2009] ["[T]he validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer"]. While Dybvig is a New York resident and the 2008 Audi is currently located in New York, New Jersey's law governs because the transactions at issue occurred in New Jersey and dealt with property located there at the time of the transaction.

#### B. Entrustment

New Jersey Statute § 12A:2-403 (New Jersey's version of the Uniform Commercial Code [NJUCC]) states in relevant part:

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be theft under the criminal law.

Notably, New York's Uniform Commercial Code [NYUCC] § 2-403 is nearly identical to the NJUCC § 2-403 [replacing the word "theft" with "larcenous"].

The facts establish that Rosen entrusted the 2008 Audi to Riverside, as entrusting includes "any delivery and any acquiescence in retention or possession" (NJUCC 2-403[3] [emphasis added]). As a threshold matter, it is uncontested that Riverside, a car dealership that sold new and used Audi vehicles,

was a merchant who dealt in goods of the kind that Rosen delivered to it.

Rosen's claim that the 2008 Audi was stolen is unpersuasive. Rather, Rosen entrusted Riverside with the vehicle. He entered into a contract for the purchase of a new vehicle, the consideration for a portion of which was Rosen's transfer of the 2008 Audi to Riverside. To implement Riverside's agreement to pay off Rosen's car loan with FNCB, he signed and delivered a power of attorney granting Riverside authority to transfer title. Riverside did not honor the agreement and, while it breached the contract, and failed to satisfy the encumbrance on the car, it did not "steal" it from Rosen.

The final element of this analysis is whether Dybvig was a buyer in the ordinary course of business. In New Jersey, a buyer in the ordinary course of business is defined as:

[A] person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

(NJ Stat § 12A:1-201[9]).<sup>1</sup>

Plaintiffs argue that Dybvig is not a buyer in the ordinary course of business because Riverside obtained and

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<sup>1</sup>NYUCC § 1-201(9) is identical to NJUCC § 1-201(9).

transferred voidable title to the vehicle to Dybvig, and Dybvig has not perfected title; and that in order to perfect title, he must show that he is a bona fide purchaser.

In New Jersey, a "person with voidable title has power to transfer a good title to a good faith purchaser for value" (NJUCC § 2-403[1]). Voidable title is transferred to a seller through a "transaction of purchase" (*Touch of Class Leasing v. Mercedes-Benz Credit*, 248 NJ Super 426, 438 [Superior Court of New Jersey, Appellate Division 1991]). A transaction of purchase is a transaction wherein a party delivers goods to a subsequent seller with the intention that the subsequent seller will become the owner of the goods (Id.). The court in *Touch of Class* held that NJUCC § 2-403(1) "cures the defects in a subsequent seller's voidable title through the sale to a good faith purchaser for value and gives the good faith purchaser clear title, free from any claims of third parties" (Id.).

There is no question that Rosen's delivery of the 2008 Audi to Riverside was a "transaction of purchase." Plaintiffs, however, contend that Dybvig was not a good faith purchaser because he failed to make reasonable inquiries into whether Riverside had good title, and had he made such a title search, he would have found Riverside was not the owner. Plaintiffs, however, do not supply any New Jersey law or statute that supports the position that a buyer must make a title search to be

considered a good faith purchaser. Instead, they cite to a New York case, *Kaminsky v. Karmin*, 187 AD2d 488 [2<sup>nd</sup> Dept., 1992], for support. In *Kaminsky*, the plaintiff purchased a BMW from a used car dealer. The defendant left the BMW with the dealer on consignment. The BMW still had the defendant's personal license plates, and the defendant never delivered title to the dealer. In fact, the court noted that the defendant had delivered to the dealer no "indicia of ownership" whatsoever. Taking these warning signs into account, the court stated: "Had the plaintiff made any investigation to determine the chain of title to the vehicle, [he] would have discovered the existence of the consignment agreement . . . which knowledge would have put the plaintiff on notice that [the dealer] was not the true owner . . ." (Id., at 490), and held that the plaintiff was, therefore, not a good faith purchaser, nor a buyer in the ordinary course of business (Id., at 489).

The present situation is markedly different. The 2008 Audi was not at the dealership on consignment, the personal plates had been removed, and Rosen signed a power of attorney explicitly granting Riverside the power to transfer title. Moreover, Rosen delivered the 2008 Audi to Riverside Audi with the intention that Riverside would become the owner of the car after it paid off the loan amount owed to FNCB. As there were several indicia of ownership present in the instant matter,

Kaminsky is not persuasive. Accordingly, Dybvig certainly appears to be a bona fide purchaser in the ordinary course of business.

On this motion, the parties appear to have set forth all the relevant facts on the merits of the dispute. From them it appears clear that neither plaintiff--separately or together, is likely to prevail on the merits of the replevin claim in the complaint. The facts are different from those they rely upon, so that neither seizure of the request injunctive relief should be granted. Accordingly, it is

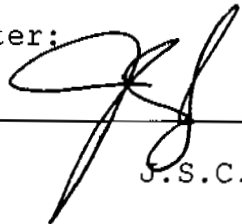
ORDERED that plaintiffs' motion is denied; and it further is

ORDERED that the temporary restraining order, dated March 26, 2010, is vacated forthwith upon entry hereof; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on October 18, 2010 at 11 AM, of which courtesy copies hereof are notice.

Dated: September 8, 2010

Enter:



J.S.C.

**JANE S. SOLOMON**

**FILED**  
SEP 15 2010  
NEW YORK  
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