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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

RYDER TRUCK RENTAL INC. d/b/a
RYDER TRANSPORTATION SERVICES,

Plaintiff,

INDEX NO. 13620/10

-against-

MOTION DATE: 1/19/10
2/17/10

SEQUENCE NO. 01,02,03,
04

RODI AUTOMOTIVE HOLDING CORP.,

Defendant.

----------X

Order to Show Cause, Affs. & Exs(Seq. 01)..... 1
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Upon the foregoing papers, defendant's Order to Show Cause requesting an order directing plaintiff to re-register the truck leased to defendant and provide defendant with the renewed registration is denied as moot, as the registration has been renewed and turned over to defendant. Plaintiff's Order to Show Cause prohibiting the use of vehicle number 452778 by the defendant is denied. Plaintiff's motion for summary judgment on its cause of action for replevin is denied. Defendant's Order to Show Cause for an order finding plaintiff in contempt of this Court's orders and awarding damages to defendant on account of said contempt is denied.

It is further ordered that the Orders of this Court granting injunctive relief, signed by the undersigned, dated December 23, 2010, January 6, 2011, and January 25, 2011, shall remain in

effect pending the outcome of this litigation.

It is further ordered that the defendant Rodi Automotive Holding Corp. shall maintain insurance on the subject vehicle, in accordance with the terms of the lease, through the outcome of this litigation .

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for breach of contract, account stated, unjust enrichment, replevin, conversion, and attorneys fees for defendant's alleged failure to make timely lease payments for a truck owned by plaintiff and leased to defendant.

On September 1, 1993, plaintiff and defendant entered into a Truck Lease and Service Agreement (hereinafter referred to as the "Lease"). Pursuant to the Lease, defendant leased two Ryder trucks from plaintiff which were used by defendant for its business. The vehicles were replaced over the course of the years. On or about November 21, 2005, defendant received delivery of two twenty-six foot box trucks known as RTR Unit No. 452777 (hereinafter "Truck 777" and 452778 (hereinafter "Truck 778").

Defendant submits an affidavit executed by its president, David Blumberg, in which Mr. Blumberg attests that on or around January 2010, he downsized his business and decided to exercise the option under the Lease to return one of the two vehicles. Section 11A of the lease provides that "[e]ither party may terminate the lease of any Vehicle prior to expiration of its term on any anniversary date of its Date of Delivery indicated on the Schedule A by giving the other party at least 60 days prior written notice...." Mr. Blumberg contends that he contacted plaintiff on January 22, 2010 to inquire about the process of surrendering one of the two vehicles early, and Ryder informed him that the early termination charges for the return of Truck 777 would be $15,900 as of February 8, 2010. According to Mr. Blumberg, Ryder also sent correspondence by fax that stated that Ryder would attempt to redeploy the vehicle, essentially to help mitigate the early termination fees. Mr. Blumberg attests that on or about June 15, 2010, Truck 777 was voluntarily returned early to Ryder.

On July 19, 2010, plaintiff commenced the within action by the filing of a summons and complaint. Mr. Blumberg contends that all required amounts have been paid and that the return of Truck 777 was expressly permitted under the Lease. In addition, Mr. Blumberg attests that the defendant has continued to make all of the payments required under the lease and same have been accepted by plaintiff. Additionally, Mr. Blumberg attests, and submits the November 4, 2010 invoice for Truck 778 documenting, that there is a credit of $7,225.68 on defendant's account. Defendant believes that said credit was due to the redeployment of Truck 777 by Ryder.

Defendant cites to section 4 of the Lease, contained within Scheduled A, which reads, "[t]he lease of each Vehicle listed on this Schedule A shall constitute a separate and independent lease agreement subject to the terms and conditions contained in: (i) the TLSA [Truck Lease and Service Agreement], (ii) any amendments to the TLSA; (iii) this Schedule A; and (iv) any other

written agreement between Ryder and you regarding this Vehicle." Additionally, that section states "If there is any conflict between the terms of this Schedule A and any other terms of the TLSA, the terms of this Scheduled A will apply." Accordingly, defendant contends that the Lease for the surrendered vehicle (Truck 777) was terminated and the Lease for the retained truck (Truck 778) continued. Defendant further contends that there was no breach of the remaining lease for Truck 778.

Plaintiff contends that defendant is in breach of the Lease, as the Lease required defendant to make certain payments which the defendant failed to make when due. Plaintiff contends that by letter dated May 19, 2010, plaintiff gave notice to defendant of its default of the Lease. Said letter advised defendant that it was in default of the Lease, pursuant to section 11C, as the amount of $10,616.01 payable under the Lease for the period of March 4, 2010 through May 5, 2010 was outstanding and overdue. The letter further advised that the default must be cured within seven days of the letter or plaintiff would pursue the remedies under the lease. Plaintiff further contends that by letter dated May 27, 2010, plaintiff advised defendant that it failed to cure the default and that plaintiff was terminating the Lease and demanding that defendant purchase the leased vehicles for the "Schedule A Value" ($80,258.49 for the two vehicles) plus taxes. Plaintiff submits an affidavit from its Collection Manager, Kevin P. Sauntry, attesting to the above facts. Mr. Sauntry also attests that the true value of Truck 778 is $14,314.00 based upon a Ryder Vehicle Sales Proceeds quote. Mr. Saundry also attests that plaintiff is the title owner of Truck 778, which is not contested by defendant.

Plaintiffs contend that paragraph 15C of the Lease states that "[i]f you fail to cure a default as required by Paragraph 15A, Ryder may terminate this Agreement as to any or all of the Vehicles. Once Ryder terminates this Agreement, Ryder may require you to purchase any or all of the terminated Vehicles by sending you a demand....You agree to purchase all of those terminated Vehicles designated by Ryder within 10 days of the date of Ryder's demand...." The Court notes, however, that the Lease (including Schedule A) submitted before this Court does not contain said paragraph, although paragraph 11C contains similar terms. Plaintiff contends that prior to the date of the commencement of the within action, plaintiff demanded the return and/or repossession of the vehicle, but that defendant has failed to return Truck 778. Plaintiff does not contest defendant's assertion that all payments are now current for Truck 778, but argues that pursuant to the termination letter dated May 27, 2010, the Lease was terminated and plaintiff is entitled to the return of Truck 778.

The evidence submitted by plaintiff, including the two affidavits executed by Kevin P. Sauntry annexed to plaintiff's motion for summary judgment and Order to Show Cause, are silent as to whether defendant defaulted in payment for both Truck 777 and Truck 778 from March through May 2010. The evidence submitted by plaintiff, including the affidavits executed by Kevin P. Sauntry, are also silent as to whether defendant's account for Truck 778 is paid in full at the present time and if any payments were late or unpaid prior to payment in full. The evidence

submitted by plaintiff is also silent as to whether the notice of default, dated May 19, 2010, and the letter regarding the termination of the Lease, dated May 27, 2010, pertained to the Lease of Truck 777 and/or Truck 778. Furthermore, the Lease termination letter dated May 27, 2010 did not demand return of Truck 778, it instead demanded payment for the value of both vehicles, Truck 777 and Truck 778. As the Lease Schedule A states that "[t]he lease of each Vehicle listed on this Schedule A shall constitute a separate and independent lease agreement" and that upon conflict, the terms of Schedule A shall apply, there is a question of fact as to whether the Lease was terminated as to Truck 778 and whether there was a default in payment for Truck 778. Accordingly, plaintiff has not made a prima facie showing of entitlement to summary judgment.

In an application for replevin, the issue is which party has the superior possessory right to the chattels. (*Honeywell Information Systems, Inc. v. Demographic Systems, Inc.*, 396 F.Supp 273 (SDNY 1975)). The plaintiff has not demonstrated that it is entitled to possession by virtue of the facts set forth herein, that it is likely to succeed on the merits, that Truck 778 is being wrongfully held by the defendant, or that the defendant has no defenses to the claim. (*See*, CPLR §§7101 and 7102). In an action for replevin, the plaintiff has the burden to demonstrate a superior possessory interest in the chattel, and the court is vested with broad "discretion to determine whether replevin relief is appropriate and also the proper status for the parties pending the final outcome of the action to prevent mistaken and unfair deprivation of property." (*Morning Glory Media v. Enright*, 100 Misc.2d 872, 420 N.Y.S.2d 176 (Sup. Ct. Monroe Cty. 1979)). The movant must establish the probability of success on the merits and such application may be defeated by a showing of a good faith defense to the movant's claim *(East Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 102 A.D.2d 157, 476 N.Y.S.2d 837 (1st Dept. 1984); *Colonial Ford, Inc. v. Ford Motor Co.*, 1991 WL 224358 (WDNY)). In the instant matter, the plaintiff has not met its burden, and even assuming that the plaintiff had met its burden, the defendant has a demonstrated a good faith defense to the plaintiff's claim of a superior possessory right to Truck 778.

In addition, there is no evidence before this Court that the truck at issue is unique or that it is probably that the truck will become unavailable or substantially impaired in value if not seized. Further, this Court's order of January 5, 2011 prohibits the defendant from "transferring, selling, assigning, pledging, or any other disposition or subjection of said vehicle to a security lien or interest" and same shall remains in effect through the outcome of the litigation.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 N.Y.2d 557 (Ct. of App. 1980)).

Further, defendant's application for summary judgment, pursuant to CPLR §3212(b), contained within its opposition papers is denied. While the Court has the authority, pursuant to CPLR 3212(b), to search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion before the court, an award summary judgment to the defendant is not appropriate here. (CPLR §3212(b); See, *Pope v. Safety and Quality Plus, Inc.*, 74 A.D.3d 1040, 903 N.Y.S.2d 124 (2d Dept. 2010)). Questions of fact exist with respect to the allegations of defendant's default under the Lease and the alleged termination of the lease by plaintiff, as well as the ambiguity of the provisions of the lease pertaining to default and termination, which preclude the granting of summary judgment to defendant.

With respect to plaintiff's Order to Show Cause prohibiting the use of vehicle number 452778 by the defendant, plaintiff's application is denied. As noted above, plaintiff has failed to demonstrate through admissible evidence that defendant defaulted on the Lease pertaining to Truck 778 or that the lease pertaining to Truck 778 was properly terminated. Schedule A of the lease specifically states that "each Vehicle listed on this Schedule A shall constitute a separate and independent lease agreement," and there is not sufficient evidence before this court to determine whether defendant breached the terms of the lease as it pertained to Truck 778.

Lastly, Defendant's Order to Show Cause for an order finding plaintiff in contempt due to its failure to comply with the orders of this Court dated December 23, 2010 and January 6, 2011 and awarding damages to defendant on account of said contempt is denied. In opposition to defendant's motion, plaintiff has submitted an affidavit from its Service Manager, Frank Clark, in which Mr. Clark attests that on January 21, 2011, the plaintiff took possession of the vehicle to service same and register same. Mr. Clark attests that the vehicle was returned to defendant's possession on January 28, 2011 and that any delay in its return was due to the weather slowing its receipt of the broken lift gate switch. An application to punish a party for contempt, and whether to allow a party to purge itself of contempt, is within the sound discretion of the court. *(See, Matter of Storm*, 28 A.D.2d 290, 284 N.Y.S.2d 755 (1st Dept. 1967)). The Court notes that the the plaintiff has now complied with the orders dated December 23, 2010, January 6, 2011, and January 25, 2011, as the vehicle has been registered and returned to the possession of the defendant. Accordingly, the defendant's motion for an order finding the plaintiff in contempt and awarding damages accordingly, is denied.

The parties shall appear for a Preliminary Conference on April 11, 2011, at 9:30 A.M. in the Differentiated Case Management Part ("DCM"), Nassau County Supreme Court, to schedule all discovery proceedings. Plaintiff shall serve a copy of this order upon the DCM Case Coordinator of the Nassau County Supreme Court within fifteen (15) days of the date of this Order.

Dated: March 9, 2011

ENTERED

MAR 15 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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