

Capital One, N.A. v USA Fin. Servs., LLC

2011 NY Slip Op 31229(U)

April 26, 2011

Supreme Court, Nassau County

Docket Number: 00251/2011

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

CAPITAL ONE, N.A., as successor by merger to
NORTH FORK BANK, and ALL POINTS
CAPITAL CORP.,

Plaintiffs,

INDEX NO.: 000251/2011
MOTION DATE: 2/16/2011
SEQUENCE NO.: 01

- against -

USA FINANCIAL SERVICES, LLC f/k/a USA
AUTO FUNDING, LLC and JAMES MOSCATELLO,

Defendants.

The following documents were read on this motion:

- Order to Show Cause to Enjoin Conversion by Defendants of Monies received from the Sale or Lease of Vehicles on Schedule "A", produce Records of USA and Moscatello, and Seize Vehicle Collateral 1,
- Affidavit in Opposition 2.
- Reply Affirmation 3.

PRELIMINARY STATEMENT

Plaintiffs, seek relief against collateral as well as against their borrower on a personal guaranty. Defendant USA is a recourse lessor of vehicles and equipment in which plaintiff maintains a security interest. Plaintiffs allege that defendants are "out of trust", that is, that they have sold or leased vehicles without forwarding the proceeds to plaintiffs under the terms of a Loan and Security Agreement. Plaintiffs move for relief under a variety of provisions of the Civil Practice Law and Rules.

CPLR § 6301

Plaintiff seeks to enjoin USA and Moscatello (a) from converting monies paid or to be paid for sales or leases of vehicles serving as collateral and identified on Schedule "A"; (b) transferring, accepting, encumbering and/or selling any Vehicle Collateral; (c) interfering with plaintiffs' efforts to safeguard and preserve its Vehicle Collateral. The further seek a directive to USA and Moscatello and their associates (a) to turn over and deliver to plaintiffs monies paid or to be paid on account of the sale or lease of any Vehicle Collateral; (b) to identify the location of Vehicle Collateral, and, if sold or leased, the identity of the party to whom transferred, the amount received, and to produce all documents in connection with the sales, leases or transfers. They also request an order directing USA and Moscatello to produce for inspection and copying USA's books and records and to make the records available for an audit.

CPLR § 7102

Plaintiffs seek an order directing the Sheriff of any count within the State, or a person with equivalent authority in another state to (a) seize Vehicle Collateral not voluntarily turned over to the Sheriff and (b) authorizing the Sheriff to break open, enter and search for the Vehicle Collateral at 1983 Marcus Avenue, Suite C136, Lake Success, New York, and at such other locations uncovered by the Sheriff. They also seek a directive that defendants (a) disclose the location of all Vehicle Collateral; (b) and identify the persons or entities in possession of the Vehicle Collateral. They also seek an order temporarily enjoining and preventing the sale, disposition or other transfer of the Vehicle Collateral.

By order dated January 7, 2011 this Court granted plaintiffs a temporary restraining order which restrained defendants from converting monies paid or to be paid for sales or leases; transferring, accepting, encumbering or selling any Vehicle Collateral, or interfering with plaintiffs' efforts to safeguard and preserve its Vehicle Collateral. The temporary restraining order also directed the turnover of monies received on account of

sales or leases to plaintiffs, and the delivery to plaintiffs any and all Vehicle Collateral in their possession, together with titles, keys and other devices needed to operate the Vehicle Collateral. It also directed defendants to provide books of account regarding the Vehicle Collateral. The order also enjoined defendants from transferring, pledging, assigning, disposing or otherwise encumbering the assets of USA and Moscatello, except in the regular course of business and to provide for the ordinary living expenses of Moscatello.

The Court added a requirement to the temporary restraining order that plaintiffs provide to defendants a statement as to the allocation of \$425,000 previously paid by defendants to plaintiffs.

BACKGROUND

On March 23, 2001 All Points Capital Corp. ("All Points"), a subsidiary of North Fork Bank and USA Auto Funding, LLC (now known as USA Financial Services, LLC) entered into a Loan and Security Agreement. (Exh. "A" to Motion). Borrower was engaged in the business of owning, developing, administering and purchasing loan and lease portfolios, and providing services and facilities for those operations. Lender was to provide advances for the purchase of vehicles. On the same date Moscatello signed a personal guaranty. (Exh. "B").

Plaintiffs allege in their complaint that, pursuant to the terms of the Agreement, defendants incurred obligations from All Points in excess of \$20,000,000, and that defendants defaulted in their payments under the agreement. In accordance with the arrangement, upon default, plaintiff was entitled to accelerate payment. As of December 21, 2010 defendants are obligated to All Points for \$16,447,977.

On May 5, 2006 USA executed a \$600,000 promissory note to Capital One, the successor by merger with North Fork Bank. Exh. "D" On May 24, 2007, and each year thereafter through August 1, 2009 USA executed a Restated Promissory Note in the amount of \$1,000,000. (Exh. E"). USA also entered into a Security Agreement with North Fork Bank on October 2, 2005, giving the bank a security interest in collateral, with a right

to repossess. Moscatello personally guaranteed all indebtedness of USA to Capital One on or about October 2, 2005. USA has defaulted under the terms of the Note, and plaintiff has declared the unpaid balance of \$598,553 due and payable. Defendants argue that title to each leased vehicle, naming USA as the owner, is kept in the custody of All Points. In addition, they have a filed lien on each vehicle. They state that all rental payments from end-users are sent directly to All Points, and, at the end of each month, All Points would forward to USA their "cash flow", typically approximately \$60,000 per month; but this sum has not been paid since October 2010. Defendant claims that as of the end of January, 2011, plaintiffs are in possession of approximately \$240,000 of cash flow for which they are entitled to a credit.

It must be noted that defendant acknowledges an August 2010 meeting with All Points Sr. V.P., Catherine Wilinski, at which time the parties discussed a "work through" plan with the President and Executive V.P. This proposal involved the sale of a substantial portion of the USA/All Points Portfolio and application of \$60,000 monthly "cash flow" payments to any remaining deficiency. It may well be that plaintiff received \$125,000 from defendants on October 7, 2010 and a wire transfer from Stearns Bank of \$7,900,000 to All Points on behalf of USA; but it also appears that defendants may have gone further "out of trust" to the extent of another \$300,000 since the August discussions.

Pursuant to the terms of the Loan and Security Agreement, the Personal Guaranty of James Moscatello, the Restated Promissory Note, the Security Agreement of October 2, 2005, and the Personal Guaranty of All Liability, plaintiff is entitled to the relief requested. Their motion is granted. Defendants are enjoined from any further transfers of the Vehicle Collateral, from converting monies received or to be received for sales or leases of the scheduled vehicles, directed to convey to All Points monies received by USA on account of sales or leases of scheduled vehicles, advise All Points of all previous sales of collateral, identifying the party to whom sold, the amount paid, and all documentation in connection with the transfers. Defendants are also directed to provide All Points with

information with respect to the location of all collateral, the person in possession, and the owner of the premises at which the collateral is located.

In the event plaintiffs call upon the Sheriff, or any other similarly authorized person, to take possession of the Vehicle Collateral, defendants are directed to provide the Sheriff with keys and other devices necessary for the operation of the vehicles so as to avoid damage to the collateral. In the event defendants fail to cooperate, the Sheriff is authorized to break, open, and enter premises where such vehicles are located. Defendants are further directed to make available to plaintiffs or their representatives, the books and records of USA, and permit copying of such records. Plaintiffs are directed, within thirty days of this Order, to advise defendants with a statement of account, setting forth the amount received since September 2010, how it was applied, and the amount claimed by plaintiffs to remain outstanding.

This constitutes the Decision and Order of the Court.

Dated: April 26, 2011


J.S.C.

ENTERED
APR 29 2011
NASSAU COUNTY
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