

Prince v Lexus Fin. Servs.
2012 NY Slip Op 30433(U)
February 6, 2012
Supreme Court, Nassau County
Docket Number: 14163/11
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
PAMELA S. PRINCE and 3rd & 6 LLC,

Plaintiffs,

-against-

LEXUS FINANCIAL SERVICES, LEXUS OF
MANHATTAN, TOYOTA FINANCIAL SERVICES
and BLESSED REPOSSESSION & RECOVERY, INC.,

Defendants.
-----X

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 08

Index No.: 14163/11

Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

Papers Read on this Motion:

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In motion sequence number one, plaintiffs Pamela S. Prince and 3rd & 6 LLC move for an order pursuant to CPLR §6311, *inter alia*, directing the defendants Lexus Financial Service, Lexus of Manhattan, Toyota Financial Services and Blessed Repossession & Recovery, Inc. to return a 2010 Lexus LX 570 sports utility vehicle ("SUV") Vehicle Identification Number JTJHY7AX3A4045103 to the plaintiffs and an award of attorney's fees incurred in this action.

In motion sequence numbers two and three, defendant Lexus Financial Services and Toyota Financial Services and defendant Lexus of Manhattan respectively cross move for an order pursuant to CPLR §3211(a)(1), (7) dismissing the complaint against them.

The plaintiffs in this action seek to recover their 2010 Lexus LX 570 SUV which was repossessed by the defendants on September 26, 2011. They have advanced causes of action sounding

in replevin, conversion and declaratory judgment.

In their complaint, the plaintiffs allege that in November 2009 Pamela Prince's son Matthew Prince was contacted by Rick Cohen, an owner of North Shore Manor Group, regarding an interest in purchasing a 2010 Lexus 570 SUV. Matthew Prince had successfully dealt with Rick Cohen for approximately ten years leasing and purchasing vehicles and had referred him to family and friends. In December 2009, Cohen allegedly proposed selling Matthew a 2010 Lexus LX 570 SUV in exchange for his 2006 Lexus 470 and \$50,000. To that end, on December 24, 2009, the plaintiff 3rd & 6 LLC paid \$50,000 via check to Lexus of Manhattan. The plaintiffs allege that on March 26, 2010, they surrendered their 2006 Lexus 470 to North Shore Motor Group and paid an additional \$9,000 in exchange for the 2010 Lexus LX 570 SUV they took possession of the vehicle.

In their complaint, the plaintiffs allege that in January 2011, they were contacted by one of the defendants and advised that they had been the victims of identify theft by Cohen. More specifically, they learned that they were victims of a scheme whereby Cohen accepted payments for vehicles and submitted forged paperwork to procure a loan on the vehicles unbeknownst to the buyers.

The 2010 Lexus LX 570 SUV had been titled in 3rd & 6 LLC's name at 40 Fox Hollow Road on November 17, 2010. The Certificate of Title reflects one recorded lien held by Toyota Motor Credit Corp. The Retail Certificate of Sale dated March 26, 2010 reflects a sale by Lexus of Manhattan to 3rd & 6 LLC at 1287B Deer Park Avenue, North Babylon. A Retail Installment Contract in 3rd & 6 LLC and Pamela Prince's name bearing Pamela Prince's purported signature reflects that the vehicle had been financed. Lexus of Manhattan is listed as the creditor. The plaintiffs deny knowing about a Retail Installment Contract, let alone executing one, and adamantly maintain that they paid for the vehicle in full. In that contract, the borrowers afforded Lexus of Manhattan a security interest in the 2010 Lexus LX 570 SUV. The Retail Installment Contract was assigned by Lexus of Manhattan to the defendants Lexus Financial Services and Toyota Financial Services. In addition, a co-signer's notice identifying 3rd

& 6 LLC as the debtor under a Retail Installment Contract in the amount of \$104,882.40; a Certified Limited Liability Company Resolution and Incumbency Certificate to Lease or Finance authorizing 3rd & 6 LLC to finance a vehicle in an amount not to exceed \$104,882.40 from Lexus of Manhattan and its assignee Toyota Motor Credit Corporation, Toyota Lease Trust or Lexus Financial Services; and, a Toyota Motor Insurance Agency Guaranteed Auto Protection Program Notice of Lessee Liability for GAP Amount-New York all purportedly bear Pamela Prince's signature, too.

The defendants Lexus Financial Services and Toyota Financial Services note the loan was assigned by Lexus of Manhattan to them on March 26, 2010, at which time they deny having had any knowledge of any fraud, thereby allegedly acquiring a valid lien on the 2010 Lexus LX 570 SUV. In fact, the title lists Toyota Motor Credit Corp., a unit of these defendants' companies, as a lienholder, as does a Notice of Recorded Lien. Additionally, a Certificate of Insurance from Allstate dated March 26, 2010 lists Lexus Financial Services as a lienholder. These reflected liens were never challenged by the plaintiffs prior to the repossession of their 2010 Lexus 570 LX SUV. The defendants Lexus Financial Services and Toyota Financial Services maintain that the loan was defaulted on May 25, 2010 and that they learned from Cohen's attorney on August 18, 2010 of fraudulent conduct by Cohen. In addition, Lexus of Manhattan notes that the Vehicle Registration Title Application for the vehicle which was allegedly signed by Pamela Prince lists Toyota Motor Credit Corp. as a lienholder. Lexus Financial Services and Toyota Financial Services have submitted proof of receipt by Lexus of Manhattan of \$87,179.74 from them.

The plaintiffs allege that at defendants' request, they completed a fraud claim form. The plaintiffs further allege that the defendant Blessed Repossession & Recovery, Inc. repossessed their 2010 Lexus 570 SUV on September 26, 2011, and that the defendants had refused to return their vehicle without court intervention.

Joseph Conway, the attorney in the U.S. Attorney's Office's criminal investigation, has attested

that

“[i]t is [his] understanding that Cohen has submitted documentation to Lexus Financial Services that purports to contain the signature of Pamela Prince wherein she allegedly obtained financing for a vehicle that plaintiffs purchased from North Shore Auto Group. The document is a Retail Installment Contract. Significantly, however, Cohen has admitted that he forged Pamela Prince’s name on the Retail Installment Contract that he submitted to Lexus Financial Services relating to plaintiffs’ purchase.”

Based on the likelihood of the plaintiff’s success on the merits and hardship in not having the vehicle, and balancing of the equities, the Court granted a Preliminary Injunction requiring the defendants’ return of the 2010 Lexus LX 570 SUV to the plaintiffs was granted on October 8, 2011 after oral argument, subject to the plaintiff maintaining insurance and not encumbering the vehicle.

The plaintiffs’ application for attorney’s fees is *denied*. *Hedaya Home Fashions Inc. v American Motorists Ins. Co.*, 12 AD3d 639 (2d Dept 2004) in the absence of explicit statutory or contractual authority. A right to an award of an attorney’s fee, litigation costs, and expenses will not be inferred. In the case at bar, the plaintiff has not submitted an agreement between the parties assenting to attorney’s fees in the event that litigation ensued, resulting in the denial of the request.

The defendant Lexus Financial Services, Toyota Financial Services and Lexus of Manhattan allege that the aforementioned documents conclusively establish that they were also victims of Cohen’s fraudulent conduct and seek dismissal of the complaint against them on that ground pursuant to CPLR §3211(a)(1),(7).

Under CPLR §3211(a)(7), the pleadings are afforded a liberal construction and accorded the benefit of every possible favorable inference. *Leon v Martinez*, 84 NY2d 83 (1994); *see also*, CPLR §3026; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976). A “motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, [and] conclusively establishing a defense as a matter of law.” *Leon v Martinez*, *supra*, at p. 88. The documentary evidence must “flatly

contradict" the plaintiff's claims. *KSW Mechanical Services, Inc. v Willis of New York*, 63 AD3d 411 (1st Dept 2009).

Neither the plaintiffs nor the defendants have conclusively established who prevails where the interests of a *bona fide* purchaser for value and the interests of a *bona fide* lender with a lien conflict.

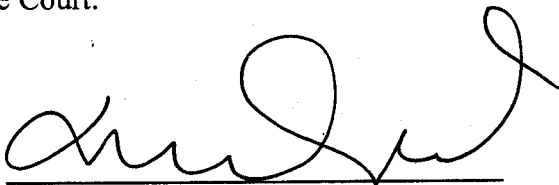
While the Certificate of Title dated November 17, 2010 and the Notice of Recorded Lien identify Toyota Motor Credit Corp. as a lienholder on the subject vehicle and the Certificate of Insurance lists Lexus Financial Services as a lienholder, at this juncture, standing alone, those documents do not require dismissal of the complaint. CPLR §3212(f). Pamela Prince adamantly denies knowledge of the supporting documents let alone executing them. These denials give rise to an issue of fact regarding the validity of the documents relied on by the defendants in seeking dismissal of the complaint pursuant to CPLR §3211(a)(1). *See, Adler v 20/20 Cos.*, 82 AD3d 918 (2d Dept 2011), citing *Siddiqui v Nationwide Mut. Ins. Co.*, 255 AD2d (3rd Dept 1999); *see also, Figueroa v Stewart Title Ins. Co.*, 29 Misc 3d 136(A) (N.Y. Sup. App. Term 2010); *Davis v Lancaster*, 30 Misc 3d 885 (Supreme Court Bronx County 2010). As such, the defendants' motions are *denied*. It is hereby

ORDERED, that the parties appear in DCM for a Preliminary Conference on February 21, 2012, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: February 6, 2012
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION - DISMISS\Prince v Lexus Financial Svs MLP.wpd

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FEB 14 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE