

Margiotta v Tantillo

2015 NY Slip Op 32607(U)

March 12, 2015

Supreme Court, Suffolk County

Docket Number: 62839-2013

Judge: Emily Pines

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Original

SHORT FORM ORDER

INDEX NO.: 62839-2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

FILED

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 12-23-2014
Motion Submit Date: 12-23-2014
Motion Sequence No.: 008 MOTD

X

LORIANN MARGIOTTA, individually, as personal representative of the ESTATE OF ANTHONY A. TANTILLO, and as a shareholder or member of, and derivatively on behalf of and for the benefit of, TOJO REALTY, INC., NISSAN 112 SAKES CORP, T TANTILLO REALTY, LLC., CARS UNLIMITED OF SUFFOLK, LLC., TRW PROPERTIES, LLC., RIVERHEAD AUTO MALL, LTD., 920 REALTY LLC., and NORTH SHORE CHEVROLET, LLC., and THOMAS TANTILLO, individually, as a shareholder or member of and derivatively on behalf of and for the benefit of, TOJO REALTY, INC., REALTY, INC., NISSAN 112 SALES CORP., T TANTILLO REALTY LLC., CARS UNLIMITED OF SUFFOLK, LLC., TRW PROPERTIES LLC., RIVERHEAD AUTO MALL LTD., 920 REALTY LLC., and NORTH SHORE CHEVROLET, LLC,

Plaintiffs,

- against -

RAYMOND TANTILLO, TOJO REALTY, INC., NISSAN 112, SALES CORP., T TANTILLO REALTY, LLC., CARS UNLIMITED OF SUFFOLK COUNTY, LLC., TRW PROPERTIES, LLC., RIVERHEAD AUTO MALL, LTD 920 REALTY LLC and NORTH SHORE CHEVROLET, LLC,

Defendants.

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In this action, involving warring owners of eight corporate entities, the Defendants move to compel Plaintiff Lori Ann Margiotta ("Margiotta") to turn over possession of a demonstrator vehicle, owned by Defendant Nissan 112 Sales Corporation ("Nissan 112") and for sanctions pursuant to 22

NYCRR § 130-1.1 (a) against Margiotta for placing the Defendants in a position of having to make this motion. The basis for the motion is found in the affidavit of Raymond Tantillo, the current Director and Dealer Principal of Nissan 112. He sets forth, in support of this request for relief, that the Nissan 112 Dealer Agreement identifies him as the Principal Owner and authorizes him to make “[i]ndependent decisions concerning the hiring and firing of its employees”.

Raymond Tantillo avers that he and Anthony Tantillo were the only shareholders of Nissan 112 during Anthony Tantillo’s life. He states further that although Margiotta remained an employee of Nissan 112 during Anthony Tantillo’s life, after he passed away, Raymond Tantillo terminated Margiotta as an employee of the entity. He thereafter demanded that Plaintiff Margiotta and Thomas Tantillo, as well as his own mother, Rosanne Tantillo, return the three demonstrator vehicles that Anthony Tantillo had provided them, as they were not payroll recipients of the entity. He further sets forth that although Thomas Tantillo and his mother returned their demonstrator vehicles to Nissan 112, Margiotta refused to do so. It is Raymond Tantillo’s argument that Lori Ann Margiotta is neither an employee of Nissan 112 nor of any of the other corporate dealerships in this lawsuit and that she performs no work or services on behalf of Nissan 112 or any of these other entities. He sets forth that under the Demonstrator Agreement, signed by all employees of Nissan 112, including Margiotta, the employee agrees that “[u]pon termination, voluntary or involuntary, I agree to deliver this automobile to Nissan 112 immediately”

Counsel for Defendants argues that pursuant to Part 78 of the Regulations of the Commissioner of Motor Vehicles of the New York State Department of Motor Vehicles, “[i]t is

unlawful, among other things, to use dealer plates on vehicles owned by members of the dealer's family or employee, and on service cars" Reg. 78.21 (b).

Accordingly, Defendants seek immediate return of a vehicle which is admittedly both a demonstrator vehicle owned by Nissan 112, containing dealership plates, and which is in the possession of Margiotta, a non employee - family member, who performs no services for Nissan 112, in violation of the Dealership Agreement and State Regulations.

In opposition to the motion, Plaintiff Margiotta's counsel argues that Defendants have created arbitrary categories of who can and cannot utilize company vehicles, now setting forth that only employees and people who work for the dealership may have use of demonstrator vehicles. However, Margiotta has assertedly identified a number of people who are non-employees and who she claims have no direct connection with the dealerships and yet have these very same vehicles. She has identified several such persons who have retained the same. These include Patricia Miller, retired from Nissan 112; Suzanne Williamson, the spouse of the General Manager for the dealership, whose vehicle has now been changed to a rental vehicle; and Patricia Frazier, the wife of another General Manager, whose vehicle has also now been changed to a company rental car. She also identified one Pat Nessinger, the wife of the managing member of Defendants Cars Unlimited and Tantillo Realty, Bruce Nessinger, as well as Nessinger's ex-wife.

Counsel for Margiotta points out that a reading of the words of the subject regulation on which Defendant's counsel relies demonstrates that what is prohibited is the use of dealer plates on

vehicles owned by a family member or employee; however, the regulation does not use the words prohibiting the use of dealer plates on a dealer owned vehicle such as that used by Margiotta.

Raymond Tantillo states that Miller still performs services for the dealerships and connected real estate entities, and that Frazier and Williamson still provide services to Nissan 112. With regard to the two vehicles attributed to the wife and ex-wife of Bruce Nessinger, Raymond Tantillo avers that he is not the manager of the Cars Unlimited or T Tantillo Realty and has no say in any decision making with regard to those entities. Defendants' counsel also argues that the subject regulation does apply because demonstrator vehicles are those carrying dealer plates and, therefore, Margiotta falls within the proscription applying to a family member who is using dealer plates.

While the Court finds the subject regulation ambiguous at best, as admitted by counsel for Nissan 112, it does appear that employees of that entity agreed to return such vehicles upon their termination for any reason. The Court also finds that counsel for Margiotta has raised issues concerning the possible arbitrary application of the regulations. As with the companion motion, in which Plaintiffs seek to compel payment of LLC distributions, the movant here is seeking mandatory injunctive relief, which is clearly compensable by monetary damages and is inappropriate at this stage of the litigation. As set forth in the companion decision, a mandatory injunction used to compel performance of an act is considered an extraordinary and drastic remedy and is rarely granted, especially where the relief sought can be provided in the form of monetary damages, see *Matos v City of New York*, 21 AD 3d 936 (2d Dep't 2005); *Neos v Lacey*, 291 AD 2d 434 (2d Dep't 2002).

Accordingly the motion by Nissan 112 to compel return of what is characterized as a demonstrator vehicle by Lori Ann Margiotta is denied. As with the request for relief by Plaintiff Margiotta in the companion motion, such is preserved for trial and there is no necessity for Defendants to amend their counterclaims. As issues in opposition to the motion have been raised, the request for sanctions is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 12, 2015
Riverhead, New York



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J. S. C.

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