

Ally Fin., Inc. v After Hours Tires

2017 NY Slip Op 33375(U)

November 14, 2017

Supreme Court, Albany County

Docket Number: Index No. 900392-17

Judge: Gerald William Connolly

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

 ORIGINAL

ALLY FINANCIAL, INC.,

Plaintiff,

DECISION/ORDER

Index No.: 900392-17

-against-

AFTER HOURS TIRES, JASON HARVEY
individually and d/b/a AFTER HOURS TIRES and
THE NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES,

Defendants.

(Supreme Court, Albany County, All Purpose Term)
(Hon. Gerald W. Connolly, Presiding)

APPEARANCES: MEOLA LAW FIRM
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Connolly, J.:

Plaintiff Ally Financial, Inc. seeks an order granting partial summary judgment dismissal of defendants' counterclaim for conversion. Defendants oppose such motion and have cross-moved for an order granting summary judgment in its favor on such counterclaim.

Background

Plaintiff Ally Financial, Inc. commenced a special proceeding¹ challenging a garage lien asserted by After Hours Tires. The Court signed an Order on February 26, 2016 in the special proceeding which approved Ally's \$10,000 bond and ordered After Hours Tires to immediately release the 2011 BMW to Ally. During the pendency of the special proceeding, the vehicle was released to Ally and sold at auction on September 16, 2016. According to plaintiff the vehicle sold for \$9,382.08 leaving a deficiency due and owing to Ally of \$11,988.78.

The Court issued a Decision and Order on January 4, 2017 dismissing the special proceeding on procedural grounds and subsequently permitted the release of the bond. Thereafter plaintiff filed the instant action in which plaintiff seeks, *inter alia*, declaratory relief adjudging that plaintiff is entitled to possession of the vehicle, that the underlying garage lien claims are unreasonable, invalid and unenforceable against plaintiff, and for relief based upon its causes of action for fraud and conversion. Defendant After Hours Tires filed an answer containing numerous affirmative defenses and a counterclaim for conversion.

Summary Judgment

To obtain summary judgment, a movant must establish his or her position "sufficiently to warrant the court as a matter of law in directing judgment" in his or her favor (*Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). 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 eliminate any genuine material issues

¹Such special proceeding, *Ally v After Hours Tires*, was commenced under Index No. 778-16.

of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Party Contentions

Plaintiff argues that the defendants' counterclaim for conversion should be dismissed as: (i) Ally's possession of the vehicle was authorized; (ii) After Hours Tires has no property interest in the vehicle; and (iii) no interference with a superior right has been demonstrated as After Hours Tires never established a superior right to possess the vehicle.

Plaintiff asserts that no cause of action can exist where the possessory actions complained of were authorized and After Hours Tires voluntarily released the vehicle to Ally on August 8, 2016. Plaintiff argues that as the vehicle was obtained by plaintiff lawfully, After Hours Tires has no claim for conversion as a matter of law. Plaintiff further argues that the fact that the special proceeding was dismissed for technical reasons is irrelevant because all of plaintiff's actions regarding the vehicle were concluded prior to January 4, 2017 and were authorized by the Order of the Court which permitted Ally to take possession of the vehicle.

Plaintiff further asserts that the only property interest in the vehicle alleged by After Hours Tires was a garage keepers' lien which is a possessory lien, however, the Court order of February 26, 2016 eliminated any right of After Hours Tires to possess the vehicle.

Finally, plaintiff asserts that once plaintiff filed its special proceeding under Lien Law 201-a, the burden fell upon After Hours Tires to demonstrate that it had a valid possessory claim to the vehicle by showing that it complied with the rules for creating a garage keepers' lien, however as

After Hours Tires never served a counterclaim seeking to establish such lien, their opportunity to do so was terminated.

Defendants contend that After Hours Tires asserted a valid garageman's lien and further, that its prior alleged acquisition of the vehicle pursuant to the auction that occurred in February of 2016 pursuant to such lien was valid and accordingly, defendant After Hours Tires is the current owner of the subject vehicle. Defendants further contend that there is a valid claim for conversion, asserting that: (i) defendant had and has legal title to the subject vehicle pursuant to its purchase on February 29, 2016 and as evidenced by DMV's grant of title to defendant on June 19, 2017; (ii) plaintiffs were never authorized to sell the vehicle as litigation was pending at the time the vehicle was sold; and (iii) plaintiff's exercise of dominion over the vehicle and admitted sale has excluded defendants' right to the vehicle as it has deprived defendant of possession.

Discussion

"Conversion is an unauthorized exercise of dominion and control over someone else's property that interferes with and is in defiance of the superior possessory right of the owner or another person" (*East Schodack Fire Co., v Milekwicz*, 140 AD3d 1255 [3d Dept 2016]). "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379 [1st Dept 1995]).

The record demonstrates that defendant After Hours Tires did not have legal ownership of the vehicle at issue. While After Hours Tires asserts, via the affidavit of Mr. Harvey, that the vehicle was purchased in February 29, 2016 at auction by such defendant, the record also demonstrates that the Court had issued an order on February 26, 2016 restraining the vehicle from being, *inter alia*, sold by respondent garage. The Court has already determined via Decision and Order of January 4,

2017 that the alleged sale of the Vehicle by respondent to itself was barred based upon the temporary restraining order issued by the Court on February 26, 2016. As to a superior possessory right, such right was extinguished via the Court Order authorizing plaintiff to take possession and post an undertaking. Accordingly, plaintiff has demonstrated its entitlement as a matter of law to partial summary judgment dismissing defendants' counterclaim. Defendants have not demonstrated entitlement to partial summary judgment on such counterclaim nor raised a triable issue of fact sufficient to preclude plaintiff's requested relief.

Given the Court's finding in the underlying special proceeding that such proceeding was untimely commenced, it is noted that plaintiff has not paid the amount allegedly due and owing under the lien and instead commenced the instant litigation. As plaintiff is seeking determination, *inter alia*, "pursuant to CPLR 7101 that it is entitled to possession of certain chattels, namely the Subject Vehicle and the bond posted in relation to The Subject Vehicle, free from all claims of the garage", the Court will require pursuant to CPLR 7102, evidence of an undertaking in the amount of \$10,000 within forty-five (45) days of the date hereof.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Therefore, it is hereby

ORDERED that plaintiff is granted partial summary judgment dismissing defendants' counterclaim for conversion; and it is further

ORDERED that plaintiff produce evidence of an undertaking in the amount of \$10,000 within forty-five (45) days of the date hereof; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

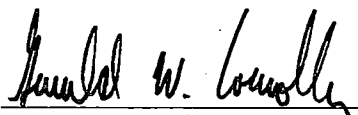
ORDERED that a conference will be held in this matter on December 4, 2017 at 11:00 a.m.

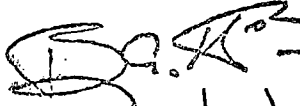
at the Albany County Courthouse, 16 Eagle Street, Room 219, Albany, New York 12207.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for plaintiff. A copy of this Decision and Order and all underlying papers are being delivered to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry, and notice of entry.

SO ORDERED.
ENTER.

Dated: November 17, 2017
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice


11/17/17

Papers Considered:

1. Court's Decision and Order in *Ally Financial v After Hours Tires* (Index 778-16) dated June 30, 2016;
2. Court's Decision and Order in *Ally Financial v After Hours Tires* (Index 778-16) dated January 4, 2017;
3. Court's Decision and Order in *Ally Financial v After Hours Tires* (Index 778-16) dated April 13, 2017;
4. Notice of Motion for Summary Judgment dated July 18, 2017; Affirmation of Rudolph J. Meola dated July 18, 2017 with exhibits 1-5 annexed thereto including the affidavit of Dennis Clabo, verified July 17, 2017;
5. Notice of Motion dated August 14, 2017; Affirmation in Opposition of Thomas B. Hughes dated August 12, 2017 with exhibit A annexed thereto; Affidavit of Jason Lee Harvey, sworn to August 12, 2017, with exhibits A-F annexed thereto; and Memorandum of Law dated August 12, 2017; and
6. Affirmation in Opposition to Cross-Motion and Reply Affirmation of Rudolph J. Meola dated September 8, 2017, with exhibits 1-6 annexed thereto.