SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALL POINTS CAPITAL CORP.,

Plaintiff,

- against -

PARKSIDE RECYCLING, INC. and BENJAMIN VERTUCCIO,

Defendants.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No. 011913-11
Mot. Seq. Nos. 1 and 2
Submission Date: 11/18/11

The following papers have been read on these motions:

Order to Show Cause, Affidavit in Support and Exhibits.....x
Affidavits of Service.....x
Supplemental Affirmation in Further Support and Exhibits.....x

Notice of Motion, Affirmation in Support and Exhibits.....x

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiff All Points Capital Corp. ("All Points" or "Plaintiff") on August 16, 2011, and 2) the motion filed by Plaintiff on October 12, 2011, both of which were submitted on November 18, 2011. For the reasons set forth below, the Court 1) denies Plaintiff's Order to Show Cause; and 2) denies Plaintiff's motion. These denials are without prejudice. The temporary restraining order issued by the Court on August 23, 2011 shall remain in effect pending further Order of this Court.

BACKGROUND

A. Relief Sought

In its Order to Show Cause, Plaintiff moves, pursuant to CPLR § 7102, for an Order of Seizure directing the Sheriff of any county where the equipment described in the Affidavit in Support is found to seize that equipment.

Plaintiff also moves, pursuant to CPLR § 3215(a), for an Order granting a default judgment in favor of Plaintiff and against Defendants Parkside Recycling, Inc. ("Parkside") and Benjamin Vertuccio ("Vertuccio") (collectively "Defendants").

Defendants have not appeared in this action or responded to Plaintiff's motions.

B. The Parties' History

The parties' history is set forth in detail in a prior Order of the Court dated October 13, 2011 ("Prior Order") in which the Court reserved decision on Plaintiff's application for an Order of Seizure (motion sequence # 1) and permitted Plaintiff to provide the Court, with copies to Defendants, with supplemental submissions in support of its application. The Court incorporates the Prior Order herein by reference.

Pursuant to the Prior Order, Plaintiff provided a Supplemental Affirmation dated November 14, 2011 in which Plaintiff's counsel ("Counsel"), *inter alia*, sets forth the specific provisions of Chattel Mortgage No. 2117-00185 and Chattel Mortgage No. 211700194 that 1) grant All Points a first priority security interest in the Equipment, and 2) set forth All Points' rights upon an event of default which include the right to demand payment of the entire unpaid balance, terminate the Agreement and take possession of the Equipment.

Counsel also affirms, in his Supplemental Affirmation, that on May 1, 2008, Defendant Vertuccio, as guarantor ("Guarantor") of Defendant Parkside, acknowledged the default by Parkside and executed and delivered to Plaintiff a confession of judgment ("Confession of Judgment") (Ex. A to Kraslow Supp. App.). In the Confession of Judgment, Vertuccio affirmed that 1) as Guarantor, he confessed judgment in favor of All Points, and against Vertuccio, in the sum of $129,337.95 and authorized All Points to enter judgment for that sum against Vertuccio; 2) the Confession of Judgment is for a debt due to All Points arising out of Vertuccio's failure and/or refusal to make payment pursuant to the terms and conditions of a Guaranty dated January

5, 2006, and the principal sum of $129,337.95 due and owing pursuant to the Guaranty is "justly due and payable;" 3) All Points has "justly repossessed collateral" securing Equipment Lease Agreements between Parkside and All Points, which Agreements refer to Accounts Numbered 2117-00185, 2117-00194 and 2117-00200; 4) as consideration for authorization to redeem that collateral, Vertuccio was executing the Confession of Judgment which will be held in escrow until such time as a default under the terms of any of the Agreements shall occur; 5) all payments received from the date of execution of the Confession of Judgment forward will be credited against the Judgment balance referred to therein; and 6) Vertuccio authorized entry of the Confession of Judgment upon the occurrence of an event of default regarding any account that he guaranteed.

Counsel affirms, further, that a Clerk's Judgment in favor of All Points and against Vertuccio in the amount of $42,001.23 ("Clerk's Judgment") (Ex. B to Kraslow Supp. App.) was granted on February 1, 2011 and entered with the Clerk of Nassau County. The Clerk's Judgment specifically states that Plaintiffs shall have judgment against Vertuccio in the amount of $129,337.95, less payments on account in the amount of $87,561.72 for a total of $41,776.23. Counsel affirms that no part of the Clerk's Judgment has been paid.

In support of Plaintiff's motion for a default judgment, Counsel provides copies of the Affidavits of Service reflecting service of the Summons and Complaint on Defendants (Ex. B to Kraslow Aff. in Supp.), and affirms that Plaintiff provided additional notice pursuant to CPLR § 3215(f)(3)(i). He affirms that Defendants have not interposed an Answer or otherwise appeared in this action, and their time to do so has elapsed.

Counsel also provides copies of Chattel Mortgage No. 2117-00185, Vertuccio's Personal Guaranty regarding Chattel Mortgage No. 2117-00185, the Collateral Assignment of Contract Documents regarding Chattel Mortgage No. 2117-00185, Chattel Mortgage No. 2117-00194, Vertuccio's Personal Guaranty regarding Chattel Mortgage No. 2117-00194, and the Collateral Assignment of Contract Documents regarding Chattel Mortgage No. 2117-00194 (*id.* at Exs. C-H).

Counsel affirms that 1) "to the best of Plaintiff's knowledge, information and belief" (Kraslow Aff. in Supp.. at ¶ 8), the Equipment is in the possession of Parkside and is located at 6

Oxford Avenue, Massapequa, New York; 2) Plaintiff has demanded that Parkside release the Equipment but it has failed to do so, and continues to possess the Equipment; 3) to the best of Plaintiff's knowledge, the value of the Equipment is $70,606.25 and $62,857.50 ; and 4) Plaintiff is entitled to possession of the Equipment pursuant to the terms and/or provisions of the Lease.

C. The Parties' Positions

With respect to its Order to Show Cause, Plaintiff submits that it has demonstrated its right to the requested relief by establishing that 1) Plaintiff is the holder of the applicable Chattel Mortgages, which grant Plaintiff a security interest in the Equipment; 2) Parkside is in default of its obligations to Plaintiff; 3) Plaintiff has demanded that Parkside release the Equipment which it has not done; 4) the relevant agreements entitle Plaintiff to possession of the Equipment; and 5) the value of Equipment 1 at the time of purchase was $70,606.25 and the value of Equipment 2 at the time of purchase was $62,857.50 (Willinski Aff. at ¶¶ 4(f) and 6(f)).

With respect to its motion, Plaintiff submits that it has demonstrated its right to judgment on the Complaint by establishing its service of the Summons and Complaint on Defendants, Defendants' failure to answer or appear, and Defendants' default under the relevant agreements which entitle Plaintiff to recover the equipment. As noted in the Prior Order, the relief demanded by Plaintiff in the Complaint is an Order granting a Prejudgment Writ of Replevin instructing the Sheriff's Office to forthwith replevy the Equipment, and subsequently entering a final judgment awarding permanent possession of the Equipment to Plaintiff, together with costs and attorney's fees.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Legal Standards for Issuance of an Order of Seizure

CPLR § 7101 authorizes an action to try the right to possession of a chattel. The sole issue in an action pursuant to CPLR § 7101 is which party has the superior possessory right to the chattels. *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 419 (S.D.N.Y. 2002) (where defendants conceded default and promissory note gave plaintiff immediate right to foreclose on pledged property, plaintiff "undoubtedly" had superior right to collateral in amount provided by note).

CPLR § 7102(c) provides that the application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;

4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;

5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is located at that place;

6. that no defense to the claim is known to the plaintiff; and

7. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.

Finally, CPLR § 7102(d)(1) provides:

> Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order.

CPLR § 7102(d) permits the court, in a replevin action, to include a provision in an order of seizure directing the Sheriff to break open, enter and search for the chattels sought to be replevied at the place specified in the affidavit submitted on the application for an order of seizure. *Iovinella v. Sheriff of Schenectady County*, 67 A.D.2d 1037, 1038 (3d Dept. 1979).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's Order to Show Cause and motion for default judgment, both of which seek an Order authorizing Plaintiff to take possession of the Equipment. With respect to the location of the Collateral, the Court notes that the Confession of Judgment states that "[All Points] has justly repossessed collateral securing Equipment Lease Agreements between [Parkside] and [All Points] as assignee...The Agreements are known as Accounts Numbered 2117-00185, 2117-00194 and 2117-00200" (Conf. of Judgment at ¶ 4). Thus, the Confession of Judgment suggests that All Points already repossessed certain collateral, and the motion papers do not address whether that is correct and, if so, which collateral has been repossessed and which collateral is still in Defendants' possession. In addition, Plaintiff obtained the Clerk's Judgment against Vertuccio and does not address what effect, if any, that judgment has on the instant applications. Finally, Plaintiff has provided only a conclusory assertion as to the value of the collateral, without providing any information or background regarding the basis of that assertion.

In light of the severe nature of the requested relief, and the issues outlined above, the Court denies Plaintiff's Order to Show Cause and motion for a default judgment. These denials are without prejudice. The temporary restraining order issued by the Court on August 23, 2011 shall remain in effect pending further Order of this Court.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

February 2, 2012

HON. TIMOTHY S. DRISCOLL

J.S.C.