

Nexum Global, LTD v Quick Park W. 42nd St., LLC

2012 NY Slip Op 32542(U)

October 1, 2012

Sup Ct, New York County

Docket Number: 101553/2012

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY
LOUIS B. YORK
J.S.C.

PRESENT: _____

Justice

PART 2

Index Number : 101553/2012
NEXUM GLOBAL, LTD.
vs.
QUIK PARK WEST 42 STREET, LLC
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

OCT 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/1/12

[Signature], J.S.C.

LOUIS B. YORK

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

NEXUM GLOBAL, LTD

Plaintiff,

Index No 101553/2012

-against-

QUICK PARK WEST 42nd Street, LLC,

Defendant.

-----x

FILED
OCT 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

Plaintiff Nexum Global, LTD ("Nexum") moves for an order directing defendant Quick Park West 42nd Street, LLC ("Quick Park") to immediately return to plaintiff a 2010 Yamaha motorcycle during the pendency of this action.

BACKGROUND

Plaintiff is the owner of a 2009 Smart car and a 2010 Yamaha motorcycle. Defendant operates a parking garage at 620 West 42nd Street, New York, NY 10036. On June 5, 2010, plaintiff filled in an application to park the motorcycle at defendant's garage at a monthly rate of \$150.00 (\$126.72 + tax). On September 24, 2010, plaintiff applied for parking of its Smart car at the same garage at a monthly rate of \$200.00 (\$168.95 +tax).

Records of payments submitted by Quick Park show that in September of 2010 plaintiff made a late payment for the motorcycle, and the garage charged a \$15 late fee. Nexum did not

pay for the garage in January and February 2011, and accumulated late fees starting in January 2011. By the end of August 2011, Nexum brought its account up to date, but stopped making payments for the motorcycle in September 2011. Plaintiff made a late payment for the Smart car in January 2011, and incurred a \$12 late fee. Though it paid the monthly fees for parking the car through October 2011, it never paid that late fee, and accumulated additional late fees starting in August 2011. All payments stopped in November 2011.

On plaintiff's version of events, it was prevented from using the car and the motorcycle in early September 2011. Nexum submitted the affidavit of Jonathan Ducos, a security guard at Silvers Towers, 620 West 42nd Street, where Quick Park is located. On September 2, 2011 he was called to investigate a situation at the garage. Two police officers were on the scene. Mr. Grozea, a vice-president of Nexum, was demanding that the garage manager release the Smart car. When told by the manager that Nexum owed \$8,000.00 in past due garage fees, the officers recommended that Mr. Grozea resolve this civil matter with the help of a lawyer.

Quick Park does not comment on this incident but claims that plaintiff was denied access to both its car and motorcycle only in November 2011. It acted in accordance with Section 184 of the New York Lien Law which authorizes a garage to detain a motor vehicle lawfully in its possession until the sum due for storage is paid. In garage's estimate, an outstanding balance of \$2,140.00 in parking fees accrued from August 2011 to May 2012 on the Yamaha motorcycle, and a balance of \$2,263.50 on the Smart car from January 2011 to May 2012. In late February 2012 Quick Park served a notice of sale of both vehicles on Nexum, in accordance with Section 201 of the New York Lien Law. It lists the amount due by Nexum on the motorcycle as \$1,615.00 and on the car as \$1,634.50.

This action was started by summons and complaint dated February 13, 2012 asserting breach of contract, unjust enrichment, conversion and replevin with damages estimated at \$25,000. Following the service of notice of sale, plaintiff submitted a petition to vacate the lien on the Smart car, in accordance with Section 201(a) of the New York Lien Law. In its application it erroneously stated that no lien was placed on the motorcycle. The second action was assigned the index 102201/2012. Plaintiff did not move to consolidate the two actions, and instead now moves in the present action for the release of the motorcycle. It does not provide the legal basis for this motion, and the court could treat it either as a motion for summary judgment or a motion for injunctive relief.

DISCUSSION

Summary judgment

Summary judgment is not warranted if there are material issues of fact in dispute. Quick Park has presented documents confirming that Nexum owes it garage fees. Nexum contests charges for late fees and correctly states that these charges are not mentioned in any contract signed by the parties. This issue cannot be resolved on the written record before the court. The conflicting versions of when Nexus was first prevented from taking its property from the garage are also material to the outcome of the case. If this event occurred when Nexum was behind on its payments, Quick Park was justified in retaining the vehicles in its possession. If, however, Nexum could not use the car and the motorcycle while still fully paying for their storage, it has a legitimate claim for conversion against Quick Park. "Where a garagekeeper claims more than is actually due, he or she is guilty of conversion and liable to the owner in damages." BMW Bank of N. Am. v G & B Collision Ctr., Inc., 46 AD3d 875, 876-77, 850 N.Y.S.2d 470 [2d Dept 2007](internal citations omitted).

The issues in dispute can only be resolved at trial.

Injunctive relief.

In its original motion, plaintiff requested the release of the Yamaha motorcycle. In its reply affirmation, it asks for the return of Nexum's property detained by Quick Park, including the 2009 Smart car. This second request is untimely.

In relation to the motorcycle, plaintiff has to demonstrate three things: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. *See, Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840; 800 N.Y.S.2d, 48 [2005].

Plaintiff did not attempt to demonstrate likelihood of success on the merits. Neither does it risk suffering irreparable injury if the motorcycle remains in the garage, since it can be compensated for the period it did not use the motorcycle should it win on the merits. The balance of equities would be in plaintiff's favor if potential harm to defendant could be prevented by creating an escrow account. In its reply affirmation, for the first time in this case, plaintiff offers to open an escrow account in which to place the alleged outstanding fees. Since the defendant was not given an opportunity to respond to this offer, the court will not consider it at this stage.

The court will provide as injunctive relief only a stay on the motorcycle's potential sale.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that plaintiff's motion for preliminary injunction to release the Yamaha motorcycle during the pendency of this action is denied, and it is further

ORDERED that the sale of the Yamaha motorcycle is stayed during the pendency of this action; and it is further

ORDERED that parties appear at the preliminary conference in Room 205, 70 Thomas Street, on October 17, 2012 at 2:00 p.m.

Dated: 10/1/12

FILED
OCT 05 2012 ENTER:
NEW YORK
COUNTY CLERK'S OFFICE
J.S.C. *[Signature]*