

Citifinancial Auto, Ltd. v Universal Auto Sales, LLC
2010 NY Slip Op 30400(U)
February 17, 2010
Supreme Court, Nassau County
Docket Number: 022457-07
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CITIFINANCIAL AUTO, LTD.,

Plaintiff,

-against-

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 022457-07
Motion Seq. No: 1**

Submission Date: 12/18/09

**UNIVERSAL AUTO SALES, LLC. dba
UNIVERSAL AUTO WORLD; UNIVERSAL
CAPITAL CORP.; MICHAEL OSHRY;
MARK HARLEY; ROBERT O'HARA;
CHRIST TSIROPOULOS aka CHRIS
TSIROPOULOS,**

Defendants.

-----X

Papers Read on this Motion:

- Notice of Motion, Affirmation and Exhibits.....X**
- Affirmation in Opposition.....X**

This matter is before the court on the motion by Plaintiff Citifinancial Auto, Ltd. ("Citifinancial" or "Plaintiff") filed on November 16, 2009 and submitted November 23, 2009. For the reasons set forth below, the Court reserves decision on the motion and directs counsel for both parties, on or before March 5, 2010, to provide the Court with a letter outlining the status of the related criminal action involving Defendant Mark Harley ("Harley"). That letter is to include 1) whether the related criminal action has been presented to a Grand Jury; 2) if the matter has been presented to a Grand Jury, whether the Grand Jury issued an Indictment in which Harley is one of the named defendants; 3) if the matter has not been presented to the Grand Jury, the scheduled date of a future Grand Jury presentment; 4) if an Indictment has been issued, the

Indictment Number and the charges in the Indictment; 5) whether Harley has pled guilty to any crime or offense in the related criminal action and, if so, the status of the sentencing proceeding; 6) if Harley has not pled guilty, whether any pretrial hearings have been conducted in the related criminal action and, if not, the scheduled date of any such pretrial hearings; and 7) the scheduled trial date of the related criminal action, if known.

BACKGROUND

A. Relief Sought

Plaintiff Citifinancial moves for an Order, pursuant to CPLR § 3126, striking the Verified Answer (“Answer”) interposed by Defendant Harley, a defendant in a related criminal matter.

Defendant Harley opposes Citifinancial’s application.

B. The Parties’ History

On December 17, 2007, Citifinancial filed its Summons and Verified Complaint (“Complaint”) (Ex. B to Motion) against Defendants. In the Complaint, Citifinancial alleges that the Defendants, acting jointly and aiding and abetting each other, participated in a scheme to defraud the Plaintiff and other entities (Compl at ¶ 11). In its Affirmation in Support of this motion, Citifinancial affirms that Defendants Universal Auto Sales, LLC dba Universal Auto World (“Universal Auto”), Harley, Christ Tsiropoulos and others were arrested and charged with numerous crimes including grand larceny, identity theft and falsification of business records, and provides a copy of a press release issued by the Nassau County District Attorney’s Office (“D.A.”) about these arrests (“Criminal Matter”).

The Complaint contains specific references to a related matter being pursued by the D.A. involving the named Defendants although it is unclear which specific matter the Complaint refers to. Those references include the following:

Paragraph 14 of the Complaint alleges:

According to documents filed with this court by the [D.A.], Index No. 07-010172, the defendants paid persons with good credit to act as a straw buyer, i.e. they would sign papers regarding the purchase of a vehicle(s) although they did not purchase the vehicle.

Paragraph 15 of the Complaint alleges:

According to documents filed with this court by the [D.A.], Index No. 07-010172, the defendants committed identity theft, i.e. the documents related to the purchase and financing of a vehicle utilized [sic] the identity of a person who had no knowledge of the transaction and did not consent to the usage of their identity.

Paragraph 16 of the Complaint alleges:

According to documents filed with this court by the [D.A.], Index No. 07-01072, credit applications were supported by forged paycheck stubs and other false documents.

Finally, paragraph 32 of the Complaint alleges:

Upon information and belief, Mark Harley was aware of the foregoing scheme, participated in and personally benefited therefrom.

Plaintiff alleges the first and third causes of action in the Complaint against all the Defendants. In the first cause of action, Plaintiff alleges that Defendants committed fraud by knowingly submitting false written documentation to Citifinancial regarding prospective purchasers, on which Plaintiff relied to its detriment. The third cause of action, asserted against all Defendants except Universal Auto, alleges that Defendants tortiously interfered with a contract between Citifinancial and Universal Auto by, *inter alia*, submitting false loan applications.

Defendant Harley served his Answer dated February 29, 2008 in which he responded to the allegations in the Complaint. Plaintiff affirms that Universal Auto, Michael Oshry and Universal Capital Corp. ("Universal Capital") also served verified answers, and that Defendant Chris Tsiropoulos has not appeared in this action.

Plaintiff alleges that, on June 5, 2009, it served combined interrogatories and document demands on Harley, and provides a copy of those demands ("Demands"). Harley responded to those demands by serving his Response to Interrogatories dated September 10, 2009 ("Response") (Ex. E to Motion). In his Response, Harley refused to answer questions 3(c), (d), and (e), 9, 10(a), 11(a), 14(a), 15(a) and 17 ("Disputed Demands") on the grounds that his responses might tend to incriminate him.

Demands 3(c), (d) and (e) asked Harley whether he was employed by Universal Auto and 1) whether he reviewed customer's [sic] credit applications; 2) whether he reviewed the identification provided by customers; and 3) asked him to state in detail his job duties and responsibilities in 2006 and 2007. Demand 9 asked Harley to state the manner in which Universal Auto maintained records of the motor vehicles it sold or leased, and who maintained such records. Demand 10(a) asked Harley to state whether he was involved in the sale or lease

of any motor vehicles to Nazeem Mohammad, whose name is mentioned in the Complaint, and to state the nature of any such involvement.

Demand 11(a) asked Harley to state whether he was involved in the sale or lease of any motor vehicles to Damian Cole, also named in the Complaint, and to state the nature of any such involvement. Demand 14(a) asked Harley to state whether he was involved in the sale or lease of any motor vehicles to Haimraj Prashad, whose role Plaintiff does not specify, and to state the nature of any such involvement. Demand 15(a) asked Harley to state whether he was involved in the sale or lease of any motor vehicles to Maurice Coleman, whose role Plaintiff does not specify, and to state the nature of any such involvement. Finally, demand 17 asked Harley to state whether he was aware of the sale or lease of more than one vehicle to the same individual, within the same month, while he worked at Universal Auto.

Plaintiff also affirms that, pursuant to the Preliminary Conference Order that was so-ordered by the Court on April 23, 2009, Harley is required to appear for a deposition. Counsel for Plaintiff affirms that counsel for Harley advised him that Harley would refuse to answer any questions at a deposition based on his Fifth Amendment privilege.

Counsel for Plaintiff affirms that he does not know the status of the Criminal Matter, and that the D.A. has not returned his calls seeking information about the Criminal Matter. He also affirms that counsel for Harley has declined to comment on the status of the Criminal Matter. Thus, counsel for Plaintiff does not know when the Criminal Matter will be resolved.

Harley opposes Citifinancial's motion, affirming that, in light of the fact that Harley has been charged with a felony for which he faces incarceration, he is permitted to decline to answer the Disputed Demands on the grounds that his responses might incriminate him. Harley also submits that, in light of the fact that the prosecution could cross examine him at the criminal trial with his sworn deposition testimony from this action, he also should not be required to submit to a deposition.

C. The Parties' Positions

Plaintiff submits that Harley has not established a factual predicate for his invocation of his Fifth Amendment privilege against self incrimination. Thus, in light of his refusal to respond to all the Demands and to appear for a deposition, the Court should strike his Answer.

Harley opposes Citifinancial's motion, submitting that, in light of the Criminal Action in which he has been charged with a felony, he is permitted to decline to answer the Demands or to

submit to a deposition on the grounds that his responses might incriminate him.

RULING OF THE COURT

CPLR § 3126(b)(3) provides, *inter alia*, that if a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Although a demand in a civil case may seek documents that could be incriminating in connection with a criminal indictment against the defendant, the fact that the witness may involve the privilege against self-incrimination is not necessarily a basis for precluding civil discovery. *Matter of Astor*, 62 A.D.3d 867, 869 (2d Dept. 2009), quoting *State of New York v. Carey Resources*, 97 A.D.2d 508, 509 (2d Dept. 1983). A blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances, and the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer. *Matter of Astor* at 869, quoting *Chase Manhattan Bank, Nat'l Ass'n v. Federal Chandros, Inc.*, 148 A.D.2d 567, 568 (2d Dept. 1989). While the witness is generally the best judge of whether an answer may tend to be incriminating when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate. *Id.*, quoting *Carey Resources* at 509.

Although it seems readily apparent to the Court that Harley's responses to the Disputed Demands may tend to incriminate him, the Court cannot issue a ruling until it is certain that there are, in fact, criminal charges pending against Harley that implicate his Fifth Amendment rights with respect to the instant action. Moreover, depending on the nature of the specific criminal charges pending against Harley, it might be difficult, if not impossible, for Plaintiff to conduct a meaningful deposition of Harley that would not elicit a systematic invocation of his Fifth Amendment privilege against self-incrimination. The Court, however, cannot issue a definitive decision on the instant motion until the Court knows the status of the Criminal Matter and, accordingly, reserves decision on this motion pending the receipt of that information from counsel. The Court directs counsel for both parties, on or before March 5, 2010, to provide the Court with a letter outlining the status of the Criminal Matter. That letter is to include

1) whether the Criminal Matter has been presented to a Grand Jury; 2) if the Criminal Matter has been presented to a Grand Jury, whether the Grand Jury issued an Indictment in which Harley is one of the named defendants; 3) if the Criminal Matter has not been presented to the Grand Jury, the scheduled date of a future Grand Jury presentment; 4) if an Indictment has been issued, the Indictment Number and the charges in the Indictment; 5) whether Harley has pled guilty to any crime or offense in the Criminal Matter and, if so, the status of the sentencing proceeding; 6) if Harley has not pled guilty, whether any pretrial hearings have been conducted in the Criminal Matter and, if not, the scheduled date of any such pretrial hearings; and 7) the scheduled trial date of the Criminal Matter, if known.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Certification Conference on March 9, 2010 at 9:30 a.m.

DATED: Mineola, NY

February 17, 2010

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
FEB 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE