

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 7-12-06

Submission Date: 7-12-06

Motion Sequence No.: 008/MOT D

SUNRISE MOTORS, LLC, x

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF

Westerman, Ball, Ederer, Miller &
Sharfstein, LLP

170 Old Country Road - Suite 400
Mineola, New York 11501

MERCEDES-BENZ USA, LLC.

Defendant,

- against -

COUNSEL FOR DEFENDANT

Frederic A. Wool, Esq.

7600 Jericho Turnpike

Woodbury, New York 11797

RECOVERY RACING, LLC d/b/a
MERCEDES-BENZ OF MASSAPEQUA,

Third-Party Defendant.

_____x

**COUNSEL FOR THIRD-PARTY
DEFENDANT**

Elias C. Schwartz, Esq.

343 Great Neck Road

Great Neck, New York 11201

ORDER

The following papers were read on Plaintiff's motion to release funds from
escrow and Third-party Defendant's cross-motion for an order of attachment:

- Notice of Motion dated June 13, 2006;
- Affidavit of Jeffrey A. Miller, Esq. sworn to on June 13, 2006;
- Notice of Cross-motion dated July 7, 2006;
- Affidavit of Stuart M. Hayim sworn to on July 7, 2006;
- Affirmation of Frederic A. Wool, Esq. dated July 5, 2006;
- Affidavit of Jeffrey A. Miller, Esq. sworn to on July 11, 2006;

Sunrise Motors, LLC ("Sunrise") moves for an order permitting its attorney to release funds being held in escrow. Third-party Defendant, Recovery Racing, LLC cross-moves ("Recovery") for a preliminary order of attachment.

BACKGROUND

Sunrise operated a Mercedes-Benz dealership in Massapequa.

Sunrise commenced the within action against Mercedes Benz USA, LLC ("Mercedes Benz") seeking to recover the sum of \$704,033.37 which it alleged was due to Sunrise from Mercedes Benz for certain transactions which allegedly occurred prior to the transfer of the dealership.

On July 19, 2004, Sunrise sold the dealership to Recovery. Recovery claims that, shortly after the closing, it discovered numerous breaches of the contract of sale and ancillary agreements. Recovery asserts that Sunrise provided it with false and misleading information regarding the operation of the dealership upon which it relied when entering into the agreement. Recovery asserts the financial information Recovery provided contained material misstatements about operating expenses of the dealership. Recovery further alleges Sunrise engaged in other improper activities such as providing a customer list that contained the names of persons who never purchased a vehicle or its employees, and failing to pay creditors.

The full list of Sunrise's alleged misdeeds need not be discussed. However, as a result of these actions, Sunrise commenced an action seeking to recover millions of dollars in damages from Recovery and its principal Wayne Rivardo. This action is

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captioned *Recovery Racing, LLC d/b/a Mercedes Benz of Massapequa, Plaintiff, v. Sunrise Motors, LLC and Wayne Rivardo, Defendants* ("Recovery Racing Action"). The Recovery Racing Action is presently pending before this Court.

Mercedes Benz conceded that it owed \$669,333.37. However, because of the dispute between its former and present dealer and company policy of issuing checks payable jointly to the transferor and transferee when the accrual and payment of the sums overlaps the transfer of title to the dealership, Mercedes refused to make payment of the amount due.

By order dated September 8, 2005, Hon. Ira B. Warshawsky, Justice of this Court, ordered Mercedes Benz pay over the disputed sum of \$669,333.37 to the attorney for Sunrise to be held in escrow pending the resolution of an action the Recovery Racing Action.

Sunrise moved to reargue from Justice Warshawsky's September 8, 2005 order. By order dated January 30, 2006, Justice Warshawsky granted reargument and adhered to his prior order. Justice Warshawsky's January 30, 2006 order transferred this action to this Court and directed that any future requests regarding the funds being held in escrow be made here.

Sunrise now moves for an order permitting its attorney to release from the escrow and to the Plaintiff the sum of \$655,933.37. Recovery opposes the motion and cross-moves for an order of attachment.

DISCUSSION

Sunrise bases its motion upon an argument that there is no dispute that it is entitled to \$655,933.37 of the escrow funds and that this Court's decisions in regard to the Recovery Racing Action constitute of change of circumstances justifying the release of the escrow funds. Sunrise asserts that Recovery is entitled, at most, to \$13,400 of the escrow funds which consists of a \$100 per car rebate on cars sold after the transfer of the dealership. In its simplest terms, Sunrise asserts that Justice Warshawsky did not have the authority to direct that the funds recovered in this action be held in escrow pending the determination of the Recovery Racing Action.

Justice Warshawsky's order constitutes the law of the case. That doctrine provides that once an issue has been decided that decision is binding on the parties and the court. Siegel, *New York Practice 4th* §448. No other judge of a coordinate jurisdiction may undo the decision. State of New York Higher Education Service Corp. v. Starr, 158 A.D.2d 771 (3rd Dept. 1990). The law of the case doctrine applies only to legal determinations that resolve issues on the merits. Gay v. Farella, 5 A.D.3d 540 (2nd Dept. 2004). The doctrine may be ignored only in extraordinary circumstances such as a change in the law or a showing of new evidence. Brownrigg v. New York City Housing Auth., 29 A.D.3d 721 (2nd Dept. 2006).

The doctrine is clearly applicable here. Justice Warshawsky's September 8, 2005 order decided the issue of what should be done with the money owed by Mercedes Benz to Sunrise and/or Recover on account of the claim made by Sunrise in

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this action by directing that that money be held by Recovery's attorney in escrow pending the resolution of the Recovery Racing Action. Sunrise moved to reargue. By order dated January 30, 2006, Justice Warshawsky granted reargument and adhered to his prior decision. This Court is bound by the decisions and orders of Justice Warshawsky.

Sunrise has failed to establish a change in the law. Sunrise has also failed to establish the existence of new evidence that was not presented to or considered by Justice Warshawsky in deciding the motion. This Court's decision in the Recovery Racing Action upon which Sunrise relies as "new facts" was rendered on November 23, 2005. Therefore, it could, and should, have been presented to and considered by Justice Warshawsky in connection with Sunrise's motion to reargue.

The arguments on the merits of this motion were previously made and rejected by Justice Warshawsky. Justice Warshawsky's statement in his January 30, 2006 order that this Court was to determine all future requests regarding the escrow funds was not an invitation to Sunrise to make a new motion seeking the same relief – release of the escrow funds – on grounds previously heard and determined by Justice Warshawsky. It was a recognition that since the action was being transferred to this Court that issues relating to the distribution of the escrow funds would be heard and determined.

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The proper method available for Sunrise to challenge the determination of Justice Warshawsky that this money should be held in escrow was by appeal. See, CPLR 5701(a)(2)(v).

Recovery's cross-motion for an order of attachment must be denied as moot. Since the money is being held in escrow pending further order of this court, there is no reason why an order of attachment is necessary.

The Court notes that the application for an attachment was made in the wrong action. Recovery seeks the order of attachment for the purposes of having a fund available to satisfy any judgment that might be entered in its favor in the Recovery Racing Action. See, Elton Leather Corp. v. First General Resources Co., 138 A.D.2d 132 (1st Dept. 1988); and CPLR 6201(3). Thus, any application for an attachment must be made in that action.

Accordingly, it is,

ORDERED, that Plaintiff's motion to release the money being held by its attorney is escrow is **denied**; and it is further

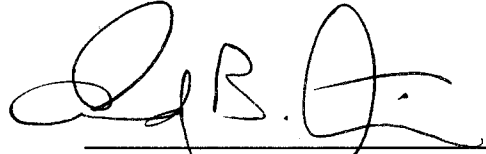
ORDERED, that Recovery Racing's cross-motion for a preliminary order of attachment is **denied**; and it is further,

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ORDERED, that counsel for the parties are directed to appear fo a status
conference on October 30, 2006 at 9:30 a.m

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
October 3, 2006



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE