*State of New York*
*Supreme Court, Appellate Division*
*Third Judicial Department*

Decided and Entered: November 25, 2020 529637

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ABELE TRACTOR & EQUIPMENT CO., INC.,
Appellant,
v

CHARLES SCHAEFFER SR., Doing Business as AUTO SOLUTIONS, Also Known as AUTO SOLUTIONS OF NEW YORK, INC., Formerly Known as AUTO SOLUTIONS OF GLENVILLE, INC., et al.,
Defendants,
and

TRUSTCO BANK CORP., NY,
Respondent.

MEMORANDUM AND ORDER

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Calendar Date: October 22, 2020

Before: Garry, P.J., Clark, Devine, Aarons and Reynolds Fitzgerald, JJ.

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Bailey, Johnson & Peck, PC, Albany (John W. Bailey of counsel), for appellant.

Mandel Clemente, PC, East Greenbush (Linda Mandel Clemente of counsel), for respondent.

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Devine, J.

Appeal from an order of the Supreme Court (McGrath, J.), entered June 6, 2019 in Rensselaer County, which, among other things, denied a motion by defendant Trustco Bank Corp., NY for partial dismissal of the complaint.

A more detailed recitation of the facts may be found in our prior decision in this matter (167 AD3d 1256 [2018]). Briefly, defendant Trustco Bank Corp., N.Y. lent significant sums of money to defendant John A. Paige, Jr., Contracting, Inc. (hereinafter Paige), which pledged all of its goods, machinery and equipment "now owned or hereafter acquired" as collateral. As default on the loans threatened in 2013, Paige's president advised Trustco that he intended to sell Paige's motor vehicles and construction equipment to plaintiff and use the proceeds to cover Paige's debts to subcontractors and suppliers. Trustco's consent to the sale was not obtained and, in a November 2013 bill of sale, the machinery and equipment was sold to plaintiff for $342,500.

Trustco thereafter hired defendant Charles Schaeffer Sr. to repossess the vehicles and equipment, which occurred in December 2013. In January 2014, Trustco advised that it would release its lien and allow plaintiff to take possession of the vehicles and equipment upon receipt of $210,000, as well as repossession and storage charges. Plaintiff commenced this action the same month, after which it paid the purchase price in full and acquired possession of the vehicles and equipment. Trustco and Schaeffer thereafter separately moved for summary judgment, and those motions were granted in part by Supreme Court. Upon appeal, we agreed with Supreme Court that Trustco was empowered to repossess the vehicles and equipment, but noted that Trustco had failed to perfect its security interest in those vehicles, requiring a certificate of title under the Vehicle and Traffic Law, and that it remained potentially liable "to any party that may have ultimately been able to establish a superior claim" (id. at 1259).[1] Moreover, inasmuch as the bill

[1] Trustco now argues that our prior decision was incorrect, that its security interest in the vehicles had been

of sale granted plaintiff an ownership interest in all but "the titled vehicles," we determined that plaintiff was a debtor to whom Trustco owed duties pursuant to UCC article 9 (id. at 1260). We accordingly found "an issue of fact that preclude[d] the grant of summary judgment to [any] party regarding plaintiff's claim for damages, pursuant to UCC article 9, based on the manner of repossession and disposition of the equipment" (id. at 1260).

Motion practice came in the wake of our decision. As is relevant here, Trustco moved to dismiss the claims against it insofar as they related to the titled vehicles, arguing that plaintiff did not acquire certificates of title for those vehicles until after commencement of this action and, as a result, lacked any ownership interest that could have been impacted by the pre-commencement repossession of them. Trustco further moved to strike plaintiff's supplemental expert disclosure statement and to preclude expert testimony on plaintiff's alleged lost profits and sales. Supreme Court denied Trustco's motions in their entirety, and Trustco appeals.[2]

To begin, although Trustco styled its motion as one to dismiss pursuant to CPLR 3211 (a) (1), it was made long after issue was joined and "should have been treated as a CPLR 3212 summary judgment motion" (Kavoukian v Kaletta, 294 AD2d 646, 646 [2002]; see CPLR 3211 [a] [1]; [e]; Rich v Lefkovits, 56 NY2d 276, 278 [1982]). We treat the motion in that fashion and, in doing so, observe that prior notice of that treatment "is unnecessary here given that 'it is clear from the papers that no

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perfected and that, as a result, its interest was superior to whatever interest plaintiff had in them. The issue is not properly before us for a variety of reasons, not least of which that it was not raised in Trustco's motion papers (see Marshall v City of Albany, 184 AD3d 1043, 1044 [2020]).

[2] Supreme Court also denied motions by Schaeffer for similar relief. Inasmuch as his appeal from the order was dismissed (see 22 NYCRR 1250.10 [a]; 2020 NY Slip Op 63853[U] [2020]), we limit our discussion to the denial of Trustco's motions.

prejudice [will] result[] from omission of notice'" (Brown v Midrox Ins. Co., 108 AD3d 921, 922 n [2013], quoting Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County, 63 NY2d 100, 103 [1984]; see Rich v Lefkovits, 56 NY2d at 283).

As for the merits, Trustco may be liable to specified individuals for its failure to comply with the statutory requirements for "the manner of repossession and disposition of [Paige's] equipment" (167 AD3d at 1260; see UCC 9-625 [b]). Those individuals include, as is relevant here, any person who "was a debtor, was an obligor, or held a security interest in or other lien on" those items at the time that plaintiff departed from statutory requirements (UCC 9-625 [c] [1]). Plaintiff claims that it is a debtor, defined as one with "an interest, other than a security interest or other lien, in the collateral" (UCC 9-102 [28] [A]), including one who holds an ownership interest in the collateral (see 167 AD3d at 1260).[3] Plaintiff may accordingly pursue a claim against Trustco for damages under UCC article 9 if it had an ownership interest in the titled vehicles – making it a debtor within the meaning of UCC article 9 – prior to commencing this action.

In discerning the owner of a titled vehicle in the context of secured transactions, we begin by noting that title to the vehicles would pass under the UCC when Paige delivered a "tangible document of title" to plaintiff (UCC 2-401 [3] [a]). The fact that title was not delivered until after the vehicles were repossessed and this action was commenced is not determinative, however, as the provisions of the UCC are relevant but, "because of the unique problems involving motor vehicle registration and liability, . . . not controlling" (Fulater v Palmer's Granite Garage, 90 AD2d 685, 685 [1982],

[3] Plaintiff does not appear to contend on appeal, as it suggested before Supreme Court, that it had an interest distinct from an ownership interest in the titled vehicles that would permit it to seek damages from Trustco.

appeal dismissed 58 NY2d 826 [1983]).[4] It is instead the general rules governing ownership of motor vehicles that control, rules that dictate how formal title of a vehicle is transferred and provide a presumption that the person named on the certificate of title is the vehicle's owner (see Portillo v Carlson, 167 AD3d 792, 793 [2018]; Zegarowicz v Ripatti, 77 AD3d 650, 653 [2010]; see also Vehicle and Traffic Law §§ 128, 2101 [g]; 2108 [c]; People v Whitehead, 48 AD3d 237, 238 [2008], lv denied 10 NY3d 872 [2008]). It is nevertheless true that "[o]wnership of a motor vehicle generally passes when the parties intend that it pass" (Nationwide Ins. Co. of Am. v Porter, 121 AD3d 1208, 1210 [2014] [internal quotation marks and citations omitted]; see Bunn v City of New York, 166 AD3d 491, 492 [2018]; Duger v Estate of Carey, 307 AD2d 675, 675-676 [2003]), and the presumption arising out of the certificate of title may therefore "be rebutted by evidence which demonstrates that another individual owned the vehicle in question" (Sosnowski v Kolovas, 127 AD2d 756, 758 [1987]; see Bornhurst v Massachusetts Bonding & Ins. Co., 21 NY2d 581, 586 [1968]; Aronov v Bruins Transp., 294 AD2d 523, 524 [2002]). This may consist of proof that the other individual "had 'possessory interest in the [vehicle], with its attendant characteristics of dominion and control'" (Dorizas v Island Insulation Corp., 254 AD2d 246, 248 [1998], lv denied 93 NY2d 810 [1999], quoting Matter of Vergari v Kraisky, 120 AD2d 739, 740 [1986]; see Maguire v Upstate Auto, Inc., 182 AD3d 757, 758 [2020]; Dobson v Gioia, 39 AD3d 995, 999 [2007]).

It is undisputed here that Paige held, and was named as owner on, the certificates of title for the vehicles until

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[4] We previously observed that "[t]he bill of sale, by which Paige sold and conveyed the equipment to plaintiff, was effective to transfer title to the equipment, except the titled vehicles, when it was executed" under UCC 2-401 (3) (b) (167 AD3d at 1260). This statement only reflected the fact that UCC 2-401 (3) (b) does not apply to vehicles titled under the Vehicle and Traffic Law (see e.g. Dairylea Coop. v Rossal, 64 NY2d 1, 12-13 [1984]). It was not, contrary to Trustco's suggestion, a declaration as to who owned the vehicles after the bill of sale was executed.

January 2014, giving rise to a presumption that Paige was their owner at all relevant times. The burden accordingly shifted to plaintiff to raise a question of fact, which it attempted to do by pointing out that, in the November 2013 bill of sale, Paige agreed to "hereby sell[], transfer[] and convey[]" the vehicles to it. Plaintiff made a down payment at that point and agreed to make full payment by November 15, 2013, and both plaintiff and Paige believed that the bill of sale afforded plaintiff some interest in the vehicles. The record is devoid, however, of proof suggesting that Paige actually intended to transfer title at that point or that plaintiff otherwise exercised dominion and control over the titled vehicles. To the contrary, the complaint itself alleges that the sale would be consummated when the balance of the purchase price was paid, and plaintiff's principal acknowledged that he did not anticipate receiving title and possession of the vehicles until that occurred. Full payment – and, with it, plaintiff acquiring possession of and title to the vehicles – was repeatedly delayed and did not occur until after this action was commenced. Thus, as plaintiff failed to demonstrate a question of fact as to whether the presumption of ownership applied, Trustco was entitled to summary judgment dismissing plaintiff's claims insofar as they involved the repossession and storage of vehicles that plaintiff did not own (see Bunn v City of New York, 166 AD3d at 492; United Servs. Auto. Assn. v Spyres, 34 AD2d 181, 182-183 [1970], affd 28 NY2d 631 [1971]; compare Bornhurst v Massachusetts Bonding & Ins. Co., 21 NY2d at 585-586).

Finally, we perceive no abuse of discretion in Supreme Court's determination that plaintiff's supplemental expert disclosure complied with the requirements of CPLR 3101 (d) (1) and that, under the circumstances presented, preclusion of the expert's testimony was not called for (see Reed v New York State Elec. & Gas Corp., 183 AD3d 1207, 1214 [2020]; Klotz v Warick, 53 AD3d 976, 979 [2008], lv denied 11 NY3d 712 [2008]).

Garry, P.J., Clark, Aarons and Reynolds Fitzgerald, JJ., concur.

ORDERED that that the order is modified, on the law, with costs to defendant Trustco Bank Corp., NY, by reversing so much thereof as denied said defendant's motion for summary judgment dismissing those claims relating to its repossession and storage of the titled vehicles; motion granted to that extent and said claims dismissed; and, as so modified, affirmed.

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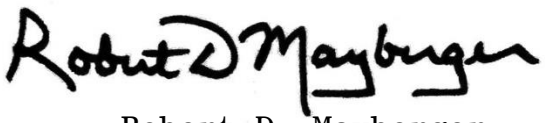

Robert D. Mayberger
Clerk of the Court