64258-8

64258-8

No. 64258-8-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Filed June 10, 10

PRINS AUTOGASSYSTEMEN B.V. and
AMERICAN ALTERNATIVE FUEL, LLC

Appellants

v

CARL COOK

Respondent

AMENDED
RESPONDENT'S BRIEF

Carl Cook, pro se
4311 NE 123rd St.
Seattle, WA 98125

Table of Contents

I. INTRODUCTION **1**

II. STATEMENT OF FACTS AND OF THE CASE **2**

A. Beginning of the Action 2

B. Pivoting the Case 3

C. Summary Judgment 4

D. The New York Actions 5

III. ARGUMENTS ON DEFENDANTS' APPEAL **10**

A. It was not error for the trial court to enter summary judgment rather than default judgment 10

B. It was not error for the trial court to not hold a separate damages hearing 11

C. It was not error for the trial court to grant Plaintiff's motion, as all exhibits were provided to Defendants 12

D. It was not error for the trial court to assess damages based on Plaintiff's lack of affidavit 14

E. It was not error for the trial court to assess damages based on alleged hearsay evidence 14

F. It was not error for the trial court to grant summary judgment despite lack of a Declaration affidavit 14

IV. CONCLUSION **18**

APPENDIX A

Email of Defendants' Counsel

APPENDIX B

Order to Show Cause – Decision

APPENDIX C

New York Lawsuit

I. INTRODUCTION

This is a breach of contract action asserting that Appellants Prins Autogassystemen and American Alternative Fuel ("Defendants") have failed to honor their warranty on a propane fuel system for the vehicle of Respondent Carl Cook ("Plaintiff").

In July of 2007 Plaintiff experienced a fault in the propane system and looked to the manufacturer, Defendant Prins Autogassystemen ("Prins"), to resolve it. When Prins determined that Plaintiff had a valid warranty, they appointed Defendant American Alternative Fuel ("AAF"), which is its U.S. agent, to resolve the issue.

Over the succeeding year Plaintiff continuously negotiated with AAF to have the repair made, with a repair appointment being promised by AAF on four successive occasions. Each scheduled appointment passed with no response from AAF, and no appointment was ever actually made with the repair facility, Max-Quip Inc.

At one point, AAF actually sent a replacement for the defective part to Plaintiff, which in conjunction with the 'repair appointments' effectively proves that AAF did in fact recognize the warranty. But AAF repeatedly delayed and refused to send the crucial wiring harness for the part, which is necessary to integrate it into the engine's electrical system.

After more than a year of delays and serious chronic vehicle problems, Plaintiff opted to file suit.

II. STATEMENT OF FACTS AND OF THE CASE

Appendices A through C are attached hereto and made a part hereof for all purposes.

A. Beginning of the Action

Suit was filed by Plaintiff on September 19, 2008 against Defendants, requesting actual damages of $5,366, plus treble damages, costs and attorney fees. *CP 3-4.* Defendants answered within the required 60 day time period, but did so through their counsel Gregory Sanda of New York law firm Sgambettera & Assoc., who is not licensed to practice law in the State of Washington. Plaintiff then filed a Motion For Order of Default on these grounds, which was denied by the trial court, perhaps fairly so if given that an answer by any means should be accepted. In order to induce the trial court to accept Defendants' Answer, Matthew Sgambettera, principal of the firm employing Defendants' counsel Gregory Sanda, assured the court in an email dated December 10, 2008 5:18pm that, "I am now in the process of securing local counsel to represent the Defendants in this action." (Appendix A, hereto) And he was admonished to do so forthwith, by the court.

It should be noted that Defendants did not notice Plaintiff of their Answer, and it was necessary for Plaintiff to repeatedly request it of them, ultimately to appeal to the trial court's bailiff to 'encourage' counsel to

forward a copy of their Answer to Plaintiff. It has turned out to be the apparent standard practice of Defendants' counsel to not notice Plaintiff of their filings, and many of Defendants' filings are missing from Plaintiff's records as a result. Defendants' counsel has continued this practice in recent actions by Plaintiff to collect the judgment in New York.

B. Pivoting the Case

On January 26, 2009 Plaintiff filed two Notices of Deposition on defendants Prins and AAF respectively. The depositions were scheduled for February 16, 2009, and no objection nor request for telephonic testimony was made by either defendant. Neither defendant appeared for deposition, so Plaintiff then filed a Motion for Relief for Corporate Party's Failure to Attend, and was granted an order by the trial court on March 10, 2009. *CP 19-21*. As sanction, the pleadings of Defendants in this action were stricken in total, and each defendant was ordered to attend deposition on March 23, 2009. No subsequent objection nor request for telephonic testimony was made by either defendant, and neither defendant appeared at the second deposition on the ordered date, causing Plaintiff to again incur significant costs.

On May 15, 2009 Plaintiff served two Requests for Admissions on defendants Prins and AAF respectively. Defendants' responses (*AOB, Appendix C*) were received on the day of the deadline, however they were completed and signed by Defendants' New York counsel Gregory Sanda,

in direct contravention of the trial court's admonishment, and despite the fact that his license to practice law had been revoked even in his home state of New York. *ibid.* So on June 19, 2009 Plaintiff filed a Motion to Find Defendants in Contempt of Court, which was granted. *CP 26-28.* Mr. Sanda was again ordered to immediately refrain from representing Defendants, and both defendants' responses to Plaintiff's Requests for Admissions were stricken. The Court also ordered that all of Plaintiff's Requests for Admissions (*AOB, Appendix C*) were deemed admitted conclusively by both defendants.

C. Summary Judgment

It was at this point that Plaintiff filed his Motion for Summary Judgment, on July 7, 2009. *CP 29-31 and 34-36.* Plaintiff drew up the Motion to the best of his ability, with appropriate exhibits and tabs, and immediately served the complete package on Defendants' counsel Gregory Sanda, as Plaintiff had received no word of other counsel at that time. Less than one week before the hearing scheduled for September 4th, local counsel Richard Bersin (WSBA# 7178) was finally hired by Defendants, who then filed a flurry of motions in an attempt to buy time. In the hearing these were denied in total by the trial court as not timely, which noted that although it was not Mr. Bersin's fault that he came in so late, he would have to bear the bad news. *RP 2.* Plaintiff was granted summary judgment by the trial court on September 4, 2009. *CP 83-85.*

After the hearing Plaintiff attempted to discuss resolution by courteously asking Defendants' counsel, "Do we have anything to talk about Mr. Bersin?" Counsel, visibly perturbed, replied that he must confer with his clients.

On October 7, 2009 Plaintiff received Defendants' Notice of Appeal. Since that time, Defendants have missed the deadlines set by the Appellate Court for every single filing, including the *Proof of Service of the Notice of Appeal*, the *Designation of Clerk's Papers*, the *Statement of Arrangements*, the *Verbatim Report of Proceedings*, and the *Appellants' Brief*. When it was clear that the *Appellants' Brief* would be tardy Plaintiff filed his Opposition to Appellants' Motion for Extension of Time, on April 21, 2010, which motion was denied.

D. The New York Actions

As of the date of this Respondent's Brief, Defendants have not filed a supersedeas bond with the trial court. Thus Plaintiff began collection actions in the State of New York, Greene County, under Index Number 09-2054 of the Supreme Court of New York (equivalent to the Washington Superior Court), in the county where American Alternative Fuel is located. Plaintiff first filed the Exemplified Abstract of Judgment with the County Clerk and paid for the Index Number to engage the courts.

Plaintiff then filed on February 1, 2010 an Information Subpoena and Restraining Notice on M & T Bank, a bank where Defendant

American Alternative Fuel is known to have an account. In response the bank froze AAF's accounts and notified them that they are in default of a $38 million credit facility as a result of this unpaid judgment. On February 2, 2010 AAF filed for a Show Cause Order, equivalent to a TRO, which lifted the stay, temporarily relieved the default, and sought the vacating of Plaintiff's judgment in New York. As a condition of granting the emergency Show Cause Order, Judge D.K. Lalor ordered AAF to deposit an 'undertaking' in the amount of $20,000 with the court clerk, in the event that Defendants do not prevail. As has been their regular practice, Defendants' counsel did not notice Plaintiff of their Affidavit for Show Cause, the resulting Order to Show Cause, nor any of their other filings, and Plaintiff was forced to secure these filings by other means.

On February 12, 2010 Plaintiff filed his Response to Order to Show Cause, and noticed Defendants as usual, and on February 17 it was necessary for Plaintiff to send a letter to the court bailiff requesting assistance in securing a copy of Defendants' Affidavit which resulted in the Show Cause Order as he hadn't received it. Plaintiff also inquired why Defendants had not yet posted the $20,000 undertaking as ordered by the Court. Soon thereafter Plaintiff received a copy of the Affidavit from Defendants, but the undertaking was never posted.

Plaintiff made repeated inquiries of Defendants counsel to determine whether he had received Plaintiff's Response to the Show Cause

Order, however counsel was unresponsive so it was necessary for Plaintiff to have same served on Defendants' counsel by the local Sheriff, in order to preclude any claim of not having received it.

On March 21, 2010 Plaintiff received the court's four-page Decision in the mail, lifting the stay on collection actions, and affirming the "final judgment of a sister state, valid on its face and entitled to full faith and credit." *Appendix B, hereto.* The court denied all of AAF's requests, and granted all of Plaintiff's requests, save the request for sanctions against Defendant for failure to post the undertaking as ordered by the Court. Plaintiff resumed collection activities.

On March 22, 2010 Plaintiff was served a summons by a process server (*Appendix C, hereto*), notifying him that suit had been filed against him by American Alternative Fuel for $38 million in the county of Saratoga, NY, where Sgambettera & Associates, counsel for Defendants, is located. (not AAF) AAF was alleging tortuous interference in their banking relationship with M & T Bank, and reiterated all of the issues already decided by Judge Inveen in the Washington case and by Judge Lalor in the Greene County case. Plaintiff answered with an itemized denial, and requested damages for what appears to be a retaliatory and frivolous suit. Plaintiff notes that in that new suit, the Complaint has been filed, but not the Request for Judicial Intervention (engaging the courts), and the fee has not been paid. Thus it appears to be a disingenuous effort

to 'soften up' Plaintiff. Clearly counsel recognizes the legal hazard in such an action however, as he has not formalized the suit.

On March 24, 2010 Plaintiff served a new Information Subpoena and Restraining Notice on M & T Bank, again freezing the assets of American Alternative Fuel. On March 26 Defendants filed for another Show Cause order, which was granted, and in their sworn Affidavit claimed that they had in fact tendered the undertaking for the first Show Cause, but that it was rejected by the clerk as only cashier's checks are accepted. No explanation was given by Defendants of why they failed to follow up after more than a month's time. Plaintiff called the deputy county clerk (Peggy Byrne 518.719.3255), who stated that she had never received an undertaking check of any kind for the Index Number at hand, much less rejected it. And that any rejection immediately mails out with a letter explaining why. Defendants' counsel was unable to produce any such rejection letter, and gave no explanation. Defendants have however posted the undertaking this time. Plaintiff has requested that the Green County Court either:

- release that part of the undertaking which would satisfy his judgment; or
- determine whether Defendants' are sincere in their Washington appeal, and if so that the undertaking be forwarded to the Washington trial court as part of the supersedeas bond for appeal.

On April 5, 2010 Plaintiff filed his Response to Second Order to Show Cause, to which he is sure Defendants have responded, although he has received no such response. On April 16 Plaintiff filed a Motion to Compel Notice asking the court to order Defendants to forward their response to Plaintiff's answer to the Show Cause, and to notice Plaintiff of all filings henceforth or face sanctions. These issues there now await the decision of the Greene County Supreme Court, as of the date of this filing.

III. ARGUMENTS ON DEFENDANTS' APPEAL

The opening brief skips randomly from one issue to another with little discernible organization, making it difficult for a layman to address, much less apply the law. It also restates one argument three ways, interspersed with other arguments which are entirely unsupported by the rules cited, statute, or case law. But an attempt is made here to address Defendants' arguments.

A. It was not error for the trial court to enter summary judgment rather than default judgment.

Defendants contend that because their pleadings were struck as sanction for contempt of court, that there must be a default judgment hearing rather than a summary judgment hearing. *AOB 6-7, para B.* This is nonsense for several reasons.

It may be more common that when an answer is not made or pleadings struck, there is a default judgment hearing. However this is entirely up to the trial court's discretion and there is no rule specifying that this <u>must</u> be the case. There is no time more proper for summary judgment than when the motion is before the court.

Defendants cite CR55, which does not support their contention at all, but simply sets out the procedure for default and judgment. And they cite CR37(b)(2)(C) which holds that, "<u>the court in which the action is pending may make such orders in regard to the failure (to comply with</u>

discovery) as are just, and among others the following: (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;". Although it is amusing that Defendants would highlight their own disobedience and contempt of court, these rules –in fact all rules– say nothing requiring a default judgment hearing rather than a summary judgment hearing, in cases where pleadings are struck.

A default judgment cannot be mandated in cases like this because from the time a case begins to the time it is resolved, there can be cumulative and additional damages, as with the instant case. When a problem is not addressed it often gets exponentially worse, and costs escalate through the intransigence of Defendants. Judge Inveen witnessed the recalcitrance of these defendants (*RP 17*) and acted appropriately to try and limit the harm with this Summary Judgment.

B. It was not error for the trial court to not hold a separate damages hearing.

In Defendants' *AOB 4, para II(2)* they ask the Court to decide whether it was error for the trial court to not hold a separate damages hearing, however in their argument at *AOB 8, para C(1)* they randomly assert the claim that an appeals court reviews summary judgments de

novo. Plaintiff stipulates that this latter is true, however Defendants' evasion of the original question implies that they know it is unsupportable.

A separate damages hearing is appropriate in the case of default judgment. But otherwise it is up to the trial court's discretion, and so this argument is moot.

Defendants state, "Summary judgment is appropriate only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor." *AOB 8, para C[1]*. In this case the Defendants' pleadings had been struck in total, and Defendants were deemed to have admitted all of Plaintiff's allegations, conclusively. There were no further questions of law remaining, and so a reasonable mind would find for the Plaintiff. Defendants claim there are facts in contention, but not once they have been deemed to have admitted conclusively, no. Thus Judge Inveen properly granted summary judgment, and a separate damages hearing was not required.

C. It was not error for the trial court to grant Plaintiff's motion, as all exhibits were provided to Defendants.

In Defendants' *AOB 9, first para* they state, "Specifically, the Respondent (a) failed to attach the exhibits to the motion served upon Appellants, ...". (*see also AOB 10 para 2*) In an appellate action the

parties are not supposed to argue new facts, however Defendants do with this allegation.

Plaintiff did provide the Motion for Summary Judgment with all exhibits to the only acting counsel he knew for Defendants at the time, Sgambettera & Associates. If Sgambettera failed to provide these to Washington counsel once he was appointed, this was out of the control of Plaintiff. Defendants' counsel presents no evidence, and he points to no evidence in the record.

As to Defendants' assertion that Plaintiff's receipts were not authenticated (*AOB 11, para 3*), Defendants' counsel admits that, "<u>if a party is relying upon ER904 to authenticate a document, he must provide: a bill, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the estimate shall forward a copy to the adverse party with a statement indicating whether or not the property was repaired, and if it was, whether the estimate repairs were made in full or in part and attach a copy of the receipted bill showing the items or repair and amounts paid.</u>"

The receipts and estimates attached to Plaintiff's Declaration in Support of Summary Judgment (*CP 34-36*) were received by Defendants' counsel on July 10th, 2009, 55 days before the hearing on September 4th. Any counsel who is concerned about authenticity would have independently verified the receipts and estimates, without indexing, and

Defendants' counsel had plenty of time to do so and/or object. As counsel failed to check such receipts and estimates, or did so and did not acknowledge, they clearly have implicitly accepted Plaintiff's receipts and estimates as authentic, waiving all future right of objection. Had Defendants not received such receipts and estimates, they surely would have objected, as well.

The Defendants have clearly not been prejudiced by the hyper-technicality which counsel asserts in this argument. There are very few pages of receipts and estimates, and so indexing is not as important as had they been voluminous. Had there been some impediment to verification, and verification is really the core issue, counsel surely would have raised it before hearing but instead he chose to waive.

D. It was not error for the trial court to assess damages based on Plaintiff's lack of affidavit.

E. It was not error for the trial court to assess damages based on alleged hearsay evidence.

F. It was not error for the trial court to grant summary judgment despite lack of a Declaration affidavit.

These last three questions which Defendants ask the Court to decide are all about the same issue, so Plaintiff will address them together.

In Defendants' *AOB 9, first para* they state, "Specifically, the Respondent ... (b) failed to authenticate the exhibits;" ... "and (d)

submitted a declaration in support of his motion which failed to comply with procedural rules." In their *AOB 16, para 5*, Defendants contend that Plaintiff's Declaration failed to comply with statutory requirements, in that there was no sworn affidavit.

Plaintiff agrees that he failed to provide a sworn affidavit with his Declaration for the Motion for Summary Judgment. However it is surprising that Defendants would assert this as an argument, as counsel was present in the summary judgment hearing when Judge Inveen swore in Plaintiff to state under oath that all his submissions were true and correct. *RP 14, 23-25 and 15, 1-19*. The trial court commented, "Ordinarily I might not have gone to the efforts of placing him under oath today to give us that magic language. But given all of the misconduct on the defendants' side and the delay, I think that it is appropriate to resolve this issue on the merits that are now before me."

Mr. Bersin as an experienced attorney should also know that attesting under oath in open court before the judge is actually more credible than a notary's affirmation. Yet he inexplicably attempts this position.

In Defendants' *AOB 9, first para* they state, "Specifically, the Respondent ... (c) submitted exhibits to the trial court that contained inadmissible hearsay;" and again in *AOB 14, para 4* they claim hearsay. It

is entirely up to the court's discretion what evidence is admitted and considered. This is well-known judicial doctrine, even to laymen. This was a hearing for summary judgment, not a trial. The court is free under its own discretion to consider what evidence is proper, and on appeal it would normally be protocol for the trial court to be shown deference. Plaintiff's evidence of damages was accepted.

There was no hearsay evidence, which Defendants' counsel knew as he did not object in the period leading up to the hearing, nor in his prehearing motions, nor during the summary judgment hearing. In not objecting, counsel implicitly accepted Plaintiff's Declaration exhibits prima facie. Plaintiff's evidence of damages was properly admitted by the trial court.

Defendants then assert that, "Even if the trial court's attempt to cure Respondent's legal deficiencies was appropriate, the Declaration still lacks sufficient admissible evidence for the trial court to have granted summary judgment." *AOB 17, first para*. Apples and oranges. The question of whether a statement under oath to the court substitutes for an affidavit, and whether a summary judgment is warranted, are separate issues. If there are no further questions of law, summary judgment is warranted. Even if the level of damages was still in question, Defendants' counsel had had Plaintiff's evidentiary receipts and estimates by July 10th,

2009, 55 days before the hearing on September 4th, plenty of time to research and confirm their authenticity. Either Defendants accepted the receipts prima facie by not investigating them, or they did investigate them and raised no objection.

Defendants were represented by a well-experienced trial attorney who raised no objection to the evidence prior to or in the hearing, thus waiving the issue entirely.

The trial court did not err in accepting Plaintiff's sworn testimony in open court rather than as a notary's affirmation, and Defendants raised no objection to same. And the trial court did not err in accepting Plaintiff's receipts and estimates as evidence of damages, as this is entirely within the Court's discretion.

IV. CONCLUSION

It is understandable that Defendants would not be pleased with the outcome of this case. However this was caused and brought about, in whole or in part, by the affirmative wrongdoing, fault, poor business judgment, negligence, and failure of due care of the Defendants and their agents, servants, and employees. If Defendants had simply honored their warranty obligations at the very beginning, rather than making countless false promises and delaying and deferring in hopes that Plaintiff would go away, this all would never have happened.

Plaintiff has a theory that for every aggrieved party who is able to defend himself, such as Plaintiff, there are 20 others who have been turned away by Defendants and simply gave up. There must be an economic disincentive for this behavior, which is why Plaintiff requested treble damages, although he was unable to prepare the legal case for it before the Summary Judgment hearing.

If Defendants' counsel had simply taken advantage of Washington's reciprocity provisions, they could have paid a nominal fee and been allowed to practice law here. Although this would not have made them privy to our legal mechanisms, it would have enabled them to avoid some of the major problems they've had.

Plaintiff has only ever wanted to be made whole, but the three years this has been ongoing and the recalcitrance of Defendants means

that only monetary compensation can be adequate now, as all trust has been sacrificed.

Plaintiff requests that this Court uphold the judgment of the trial court in total.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 10 June, 2010

Carl Cook, pro se
4311 NE 123rd St.
Seattle, WA 98125

SUBSCRIBED AND SWORN TO by me this 10th day of June, 2010

NOTARY PUBLIC in and for the
State of Washington

APPENDIX A

Email of Defendants' Counsel

Greg Sanda

From: Greg Sanda [greg@sgambetteralaw.com]
Sent: Wednesday, December 10, 2008 5:18 PM
To: 'margette.baptist@kingcounty.gov'
Subject: Cook v. PRINS Autogassystemen, et al. (No. 08-2-32431-1 SEA)

Dear Ms. Baptist:

I represent the Defendants in the above-referenced matter. Pursuant to our telephone conversation from earlier today, I wanted to provide you with a summary of the actions my clients have taken in connection with the Plaintiff's summons and complaint, and subsequent motion for default judgment.

First, after my clients were served with the Plaintiff's process on September 30, 2008, I spoke with my clients about the allegations contained in the Complaint. Thereafter, I drafted an Answer generally denying the Plaintiff's allegations. It is undisputed that I timely served the Plaintiff with my clients' Answer by Federal Express on November 20, 2008. A copy of the cover letter and Federal Express tracking receipt is attached hereto. A copy of the Defendants' Answer is also attached hereto.

Yesterday, December 9, 2008, my office received a copy of the Plaintiff's Default Judgment motion, which was returnable today, December 10, 2008. I was not in the office yesterday, so the first I knew of this motion was this morning. I am not fully familiar with the local rules regarding notice for such motions, but I find it difficult to believe that I can be provided with less than 1 day's notice to respond. Further, the Plaintiff's motion does not allege that the Defendants failed to serve an Answer to his Complaint. In fact, the Plaintiff admits that he received the Defendants' Answer on November 26, 2008, but that he is nonetheless entitled to a default judgment based solely on the fact that I am not a licensed Washington State attorney.

The Plaintiff has clearly not been prejudiced by the hyper-technicality that he points to in support of his default motion. Not only that, but as I stated to you, I timely served the Defendants' responsive pleading on the Plaintiff for the purpose of making an appearance on the record, and to avoid defaulting. I am now in the process of securing local counsel to represent the Defendants in this action. In light of the foregoing, I respectfully request that the Court, in its sound discretion, deem the Defendants' Answer properly served, and accepted by the Plaintiff.

Please also note that a copy of this email will be served upon the Plaintiff by US Post, as I do not have the Plaintiff's email address.

I thank you for your continued consideration in this matter, and should you have any questions regarding the same, please do not hesitate to contact me at anytime.

Very truly yours,
Greg Sanda

Gregory J. Sanda, Esq.
Sgambettera & Associates, P.C.
323 Ushers Road
P.O. Box 1550
Clifton Park, New York 12065
(tel) 518/877-7600
(fax) 518/877-7611

APPENDIX B

Order to Show Cause – Decision

State of New York
Supreme Court : County of Greene

CARL COOK,

Plaintiff,

-against-

DECISION
Ind.No. 09-2054
RJI 19-10-4831

PRINS AUTOGASSYSTEMEN B.V. and
AMERICAN ALTERNATIVE FUEL, LLC,

Defendants.

Appearances: Carl Cook, 4311 NE 123rd Street, Seattle, Washington 98125, plaintiff pro se; Matthew J. Sgambettera, Esq., Sgambettera & Associates, P.C., P.O. Box 1550, Clifton Park, New York 12065 for defendant American Alternative Fuel, LLC.

By order to show cause defendants seek an order vacating any and all restraining notices served by plaintiff in connection with a certain judgment. The order to show cause signed by the Court on February 2, 2010 stayed plaintiff from further enforcement proceedings, vacated any and all restraining notices heretofore served by plaintiff, and ordered that the undertaking identified in paragraph 14 of the affidavit of Matthew J. Sgambettera dated February 2, 2010 shall remain in place and on deposit with the Greene County Clerk until further order of this Court.

The affidavit of counsel for defendant American Alternative Fuel, LLC ("AAF") dated February 2, 2010 states that AAF is seeking an order vacating a judgment entered "on December ___, 2009 with the Rensselaer County Clerk." The affidavit further states that the judgment should be vacated on two grounds - first, that "the Washington State Court lacked jurisdiction over AAF, and therefore, the judgment should not be recognized or enforced by this Court in New York", and second, that "the Plaintiff engaged in fraud in obtaining the initial judgment in the Washington State Court."

The affidavit next recites a series of "background facts" concerning the facts of litigation between the parties in the State of Washington. Defense counsel states that "AAF filed a pleading in that matter solely to contest the jurisdiction of the Washington State Court", and that "the issue of personal jurisdiction over AAF remains unresolved." But, the affidavit goes on to state, "However, despite the fact that the Court did not decide that it had personal jurisdiction over AAF and the fact that Washington State Long Arm Statute does not provide that court with jurisdiction over AAF, the Court entered judgment against AAF in favor of Carl Cook for contractual issues that did not involve AAF." And, counsel asserts that "in or around December 2009, Carl Cook entered the Washington State judgment against AAF with the Rensselaer County Clerk."

Defense counsel has submitted a second affidavit dated February 2, 2010, in support of an "emergency motion to vacate the restraining notices issued by plaintiff Carl Cook pursuant to CPLR 5204 and 5519, in connection with the above-referenced matter; and for an order staying any further collection action in this matter based upon the undertaking provided by my client."

In this affidavit, counsel states that plaintiff "in or around September, 2009" obtained a

judgment against the defendant in the State of Washington, purportedly without personal jurisdiction and by fraudulent means, and that plaintiff entered the Washington judgment against AAF in the County of Rensselaer, New York in the amount of $15,774.25 with interest at 12% from September 4, 2009. Counsel states that AAF is a guarantor of certain corporate debts of the Boat N RV Group with M&T Bank, with "$38,000,000 in Floor Plan Credit facilities and mortgages notes with M & T Bank to operate its four (4) retail locations." Counsel states that "Boat N RV Group employs approximately 250 employees in four (4) states including sixty five (65) employees here in Coxsackie, New York."[1]

Counsel avers that on or about January 25, 2010 plaintiff served an information subpoena and restraining notice on M & T Bank against AAF in the amount of the judgment. The copy of the restraining notice attached to defendant's papers is addressed to M & T Bank in Clifton Park, New York, and is encaptioned in this action venued in the "Supreme Court of New York; County of Rensselaer." Counsel asserts that, at the demand of M & T Bank, he in now holding in his escrow account funds in the amount of $20,000 received from AAF that is sufficient to satisfy the judgment with interest. Counsel states that the Washington judgment is there subject to a pending appeal on the sole issue of lack of personal jurisdiction, and he asks that this Court vacate plaintiff's restraining notice and stay further collection efforts by plaintiff based on an "undertaking" having been "posted."

In response to the motion, plaintiff has submitted an unsworn "response" dated February 12, 2010[2] wherein he opposes the relief sought by defendant, and an affidavit dated February 11, 2010. In his affidavit, plaintiff sets forth facts relating to the Washington litigation, which appears to arise out of a warranty claim asserted by plaintiff against the defendants. Plaintiff states that on September 4, 2009 he was granted summary judgment against the defendants in the amount of $15,414.25 plus costs and interest at 12% per annum, that on October 8, 2009 plaintiff received a notice of appeal in that case to the Washington State Court of Appeals, and that the appeal remains pending. Plaintiff further states that "in January of this year Plaintiff proceeded to perfect the Judgment in Greene and Rensselaer Counties, NY by filing with the respective county clerks and securing an Index Number from Greene County."

Attached to plaintiff's response are exhibits: Exhibit A consists of two orders from the Superior Court of Washington for King County (Hon. Laura Inveen) dated March 10, 2009 and July 2, 2009 respectively. The March 10 order granted plaintiff's motion to strike defendants' two defenses to the action, and ordered defendants to attend a deposition scheduled for March 23, 2009. The July 2 order found defendants in contempt for their failure to attend that deposition and directed defendants to obtain local counsel admitted to practice in the State of Washington.

Exhibit B consists of two sets of plaintiff's requests for admissions in the Washington action directed to defendants and their attorney.

Exhibit C is an order of summary judgment from the Superior Court of Washington for King County (Hon. Laura Inveen) dated November 19, 2009 awarding plaintiff damages in the amount of $12,541.04 plus $2,508.21 prejudgment interest and costs of $365.00.

Exhibit D consists of correspondence from the Court of Appeals of the State of Washington dated February 4, 2010 addressed to plaintiff Carl Cook and attorney Richard Berson of Bellevue, Washington advising of that's court's intention to dismiss defendants'

---

[1]This is the first mention in counsel's papers of any fact having the remotest connection to Greene County, New York, the venue of this Court.

[2]This is the first paper filed in the proceeding that is venued in Greene County.

appeal in the event a "report of proceedings"[3] or motion for extension of time is not filed on or before February 16, 2010.

Exhibit E consists of a printout of case proceedings in this matter from the Washington, King County, Superior Court.

Exhibit F consists of an information subpoena in an action encaptioned "Carl Cook, Plaintiff against Prins Autogassystemen B.V. and American Alternative Fuel, LLC, Defendants" and venued in "Supreme Court, County of Rensselaer", apparently completed by "Amy P. Mitchell" of M & T Bank and indicating that AAF, with an address in West Coxsackie New York, has $4,098.48 in an account at M & T Bank. Also submitted is an unsigned proposed order that this Court grant certain relief to plaintiff.

Defendant has submitted the affidavit of its attorney Michael J. Carota, Esq. dated February 24, 2010 in response to plaintiff's submission. Counselor Carota states that

"Plaintiff originally filed suit in Washington State Court in September of 2008 which resulted in a Judgment in Plaintiff's favor in the amount of $15,774.25. The Judgment also accumulates interest at 12% per annum from September 4, 2009. This underlying Washington State Judgment is currently under appeal, Washington Appeals Court Case Number 642588" Counsel further states that plaintiff on February 2, 2010 served an information subpoena and restraining order on M & T Bank against AAF, that on February 2, 2010 the "Supreme Court of New York, County of Rensselaer" issued the present order to show cause, and that "Pursuant to the Court's February 2nd Order, Defendant has deposited a $20,000.00 undertaking with the Greene County Clerk."

Plaintiff has submitted an affidavit dated March 10, 2010 in reply.

Upon motion of the judgment debtor, upon notice to the judgment creditor, the sheriff and the sureties upon the undertaking, the court may order, upon such terms as justice requires, that the lien of a money judgment, or that a levy made pursuant to an execution issued upon a money judgment, be released as to all or specified real or personal property upon the ground that the judgment debtor has given an undertaking upon appeal sufficient to secure the judgment creditor (CPLR 5204).

No documentation, receipt or other evidence of such undertaking has been provided to this Court by defendants, and the response to this Court's inquiry of the Clerk's office on March 16, 2010 is that no such undertaking has been filed with the Greene County Clerk.

The motion to vacate the judgment is denied. Plaintiff has what appears to be a final judgment of a sister state, valid on its face and entitled to full faith and credit. A party is in general entitled to one full day in court on the issue of personal jurisdiction. The papers before the Court indicate that defendants have appeared in the Washington State action, the issue of personal jurisdiction has been raised there, and the matter is there pending on appeal. Under these circumstances this Court is foreclosed from considering the issue (*Baldwin v Iowa State Traveling Men's Assoc.*, 283 U.S. 522; *Vander v Casperson,* 12 NY2d 56 [1962]; Siegel, *New York Practice*, 4th Ed., § 471, p.798).

The motion to vacate any and all restraining notices served by plaintiff in connection with the judgment is granted. The papers before the Court are replete with omissions and

---

[3]The "report of proceedings" sought by the appellate court appears to refer to the trial transcript or record on appeal.

inaccuracies. Plaintiff is advised to retain New York counsel to pursue any further remedies.

The motion to stay plaintiff from further enforcement proceedings based on the judgment is denied. Defendants have submitted to this Court on this motion no documentary proof of any undertaking having been filed, either in accord with the CPLR or in compliance with this Court's order to show cause. Plaintiff may proceed to enforce his judgment in any manner consistent with the laws of the states of New York and Washington.

All other relief sought by either party is hereby denied.

This constitutes the decision and order of the Court. The original decision and order are returned to the plaintiff. All papers submitted to the Court shall be delivered to the County Clerk together with a copy of this decision and order. The signing of this decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

This is the Decision and Order of the Court.

Dated : **March 17, 2010**
Catskill, New York

Hon. Daniel K. Lalor
Acting Supreme Court Justice

Papers considered:

Affidavit of Matthew J. Sgambettera, Esq., February 2, 2010.
Affidavit of Matthew J. Sgambettera, Esq., February 2, 2010.
Affidavit of Matthew J. Sgambettera, Esq., February 2, 2010, with Exhibits A-C.
Affidavit of Carl Cook, February 11, 2010, with Exhibits A-E.
Affidavit of Michael J. Carota, Esq., February 24, 2010.
Affidavit of Carl Cook, March 10, 2010.

APPENDIX C

New York Lawsuit

SUPREME COURT OF NEW YORK
COUNTY OF SARATOGA

AMERICAN ALTERNATIVE FUEL, LLC,

Plaintiff,

-against-

CARL COOK,

Defendant.

SUMMONS

2010211617393

20101063 FILED
03/17/2010 08:22:03 AM

INDEX NUMBERS
Kathleen A Marchione Saratoga Co Clerk

To the above-named Defendant:

You are hereby summoned to answer the Complaint in this action and to serve a copy of your Answer, or, if the Complaint is not served with this Summons, to serve a Notice of Appearance, on the Plaintiff's attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief as demanded hereinbelow.

Dated: March 15, 2010
Clifton Park, New York

Michael J. Carota
Sgambettera & Associates, P.C.
Attorneys for Plaintiff
323 Ushers Road, P.O. Box 1550
Clifton Park, NY 12065
Telephone No.: 518/877-7600

Defendant's address:

Carl Cook
4311 NE 123rd Street
Seattle, WA 98125

Upon your failure to appear, judgment will be taken against you by default for the relief demanded in the Complaint.

STATE OF NEW YORK
SUPREME COURT SARATOGA COUNTY

AMERICAN ALTERNATIVE FUEL, LLC,

Plaintiff,

-against-

CARL COOK,

Defendant.

COMPLAINT

2010211617383

20101063 FILED
03/17/2010 08:22:03 AM

INDEX NUMBERS
Kathleen A Marchione Saratoga Co Clerk

NOW COMES, AMERICAN ALTERNATIVE FUEL, LLC, by and through its attorneys, Sgambettera & Associates, P.C., as and for its Complaint alleges as follows:

BACKGROUND

1. AMERICAN ALTERNATIVE FUEL, LLC (the "Plaintiff") is a duly registered New York limited liability corporation with a place of business in Clifton Park, Saratoga County, New York.

2. Upon information and belief, defendant CARL COOK (the "Defendant") is an individual with a principal address of 4311 NE 123rd Street, Seattle, WA 98125.

3. Since 2005 the Plaintiff has been the United States distributor of Prins propane conversion systems.

4. Plaintiff did not sell or install or have a contract with Defendant for the conversion of his vehicle with a Prins propane conversion system.

5. Upon information and belief, Mr. Cook illegally purchased his propane conversion system from a Canadian company known as Maxquip or Autogas Propane LTD prior to the time that Plaintiff was a distributor for the Prins conversion system.

6. Plaintiff is not the distributor of Prins propane conversion systems in Canada.

7. Plaintiff had no part in Defendant's transaction to acquire the illegal propane system from the Canadian company; did not contract with either of the Canadian companies or Defendant to participate in that transaction; and has no relationship or privity with any of the parties to that transaction, including Defendant.

8. Defendant is fully aware that he illegally purchased the propane conversion system from Autogas Propane LTD, a Canadian company, and that the system is illegal as it is not EPA certified.

9. As a result, this illegal conversion system is not warrantied by the manufacturer Prins Autogas Systems, B.V. or Plaintiff as the distributer.

10. Defendant is also aware that his sole recourse, if any, was through Autogas Propane, LTD. as the company from which he purchased this illegal system.

11. Despite the foregoing, Defendant sued the Plaintiff in Washington State Court located in Seattle, Washington (the "Washington Complaint").

12. In the Washington Complaint, Defendant misrepresented that he purchased his system and had a contract with Plaintiff when in fact no such contract existed, no such goods or services were purchased from Plaintiff, and there was not privity of contract between Plaintiff and Defendant.

13. In or around September 2009, the Defendant obtained a judgment against the Plaintiff in the State of Washington based on these misrepresentations. The total amount of the judgment is $15,774.25. The judgment also accumulates interest at 12% annum from September 4, 2009.

14. The Defendant has now furthered his fraudulent actions by seeking to enforce the Washington judgment against Plaintiff in New York State.

15. The Plaintiff is a guarantor of certain corporate debts of the Boat N RV Group with M & T Bank. Specifically, the Boat N RV Group has $38,000,000.00 in Floor Plan credit facilities and mortgages and notes with M & T Bank to operate its four (4) retail locations for the sale of boats and recreational vehicles.

16. The Boat N RV Group employs approximately 250 employees in four (4) states, including sixty five (65) employees here in Coxsackie, New York.

17. On or about January 25, 2010, without notice to the Plaintiff, the Defendant served an Information Subpoena and Restraining Notice on M & T Bank against Plaintiff in the amount of the judgment.

18. Prior to the Information Subpoena and Restraining Notice served on M & T Bank, the Plaintiff had no notice of the filing of the judgment against it with the Rensselaer County Clerk; or of the Defendant's attempts to collect that judgment by issuing Restraining Notices to Plaintiff's banks, including M & T Bank.

19. Had Defendant notified Plaintiff or if Plaintiff had known of the transcription of the judgment or the attempts to collect the judgment, here in New York, Plaintiff would have posted an undertaking to stay any collection actions by the Defendant – and prevent Defendant from interfering with Plaintiff's business operations.

20. The judgment entered against Plaintiff and the Restraining Notice issued by the Defendant to M & T Bank triggered a non-monetary default of the $38,000,000.00 in Boat N RV Group's floor plan and mortgage credit facilities with M & T Bank. As a

result, M & T Bank has required that the Plaintiff immediately vacate the Restraining Notice and post an undertaking to satisfy this judgment in New York should it stand.

21. Failure to cure such default would subject AAF and Boat N RV Group to significant hardship as there is no other lending institution in the market that could replace the $38,000,000.00 in credit facilities at the present time.

COUNT I - Defamation

22. The Plaintiff repeats and realleges all of its allegations contained in Paragraphs 1-21 of this Complaint and hereby makes them a part of this Count I.

23. The Defendant has repeatedly made materially false assertions and misrepresentations in obtaining the Washington judgment, despite an obligation not to engage in fraud – including statements that his system was purchased and installed legally, that his system was covered by warranty, and that Plaintiff is in any way responsible for Defendant's Prins system.

24. The Defendant has further engaged in these misrepresentations not only to the New York State Courts, but to Plaintiff's business partners, including M & T Bank, on which they have relied.

25. These misrepresentations have been published in documents served on third parties, such as M & T Bank.

26. These misrepresentations and misleading statements have injured Plaintiff in its business and trade, as demonstrated by the non-monetary default triggered by Defendant's actions.

27. The Plaintiff has incurred damages as a result of the Defendant's defamatory actions.

WHEREFORE, the Plaintiff requests that this Court enter a judgment against Defendant in an amount to be determined by this Court, representing the Plaintiff's damages in connection with said Defendants' fraudulent defamatory conduct. Additionally, the Plaintiff requests that this Court grant it such other, further and different relief as this Court deems just and proper.

COUNT II - Tortious Interference

28. The Plaintiff repeats and realleges all of its allegations contained in Paragraphs 1-27 of this Complaint and hereby makes them a part of this Count II.

29. Defendant has interfered with Plaintiff's business relationship with M & T Bank and Plaintiff's other business partners by, among other things, serving M & T Bank with the Restraining Notice.

30. By making statements that his system was purchased and installed legally, that his system was covered by warranty, and that Plaintiff is responsible for Defendant's Prins system, Defendant has knowingly pursued this action against the Plaintiff by wrongful means and misrepresentations with the sole intent of harming Plaintiff.

31. Defendant's actions have already triggered the non-monetary default of the $38,000,000.00 in Boat N RV Group's floor plan and mortgage credit facilities with M & T Bank and therefore Defendant has interfered with Plaintiff's business and contractual relationships.

32. Compounding the damaged relationship between Plaintiff and M & T Bank is the fact that there is currently no other lending institution in the market that could replace the $38,000,000.00 credit facilities.

33. As a result of the Defendant's intentional interference with the Plaintiff's business and contractual relationships, the Plaintiff has incurred damages.

WHEREFORE, the Plaintiff requests that this Court enter a judgment against Defendant in an amount to be determined by this Court, representing the Plaintiff's damages in connection with said Defendants' intentional interference with Plaintiff's business and contractual relationships. Additionally, the Plaintiff requests that this Court grant it such other, further and different relief as this Court deems just and proper.

Dated: March 15, 2010
Clifton Park, New York

Michael J. Carota, Esq.
Sgambettera & Associates, P.C.
Attorneys for Plaintiff
323 Ushers Road, P.O. Box 1550
Clifton Park, New York 12065
Telephone No.: 518/877-7600