

**Siemens Fin. Servs., Inc. v Premier P.E.T. of Long Is.,
LLC**

2010 NY Slip Op 30387(U)

March 2, 2010

Supreme Court, Nassau County

Docket Number: 022856-09

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**SIEMENS FINANCIAL SERVICES, INC.,
CORPORATION,**

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

Plaintiff,

-against-

**Index No: 022856-09
Motion Seq. No: 1
Submission Date: 12/14/09**

**PREMIER P.E.T. OF LONG ISLAND, LLC,
SAGEMARK ROCKVILLE, LLC and
ROCKVILLE PET INC.,**

Defendants.

-----x

Papers Read on this Motion:

- Order to Show Cause, Affidavit in Support,**
- Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition (L. Weinberg).....X**
- Affirmation in Opposition (J. Wernick) and Exhibit.....X**
- Memorandum of Law in Opposition.....X**
- Correspondence dated December 8, 2009.....X**
- Affirmation in Further Support.....X**
- Supplemental Affidavit in Further Support.....X**

This matter is before the court on the Order to Show Cause, filed by Plaintiff Siemens Financial Services, Inc. ("Siemens") on November 6, 2009 and submitted on December 14, 2009, for an Order of Seizure. The Court grants Plaintiff's application, and will sign the proposed Order of Seizure previously submitted by Plaintiff. The Court authorizes Plaintiff and its surety to complete and execute the proposed Undertaking that it previously submitted, in light of the Court's granting of Plaintiff's application for an Order of Seizure.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order 1) directing the sheriff of any county where the chattels described in the Affidavit of Curtiss Burrell, specifically one (1) Biograph 16 and all related equipment (“Seizure Chattels”),¹ are found, to seize and immediately deliver same to Plaintiff; 2) directing Defendant Premier P.E.T. of Long Island (“Premier P.E.T.”) to turn over possession of the Seizure Chattels to the sheriff of any county where the Seizure Chattels may be found; 3) directing that, if the Seizure Chattels are not delivered to the sheriff, the sheriff may break open, enter, and search for the Seizure Chattels in 119 North Park Avenue, Suite 101, Rockville Centre, New York 11570, or any other place where the Seizure Chattels are located; and 4) if the Seizure Chattels cannot be levied upon by the sheriffs to which the requested Order of Seizure is directed, directing Defendant Premier P.E.T. and its officers to cooperate with Plaintiff to transfer the Seizure Chattels to Plaintiff forthwith and/or assist Plaintiff in obtaining possession of the Seizure Chattels wherever they may be located.

Defendants oppose Plaintiff’s application.

B. The Parties’ History

In support of its motion, Plaintiff provides in Affidavit in Support of Curtiss Burrell (“Burrell”), a Director of Workout for Siemens. Burrell affirms as follows:

On or about April 5, 2006, Siemens Medical Solutions USA, Inc. (“Siemens Medical”) and The Sagemark Companies Ltd. (“Sagemark Companies”) entered into a Leasing Schedule, designated number 10576 (“Lease”) pursuant to which Sagemark Companies leased from Siemens Medical one (1) Biograph 16 and related equipment, the Seizure Chattels. This Lease was executed in connection with a Master Equipment Lease Agreement dated December 5, 2005 (“Master Lease”) between Siemens Medical and the Sagemark Companies. Siemens Medical assigned all of its rights and remedies under the Lease to Siemens Financial, the Plaintiff in this action.

Paragraph 4 of the Lease, titled “Miscellaneous,” provides in pertinent part:

¹ The Biograph 16 is a high-powered medical imaging system.

Lessor and Lessee agree that the terms and conditions of the [Master Lease] are hereby incorporated into this [Lease] to the same extent as if such terms and conditions were set forth in full herein.

Pursuant to Paragraph 9(a) of the Master Lease, lessee's failure to pay any amounts due under the Lease, or within ten (10) days of the due date, constitutes a default under the Master Lease. Paragraph 9(b) of the Master Lease provides as follows:

Upon any Default, Lessor may exercise any one or more of the following remedies (which remedies may be cumulative to the extent permitted by law): i) cancel or terminate the Lease and/or any unfunded commitments or proposals to Lessee, whether related to the Lease or otherwise; ii) secure peaceable repossession and removal of the Equipment by Lessor or its agent without judicial process; iii) demand and Lessee shall return the Equipment to Lessor in accordance with Section 11 hereof [immediately upon demand of Lessor after default]; iv) sell, lease or otherwise dispose of the Equipment at public or private sale...v) demand and Lessee shall pay all expenses in connection with the Equipment...; and vi) exercise any other right or remedy [available pursuant to the Uniform Commercial Code or other law].

Pursuant to a Transfer of Interest Agreement executed in February of 2008, Premier P.E.T. assumed all of Sagemark Companies' rights and obligations under the Lease effective February 11, 2008. The Transfer of Interest Agreement reflects that the balance on the Lease as of February 11, 2008 was \$2,324,962.59, payable in sixty nine (69) consecutive installments of \$33,695.11.

Burrell affirms that Premier P.E.T. failed to pay Siemens Financial the amounts due pursuant to the Lease. Specifically, Premier P.E.T. failed to make the full payment due by January 30, 2009, and has failed to make any payments since that date.

Burrell avers, further, that Premier P.E.T.'s right to possess the Seizure Chattels is conditioned on, *inter alia*, Premier P.E.T. making all payments due to Siemens Financial pursuant to the Lease. He submits that, in light of Premier P.E.T.'s failure to make those payments, Siemens Financial is entitled to immediate possession of the Seizure Chattels. Siemens Financial has demanded that Premier P.E.T. surrender possession of the Seizure Chattels, and Premier P.E.T. has refused. Burrell submits that, upon information and belief, Premier P.E.T. has no defenses to Siemen Financial's claim to possession of the Seizure Chattels.

Burrell affirms that, upon information and belief based on the Transfer of Interest

[4]
Agreement, the Seizure Chattels are in the possession of Premier P.E.T., or its representatives, at 119 North Park Avenue, Suite 101, Rockville Centre, New York 11570, within a location that may require the sheriff to break open, enter and search for the Seizure Chattels.

Burrell avers that the Seizure Chattels may be easily destroyed or damaged, and their parts may be readily removed or sold by Premier P.E.T. or other entities that have access to Premier P.E.T.'s facility, the latter of whom have no liability to Siemens. Burrell affirms, further, that any continued use of the Seizure Chattels by Premier P.E.T., or others, will result in a depreciation of the value of the Seizure Chattels, and a corresponding reduction in the value of Siemens interest in that Equipment. Burrell also suggests that Premier P.E.T.'s failure to make the required payments may suggest that it is experiencing financial difficulties, and may be unable to service and maintain the Seizure Chattels properly.

Burrell affirms that, based on his review of Siemen Financial's records as well as Burrell's knowledge of the medical equipment market, the gross fair market value of the Seizure Chattels, assuming normal wear and tear, is \$425,000. He submits, however, that the Seizure Chattels may be worth substantially less, if their condition has deteriorated and/or they are sold at a forced liquidation sale.

Burrell avers that, as of October 9, 2009, Premier P.E.T. owes "the minimum amount" of \$1,696,128.44, plus interest, costs, counsel fees and late charges, all of which continue to accrue (Burrell Aff. in Support at ¶ 17).

Plaintiff filed a verified complaint ("Complaint") on November 6, 2009 that contains five causes of action: 1) breach of the Lease against Premier P.E.T., 2) replevin of the Seizure Chattels against Premier P.E.T., 3) breach of a promissory note ("Note") that Sagemark Companies executed, for which Premier P.E.T. is now liable, pursuant to a Transfer and Assumption Agreement, 4) breach of guaranties against Sagemark Companies, and 5) breach of guaranties against Rockville PET, which agreed to guaranty 49% of Premier P.E.T.'s obligations to Siemens Financial pursuant to the Note.

Defendants provide two (2) Affirmations in Opposition from attorneys representing them ("Counsel for Defendant").

In the first Affirmation, dated December 3, 2009, Counsel for Defendant submits that

1) the Burrell Affidavit is inadequate, pursuant to CPLR § 7102(c), because it a) fails to identify the chattel to be seized; b) fails to establish that Plaintiff is entitled to possession of the Seizure Chattels; c) fails adequately to set forth the value of the Seizure Chattels; d) fails to state with personal knowledge the location of the Seizure Chattels; and e) erroneously states that Plaintiff is unaware of any defenses that Premier P.E.T. may have.

Counsel also argues that Plaintiff has failed to comply with the requirements of CPLR § 7102(d) by virtue of 1) its failure to submit an undertaking in connection with its proposed Order of Seizure; 2) its failure to demonstrate its probability of success on the merits, in light of Premier P.E.T.'s potential defenses, including the invalidity of the purported assignment from Siemens Medical to Siemens Financial; and 3) the inaccuracy of Burrell's statement that Premier P.E.T. failed to make payments since January 30, 2009, as Counsel was advised that Premier P.E.T.² made payments pursuant to the lease in March, in the amount of \$15,000, and in April, in the amount of \$20,000. Counsel also affirms that Premier P.E.T. has properly maintained the Seizure Chattels. Counsel also submits that the Court should, in its discretion, deny Plaintiff's application for an Order of Seizure.

In the second Affirmation, dated December 6, 2009, Counsel for Defendant affirms that, while in negotiations with Siemens Financial regarding a modification of the Lease payment schedule, Premier P.E.T. made several payments to Siemens Financial, including the full payment due in January 2009, and payments in March and April for \$15,000 and \$20,000, respectively. Counsel for Defendant affirms that copies of those checks are annexed as Exhibit A to his Affirmation. In fact, Exhibit A does not contain copies of checks. Rather, Exhibit A consists of three (3) pages of what appear to be bank statements, reflecting certain payments to Siemens Financial.

Counsel for Defendant also affirms that Premier P.E.T. has made the required monthly maintenance payments for the Seizure Chattels. Counsel submits that "Plaintiff's alleged economic harm cannot outweigh the devastating harm to Premier P.E.T. and its patients in the event an Order of Seizure is granted." Counsel affirms that, to the best of his knowledge, the

² The Court assumes that Counsel's affirmation that "Plaintiff" made payments in March and April was a typographical error, and that she meant to refer to Defendant Premier P.E.T.

Seizure Chattels is “the only fixed-base machine within a fifteen mile radius, and therefore exclusively serves the population within that portion of South Nassau” (Aff. in Opp. at ¶ 4).

This Court conducted a conference with counsel for the parties on December 7, 2009, at which time it directed counsel to provide supplementary submissions regarding 1) the appropriateness of an undertaking (bond), 2) Plaintiff’s likelihood of success on the merits, and 3) whether patients of Defendant would be inconvenienced by the removal of the Seizure Chattels.

Counsel for the Defendants provided counsel for the Plaintiff, and the Court, with a letter dated December 8, 2009 stating that Defendant advised him that during September, October and November of 2009, the Seizure Chattels were used to perform 112, 116 and 120 monthly scans/diagnostic tests of patients, respectively. In addition, as of December 8, 2009, 40 patients had scheduled, or were in the process of scheduling, appointments for diagnostic testing with the Seizure Chattels in December.

In his Supplemental Affidavit dated December 11, 2009, Burrell affirms that his Affidavit is based on his personal knowledge and a review of Siemen Financial’s files and business records regarding this matter. Burrell affirms that 1) Premier P.E.T. made payments in March and April of 2009 totaling \$35,000 toward the payments that were due by January 30, 2009; and 2) Premier P.E.T. has not made the full payment due by January 30, 2009 and has not made any other payments pursuant to the Lease.

Burrell also provides a copy of the UCC Financing Statement corresponding to the Seizure Chattels. That Financing Statement contains pertinent information regarding the Seizure Chattels including 1) the identity of Premier P.E.T. as the debtor, 2) the address of Premier P.E.T. as 119 North Park Avenue, Rockville Centre, New York (“Premier Address”), 3) the status of Siemens Financial as the secured party, and 4) the location of the Seizure Chattels at the Premier Address.

C. The Parties’ Positions

Plaintiff submits that it has made the requisite showing to entitle it to an Order of Seizure pursuant to CPLR § 7201 (c) by demonstrating 1) Plaintiff’s entitlement to possession of the Seizure Chattels, in light of a) the terms of the Lease and b) P.E.T.’s conceded failure to make

payments pursuant to the Lease since April of 2009, 2) Defendants' wrongful holding of the Seizure Chattels, 3) the value of the Seizure Chattels, 4) the location of the Seizure Chattels and 5) no knowledge of a defense to the claim. Plaintiff also concedes that the Court should require Plaintiff to post a bond in the sum of \$850,000, representing two times the value of the Seizure Chattels.

Defendants, in opposition to Plaintiff's application, submit, *inter alia*, that Plaintiff has failed to demonstrate its probability of success on the merits, in light of 1) Premier P.E.T.'s potential defenses, including the invalidity of the purported assignment from Siemens Medical to Siemens Financial, 2) Burrell's allegedly inaccurate statement that Premier P.E.T. failed to make payments since January 30, 2009, and 3) Premier P.E.T.'s proper maintenance of the Seizure Chattels. Defendants also submit that the Court, in its discretion, should deny Plaintiff's application in light of the alleged harm that Defendants would suffer without the use of the Seizure Chattels.

RULING OF THE COURT

CPLR § 7101 provides that "[A]n action under this article may be brought to try the right to possession of a chattel."

CPLR §§ 7102 (c) and (d)(1) provide as follows:

(c) Affidavit. The application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;
2. that the chattel is wrongfully held by the defendant named;
3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;
4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;
5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is

located and facts sufficient to establish probable cause to believe that the chattel is located at that place;

6. that no defense to the claim is known to the plaintiff; and

7. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.

(d) Order of seizure.

1. Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order.

Under CPLR § 7102(d), a court may grant an order of seizure upon the presentation of an affidavit and undertaking and upon a determination that the plaintiff will likely succeed on the merits and that the facts are as stated in the affidavit. *Amplicon, Inc. v. Information Management Technologies*, 1999 U.S. Dist. LEXIS 13464, p.3 (S.D.N.Y. 1999). *See also Ukryn v. Morgan Marine*, 100 A.D.2d 649 (3d Dept. 1984), appeal withdrawn, 62 N.Y.2d 977 (1981) (order of seizure dependent on court's finding that it is probable that plaintiff will succeed on the merits). In an action for recovery of chattels pursuant to CPLR § 7101, the sole issue is which party has the superior possessory right to the chattels. *Merrill Lynch v. American Standard Testing*, 2010 U.S. Dist. LEXIS 2278, p. 21 (E.D.N.Y., January 12, 2010), citing *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 419 (S.D.N.Y. 2002), quoting *Honeywell Information Systems, Inc. v. Demographic Systems, Inc.*, 396 F. Supp. 273, 275 (S.D.N.Y. 1975).

The recent *Merrill Lynch* decision is instructive. There, the court granted plaintiff's motion for an order of seizure. The court concluded that plaintiff clearly had the superior possessory right to the collateral in light of the facts that 1) plaintiff held a perfected security interest in the collateral; 2) defendants were in default of the applicable agreement and guaranties; and 3) the agreement provided that one of plaintiff's remedies, in the event of a

default by defendant, was to take possession of the collateral with or without the use of any judicial process. *Id.* at 21-22. The court also rejected defendants' contention that they had a good faith defense to the action based on the parties' course of conduct, concluding that it was the terms of the applicable contracts between the parties, not the parties' past course of conduct, that determined whether defendants were in default of their obligations. *Id.* at 22.

Here, the Court concludes that Plaintiff has demonstrated its right to an order of attachment by virtue of proof demonstrating that 1) Premier P.E.T., pursuant to the applicable Transfer of Interest Agreement, is bound by the terms of the Lease and Master Lease; 2) Premier P.E.T. is in default of its obligations by failing to make payments since April of 2009; 3) the Lease and Master Lease authorize Plaintiff to take possession of the Seizure Chattels in light of the default of Premier P.E.T.; 4) counsel's bald assertion that Defendants have a defense based on the alleged impropriety of the assignment does not constitute adequate proof of a defense that should defeat Plaintiff's application; 5) Plaintiff has demonstrated a basis for its assertion that the Seizure Chattels is located at the Premier Premises; 6) Plaintiff has provided a value for the Seizure Chattels; and 7) Plaintiff has agreed to post an undertaking that is twice the value of the Seizure Chattels.

In so concluding, the Court notes that Defendants have failed to provide any affidavit by an individual with personal knowledge of the facts in support of its assertions, *inter alia*, that 1) Premier P.E.T. has properly maintained the Seizure Chattels; 2) the Seizure Chattels is the only fixed-base machine within a fifteen mile radius and exclusively serves the population within that portion of South Nassau; and 3) the order of seizure would result in devastating harm to Premier P.E.T. and its patients. Counsel's letter of December 8, 2009, providing hearsay information as to the number of patients being serviced by the Seizure Chattels, is inadequate to establish the harm that Defendants would suffer if the Court grants the Order of Seizure.

In light of the foregoing, the Court grants Plaintiff's application for an Order of Seizure, and directs Plaintiff to provide an undertaking in the sum of \$850,000, representing twice the value of the chattel, to wit, the Seizure Chattels.

The Court will sign the proposed Order of Seizure previously submitted by Plaintiff, authorizing Plaintiff to immediate possession of the Seizure Chattels upon the giving and filing

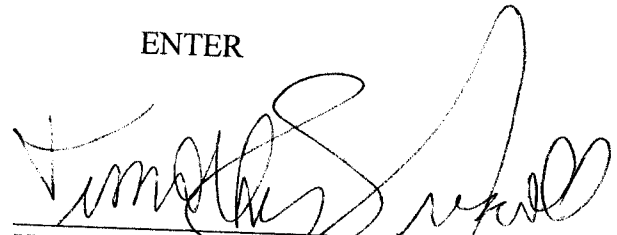
of an undertaking in the amount of \$850,000, representing twice the value of the Seizure Chattels. The Court also authorizes Plaintiff and its surety to complete and execute the proposed Undertaking that Plaintiff previously submitted to the Court, in light of the Court's granting of Plaintiff's application for an Order of Seizure.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
February 11, 2010

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

FEB 18 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**