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12-10-2009

TENNESSEE DEPARTMENT OF SAFETY vs.
One 2001 Ford Expedition, VIN:
1FMRU16W11LA58515, Seized From:
Raymundo L. Gaona, Date of Seizure: April 5,
2008, Claimant/, Lien Holder: Primos Auto Truck,
Inc.

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**BEFORE THE COMMISSIONER OF
THE TENNESSEE DEPARTMENT OF SAFETY**

IN THE MATTER OF:

**TENNESSEE DEPARTMENT OF
SAFETY**

v.

**One 2001 Ford Expedition
VIN: 1FMRU16W11LA58515
Seized From: Raymundo L. Gaona
Date of Seizure: April 5, 2008
Claimant/Lien Holder: Primos Auto
Truck, Inc.**

**DOCKET NO: 19.01-101916J
(D.O.S. Case No. H2525)**

INITIAL DEFAULT ORDER

This matter was heard on December 10, 2009, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Commissioner of the Tennessee Department of Safety. Orvil Orr, attorney with the Department of Safety, represented the State. Neither the Claimant nor legal counsel on its behalf appeared for the hearing.

The subject of this matter was the proposed forfeiture of the Lien Holder's interest in the captioned vehicle.

When the Lien Holder Claimant failed to appear for the hearing, the attorney for the State made an oral motion pursuant to Tennessee Code Annotated § 4-5-309 and Rule 1340-2-2-.17, TENN. COMP. R. & REGS., Rules of Procedure for Asset Forfeiture Hearings, requesting that the Claimant be held in default. Based upon the record and the evidence presented, the State's motion was granted, as supported by the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The subject property was seized pursuant to law; the Lien Holder Claimant filed a claim seeking to enforce its interest in the property. After a hearing, the property was forfeited, subject to the claim of the Lien Holder.

2. The Lien Holder failed to take subsequent action to protect its interest in the property. The case was rescheduled so that the Lien Holder could show good cause as to why its interest in the vehicle should not be forfeited to the seizing agency.

3. The show-cause hearing was scheduled for December 10, 2009, and the Lien Holder was notified of the hearing time and location by certified mail sent to the address of record. This notice was received on November 10, 2009. EXHIBIT 1.

4. The Lien Holder did not appear at the hearing, the second or subsequent setting of the case. Based upon this failure to appear, the State made an oral motion for the entry of an Order of Default. The State did not wish to proceed with an uncontested hearing.

CONCLUSIONS OF LAW and ANALYSIS

1. Tennessee Code Annotated § 4-5-309(a) provides that “if a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge . . . may hold the party in default” An order holding an absent party in default at the second or subsequent setting of a forfeiture hearing is also authorized by Rule 1340-2-2-.17(1)(a), TENN. COMP. R. & REGS., Rules of Procedure for Asset Forfeiture Hearings.

2. Rule 1340-2-2-.17(1) contains the following relevant provisions:

- (d) No default shall be entered against a claimant for failure to attend [the hearing] except upon proof by the filing of the return receipt card, that the legal division has given notice of the hearing per Rule 1340-2-2-.11(3).

(e) Upon default by a party, an administrative judge may enter either an initial default order or an order for an uncontested proceeding . . .

3. Rule 1340-2-2-.17(2)(b) specifies possible results when a claimant is held in

default:

Upon a default by a claimant, a **claimant's claim shall be stricken by initial default order**, or, if the agency requests, the agency may proceed uncontested.

(Emphasis added.)

4. The legal impact of striking a claim is to render the claim void *ab initio*, as though it had never been filed.¹ Failure to file a claim results in the forfeiture of the property for disposition as provided by law. *See*, Tennessee Code Annotated § 40-33-206(c).

5. In accordance with the law, as set forth above, it is determined that the State's motion is well taken. The State notified the Lien Holder Claimant according to the rules cited above, as shown by the certified return receipt. The Lien Holder failed to appear at the hearing to proceed with the claim. Pursuant to the cited authority, the Lien Holder is hereby found to be in default.

Accordingly, it is hereby **ordered** that the Lien Holder's claim is stricken from the record, and dismissed. The Lien Holder's interest in the subject property is forfeited to the seizing agency for disposition as specified by law.

This Initial Order entered and effective this 15th day of December, 2009.

Ann M. Johnson
Administrative Judge

¹ The effect of striking a pleading "is to posture the action as if [that pleading] had never been made." *See, INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 404 (6th Cir. 1987).

Filed in the Administrative Procedures Division, Office of the Secretary of State, this
15th day of December, 2009.

A handwritten signature in black ink that reads "Thomas G. Stovall". The signature is written in a cursive style with a large, sweeping initial 'T' and a distinct 'S'.

Thomas G. Stovall, Director
Administrative Procedures Division