STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

IN THE MATTER OF THE SPECIAL
PROCEEDING APPLICATION OF GMAC,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 890-08
RJI NO. 01-08-092120

ACME TOWING INC. and THE NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents.

Supreme Court Albany County All Purpose Term, May 14, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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New York State Office of the Attorney General
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TERESI, J.:

Petitioner commenced this proceeding by Order to Show Cause, dated February 7, 2008, with an accompanying Verified Petition seeking a declaration of the validity and amount of the

garageman's lien claimed by respondent ACME Towing Inc. (hereinafter "ACME") on a 2002 Cadillac. ACME answered, claiming its lien on the 2002 Cadillac is in all respects valid and totaled $14,395.22, as of January 12, 2008, which continues to accrue storage charges at rate of $18.42 per day. Respondent Department of Motor Vehicles submitted, in letter form, a statement that such agency takes no position on this proceeding.

This proceeding is brought pursuant to CPLR Article 4. In such a proceeding, "where no triable issues of fact are raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it." Friends World College v. Nicklin, 249 A.D.2d 393, 394 (2d Dept.1998).

A garageman's lien accrues pursuant to Lien Law §184. The Court of Appeals stated: "[t]he statute clearly inures to the benefit of a garage owner who can establish the following elements: (1) the garage is the bailee of a motor vehicle,... (2) it has performed garage services or stored the vehicle with the vehicle owner's consent,...(3) there was an agreed-upon price or, if no agreement on price had been reached, the charges are reasonable for the services supplied,... and (4) the garage is a duly registered motor vehicle repair shop as required under article 12-A of the Vehicle and Traffic Law". National Union Fire Ins. Co. of Pittsburgh, Pa. v. Eland Motor, 85 NY2d 725, 730 (1995). Each element of a valid claim will be addressed in turn.

First, it is undisputed that ACME is a bailee of the vehicle herein. ACME alleged that the vehicle's owner voluntarily relinquished the vehicle. *See* Sharrock v. Dell Buick-Cadillac, Inc., 45 NY2d 152, 166 (1978). Such voluntarily relinquishment was further indicated by the "Authorization to Tow" signed by the vehicle's owner and petitioner has submitted no proof to the contrary.

Second, it is undisputed that ACME has towed and stored the vehicle with the owner's consent. Again, ACME submitted an "Authorization to Tow" signed by the owner of the vehicle. Respondent submitted no contradictory proof.

Third, it is undisputed that there was an agreed upon price for towing the vehicle, as was set forth in the "Authorization to Tow". However, petitioner claims that there was no agreed upon price for storage. ACME, relying upon the "Authorization to Tow", alleges that there was a specific agreement with the owner of the vehicle. The "Authorization to Tow" includes a specific provision which states: "Storage: $15 per day for second and third calendar days of storage and $17 for the fourth calendar day and each day thereafter." Such written provision of the agreement signed by the owner of the vehicle, coupled with ACME's sworn allegations that the owner of the vehicle specifically requested and consented to storage, meets ACME's burden of proof on this element of their lien claim. Moreover, petitioner offers no sworn allegations of fact to dispute ACME's proof. Accordingly, the court finds that ACME and the owner of the vehicle agreed upon the price of: $80.00 for towing of the vehicle, $30.00 for the second and third days of storage of the vehicle, $17.00 per day for each and every day the vehicle has been stored after the third day of storage, and to include the applicable tax at a rate of 8.625%.

Fourth, ACME failed to support its lien claim by any documentary proof, or sworn allegations, that it was a duly registered motor vehicle repair shop when it towed the vehicle and has continued to be duly registered. However, petitioner provides no proof that ACME is not duly registered, but rather claims that the above lack of proof in ACME's opposition papers voids its lien. As petitioner has failed to affirmatively prove ACME was not duly registered, an issue of fact exists which precludes judgment from being entered on these papers. Antonucci v.

Emeco Industries, Inc., 223 A.D.2d 913, 914 (3d Dept.1996) (holding that on a summary judgment motion, the applicable standard herein, a movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one).

Additionally, petitioner claims that ACME's lien is void under Lien Law §184(1) due to the owner reclaiming possession of the vehicle. To support its position, petitioner relies upon the document entitled Notice of Lien and Sale as compared to the vehicles' Insurance Card, both of which contain the same address. Petitioner claims that such proof shows the sale of the vehicle was to be conducted at its owner's address, which in turn proves that the vehicle was returned to its owner and suggests a "bogus lien claim." Examining the "Authorization to Tow" and the New Jersey Vehicle Registration card, however, both show an address for the owner of the vehicle that is different from the address for the sale or its Insurance Card. Far from conclusively proving ACME released possession of the vehicle or that ACME and the owner of the vehicle are colluding, petitioner merely raises an issue of fact that precludes this Court from entering judgment on the papers submitted.

Petitioner also objects to ACME's inclusion in its Notice of Lien and Sale of "miscellaneous/processing" fees. However, Lien Law §203 specifically authorizes such legitimate expenses of the lienor to be collected upon a "redemption before sale". As such, the "miscellaneous/processing" fees are not included in the lien amount, however, are legitimate charges to the person or entity redeeming the vehicle prior to sale.

In a special proceeding, CPLR §409(a) provides, in pertinent part, that: "[t]he court may require the submission of additional proof." Here, as there are two distinct issues yet to be resolved, the court directs additional proof to be submitted, in admissible form, by both petitioner

and ACME on the unresolved issues. Specifically, ACME shall provide proof, if any, that it was and is duly registered in accord with the vehicle and traffic law and any other municipal regulations. Also, ACME shall provide proof, if any, of its retention of the vehicle herein and lack of collusion with the owner of the vehicle. Petitioner shall have an opportunity to rebut ACME's submission by offering proof, in admissible form, of its contentions on the registration issue and the retention of the vehicle/collusion issue.

In accord with the above, ACME is directed to file its additional proof, if any, on or before 20 days from the date of this Order. Petitioner is directed to file its opposition papers, if any, on or before 10 days after ACME's papers are filed.

All papers, including this Decision and Order are being returned to the attorneys for Respondent ACME Towing Inc. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 2, 2008
Albany, New York

Joseph C. Teresi, J.S.C.

1. Order to Show Cause, dated February 7, 2008, with attached Verified Petition of Karen Gilchrist, dated January 7, 2007.
2. Affirmation in Opposition to Verified Petition, dated April 30, 2008, with attached Exhibits "A"-"C", and accompanying Affidavit of Michael Looney, dated April 30, 2008.
3. Reply Affirmation of Rudolph Meola, Esq., dated May 12, 2008, with attached Exhibits "A"-"B".
4. Letter of David L. Fruchter, Assistant Attorney General, dated March 6, 2008.