Matter of Ally Fin., Inc. v All County Towing & Recovery
2016 NY Slip Op 32936(U)
December 6, 2016
Supreme Court, Albany County
Docket Number: 1531-16
Judge: James H. Ferreira

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Special Proceeding
Application of ALLY FINANCIAL, INC.,
Petitioner,

-against-

ALL COUNTY TOWING & RECOVERY and
THE NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES,
Respondents.

DECISION, ORDER & JUDGMENT
Index No.: 1531-16
RJI No.: 01-16-120491

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Rudolph J. Meola, Esq.
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Attorney for Respondent All County Towing & Recovery
130 Washington Ave.
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Eric T. Schneiderman, Esq., New York State Attorney General
(David L. Fruchter, Esq., Assistant Attorney General, of counsel)
Attorney for Respondent New York State Department of Motor Vehicles
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HON. JAMES H. FERREIRA, Acting Justice:

This is a proceeding pursuant to Lien Law § 201-a to declare a lien asserted by respondent All County Towing & Recovery (hereinafter respondent) to be null and void. The

proceeding was commenced by Order to Show Cause dated April 6, 2016. Respondent has submitted an answer opposing the Order to Show Cause, and petitioner has submitted a reply.[1]

The record reflects that petitioner holds a first priority perfected lien on a certain 2012 Chevrolet Express motor vehicle (VIN: 1GCWGGCA8C1115141). On February 10, 2016, respondent towed the subject vehicle to its garage at the request of the Town of Freeport Police Department. Respondent asserts that, on February 23, 2016, it mailed notices of the impoundment to OTF Wireless, Robert A. Castrotta and petitioner by certified mail, return receipt requested. On or about March 9, 2016, petitioner attempted to recover the vehicle from the police and from respondent but was unsuccessful. Petitioner thereafter commenced the instant proceeding. Since the commencement of this proceeding, the vehicle has been released to petitioner, and the sole issue before the Court is the validity of respondent's asserted lien.

Pursuant to Lien Law § 184 (2):

> "[a] person who tows and stores a motor vehicle at the request of a law enforcement officer authorized to remove such motor vehicle shall be entitled to a lien for the reasonable costs of such towing and storage, provided that such person, within five working days from the initial towing, mails to the owner of said motor vehicle a notice by certified mail return receipt requested that contains the name of the person who towed and is storing said motor vehicle, the amount that is being claimed for such towing and storage, and the address and times at which said motor vehicle may be recovered. Such notice shall further state that the person mailing said notice claims a lien on said motor vehicle and that said motor vehicle shall be released to the owner thereof or his or her lawfully designated representative upon full payment of all charges accrued to the date that said motor vehicle is released. A person who mails the foregoing notice within said five day period shall be entitled to a lien for storage from and after the date of initial towing, but a person who fails to mail such notice within said five day period shall only be entitled to a lien for storage from and after the date that the notice was

[1] Counsel for respondent New York State Department of Motor Vehicles has submitted a letter, dated May 3, 2016, stating that the Department does not take a position on the merits of the petition and that it has temporarily frozen the title to the subject vehicle pending further order of the Court.

> mailed. A failure to mail such notice in a timely fashion shall not affect a lien for towing."

Lien Law § 184 (5) further provides that a person seeking to assert a lien for storage of a vehicle pursuant to Lien Law § 184 (2):

> "shall mail by certified mail, return receipt requested, a notice pursuant to this subdivision to every person who has perfected a security interest in such motor vehicle . . . within twenty days of the first day of storage. Such notice shall include the name of the person providing storage of the motor vehicle, the amount being claimed for such storage, and address and times at which the motor vehicle may be recovered. The notice shall also state that the person providing such notice claims a lien on the motor vehicle and that such motor vehicle shall be released upon full payment of all storage charges accrued on the date the motor vehicle is released. A person who mails such notice within such twenty day period shall be entitled to a lien for storage from and after the first date of storage. A person who fails to mail such notice within such twenty day period shall only be entitled to a lien for the amount payable for storage from and after the date the notice was mailed. A failure to mail such notice in a timely fashion shall not affect a lien for towing."

Lien Law § 184 "is in derogation of common law and thus is strictly construed" (Grant St. Constr., Inc. v Cortland Paving Co., Inc., 55 AD3d 1106, 1107 [3d Dept 2008]; see Matter of Ally Fin. Inc. v Oakes Towing Serv., Inc., 130 AD3d 1355, 1356 [3d Dept 2015]). "In response to a challenge to the lien pursuant to Lien Law § 201-a, the lienor must make a prima facie showing of the validity of the lien and entitlement to the amount claimed" (Matter of BMW Bank of N. Am. v G & B Collision Ctr., Inc., 46 AD3d 875, 876 [2d Dept 2007]; see Matter of DCFS Trust v New York State Dept. of Motor Veh., 13 Misc 3d 1056, 1059 [Sup Ct, Kings County 2006]).

The Court finds that respondent has failed to meet its burden of establishing the validity of its claimed lien. In support of its position that it complied with the notice requirements set forth in Lien Law § 184 (2) and (5), respondent has submitted the affirmation of its counsel

stating that, on February 23, 2016, respondent mailed notices of the impoundment to OTF Wireless, Robert A. Castrotta and petitioner by certified mail, return receipt requested. Counsel states that he has attached to his affirmation a copy of the notice that he states was sent to petitioner and copies of the certified mail receipts. However, in his affirmation, respondent's counsel does not purport to have personal knowledge of the date and manner in which the notices were sent, or personal knowledge that the letter attached to his affidavit is, in fact, the letter that was sent to petitioner. Counsel's affirmation with respect to the notice provided is therefore without evidentiary value (see e.g. Hill v Country Club Acres, Inc., 134 AD3d 1267, 1268 [3d Dept 2015]). Without more, the Court finds respondent's evidence insufficient to establish that respondent complied with the notice requirements set forth in Lien Law § 184 (2) and (5). As respondent has failed to establish the validity of its lien, the Court finds that petitioner is entitled to the relief sought (compare Matter of Ally Fin. Inc. v Oakes Towing Serv., Inc., 130 AD3d at 1357).

Based upon the foregoing, it is ORDERED and ADJUDGED that the petition is granted; and it is further

ORDERED, ADJUDGED and DECLARED that the asserted lien of respondent All County Towing & Recovery with respect to the 2012 Chevrolet Express motor vehicle which is the subject of this proceeding (VIN: 1GCWGGCA8C1115141) is invalid and hereby cancelled; and it is further

ORDERED and ADJUDGED that the bond posted herein is released; and it is further

ORDERED and ADJUDGED that petitioner's right to pursue conversion damages is preserved to abide the circumstances.

The foregoing constitutes the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to counsel for petitioner. A copy of the Decision, Order and Judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision, Order and Judgment, and delivery of a copy shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
December 6, 2016

Hon. James H. Ferreira
Acting Justice of the Supreme Court

12/16/16

Papers Considered:

1. Order to Show Cause, dated April 6, 2016;
2. Petition, dated April 4, 2016, with attached exhibits;
3. Answer, dated August 19, 2016;
4. Affirmation in Support of Answer by Peter B. O'Connell, Esq., dated August 19, 2016, with attached exhibits;
5. Reply Affirmation by Rudolph J. Meola, Esq., dated August 26, 2016, with attached exhibits; and
6. Affidavit in Reply by Tracy Fox, sworn to August 25, 2016.