STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DAIMLER TRUST and DAIMLER TITLE CO.,

Petitioners,

-against-

SAFEWAY MOTORS, INC. and THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES

Respondents.

DECISION and ORDER
INDEX NO. 1982-13
RJI NO. 01-13-109783

Supreme Court Albany County All Purpose Term, July 26, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Daimler Trust owns a 2011 Mercedes-Benz[1] and Daimler Title Co[2] is its first lienholder.

[1]VIN: WDDGF8BB1BR139987 (hereinafter the "Vehicle")

[2] Daimler Trust and Daimler Title Co will hereinafter collectively be referred to as "Petitioners."

The Vehicle was leased to Ahmad Imadedin (hereinafter "Imadedin") and purportedly serviced by Safeway Motors, Inc. (hereinafter "Safeway"). Petitioners commenced this proceeding, in part, pursuant to Lien Law §201-a to invalidate the Lien Law §184(1) garageman's lien Safeway asserted on the Vehicle. Safeway opposes the petition, and cross-moves to dismiss and to change venue. Petitioners oppose the cross-motion. Because Safeway demonstrated neither its entitlement to change venue nor to dismissal, its cross-motions are denied. Likewise, because Safeway failed to establish the prima facie validity of its "storage" lien, the petition is granted to that extent. However, because a triable issue of fact remains on Safeway's "services" lien this Court must hold a hearing on such issue.

Considering Safeway's venue motion first, it failed to establish its entitlement to change the venue of this proceeding pursuant to either CPLR §510(1) or CPLR §510(3).[3] "To effect a change of venue pursuant to CPLR 510(1), [Safeway] must show both that the [Petitioners'] choice of venue is improper and that its choice of venue is proper." (Silvera v Strike Long Island, 52 AD3d 497 [2nd Dept 2008]). Safeway, however, cannot make the requisite "improper" showing because the New York State Department of Motor Vehicles' principal office is located here in Albany County. (Vehicle and Traffic Law §200[1]; CPLR §§503[a] and 506[a]). Safeway similarly failed to establish its entitlement to change venue pursuant CPLR §510(3) for the "convenience of material witnesses." Although required to do so for its CPLR §510(3) motion, Safeway did not "include the names and addresses of each witness, a specific fact-based summary of the proposed testimony... how that testimony is relevant to the issues to be resolved at trial... an assertion attributed to the witness that he or she is willing to testify, and [a

[3] CPLR §510(2) is not applicable to Safeway's motion.

description of] the difficulties that will necessarily be encountered by the witness if venue is not changed." (Cavazzini v Viennas, 82 AD3d 1343, 1344 [3d Dept 2011]). Because Safeway failed to "support [its] application with detailed relevant information establishing that the convenience of the nonparty witnesses would be enhanced by the change" (Singh v Catamount Dev. Corp., 306 AD2d 738 [3d Dept 2003]), its CPLR §510(3) motion is defective and denied.

Accordingly, Safeway's change of venue motion is denied in its entirety.

Safeway also failed to establish its entitlement to dismissal based on Petitioners' untimely commencement. Lien Law §201-a required Petitioners to commence this special proceeding "[w]ithin ten days after service of the notice of sale." Safeway, however, failed to proffer any admissible proof to establish when its notice of sale was served. Conspicuously absent from Safeway's submission is an affidavit of service alleging service of its notice of sale. Instead, Safeway proffered an unsigned copy of its Notice of Lien and Sale, which offered no proof of service. Safeway's unsworn and unexplained postmarked document similarly failed to offer any admissible proof of the notice of sale's service. Moreover, neither Safeway's attorney's affirmation nor its president's affidavit offer any admissible proof, based upon personal knowledge, of the notice of sale's service. Because Safeway failed to demonstrate the date it served Petitioners, it did not establish that Petitioners' commenced this proceeding more than ten days after it service occurred.

Accordingly, Safeway's timeliness motion to dismiss is denied.

Turning to Petitioners' Lien Law § 201–a claim, because issues of fact remain a hearing on this petition must be held.

Lien Law §184(1) provides a garagekeeper with security for its services and storage.

However, when challenged "pursuant to Lien Law § 201–a, the [garagekeeper] must make a prima facie showing of the validity of the lien and entitlement to the amount claimed." (BMW Bank of N. Am. v G & B Collision Ctr., Inc., 46 AD3d 875, 876 [2d Dept 2007]). Here, on Petitioners' challenge, Safeway has the initial burden to demonstrate that: "(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." (Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Eland Motor Car Co., Inc., 85 NY2d 725, 730 [1995][citations omitted]; BMW Bank of N. Am. v G & B Collision Ctr., Inc., supra).

On this record, Safeway properly established that it is a duly registered vehicle repair shop, that it was the bailee of the Vehicle and that it performed services on the Vehicle. Safeway established that it was "duly registered" with the sworn affidavit of its President and a copy of its Official Business Certificate. Safeway similarly demonstrated its bailee status with its President's affidavit, which alleged that Imadedin had the Vehicle delivered to Safeway for repair. (*see generally* Pivar v Graduate School of Figurative Art of the New York Academy of Art, 290 AD2d 212 [1st Dept 2002]). Safeway's president's affidavit, although not overly detailed, likewise established that Safeway actually performed services on the Vehicle. Such evidence sufficiently met Safeway's obligation to make a prima facie showing of registration, bailment, and service.

Safeway wholly failed to establish, however, the prima facie validity of that portion of its lien for "storage." Safeway proffered no proof that Petitioners or Imadedin consented to any

storage charges. Safeway's President's affidavit makes no such allegation. Nor is such charge agreed to or disclosed in the document attached to Safeway's opposition and described by its President as both a "[t]rue and accurate estimate[]" and a "detailed bill." Because Safeway made no showing that its lien for storage fees was "specifically authorized to be included as part of [its] lien on the vehicle" (Grant St. Const., Inc. v Cortland Paving Co., Inc., 55 AD3d 1106, 1107 [3d Dept 2008]; BMW Bank of N. Am. v G & B Collision Ctr., Inc., supra), the petition is granted to the extent that the portion of Safeway's lien for storage is canceled, null and void.

Although Safeway met its prima facie burden to establish the validity of the "services" portion its lien, because triable issues of fact remain on this issue a hearing is necessary. "Where the vehicle is leased, consent to the performance of the services on the vehicle by the owner-lessor may be implied where the lessee brings the vehicle to the garageman for the services and same are authorized by the lease." (Daimerchrysler Financial Services America, LLC. v. Best Tire Corp., 2008 NY Slip Op 31037[U][Sup Ct, Nassau County 2008][emphasis added]; General Motors Acceptance Corporation v. Anthony J. Minervini, Inc., 301 AD2d 940 [3d Dept 2003]). On this record, it is uncontested that the Vehicle's owner, Daimler Trust, consented to no services. Instead, Safeway relies solely on Imadedin's consent as set forth in the "[t]rue and accurate estimate[]" and "detailed bill" discussed above. Safeway, however, failed to submit a copy of the lease to establish that Imadedin's consent was authorized thereunder. Because Imadedin's authority to consent remains a triable issue of fact, a hearing is necessary. (CPLR §409; Natl. Enterprises, Inc. v Clermont Farm Corp., 46 AD3d 1180 [3d Dept 2007]).

Relatedly, Safeway demonstrated its entitlement to "discovery to obtain from petitioner... the lease." (CPLR §408).

Accordingly, Petitioners shall turn over to Safeway a copy of the Vehicle's lease between Daimler Trust and Imadedin within fourteen days of the date of this Decision and Order. Then, within fourteen days of such turnover, Petitioner shall file a non-jury note of issue in this proceeding. A copy of such note of issue shall be forwarded to my chambers, with two agreed upon hearing dates (Wednesdays), and the case will be scheduled for the first available date.

This Decision and Order is being returned to the attorneys for Petitioners. All original papers submitted are being held by this Court pending the hearing scheduled above. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
August 21, 2013

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated April 5, 2013; Undertaking, dated March 26, 2013; Petition, dated March 28, 2013, with attached Exhibits A-B; Affirmation of Rudolph J. Meola, dated April 3, 2013, with attached unnumbered Exhibit.
2. Notice of Cross-Motion, dated July 23, 2013; Affirmation of Jeffrey A. Barr, dated July 23, 2013, with attached Exhibit A; Affidavit of Robert Zelazny, dated July 23, 2013, with attached exhibits A-E.
3. Affirmation of Rudolph J. Meola, dated July 24, 2013, with attached Exhibits 1-13.
4. Letter of David L. Fruchter, dated April 22, 2013.