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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

DAIMERCHRYSLER FINANCIAL SERVICES AMERICA, LLC.

Plaintiff.

- against -

Sequence No.: 002 & 003
Index No.: 014436/06

BEST TIRE CORPORATION and SCOTT M. LEFFERTS, the persons or parties intended to be in possession of the Collateral known as a 2004 Mercedes Benz E55 AMG (VIN#: WDBUF76J14A502779).

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Order to Show Cause and Affidavits Annexed	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

Upon reading the papers submitted and due deliberation having been had herein, plaintiff's motion for, *inter alia*, an order of seizure of the vehicle which is the subject of the instant action and dismissing defendant Best Tire Corporation's counterclaims is denied. Defendant Best Tire Corporation's (hereinafter "Best Tire") cross-motion for summary judgment dismissing the complaint as asserted against this defendant and on its counterclaims is granted in part and denied in part as set forth below.

The following facts are undisputed. On March 11, 2004 non-party Competition Imports of Huntington d/b/a Mercedes Benz of Huntington (hereinafter "Competition") entered into a motor vehicle lease with defendant Scott M. Lefferts for a thirty-nine month period for a 2004 Mercedes Benz E55 AMG (VIN No. WDBUF76J14A502779). Plaintiff herein obtained all rights in said lease agreement from Competition on that same date. At some point defendant Lefferts placed the vehicle into defendant Best Tire's possession in order to have certain work performed on the vehicle, to wit, the installation of a sophisticated audio and video system, detailing and accessories. Defendant Best Tire claims a garageman's lien pursuant to Lien Law §184 for such work for which Mr. Lefferts failed to pay. The vehicle remains in Best Tire's possession. Plaintiff commenced the instant action asserting causes of action for 1) conversion;

2) unlawful use and detention of its property; 3) unjust enrichment; 4) what is termed "monetary damages" in the event the vehicle cannot be returned to plaintiff; 5) a judgment of possession; and 6) breach of contract based upon defendant Leffert's default under the lease. Defendant Best Tire has answered and defendant Lefferts has defaulted in appearing herein. In its answer defendant Best Tire asserts counterclaims and cross-claims for 1) breach of contract for unpaid sums for the amount of work performed; 2) accrued maintenance fees during its possession of the vehicle; 3) enforcement of its garageman's lien in the sum of $71,605.00; 4) attorneys fees; and 5) a declaratory judgment that defendant Best Tire has a superior lien to that of plaintiff on the vehicle.

Plaintiff's Motion

Plaintiff first moves herein for an order of seizure pursuant to CPLR 7102. It more properly appears, however, that plaintiff is actually moving for summary judgment on its cause of action for replevin of the subject vehicle in which it seeks an order directing return of the automobile. It is procedurally proper where, as here, the parties have charted a summary judgment course. See, G& S Quality Inc. v. Bank of China, 233 A.D.2d 215 (1st Dep't 1996). The court shall therefore treat plaintiff's motion as if it were one for summary judgment on its replevin cause of action.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing the motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. *Id.*

In support of its motion plaintiff annexes the affidavit of Brooker Preston, the customer services supervisor of plaintiff, who avers that on March 11, 2004 plaintiff obtained all rights title and interest in the lease agreement between Competition and Mr. Lefferts and is the owner of the vehicle. Defendant Lefferts breached the lease agreement by allowing the vehicle to be seized, in this case by defendant Best Tire and by allowing Best Tire to perform augmentation to the vehicle in violation of the lease terms without plaintiff's consent. Further, and perhaps more importantly, defendant Lefferts is in default in making payments pursuant to the lease terms. Mr. Preston further avers that pursuant to the lease terms, due to defendant Leffert's defaults, plaintiff is entitled to immediate possession of the vehicle.

Plaintiff also argues in its attorney's affirmation that defendant Best Tire cannot be heard to argue here that it has an enforceable garageman's lien against the subject vehicle which would act to prohibit an order directing defendant Best Tire to turn the vehicle over to plaintiff. First, plaintiff asserts that Best Tire breached a duty to investigate whether the lessee, defendant Lefferts, had authority from the owner to place liens on the vehicle which, plaintiff asserts, was never given. Further, plaintiff argues that a lien pursuant to Lien Law §184 may be imposed for repairs, towing, storing, maintaining or keeping the subject property. The work performed by Best Tire was not repairs and, argues plaintiff a lien pursuant to Lien Law §184 may therefore not

lie.

Plaintiff also asserts that defendant Best Tire may not claim that there was an implied agreement that plaintiff authorized the work because such an authorization is limited to reasonably necessary repairs for everyday use of the vehicle.

The court should find that Best Tire does not have a lien, contends plaintiff, upon the grounds that there are certain facial violations or defects in the invoices in violation of the Vehicle Repair Registration Act §82.5.

The plaintiff further claims that the court should find that the lien is unenforceable against it because Best Tire did not attempt to enforce the lien against Lefferts, the person to whom its invoices were sent. Lastly, with regard to the lien, plaintiff argues that the lien is void because it is wilfully exaggerated in the amount of $2,950.00 in storage fees.

At the outset, defendant Best Tire asserts that plaintiff's motion should be denied upon the grounds that another entity, DCFS Trust, is the actual titled owner of the vehicle. Annexed to plaintiff's reply papers is an affidavit from a supervisor employed by plaintiff, Jennifer Coleman, in which she avers that plaintiff has a power of attorney from DCFS Trust to enforce its rights with regard to the vehicle. A copy of the power of attorney dated December 13, 2005 is annexed thereto.

In opposition defendant Best Tire argues that it was a bailee which performed services on the automobile and provided storage for same leaving as the sole issue whether or not plaintiff is bound by the actions of the lessee, defendant Lefferts. This defendant asserts that it had the implied authority of plaintiff-owner.

Pursuant to Lien Law §184(a) a garageman who tows, stores, repairs, maintains or otherwise furnishes services or supplies to a motor vehicle at the request, or with the consent of the owner has a lien upon such vehicle to the extent of the sum due for the services performed. A garageman may maintain a lien against a vehicle where the garageman performed garage-services or stored the vehicle with the owner's consent for an agreed-upon price or in the absence of an agreement for a reasonable price. See, National Union Fire Insurance Company of Pittsburgh, PA v. Eland Motor Car Company, Inc., 85 N.Y.2d 725 (1995). The services provided by the garageman need not be repair-related. Id.

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. See, General Motors Acceptance Corporation v. Anthony J. Minervini, Inc., 301 A.D.2d 940 (3rd Dep't 2003); A-Leet Leasing Associates v. Fiero and Mandaro Collision Works, Inc., 138 Misc.2d 664 (Sup. Nas. 1988). In the instant matter plaintiff has annexed a copy of the subject lease as an exhibit to its motion. Having reviewed the copy provided by plaintiff, the court is unable to read it as same is illegible. All other issues

raised by plaintiff are of no merit.

Accordingly, based upon the foregoing, the court concludes that an issue of fact exists as to whether defendant held a valid garageman's lien on the vehicle which is the subject of the instant matter and therefore on the issue of whether plaintiff is entitled to an order of seizure. Plaintiff's motion is therefore denied in its entirety.

Defendant Best Tire's Cross-Motion

Defendant cross-moves for summary judgment 1) dismissing plaintiff's first, second, third, fourth, fifth and sixth causes of action and 2) on each of its counterclaims At the outset the motion is denied as to the sixth cause of action in plaintiff's complaint which is asserted against defendant Lefferts only.

Defendant also argues, as set forth above, that plaintiff may not be heard to complain that defendant converted the vehicle by virtue of its use of it in an advertising campaign without plaintiff's permission. At the outset, the first and second causes of action asserted by plaintiff are based not only upon defendant's use of the vehicle in the advertising campaign, but also upon defendant's intentional and wrongful withholding of the vehicle. The motion is therefore denied as it applies to these two causes of action.

As to the third cause of action plaintiff alleges conversion based upon defendant Best Tire's use of the vehicle in the advertising campaign. Conversion is an unauthorized assumption and exercise of the right of ownership over goods which belong to another to the exclusion of the owner. See, Peters Griffin Woodward, Inc. v. WCSC Incorporated, 88 A.D.2d 883 (1st Dep't 1982). An allegation that defendant used plaintiff's property in an advertising campaign without plaintiff's consent may constitute a cause of action under 15 USC §1125(a)(1)(A), but is not exercising ownership over the vehicle. Thus, the third cause of action is dismissed.

The court also denies defendant Best Tire's motion as it pertains to the fourth and fifth causes of action in that as with the first two causes of action, the issue of whether defendant Best Tire has a valid lien is yet to be determined.

Likewise, the court denies Best Tire's motion for summary judgment on its counterclaims on the grounds that each counterclaim is based upon Best Tire's having an enforceable mechanic's lien on the vehicle.

So Ordered.

A.J.S.C.

Dated: March 31, 2008

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE