

**Dzine It, Inc. v Rizzo**

2008 NY Slip Op 31579(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0111330/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE Justice PART 10

DZINE IT, INC.,  
ETAL

INDEX NO. 111330/07

MOTION DATE \_\_\_\_\_

- v -  
EDWARD RIZZOI  
ETAL.

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

JUN 10 2008

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: June 3, 2008

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Dzine It, Inc. and Kenneth Herbert III,

Plaintiffs,

-against-

Edward Rizzo a/k/a Vertucci,  
Broadway Auto Collision Ltd., a/k/a  
Broadway Auto Collision Inc.,  
Insurance Counselors, Inc. d/b/a  
GEICO General Insurance Company,  
Bank of America, N.A.,  
Commerce Bank, N.A.

-and-

Lexus Financial Services, a division of  
Toyota Motor Credit Corporation,

Defendants.  
-----X

**DECISION/ ORDER**

Index No.: 111330/07

Seq. No.: 003

**Present:**

Hon. Judith J. Gische

J.S.C.

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

| <b>Papers</b>   | <b>Numbered</b> |
|---|-----------------|
| Pltff's motion for prelim injunc, PSJ etc w/KH affid, DH affirm, exhs . . | 1               |
| Toyota's opp w/MET affirm, CJP affid, JB affid, exhs . . . . .            | 2               |
| Rizzo & Broadway's opp w/ERB affirm, EV affid . . . . .                   | 4               |
| DH's statement 1/29/08 . . . . .  | 5               |
| Order, Gische J., 2/7/08 . . . . .  | 6               |
| Stip so ordered 3/20/08 . . . . .   | 7               |
| Transcript ct minutes 11/8/07 . . . . .                                   | 8               |

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for various relief pertaining to a damaged 2007 Lexus ("the car") leased by Dzine it, Inc. ("Dzine") from Bay Ridge Lexus. Plaintiff Kenneth Herbert III is the principal of Dzine ("Mr. Herbert"). Defendant Toyota Motor Credit is the titled and

record owner of the car.

Now before the court is plaintiffs' motion for an order allowing them to: 1) serve an amended complaint, 2) enjoin defendant GEICO from disposing from the car, 3) partial summary judgment on their forgery claims, and 4) the release of the bond they posted, as per the court's order of November 8, 2007. The plaintiffs have withdrawn their request for permission to serve an amended complaint and for injunctive relief. Therefore, what remains for the court to decide is whether plaintiff is entitled to partial summary judgment and the release of the bond the court ordered as a condition of allowing plaintiff to obtain the car from the defendant auto body shop ("Broadway").

Since issue has been joined and plaintiffs withdrew their motion to serve an amended complaint, this motion, insofar as it seeks partial summary judgment is timely. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). It will, therefore be decided on the merits, along with the issue regarding the release of the bond.

### **Arguments presented**

Plaintiffs leased a brand new car from Bay Ridge Lexus pursuant to a lease agreement made February 12, 2007 ("lease agreement"). The car was involved in an accident on May 26, 2007 involving a non-party. The car was towed to the auto body shop and Mr. Herbert contacted defendant GEICO to file a claim. The claims adjuster estimated the cost of the necessary repairs as being \$15,992.85, less the \$500 deductible that plaintiffs were responsible for. Mr. Herbert entered into a Repair Terms Agreement with the auto body shop on May 30, 2007. Thereafter, on June 8, 2007, GEICO issued a check for \$15,992.85 to pay for the repairs. Plaintiffs contend that auto body shop promised them the car would be repaired in two weeks, but not only did

they fail to keep that promise, the auto body shop further damaged the car.

Plaintiffs contend they revoked their permission to have the auto body shop repair the car once they learned the shop could not live up to its promise. Mr. Herbert provides his sworn affidavit stating that he did this by fax on July 12<sup>th</sup>. By then, however, the check GEICO had sent to the auto body shop had been cashed.

Plaintiffs seeks summary judgment against the auto body shop and the defendant sued herein as "Edward Rizzo a/k/a Vertucciq." Plaintiffs contend that the check GEICO issued was a two-party check made out to the auto body shop and Mr. Herbert. Plaintiffs contend further that the check was cashed with the forged signature of "Kenneth M. Hubut."

The auto body shop denies any forgery took place, but contends that someone authorized by Mr. Herbert signed it for him. Edward Vertucci provides his sworn affidavit that he is an officer of the auto body shop, but he has never been known by any other name, including "Rizzo," or "Vertucciq." The auto body shop also opposes plaintiffs' motion to have the money he posted as bond released. It also opposes plaintiffs' motion for an order requiring it disgorge the \$15,492.83 GEICO already paid.

Though the relief seeking permission to amend the complaint to assert claims against Toyota was withdrawn, Toyota also addressed, and opposed, these remaining branches of plaintiffs' motion. Toyota, like the auto body shop, contends there are issues of fact who signed the check and the bond has to remain in place until this case is finally resolved.

### **Discussion**

"The proponent of a summary judgment motion must make a prima facie

[\*5]

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Plaintiffs have not met their burden of proving the two party check was forged. Not only have plaintiffs failed to provide the court with a copy of the purportedly forged check, there is an issue of fact about who signed it. Mr. Rizzo denies he, or anyone else associated with the auto body shop signed it, but contends Mr. Herbert authorized someone who worked for Dzine to sign the check for him. Therefore, plaintiffs have not proved they are entitled to summary judgment on their forgery claims against Mr. Rizzo or the auto body shop.

Plaintiffs' argument about why the court should order the auto body shop to disgorge the proceeds already paid is closely aligned to their arguments about whether the plaintiffs revoked their permission to have the car repaired. It is also closely related to, and inseparable from, the issue of whether anyone forged the check GEICO sent. This issue also has to be tried because plaintiffs have not proved their entitlement to summary judgment.

The court ordered plaintiffs to post a bond of \$7,900. Plaintiffs offer no meaningful explanation for why the bond the court ordered is no longer required. The car is still being preserved, although GEICO now has taken possession of it, and the

[\* 6 ]

bond is a condition of the continued injunction against the car being destroyed. There is no basis to direct the release of the bond money at this time and the motion for such relief is denied.

**Conclusion**


Plaintiffs' motion for partial summary judgment, the disgorgement of monies, and the release of the bond is denied in all respects. Other branches of their motion were previously withdrawn.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 2, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Bische, JSC

