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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

EDWARD H. WALSH,

Petitioner,

-against-

AUTOTECH COLLISION, INC.,

Respondent.

Motion Sequence #01
Submitted May 8, 2009

INDEX NO: 5828/09

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....1
Affidavit in Support of Preliminary Injunction.....2
Memorandum of Law in Support of Inspection of Vehicle.....3
Petitioner's Pre-Trial Memorandum.....4
Verified Response and Counter-Claim.....5
Affirmation in Opposition.....6
Memorandum of Law in Opposition to Verified Petition.....7
Supplemental Memorandum in Support of Petition.....8

Petitioner, EDWARD H. WALSH, petitions the Court, pursuant to CPLR §6311, for a preliminary injunction enjoining respondent, AUTOTECH COLLISION, INC. (hereinafter referred to as "AUTOTECH"), from selling, transferring or otherwise disposing of petitioner's 2006 BMW automobile, VIN# WBXPA934X6WG90205, and directing said respondent to permit inspection of the subject vehicle by petitioner's insurance company. Counsel for respondent submits a verified response, affirmative defense and counter-claim

and opposes the petition for injunctive relief, which is determined as follows:

In this special proceeding, petitioner, the owner of a 2006 BMW Suburban Van, VIN #WBXPAA934X6WG90205, which was towed after an accident on January 28, 2009 to respondent AUTOTECH's shop, seeks, *inter alia*, recovery of his vehicle. Despite continued efforts by petitioner, on January 29th, January 30th and February 2nd, 2009, to have the vehicle removed from the AUTOTECH shop, respondent allegedly refused to release the vehicle or permit petitioner's insurance company to inspect the vehicle claiming that it had provided authorized repairs to the vehicle in the amount of $9,357.34 (including towing and storage charges), disputed by petitioner, which must be paid before the vehicle can be released.

Respondent, AUTOTECH, opposes petitioner's request for injunctive relief and contends, *inter alia*, that the petition herein is procedurally improper as it is incorrectly styled as one brought under §201-a of the Lien Law, notwithstanding the fact that no notice of sale has been served on petitioner and, therefore, petitioner has no reason to believe the vehicle in question is in imminent danger of being sold. It is AUTOTECH's position that petitioner has failed to demonstrate he would be irreparably harmed. Notwithstanding same, the petition reflects that AUTOTECH's attorney has communicated to petitioner that AUTOTECH will liquidate the vehicle if petitioner does not negotiate payment of outstanding charges allegedly owed.

Counsel for AUTOTECH disputes what he characterizes as "egregious misstatements" in the petitioner's recital of the facts surrounding this controversy and contends that the petitioner's insurance carrier "shirked its responsibility to make a timely inspect[ion] of the vehicle in question" and, rather than pay the claim, is hoping to divert the

insured's attention from its purported failure to pay.

Pursuant to Lien Law §184(1), a garage keeper 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 garage keeper may maintain a lien against a vehicle where the garage keeper 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. *General Motors Acceptance Corp. v Anthony J. Minervini, Inc.*, 301 AD2d 940, 753 NYS3d 627 (3rd Dept. 2003). Under Article 12-A of the Vehicle and Traffic Law, the garage must be a duly registered motor vehicle shop.

§ 184 of the Lien Law, which is in derogation of common law, must be strictly construed. *Phillips v Catania*, 155 AD2d 866, 547 NYS2d 476 (4th Dept. 1989). It is the garage keeper's burden to establish that it has performed garage services or stored the vehicle with the owner's consent. *National Union Fire Ins. Co. of Pittsburg, Pa. v Eland Motor Car Co., Inc.*, 85 NY2d 725, 628 NYS2d 238, 651 NE2d 1257 (C.A.1995), *clarification denied*, 87 NY2d 1002 (1996).

A lien is specific to the vehicle upon which repairs were made (*National Union Fire Ins. Co. of Pittsburg, Pa. v Eland Motor Car Co.*, *supra*, at p. 730) and an estimate of repairs does not create a lien (*Mercedes-Benz Credit Corp. v One Stop Auto & Truck Ctrs.*, 170 Misc2d 354, 650 NYS2d 913 [Supreme Nassau Co. 1996]). Moreover, storage fees must specifically be authorized in order to be included as part of a lien on the vehicle. Where a garage keeper claims more than is actually due, he or she is guilty of conversion

and liable to the owner in damages. *BMW Bank of N. Am. v G & B Collision Ctr., Inc.*, 46 AD3d 875, 850 NYS2d 470 (2nd Dept. 2007);*F & N Corvette Classics v Corvette Repairs, Inc.*, 206 AD2d 349, 613 NYS2d 930 (2nd Dept. 1994).

A vehicle owner faced with a garage keeper's lien on his car may commence a special proceeding under Lien Law §201-a to challenge the validity of the lien. The section provides, in pertinent part:

> [i]f the owner or any such person shall show that the lienor is not entitled to claim a lien in the property, or that all or part of the amount claimed by the lienor has not been properly charged to the account of such owner or such person, or, as the case may be that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court shall direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly. If the lienor shall establish the validity of the lien, in whole or in part, the judgment shall fix the amount thereof, and shall provide that the sale may proceed upon the expiration of five days after service of a copy of the judgment together with notice of entry thereof upon the owner or such person unless the property is redeemed prior thereto pursuant to section two hundred three of this article. If the lien is cancelled, the judgment shall provide that, upon service of a copy of the judgment together with notice of entry thereof upon the lienor, the owner or such person shall be entitled to possession of the property.

It is the Court's responsibility, therefore, to determine the reasonableness of the amount claimed in the lien. *Munro v Autosports Designs, Inc.*, 185 Misc2d 821, 714 NYS2d 415 (Supreme Nassau Co. 2000). Refusal to release property based on the improper assertion of a lien can give rise to a cause of action for conversion. *Grant Street Const., Inc. v Cortland Paving Company, Inc.*, 55 AD3d 1106, 865 NYS2d 762 (3rd Dept. 2008).

It is well established that a party seeking a preliminary injunction must demonstrate the likelihood/probability of success on the merits, danger of irreparable harm in the absence of an injunction and a balance of the equities in the movant's favor. *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 808 NYS2d 418 (2nd Dept. 2006). The remedy is a drastic one which should be used sparingly.

It is not for the Court to decide the merits of an action upon a motion for preliminary injunction. *Gambar Enterprises, Inc. v Kelly Services, Inc.*, 69 AD2d 297, 418 NYS2d 818 (4th Dept. 1979). The purpose of the interlocutory relief is to preserve the status quo and prevent dissipation of property that could render a judgment ineffectual. *Ruiz v Maloney*, 26 AD3d 485, 810 NYS2d 216 (2nd Dept. 2006). Therefore, a preliminary injunction may be granted where, as here, injunctive relief is deemed necessary to maintain the status quo even if the movant's success on the merits cannot be determined at the time the application for relief is brought. *Mr. Natural, Inc. v Unadulterated Food Products, Inc.*, 152 AD2d 729, 544 NYS2d 182 (2nd Dept. 1989). The decision to grant or deny a preliminary injunction rests in the sound discretion of the court. *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 (2nd Dept. 2004).

After a careful reading of the submissions herein, it is the judgment of the Court that the purpose of a preliminary injunction will be well served by the granting of the requested relief herein as petitioner's vehicle would be preserved and secured and respondent would suffer no great hardship as a result.

Moreover, it is the Court's view that, contrary to respondent's assertion, petitioner's insurance company has not forfeited its right to inspect petitioner's vehicle. According to

the chronology of contacts submitted by USAA Casualty Insurance Company, telephone overtures were made to respondent by the insurer on January 28th, January 30th, February 2nd, February 5th and February 13th, 2009. In any event, even if the insurer did not timely inspect the damaged vehicle prior to repairs (see, 11 NYCRR§216.7[8], Unfair Trade Practices), Vehicle and Traffic Law §398-d(1) provides with respect to post repair inspections, in relevant part, as follows:

> [f]or the purposes of insuring that the repairs described on the work invoice have been performed, every customer and his representative or a representative of an insurance company where such company has paid or is liable to pay a claim for damage to such customer's motor vehicle shall have a right to inspect the repaired motor vehicle. Such right of inspection shall also include the right to inspect all replaced parts and components thereof, except warranties or exchange parts.

Based on the foregoing, it is hereby

ORDERED, that petitioner is entitled to a preliminary injunction, pursuant to CPLR §6311, and AUTOTECH is enjoined from selling, transferring or otherwise disposing of petitioner's BMW 2006 vehicle, VIN #WBXPA934X6WG90205, on condition that petitioner post an undertaking in the amount of $12,500.00, in accordance with CPLR §6312(b). See, *Livas v Mitzner*, 303 AD2d 381, 756 NYS2d 27 (2nd Dept. 2003); and it is further

ORDERED, that AUTOTECH is directed to permit a representative of petitioner's insurance company to inspect said vehicle in accordance with Vehicle and Traffic Law §398-d(1) within twenty (20) days of service of a copy of this order, with notice of entry, on respondent's attorney; and it is further

ORDERED, that, based on the record herein, it appears that an evidentiary hearing is required to consider the contradictory positions of the parties and to judge their

credibility. Accordingly, this matter is specifically referred to the Calendar Control Part (CCP) for a hearing on the validity and reasonableness of respondent's lien and what sums, if any, are due to respondent, and shall appear on the calendar of CCP on September 9, 2009 at 9:30 A.M. subject to the approval of the Justice there presiding; and it is further

ORDERED, that petitioner shall file a Note of Issue within thirty (30) days from the date of this order and serve a copy of this order and the Note of Issue upon counsel for the respondent by certified mail, return receipt requested, and shall serve copies of same together with receipt of payment, upon the Calendar Clerk of this Court, no later than ten (10) days prior to the date of Inquest; and it is further

ORDERED, that the directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate; and it is further

ORDERED, that the failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 14, 2009

WILLIAM R. LaMARCA, J.S.C.

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