

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GENERAL ELECTRIC CREDIT UNION,	:	APPEAL NO. C-130253
	:	TRIAL NO. A-1202676
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
TRULY UNIQUE TIRE AND AUTO,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Truly Unique Tire and Auto (“Truly Unique”) appeals from the entry of summary judgment for plaintiff-appellee General Electric Credit Union (“GECU”) on GECU’s claim for replevin of a vehicle and Truly Unique’s counterclaim for storage fees. We affirm.

In September 2010, Darryll L. Smith granted GECU a security interest in a 2003 Landrover Range Rover that he purchased with the proceeds from an installment loan. It is undisputed that GECU’s security interest was then duly recorded on the vehicle’s certificate of title in accordance with R.C. 4505.13. About a year later, Smith allegedly hired Truly Unique to perform services on the Range Rover. Smith apparently did not return to claim the Range Rover after the completion of the services, and Truly Unique began to assess fees for storage.

Smith also failed to make timely payments to GECU and defaulted on the installment loan. GECU contacted Truly Unique to claim its interest in the collateral, but was unsuccessful in obtaining it. GECU then filed this action in replevin against Truly Unique for recovery of the collateral and against Smith for the amount due under the installment loan. Truly Unique filed a counterclaim against GECU for \$5,200 in storage fees. Subsequently, GECU obtained a default judgment against Smith and summary judgment against Truly Unique.

In two assignments of error, Truly Unique challenges the summary judgment for GECU. We review the grant of summary judgment *de novo*, applying the standards set forth in Civ.R. 56. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000).

Truly Unique first argues that the summary judgment was erroneous because it had asserted a common-law artisan's lien for labor and skill provided in diagnosing engine noise on the Range Rover and because such a lien defeats the perfected interest of a secured creditor in a replevin action. But Truly Unique misstates Ohio law. A common-law artisan's lien for servicing the vehicle is subordinate to a prior lien noted upon the certificate of title of a motor vehicle in accordance with R.C. 4505.13(B), and that secured creditor is entitled to replevin against such an artisan's lien holder. *See Leesburg Fed. Saus. Bank, n.k.a. Southern Hills Community Bank v. McMurray*, 12th Dist. Fayette No. 2012-02-002, 2012-Ohio-5435, ¶ 9, citing *Commonwealth v. Berry*, 2 Ohio St.2d 169, 207 N.E.2d 545 (1965); *Assoc. Commercial Corp. v. Green, d.b.a. Green Trucking*, 5th Dist. Stark No. 1999CA00146, 1999 Ohio App. LEXIS 6447 (Dec. 6, 1999); *Mack Fin. Corp. v. Kenworth of Cincinnati, Inc.*, 1st Dist. Hamilton No. C-790740, 1981 Ohio App. LEXIS 12186 (June 3, 1981).

Truly Unique does not dispute that GECU was a prior secured creditor within the meaning of R.C. 4505.13(B). Thus, GECU was entitled to summary judgment on the

replevin action, even if Truly Unique had an artisan's lien for service on the vehicle, which was provided at the request of Smith.

Next, Truly Unique argues that summary judgment was improper because material issues of fact remained as to whether GECU was liable for the storage fees under an implied-contract theory. But Truly Unique's counterclaim did not state a claim under an implied-contract theory, which required an allegation that GECU not only knew that Truly Unique was storing an "abandoned" vehicle, but that GECU made no request or demand for the release of the vehicle. *See Gen. Elec. Evendale Emp. Fed. Credit Union v. Coffey's Body Shop & Towing Serv., Inc.*, 2d Dist. Montgomery No. 12430, 1991 Ohio App. LEXIS 2595 (June 5, 1991); *Motors Ins. Corp. v. Bougher, d.b.a. Lloyd's Marathon*, 9th Dist. Medina No. 1077, 1981 Ohio App. LEXIS 13933 (Dec. 16, 1981). Truly Unique did not move to amend its counterclaim before the trial court, and the issue was not tried by the express or implied consent of the parties. The Rules of Civil Procedure do not provide for a party to amend its counterclaim on appeal and avoid a summary judgment on the counterclaim as it was presented to the trial court. *See Civ.R. 15*. Thus, Truly Unique's argument is meritless.

Accordingly, we overrule the assignments of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on March 19, 2014

per order of the court _____.
Presiding Judge