Property Clerk, NYC Police Dept. v Jones
2014 NY Slip Op 32918(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 450438/14
Judge: Martin Shulman

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

PRESENT: Hon. MARTIN SHULMAN, Justice PART 1

PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT,

Plaintiff,

-v-

BENJAMIN JONES,

Defendant.

INDEX NO.: 450438/14

DECISION, ORDER & JUDGMENT

In this civil forfeiture proceeding, plaintiff seeks forfeiture of the subject vehicle, a 2007 BMW, bearing Vehicle Identification Number WBAVB73597VF52139 (the "subject vehicle"), which was seized from defendant Benjamin Jones ("defendant" or "Jones") and vouchered under Property Clerk Invoice Number 4000111540 as a result of defendant's January 25, 2013 arrest on charges of driving while intoxicated (VTL §§ 1192.2 and 1192.3). Plaintiff now moves by order to show cause ("OSC") for summary judgment based upon Jones' February 11, 2014 guilty plea to violating VTL § 1192.2 (OSC at Exh. 4).[1]

Jones opposes the OSC. In his amended verified answer (NYSCEF Doc. No. 13), defendant does not deny the entry of his guilty plea or that he is the registered and titled owner of the subject vehicle. He asserts the following three (3) affirmative defenses: (1) failure to state a cause of action; (2) lack of personal jurisdiction; and (3) failure to timely commence this forfeiture action within the applicable limitations period.

[1] By prior decision and order dated June 6, 2014, this court granted plaintiff a preliminary injunction enjoining Jones "from selling, leasing, gifting, assigning, pledging or otherwise disposing of the subject vehicle or transferring his right, title and interest therein in any manner or from otherwise removing the subject vehicle from this court's jurisdiction during the pendency of this forfeiture action", and denied the portion of that motion which sought to enjoin defendant from taking possession of the subject vehicle.

Plaintiff has submitted Queens County Certificate of Disposition Number 263023, which discloses that on February 11, 2014, defendant pleaded guilty to VTL § 1192.2 (OSC at Exh. 4). A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts. *Grayes v DiStasio*, 166 AD2d 261, 262-263 (1st Dept 1990). Therefore, a defendant who pleads guilty to a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based. *Id.; S.T. Grand, Inc. v City of New York*, 32 NY2d 300 (1973).

There can be no dispute that the subject vehicle is the instrumentality of the crime of driving while intoxicated. As stated in *Grinberg v Safir*, 181 Misc2d 444, 694 NYS2d 316 (Sup Ct NY County, 1999), *aff'd* 266 AD2d 43 (1st Dept 1999):

> Operation of a motor vehicle is a necessary element of DWI. VTL §1192(2), (3). A drunk driver's automobile is the quintessential instrumentality of a crime - the *sine qua non* without which the crime could not have been committed.

Id., 181 Misc2d at 448-449, 694 NYS2d at 320.

In accordance with NYC Admin. Code §14-140 and 38-A RCNY §§ 12-35 and 12-36, plaintiff has established by a preponderance of the evidence that defendant is the registered and titled owner of the subject vehicle and that defendant used the subject vehicle as the instrumentality of committing the crime of driving while intoxicated. Upon plaintiff establishing its *prima facie* case, the burden of proof now shifts to Jones to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *see also*, *DeSouter v HRH Const. Corp.*, 216 AD2d 249 (1st Dept 1995).

In opposition to plaintiff's motion for summary judgment, Jones relies upon his third affirmative defense that the statute of limitations had run at the time plaintiff commenced this forfeiture action.[2] Establishing that an issue of fact exists with respect to the statute of limitations defense would defeat plaintiff's entitlement to summary judgment.

The time in which the Property Clerk must commence a forfeiture action has been established in accordance with the decisions in *McClendon v Rosetti*, 460 F2d 111 (2d Cir. 1972), *McClendon v Rosetti*, 369 FSupp 1391 (SDNY 1974) and the subsequent regulations set forth in *McClendon v Rosetti*, 1993 WL 158525 (SDNY 1993) by Federal District Judge Lasker, as codified in the Rules of the City of New York ("RCNY"), Title 38, Chapter 12. Where a timely demand for the return of seized property has been made, the Property Clerk has twenty-five (25) days within which to commence a forfeiture proceeding. If a forfeiture proceeding is not commenced within the twenty-five day window period, the Property Clerk must advise the claimant that it will return the property forthwith. RCNY §12-36(a).

Here, Jones contends that he was never given notice of his right to request a retention hearing before the New York City Office of Administrative Trials and Hearings ("OATH"). As of February 18, 2014, the date defendant submitted a completed Notice

---

[2] Defendant previously raised this defense in opposition to plaintiff's motion for preliminary injunctive relief. In that context, this court found that Jones' allegations regarding his purported summer 2013 telephone call to plaintiff's counsel were vague and unsubstantiated and that, notwithstanding this potential defense, plaintiff had established a likelihood of success on the merits. Although at that time Jones expressed his intention to move to dismiss this action based on such defense, he does not cross-move for such relief.

of Right to Retention Hearing form requesting a hearing, plaintiff had retained the subject vehicle for over a year (since Jones' January 25, 2013 arrest) without notifying defendant that he had a right to a retention hearing.[3]

During this period, Jones claims he was unable to determine how to go about having the subject vehicle released to him. He avers that he made several attempts to obtain it, including going to the impound lot and police precincts. He ultimately was referred to plaintiff's office and spoke to plaintiff's counsel, Harold Gates, Esq. Defendant claims he told Mr. Gates that he wanted the subject vehicle back during a telephone call some time between July and September 2013. He maintains Mr. Gates should have advised him of his right to a retention hearing at that time.

Jones argues that the following issues of fact preclude summary judgment in plaintiff's favor: "(1) whether defendant's communications with Mr. Gates between July and September 2013 gave plaintiff notice the defendant was seeking the return of his vehicle; and if yes, (2) whether this action, commenced more than twenty-five days after that communication, is untimely." Toscano Aff. in Opp. at ¶26. Defendant further urges that his communication with Mr. Gates should be given weight in light of plaintiff's failure to inform him of his rights. *Id.* at ¶18.

Plaintiff does not respond to Jones' opposition. Notwithstanding plaintiff's failure to deny Jones' allegations, this court finds no authority supporting defendant's position

---

[3] The retention hearing was held on March 20, 2014, and culminated in Administrative Law Judge Ingrid M. Addison issuing a memorandum decision and order dated March 21, 2014 ordering that the subject vehicle be released to Jones on procedural grounds, to wit, plaintiff's failure to establish compliance with the notice requirements set forth in *Krimstock v Kelly*, 306 F3d 40 (2d Cir 2002), *cert den*, 539 US 969 (2003). See OSC at Exh. 8.

that his oral request to plaintiff's counsel via telephone was sufficient to put plaintiff on notice that he sought the return of the subject vehicle. Demands for the return of vouchered property may be made in person or by mail by the claimant or his authorized representative. 38 RCNY §12-35[c]. However, a claimant's failure to precisely follow the procedures for the return of property from the Property Clerk is not fatal to his or her claim provided that the Property Clerk is given sufficient notice that return of property is being sought. *Camacho v Kelly*, 57 AD3d 297, 298 (1st Dept 2008). See also, *DeBellis v Property Clerk of City of New York*, 79 NY2d 49, 58 (1992) (claimant's in person demand plus the written demand of his attorney deemed sufficient notice even though demands were premature); *Property Clerk, New York City Police Dept. v Smith*, 62 AD3d 486 (1st Dept 2009) (Property Clerk had notice that defendant sought the return of his vehicle by no later than the date a retention hearing was convened and action commenced more than 25 days later was untimely).

Jones offers no indication as to when he visited the police precincts and auto pound to obtain his vehicle or any details as to whom he spoke or what he was advised. Unlike in the cases cited above, these vague claims and defendant's telephone call to Mr. Gates are too indefinite to place plaintiff on notice that defendant sought the return of the subject vehicle. This action was commenced on February 24, 2014, well within 25 days of Jones' February 18, 2014 request for a retention hearing, that being plaintiff's first definitive indication that defendant requested the return of his vehicle.

Jones having failed to establish his defense, there are no outstanding questions of fact and plaintiff's motion for summary judgment must be granted. Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted in plaintiff's favor; and it is further

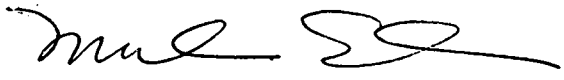
ORDERED and ADJUDGED that the subject vehicle, a 2007 BMW, bearing Vehicle Identification Number WBAVB73597VF52139, seized from defendant Benjamin Jones and vouchered under Property Clerk Invoice Number 4000111540, be forfeited pursuant to the provisions of the Administrative Code of the City of New York § 14-140; and it is further

ORDERED and ADJUDGED that defendant Benjamin Jones may not lawfully possess the subject vehicle and shall deliver the subject vehicle into plaintiff's custody; and it is further

ORDERED and ADJUDGED that, in the event defendant Benjamin Jones has sold, conveyed or otherwise disposed of the subject vehicle, plaintiff shall be entitled to the monetary value of the subject vehicle at the time of seizure; and it is further

ORDERED and ADJUDGED that the plaintiff's custody and retention of the subject vehicle is both lawful and proper.

Dated: November 17, 2014



Hon. Martin Shulman, J.S.C.