

**Property Clerk, New York City Police Dept. v
Dolgetta**

2014 NY Slip Op 31447(U)

June 2, 2014

Supreme Court, New York County

Docket Number: 450069/14

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
PROPERTY CLERK, NEW YORK CITY POLICE
DEPARTMENT,

Plaintiff,

Index No: 450069/14

-against-

**Decision, Order
& Judgment**

ALFONSO DOLGETTA and ALLY FINANCIAL,

Defendants.

-----X
Hon. Martin Shulman, J.:

Plaintiff, Property Clerk, New York City Police Department ("Property Clerk" or "plaintiff") commenced this action by filing the summons and verified complaint on January 9, 2014 seeking forfeiture of a 2003 Chevrolet bearing Vehicle Identification Number 1GNFK16Z83J135653 (the "subject vehicle") pursuant to N.Y.C. Adm. Code §14-140. The subject vehicle was seized from defendant Alfonso Dolgetta ("defendant" or "Dolgetta") and vouchered under Property Clerk Invoice Number 2000274916 at the time of defendant's December 17, 2013 arrest for *inter alia* violating Penal Law ("PL") §1192.3 (operating a motor vehicle while under the influence of alcohol or drugs).

The Property Clerk moves by order to show cause ("OSC") for a preliminary injunction enjoining Dolgetta from taking possession of the subject vehicle¹ as well as from "selling, leasing, gifting, assigning, pledging or otherwise disposing of the subject

¹ By memorandum decision dated February 7, 2014, Administrative Law Judge ("ALJ") Alessandra F. Zornotti of the New York City Office of Administrative Trials and Hearings ("OATH") determined that the Property Clerk was not entitled to retain the subject vehicle pending the outcome of this forfeiture action. See Motion at Exh. 8. ALJ Zornotti's found that plaintiff failed to establish "that returning the seized vehicle to [Dolgetta] would present a heightened risk to the public safety, or to the preservation of the seized vehicle." *Id.* at p. 5.

vehicle or transferring his right, title and interest therein . . . or from otherwise removing the subject vehicle from the jurisdiction of this Court during the pendency of the instant action". On February 13, 2014, this court issued a temporary restraining order ("TRO") prohibiting the foregoing acts pending the hearing of the OSC, effectively staying enforcement of the OATH decision.

Plaintiff's OSC also seeks entry of a default judgment against defendant based upon his failure to timely answer the complaint or otherwise appear in this action. Dolgetta, appearing by counsel, opposes the OSC and cross-moves pursuant to CPLR §3012(d) to compel plaintiff to accept late service of his verified answer. Plaintiff has not interposed a reply or opposition to the cross-motion.

Defendant's Opposition

Dolgetta contends that both the summons and complaint² and the instant OSC were not properly served on him and as such, this court lacks personal jurisdiction over him. This court agrees that the OSC was not properly served on defendant and must therefore be denied in its entirety.

"The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with." *Matter of El Greco Socy. of Visual Arts, Inc. v Diamantidis*, 47 AD3d 929 (2d Dept 2008). Here, the OSC directed service upon Dolgetta, yet plaintiff served the OSC on defendant's counsel who had appeared for

² Defendant's cross-motion does not seek dismissal of this action based upon alleged improper service of the summons and complaint and as such, this decision does not address the merits of defendant's claim that the summons and complaint were personally served on his attorney, who had not yet been retained in this action, rather than on Dolgetta himself. Such service occurred when Dolgetta appeared with counsel at the retention hearing scheduled before OATH on January 13, 2014.

him in the criminal matter and before OATH. CPLR 2103[c] provides that, where a party has not appeared by an attorney, service shall be made upon the party. At the time the OSC was served, counsel in the related criminal and administrative proceedings had not yet appeared in this forfeiture action on Dolgetta's behalf. As such, the OSC was never served on defendant and it must be denied and the TRO vacated.

Defendant's Cross-Motion

CPLR §3012(d) provides that the court may, upon application, extend the time to appear or plead, or compel the acceptance of an untimely served pleading, upon such terms as may be just and upon showing a reasonable excuse for the default. Here, the discrepancy surrounding the circumstances of the summons and complaint's service (see fn. 2, *supra*) establish a reasonable excuse for the default. Furthermore, the Property Clerk sought a default judgment against defendant a mere eleven (11) days after his default. Given the brief delay and plaintiff's failure to oppose the cross-motion or otherwise establish any prejudice, the cross-motion should be granted to the extent that Dolgetta is granted an additional ten (10) days from the date hereof to serve and file his answer to the complaint.³ See *Nason v Fisher*, 309 AD2d 526 (1st Dept 2003); *Jones v 414 Equities LLC*, 57 AD3d 65, 81 (1st Dept 2008).

For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's OSC is denied in its entirety, and the TRO is vacated;
and it is further

³ The court cannot compel plaintiff to accept service of an answer as defendant requests since no proposed answer has been submitted with the cross-moving papers.

ORDERED that defendant Alfonso Dolgetta's cross-motion is granted; and it is further

ORDERED that defendant shall serve and file an answer to the complaint within ten (10) days of the date hereof.

Counsel for the parties are directed to appear for a preliminary conference at 60 Centre Street, Room 325, New York, New York, on June 24, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
June 2, 2014



HON. MARTIN SHULMAN, J.S.C.