Matter of Criscuolo v City of New York
2017 NY Slip Op 31813(U)
August 29, 2017
Supreme Court, New York County
Docket Number: 156001/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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IN THE MATTER OF THE CLAIM OF:
ANTHONY CRISCUOLO,

Claimant,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

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Index No. 156001/16

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

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By amended notice of motion, claimant moves pursuant to CPLR 2221(d) for an order granting him leave to renew and reargue his application seeking leave to file a late notice of claim, which I denied by decision and judgment dated January 24, 2017. Defendants oppose.

I. BACKGROUND

As set forth in the January 2017 order, the pertinent facts are as follows:

> Claimant asserts that on or around June 19, 2013, he was arrested by defendants and his vehicle was seized. Through his criminal trial, conviction on June 13, 2014, and incarceration beginning on July 7, 2014, the vehicle remained in defendants' possession. By form dated April 24, 2015, the district attorney's office released the vehicle. On April 27, 2015, the vehicle was sold at auction. Claimant seeks to recover damages for the sale of the vehicle.

In denying the petition, I held as follows:

Pursuant to General Municipal Law 50-i(1)(c), an action against the City must be commenced within one year and 90 days after the occurrence at issue. To the extent that claimant sought the release of his vehicle on March 10, 2015, when he allegedly filed a motion in the criminal proceeding, the instant action was not commenced until July 19, 2016, more than a year and 90 days later. (*See Wiekiert v City of New York*, 128 AD3d 128 [2d Dept 2015] [action seeking return of seized property accrued when plaintiff attempted to recover property from property clerk, and action filed more than one year and 90 days thereafter was time-barred]; *cf Beck v City of New York*, 133 Misc 2d 265 [Sup Ct, Richmond County 1986] [replevin action accrued upon imposition of criminal sentence]). Moreover, the district attorney's release of the property did not preclude the auctioning of claimant's vehicle as the property clerk must return non-contraband arrest evidence only upon a demand made within 120 days after the termination of criminal proceedings, whether or not it is accompanied by a district attorney's property release, and if the demand is made in person or by mail. (38 RCNY 12-35). It is undisputed that here claimant never made a demand upon the property clerk.

II. MOTION TO REARGUE

Claimant now alleges that: (1) he made a demand upon the property clerk for the return of his property; (2) as the property clerk deemed claimant's vehicle to be "forfeiture property," it was improperly sold without a legal transfer of title; (3) as the vehicle was forfeiture property, 38 RCNY 12-35 is inapplicable; (4) the claim accrued on April 27, 2015, when his property was wrongfully sold at auction; (5) *Wiekert* and *Beck*, cited above, are inapposite; and (6) there are factual issues that require an evidentiary hearing. (NYSCEF 35).

Claimant's current assertion that he made a demand is contradicted by the allegations in his complaint, in which he twice concedes that he failed to make a demand for the recovery of his vehicle. (NYSCEF 8). This recent reversal of position constitutes an improper feigned attempt to create a factual issue. (*See e.g., Israel v Fairharbor Owners, Inc.*, 20 AD3d 392 [2d Dept 2005] [plaintiff's affidavit raised feigned factual issue to avoid consequences of prior admissions]).

To the extent that claimant relies on correspondence with an assistant district attorney to establish that a demand was made, the applicable rule requires that a demand be made on the

Property Clerk either in person or by mail, not on the District Attorney's Office. Moreover, a letter from an attorney for the Legal Bureau of the New York City Police Department (NYPD) confirms that his communication with claimant's criminal defense attorney regarding the vehicle "made clear that such communications were not to be construed as a demand for the vehicle." (NYSCEF 26).

Claimant's reliance on 35 RCNY 12-36 for his assertion that the property clerk was required to institute a forfeiture proceeding before auctioning his vehicle is misplaced. The rule provides that a property clerk "may" refuse to return property and "may" cause a civil forfeiture proceeding or other similar civil proceeding to be initiated. Thus, the rule does not require that the clerk institute a forfeiture proceeding.

Pursuant to 35 RCNY 12-35, the clerk must return non-contraband arrest evidence only upon timely demand made on it. As no demand was made, the vehicle was disposed of properly. Therefore, claimant's claim accrued when he attempted to recover his vehicle, which was after the expiration of the statute of limitations. (*See Wikiert*, 128 AD3d at 135 [claim accrued when plaintiff attempted to recover property from clerk]; *Prop. Clerk, New York City Police Dept. v Ford*, 30 Misc 3d 301 [Sup Ct, New York County 2010], *affd on other grounds* 92 AD3d 401 [1st Dept 2012] [date of demand for return of property is date claim accrues]; *see also Smith v Scott*, 294 AD2d 11 [2d Dept 2011] [claim accrues when claimant has right to make to demand]). Claimant does not now, nor did he before, cite authority for the proposition that the claim accrued when the vehicle was sold.

Claimant thus fails to establish that I overlooked or misapprehended any fact or law in denying his application. In any event, he improperly advances his previous arguments, which

were considered and rejected. (*See Setters v Al Props. and Dev. [USA] Corp.*, 130 AD3d 492 [1st Dept 2016] [reargument not for unsuccessful party to reargue issues already decided]).

III. MOTION TO RENEW

In support of his motion to renew, claimant submits: (1) information related to a pending lawsuit in federal court against the City, wherein it is alleged that the City has a policy, pattern, and practice of unconstitutionally retaining non-contraband personal property seized pursuant to an arrest (NYSCEF 27); (2) correspondence from an assistant district attorney (NYSCEF 28); (3) a New York Daily News article which provides that the Bronx District Attorney's Office had agreed to new procedures to speed up the return of seized property (NYSCEF 29); and (4) an informal opinion from the Attorney General's Office (NYSCEF 30).

Claimant fails to offer any explanation as to why he was unable to offer these documents with his application, and I thus do not consider them. (CPLR 2221[e][3] [motion for leave to renew shall contain reasonable justification for failure to present new facts on prior motion]; *see Jones v City of New York*, 146 AD3d 690 [1st Dept 2017] [motion to renew properly denied absent explanation as to why plaintiff did not submit new affidavits on prior motions]).

In any event, allegations in a pending lawsuit do not constitute evidence (*see* 3B Carmody-Wait 2d §27:2 [pleadings do not have force of evidence]), and at issue there, moreover, was the City's policy of retaining personal property, not auctioning it or failing to commence forfeiture proceedings. The correspondence does not support claimant's position, as the assistant district attorney states that claimant's criminal defense attorney was given "notice of the impending forfeiture of the vehicle, but no formal demand for the return of the property was ever made on behalf of [claimant] at that time. Accordingly . . . as a result of the NYPD not receiving

a formal demand for the vehicle, the City of New York did not need to commence a forfeiture action." (NYSCEF 28).

The news article is inadmissible (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403 [2d Dept 2009] [statement in newspaper article not competent evidence]) and otherwise irrelevant. And the informal opinion, rather than supporting claimant's position, provides that "the government ordinarily is not required to return confiscated property to its owner unless the owner makes a 'demand' for the property . . . as an alternative to returning confiscated property to its owner, the government may, where permitted by statute, initiate a forfeiture proceeding." (2003 Ops Atty Gen [Inf Ops]1090).

IV. CONCLUSION

Absent a disputed issue of fact relevant to the determination of the application, a hearing is not required. Accordingly, it is hereby

ORDERED, that claimant's motion for an order granting him leave to reargue and renew the decision and judgment denying his application and dismissing the proceeding is denied.

ENTER:

Barbara Jaffe, JSC

DATED: August 29, 2017
New York, New York