

City of New York v Nadler

2001 NY Slip Op 30059(U)

September 5, 2001

Supreme Court, New York County

Docket Number: 404304/00

Judge: Martin Shulman

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

PRESENT: Hon. MARTIN SHULMAN, Justice

PART 1

HAYIM

Plaintiff,

-v-

CITY

Defendant.

401346/01

INDEX SO. 40430400

Motion sq.

DECISION/ORDER

The following papers were read on this motion

NOTICE OF MOTION-AFFIDAVITS-EXHIBITS

ANSWERING AFFIDAVITS - EXHIBITS

REPLYING AFFIDAVITS

Papers Numbered

1, 2, 3, 4, 5

CROSS- MOTION:

YES

SO

Upon the foregoing papers The motion & cross-motion are denied in accordance with the attached Decision, Order & Judgment

Dated: 9/5/01



Hon. Martin Shulman, J.S.C.

Final Disposition

Non-Final Disposition

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

..... X
THE CITY OF NEW YORK,

Plaintiff,

Index No.: 404304/00

- against -

DECISION, ORDER and
JUDGMENT .

FRED NADLER, DAVID HAYIM, and
Property Seized and Vouchered under Police
Property Clerk Invoice No. K467288

Defendants.

-----X
DAVID HAYIM,

Plaintiff,

Index No.: 401346/01

-against-

THE CITY OF NEW YORK, POLICE DEPARTMENT
OF THE CITY OF NEW YORK, DEPARTMENT OF
FINANCE AND ENVIRONMENTAL CONTROL
BOARD OF THE CITY OF NEW YORK,

Defendants.

-----X
HON. MARTIN SHULMAN, J.S.C.:

In this civil forfeiture action, the City of New York (“City”) seeks to retain custody of Food Vending Cart No. 52824 (“cart”). The cart **was** seized pursuant to N.Y.C. Admin. Code § 17-321(c), as a result of the issuance of a Notice of Violation (“NOV”) **by** N.Y.C. Police Officer Noriega to defendant Fred Nadler (“Nadler”). The NOV accused Nadler of selling coffee from the cart without the required N.Y.C. Department of Health (“DOH”) license in violation of

N.Y.C. Admin. Code § 17-307(a). David Hayim (“Hayim”) is the purported owner of the cart. By stipulation dated April 14,2001, Action No. 2 was consolidated with Action No. 1 and the papers submitted to this Court were deemed to be Hayim’s motion for summary judgement on his demand for the return of the seized cart and the City’s cross-motion for summary judgment in its favor. The motion and cross-motion are consolidated for disposition herein.

The NOV on which the seizure was based (annexed to April 27,2001 ,Holden Aff.) and which serves as the predicate for this forfeiture action states:

Respondent [Fred Nadler] observed selling coffee from cart # 5284 w/o a Health Dept. License. Respondent was observed selling in cart w/2 other males without any Health Dept. Licenses.

The City has submitted the decision of Environmental Control Board (“ECB”) Administrative Law Judge Richard Roberts, dated September 28,2000, (Exh. C to April 10, 2001, Holden Aff.) which found Nadler in violation of N.Y.C. Admin Code § 17-307(a).

In relevant part, N.Y.C. Admin Code § 17-307 states:

(a)(1) It shall be unlawful for any individual to act **as** a food vendor without having first obtained a license therefor from the commissioner in accordance with the provisions of this subchapter.

(b)(1) It shall be unlawful to vend food **from** any vehicle or pushcart in a public space without having first obtained a permit for such vehicle or pushcart **from** the commissioner in accordance with the provisions of this subchapter..

N.Y.C. Admin. Code § 17-321 details the enforcement provisions relating to food vendors and, in relevant part, states:

(a) Public health sanitarians or other authorized officers or

employees of the department and police officers shall have the power to enforce all laws, rules and regulations relating to food vendors....

(c) an officer or employee designated in subdivision a of this section may seize any vehicle or pushcart which (i) does not have a permit or . . . (iii) is being used by an unlicensed vendor, and may seize any food sold or offered for sale from such vehicle or pushcart. Such vehicle, pushcart or food shall be subject to forfeiture as provided in section 17-322 of this subchapter. ...

N.Y.C. Admin. Code §17-322 sets forth a forfeiture provision which, inter alia, states:

(a) In addition to any penalties imposed pursuant to subdivision a of section 17-325 of this subchapter upon any person found guilty of violating subdivision a, b or c of section 17-307 of this subchapter, all property seized pursuant to this subchapter shall be subject to forfeiture upon notice and judicial determination. Notice of the institution of the forfeiture proceeding shall be in accordance with the provisions of the civil practice law and rules.

In the instant matter there is no dispute that on the date the NOV was issued, Hayim possessed a valid Health Department license that allowed him to vend food from the seized cart. There is also no dispute that at the time that Noreiega approached the cart and asked to see a food vendor's license that Hayim was not present at the cart but had to be called from a deli Hayim and Nadler co-owned and located across the street. It is Hayim's contention that he left the cart for a few minutes to use the restroom and asked Nadler to safeguard the cart and did not give the latter any specific instructions to sell food during his absence. At the ECB hearing, Nadler corroborated his partner's version of the facts, *i.e.*, that Hayim was at the cart 95% of the time but on occasion had to go to the deli.

Hayim has submitted documents that disclose that he paid \$20,000.00 to purchase the cart and \$1649.00 for improvements to the cart. (Exh. E to Holden **Aff.**)

The City asserts that the forfeiture of the cart does not warrant analysis pursuant to the excessive fines clause of the Eighth Amendment because: (1) the instant matter involves an *in rem* forfeiture; (2) the Administrative Code provisions under which forfeiture is sought do not include an innocent owner defense; (3) the forfeiture is not conditioned upon a conviction or a finding of guilt; and (4) the forfeiture of the cart serves important non-punitive and remedial governmental interests. The City further posits that even if the instant forfeiture proceeding is subject to excessive fines analysis, nonetheless, the forfeiture of the cart is not excessive when compared to the governmental interest in promoting public health, safety and welfare or when compared to other court sanctioned forfeitures.

The theory underlying an *in rem* forfeiture proceeding is the legal fiction that the action is directed against “guilty property” rather than against the offender . United States v. Baiakian, 524 U.S. 321,330 (1998). Traditionally, such proceedings were thought to be non-punitive. However **as** the Baiakian Court noted, the traditional distinction between *in rem* and *in personam* forfeiture has blurred and “. . . a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*”. Id. at 331. *See also, United States v. Halper*, 490 U.S. 435,448 (1989) (“A civil sanction that can not be said to solely serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, **as** we have come to understand the term.”); Austin v. United States 509 U.S. 602 (1993); Grinberg v. Safir, 181 Misc.2d 444,458 (Sup. Ct., N.Y. Co., 1999), affd. 266 A.D.2d 43 (1st Dept., 1999), app. den. 95 N.Y.2d 756 (2000) (“[i]f a civil forfeiture contains a punitive element, it is deemed **a** fine under the Eighth Amendment despite its remedial purpose and must be analyzed **for** excessiveness”).

The absence of an innocent owner defense or the requirement that there be a finding of guilt preceding forfeiture is not dispositive in determining in whether the proposed forfeiture is punitive.

United States v. Baiakian, 524 U.S. 321 (1998) arose from the respondent Bajakian's ("Bajakian") attempt to board an international flight without reporting that he was carrying \$357,144.00 in U.S. currency in violation of 31 U.S.C. § 5316 (a) (1) (A) (which requires the reporting of any attempt to transport currency in excess of \$10,000.00 from the United States). Bajakian pleaded guilty and at the forfeiture proceeding the government argued that the forfeiture of currency under the statute served important remedial purposes because the government has an overriding interest in controlling what property enters and exits the country and that full forfeiture of unreported currency serves to deter the transfer of unreported currency and provides valuable investigatory information. Id. at 329. In addressing these arguments, the Court noted that, "[d]eterrence, however, has traditionally been viewed **as** a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. See Black's Law Dictionary 1293 (6th ed. 1990) ("Remedial action" is **one** brought to obtain compensation **or** indemnity)." Id. at 329.

In the instant matter, the cart itself had the proper license and it was lawful for Hayim individually to vend food from it. The violation resulted from an unlicensed person vending food when Hayim was briefly away from the cart. There is no evidence that either Hayim or Nadler caused any actual harm. Aside from the license issue, there is no allegation that there **was** any unlawful activity afoot that would warrant forfeiture. In seeking forfeiture, the **City** places the entire societal burden of unregulated food vendors on Hayim and Nadler's shoulders rather than

addressing the particular harm caused in this instance. There is absolutely no correlation between the value of the cart the City seeks to forfeit and either the harm caused to society or the cost of enforcing these provisions of the N.Y.C. Administrative Code. Under these circumstances, forfeiture of the cart can only be characterized as punitive.

In Baiakian, the Supreme Court noted that the “[t]ouchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” Baiakian at 334. Clearly the forfeiture of a cart, valued in excess of \$20,000.00, as the penalty for selling a cup of coffee without a food vendor’s license is entirely disproportional. Significantly the instant forfeiture action arises out of a violation of the N.Y.C. Administrative Code and not a purported violation of a penal law. Any attempt to compare forfeiture of the cart with other court-sanctioned forfeitures arising from serious criminal charges is simply misplaced. There is no comparison between the alleged harm caused in the instant matter as compared to the alleged harm caused by intoxicated drivers and drug dealers.

In Attorney General of the State of New York v. One Green 1993 Four Door Chrysler et al., 217 A.D.2d 342 (3rd Dept., 1996), the court, in analyzing excessiveness, adopted a multi-factor test utilized in United States v. Milbrand, 58 F.3d 841 (2nd Cir., 1995). The Milbrand Court listed three factors to be considered: “(1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate


and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property." In the instant matter, a consideration of the above factors clearly warrants a finding against forfeiture.

Accordingly, it is hereby Ordered that David Hayim's motion for summary judgment in his favor and the issuance of an Order directing the return of the seized cart be granted and the City's cross-motion for summary judgment in its favor be denied; and it is further

ORDERED and ADJUDGED that the City is directed to return the subject cart within twenty (20) days of the service of this Order with notice of entry without the imposition of any costs, fees or disbursements.

The foregoing constitutes the Decision, Order and Judgement of this Court. Courtesy copies have been sent to counsel for all parties.

New York, New York
Dated: September 5, 2001



Hon. Martin Shulman, J.S.C.