

**Matter of Okada v Property Clerk of the Police Dept.
of City of N.Y.**

2004 NY Slip Op 30336(U)

January 14, 2004

Supreme Court, New York County

Docket Number: 122154/02

Judge: Lewis Bart Stone

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

PRESENT: Lewis Bart Stone
Justice

PART 508

Emre Muncherov Okada

INDEX NO. 122154/02

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

Robert, Clerk of D. NYC

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted _____
with the attached decision and order. The cross motion is denied

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SCANNED
JAN 22 2004

FILED
JAN 23 2004
NEW YORK COUNTY CLERK'S OFFICE

Dated: 13 Jan 2004

Lewis Bart Stone
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

-----X
In the Matter of the Application of :
MUNEHIRO OKADA,

Petitioner,

DECISION AND
ORDER

-against-

Index Number
122154/02

PROPERTY CLERK OF THE POLICE
DEPARTMENT OF THE CITY OF NEW YORK

Respondent.

-----X

Hon. Lewis Bart Stone, J

A little over nine years ago, on November 29, 1994, one Carlos Gonzalez, (“Gonzalez”) a/k/a Victor Manuel, was arrested in New York trying to sell to a police undercover officer two violins taken from Kazumasa Irie (“Irie”), a Japanese violin dealer, several months before. Shortly after his arrest, Gonzalez was indicted for Criminal Possession of Stolen Property in the Second Degree under New York Penal Law (“P.L.”) § 165.52. The violins were recovered when Gonzalez was arrested were vouchered by the New York City Police Department (NYPD) and have since been held by Respondent Property Clerk of NYPD (the “Property Clerk”). Gonzalez posted bail of \$10,000, absconded, and has remained a fugitive since.

This proceeding was commenced on October 8, 2002 by the Petitioner, Munehiro Okada (“Munehiro”), the son and heir of Sojiro Okada (“Sojiro”), who

owned the violins, to recover one violin, the one made by Joseph Rocca of Cremona (hereafter the “Rocca”). The second violin which Gonzalez had stolen, was originally bought by Sojiro as a purported Stradivarius (the “Faux Strad”), relying on certification by Jacques Francois (“Francois”), a New York violin expert. Such certification has turned out to be forged and Munehiro does not seek the Faux Strad in this proceeding.

In March 1994, Sojiro consigned the Rocca to Irie for possible sale, and in June, Sojiro consigned the Faux Strad to Tsutasa Kitahara (“Kitahara”), another Japanese violin dealer, for possible sale. Kitahara, without Sojiro’s knowledge, delivered the Faux Strad to Irie, based on Irie’s representation to Kitahara that Irie had a buyer in the United States. Irie brought both violins together with a third, to the United States in July 1994. When he arrived, he met with Francois who advised Irie that the he had not issued the certificate for the Faux Strad. The next day, Sojiro’s two violins were stolen out a car in New York.

Irie apparently had insured both of Sojiro’s violins to cover loss in transporting them to the United States. Irie, however, has never made a claim under such policy.

Sojiro began a series of requests for the return of the violins; the Rocca, for its value, and the Faux Strad to enable the person from whom Sojiro had bought it in Japan to be prosecuted, After Sojiro died on January 1, 1999, Munehiro, his heir,

continued to press for the return of the violins. The New York County District Attorney's office resisted all of these efforts on the grounds that the two violins were evidence in the criminal case against Gonzalez. Munehiro, having been unsuccessful by persuasion, commenced this proceeding by Order to Show Cause, issued by this Court on October 7, 2002, to recover the Rocca.

In response, the Property Clerk cross moved to dismiss on the grounds that only the District Attorney knows the facts and that in any event the decision whether to release or not to release the violins was within the sole discretion of the District Attorney.

Thereafter, the parties attempted to resolve certain issues, adjourning the matter several times to allow an inspection of the violins, and to set a briefing schedule with a return date initially set for May 9, 2003. At the return, NYPD appeared and the Office of the New York County District Attorney (the "District Attorney") appeared, as it had been given notice in the Order to Show Cause, although not named as party Respondent. appeared. All parties agreed to submit further papers, which have now been submitted, and the parties have subsequently submitted letters of explanation, the last of which was dated October 15, 2003.

Under New York law, property seized in connection with a lawful prosecution which may be used as evidence in such prosecution is vouchered to the Property

Clerk so that it will be available for the trial. Munehiro does not dispute the propriety of the 1994 seizure of the violins and that their delivery to the Property Clerk was proper. The question presented is whether there is any limit on the time for the return of property so deposited to its rightful owner, absent the completion of the prosecution on the consent of the District Attorney, and what recourse an owner has to retrieve his property in such event.

Munehiro has, in this proceedings, established by affidavit and documentary evidence that he is the owner of the Rocca. Such documentation includes authenticated Japanese records, certified by a translator, that he is the heir of Sojiro, who owned the violin. Munehiro has presented sworn statements of the violin's provenance, and a wholly believable scenario by which a legitimate businessman in the musical instrument business, of substantial wealth, purchased the violin. Ownership has been overtly claimed without dispute by Sojiro and later by Munehiro for over six years. The civil statute of limitations for the recovery of personal property under quasi contract theories or under the omnibus provisions relating to actions for which no limitation is proscribed by law, is six years under CPLR §213. As the Property Clerk must be deemed to hold the violin for the benefit of its owner, subject to the rights of the People to sequester it for use in a criminal proceeding, the lack of any adverse claim in such a year period makes it presumptive that Sojiro was

and Munehiro is the owner of the Rocca.’

The response of the Property Clerk, under the circumstances, that there “may” be another claimant is no more than mere speculation and is insufficient to prevent this Court from finding, on the record before it, that Munehiro has established, by credible evidence, his ownership of the Rocca.

Thus, this Court will proceed under P. L. §450.10(2), which governs the disposal of stolen property, other than contraband. The Rocca is not contraband.

Such section was enacted in 1984 to provide a balance between the rights of an accused to have evidence available at trial and the rights of the victim to regain his property. The section contemplates that where a request for the return of property is made by the owner prior to trial, the custodian of the property, whether the Property Clerk or the District Attorney,

“must provide the defense with written notice of the request, the date on which the property will be returned, and the name and address of the person with whom the defense can arrange to examine, test, photocopy or photograph the property...Once the parties have completed the process, the statute requires the parties to complete their examination, testing or reproduction within certain time limits, requiring the property to be returned thereafter, irrespective of whether the parties are finished.” Donnino, McKinney’s Practice Commentary, Penal Law §450.10

¹ Tolling of a statute is always a possibility

As Munehiro has established his ownership of the Rocca, and as the requests for the return of the Rocca have been made for over six years, the prosecution has had ample time to proceed under P.L. §450.10(2) to preserve evidence. That Gonzalez has absconded is no excuse. He had been indicted and released on bail. Counsel was presumptively present for such procedures and neither the District Attorney nor the Property Clerk have asserted that Gonzalez was not represented by counsel. Therefore the procedure contemplated could have been followed to protect the People's interest in preserving evidence for prosecution.

The Property Clerk, represented by Counsel to the Police Department and the District Attorney's Office have resisted the return of the Rocca on various grounds, separately and jointly, including their construction of New York City Administrative Code Provisions, their assertion that the violins might be needed in an insurance fraud prosecution, that ownership of the violins has not been proven and that the petition does not name the proper parties and is time barred. As this matter progressed, the objections to release seem to boil down to the question of proof of ownership, a legitimate issue as P.L. §450.10 only provides for a return of property to its owner.

The Court will address the contentions of the Property Clerk and the District Attorney (who though not a party, has been noticed in the proceeding and has submitted letters to the Court).

The Property Clerk has cited various provisions of the Administrative Code of the City of New York (“Code”) and the Rules of the City of New York (“RCNY”) to support its position including provisions which require a waiver from the District Attorney for the release of the property, and effectively stating that without such a release, it may not release the property. The Property Clerk further cites a procedure for obtaining a District Attorney’s release, which, under the RCNY, requires a voucher to be presented. Further, cited is Code Section 14-140(g) which provides that no “action or proceeding may be brought against the property clerk for or on account of any property or money held as evidence in any criminal investigation or proceeding until termination thereof.” Thus, the Property Clerk concludes that the District Attorney’s discretion is required for the release. The Property Clerk also cites various sections establishing statutes of limitations, such as the four month statute for commencing an Article 78 proceeding, which the Property Clerk claims began to run on the seizure of the property in 1994, and General Municipal Law 50-e and 50-i requiring notice of claims to be filed within 90 days of the event where a tort is alleged.

These statutory provisions are inapplicable to this proceeding. The General Municipal Law provision of notice as a requisite to a tort claim does not apply to a demand for the return of property. The purpose of the General Municipal Law

provisions is to give the City prompt notice of tort claims so as to enable it to preserve evidence and to prevent fraudulent tort claims. There is no allegation that the Rocca has been damaged and no claim for a money judgment and accordingly, no claim in tort is made. The Property Clerk's view as to when the time begins *to* run is also misplaced. P. L. §450.10 contemplates a demand *to* be made "prior to or during a criminal proceeding." Thus, the claimant, under State law has rights relating to the return of property, which may be asserted during such period, which, according to both the Property Clerk and the District Attorney is still pending.

The Code and the Rules provide for an interface between the Property Clerk and the District Attorney *to* prevent the Property Clerk from inadvertently releasing property still needed for a prosecution. As the City is subject *to* State law, such provisions, however, cannot contradict the provisions of P. L. §450.10, which the Legislature enacted to speed the return of non-contraband property seized in connection with a criminal investigation *to* its owner. P. L. §450.10 addresses property in the custody of "a police officer, peace officer *or* district attorney" and does not distinguish between them, recognizing that seized property may be held by the different offices at different times, or in different places in different parts of the State. The same time constraints apply, however, regardless of where the property rests. While the Rules or Code may provide interstitial rules as to how the police and

the prosecution are to act in the event of a demand for the return of property, they cannot be read to countermand, subvert or negate State law. The demand, and this action has been directed to the Property Clerk, who is bound by State law. How the Property Clerk acts when such a demand is made to inform the District Attorney so that the District Attorney can proceed to preserve the evidentiary value of the property may be regulated by the Code or the Rules, but neither can extend the time provided for the property's return or negate the obligation to do so. Because of the presumption of the validity of a municipal ordinance and the rules of a municipality, this Court will not, as Munehiro has requested, declare such rules invalid, but will construe them so as to require all proceedings under such rules to be carried out in a timely manner consistent with the 15 day time limit set forth in P. L. §450.10. Similarly, the Court does not rule that provisions of the Code or Rules reduce the discretion of the District Attorney, provided that such discretion cannot be exercised so as to extend the 15 day period set forth in P. L. §450.10.

The Court recognizes that there are two aspects of this dispute which may have presented a legitimate concern to the Property Clerk and the District Attorney, the issue of ownership and the issue of a possible insurance fraud.

P.L. 5450.10 is predicated on the demand of an owner. In this case, the Rocca was in the possession of Irie, a bailee, when it was stolen and the owner, a Japanese

citizen, died prior to this proceeding, which has been brought by his son. Much of the documentation as to ownership is in Japanese and the passage of title to Munehiro involves the operation of Japanese law. Munehiro has, by the time of final submission in this proceeding, including the supplemental letters, established ownership, but it may not have been so clear to the Property Clerk at an earlier time. This is not to wholly excuse the Property Clerk, from his inaction under P. L. §450.10 as the Property Clerk hardly made clear that the sole issue was that of ownership of the Rocca, which could have been addressed by Munehiro as he did in this proceeding, but also raised a smokescreen of multiple objections, as can be seen from the Property Clerk's Affirmation in Reply to the Order to Show Cause and Cross Motion to Dismiss.

Similarly, the suspicion of the District Attorney that there may have been an insurance fraud somewhere in the transactions was not unreasonable, given the fraud of the Faux Strad and the insurance carried by Irie. However, P.L. §450.10 relates to the return of stolen property to the owner, regardless of whether the bailee of the property or someone else was committing insurance fraud. Further, as the Rocca was not compromised by fraud, the request for its return does not prevent the District Attorney from addressing a possible insurance fraud over the Faux Strad.

In any event, Munihero having established his ownership of the Rocca to the satisfaction of this Court, there is no further reason why it should not be returned to him. As the Court has so found, the Court will delay the return for 15 days² in consideration of the possibility that the District Attorney has not acted pursuant to P.L. §450.10 absent the finding of title. Accordingly, it is ordered that the Property Clerk deliver the Rocca to Munihero or his attorney within fifteen days of the service upon him of notice of entry of this order, provided that a copy of this order be served for notice purpose to the District Attorney or before such service upon the Property Clerk.

This is the Opinion and Order of the Court.

DATED: JANUARY 14, 2004
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
JAN 23 2004
NEW YORK
COUNTY CLERK'S OFFICE

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A delay equivalent to the statutory period under P.L. §450.10