

Malafi v a1997 Ford, VIN No. 1FMDU24E0VUC58182

2007 NY Slip Op 31049(U)

April 18, 2007

Supreme Court, Suffolk County

Docket Number: 0013882/2005

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 13882/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CHRISTINE MALAFI, County Attorney for the
COUNTY OF SUFFOLK,

Plaintiff/Claiming Authority,

-against-

a 1997 FORD, VIN NO.
1FMDU24E0VUC58182, EDWARD J.
RADWINSKY and FORD MOTOR CREDIT
CO.

Defendants.

ORIG. RETURN DATE: JUNE 5, 2006
FINAL SUBMISSION DATE: FEBRUARY 1, 2007
MTN. SEQ. #: 001
MOTION: MG CASEDISP

ORIG. RETURN DATE: JUNE 5, 2006
FINAL SUBMISSION DATE: FEBRUARY 1, 2007
MTN. SEQ. #: 002
CROSS-MOTION: MD

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Upon the following papers numbered 1 to 10 read on this motion FOR
SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-
Motion and supporting papers 5-7; Answering Affidavits and supporting papers 8, 9;
Replying Affidavits and supporting papers 10; it is,

ORDERED that this motion by plaintiff/claiming authority CHRISTINE MALAFI, County Attorney for the County of Suffolk, for an Order directing that defendant EDWARD J. RADWINSKY (“defendant”) forfeit to the plaintiff, in her capacity as claiming authority, a 1997 FORD, VIN NO. 1FMDU24E0VUC58182, and that it be disposed of pursuant to the provisions of Suffolk County Code Chapter 270, Article IV, is hereby **GRANTED**; it is further

ORDERED that this cross-motion by defendant, for an Order granting defendant summary judgment and directing the return of a 1997 FORD, VIN NO. 1FMDU24E0VUC58182; declaring Article IV of Chapter 270 of the Suffolk County Code unconstitutional, pursuant to CPLR 3001; or in the alternative, holding that plaintiff’s instant application is premature and directing the completion of discovery, is hereby **DENIED**, for the reasons set forth herein.

This action, commenced by summons with notice and verified complaint filed on June 7, 2005, seeks the forfeiture and disposal of a 1997 FORD, VIN NO. 1FMDU24E0VUC58182, pursuant to the provisions of Suffolk County Code Chapter 270, Article IV, commonly known as Suffolk’s “DWI Seizure Law.” Defendant joined issue with service of a verified answer on or about July 18, 2005. Along with the verified answer, defendant served upon plaintiff various discovery demands, including a demand for a verified bill of particulars and a demand for discovery and inspection.

On December 19, 2004, defendant was arrested for driving while intoxicated while operating the subject 1997 FORD in an eastbound lane of the service road of the Long Island Expressway in Hauppauge, New York. Defendant was taken into custody and administered a breathalyzer test, which showed that defendant’s blood-alcohol content at the time was 0.19%, in excess of the legal limit. As a result, defendant was charged with, among other things, operating a motor vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law §§ 1192(2) and 1192(3). Prior to this arrest, on May 16, 1988, defendant was convicted of driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2). As such, upon the arrest of December 19, 2004, defendant’s vehicle was seized as an “instrumentality of an offense” pursuant to Suffolk County Code § 270-26(A). A post-seizure hearing was held on January 4, 2005, in which a Judicial Hearing Officer (Seidell, J.) directed plaintiff to retain the vehicle pending resolution of a forfeiture proceeding, and made the following findings in conformance with the Court of Appeals decision in *County of Nassau v*

Canavan, 1 NY3d 134 (2003): (1) Probable cause existed for the arrest of defendant on December 19, 2004; (2) it is likely that plaintiff will succeed on the merits of a forfeiture action; and (3) the retention of the subject vehicle by plaintiff was necessary. On or about April 6, 2005, defendant pled guilty to a violation of Vehicle and Traffic Law § 1192(2), was sentenced to probation for a period of three years, was assessed a mandatory surcharge of \$500.00, and his license was revoked for six months. The instant action was commenced within 180 days thereafter (Suffolk County Code § 270-26[C]) for the forfeiture of defendant's motor vehicle pursuant to Chapter 270, Article IV of the Suffolk County Code.

In the instant application, plaintiff argues that defendant has failed to raise any triable issues of fact in his verified answer, and therefore plaintiff is entitled to judgment as a matter of law forfeiting the 1997 FORD to plaintiff for disposal pursuant to the provisions of the Suffolk County Code. Plaintiff claims that as defendant has now been twice convicted of DWI, this instrumentality of the offense should be removed from defendant in order to protect innocent motorists on the highway from defendant's dangerous and repeated driving while intoxicated. In support of her application, plaintiff has provided copies of the following: (1) a Transcript of Record of May 16, 1988, in which defendant pled guilty to a violation of Vehicle and Traffic Law § 1192(2); (2) a Transcript of Record of April 6, 2005, in which defendant pled guilty to a violation of Vehicle and Traffic Law § 1192(2); and (3) a Department of Motor Vehicles record demonstrating that the subject vehicle is titled and registered to defendant.

In opposition, defendant has filed a cross-motion for summary judgment seeking an Order directing the return of the 1997 FORD to defendant. Defendant alleges that the use of his prior conviction of May 16, 1988 violates his due process rights, as that conviction is too remote in time to serve as a predicate conviction for the instant forfeiture. Defendant also seeks an Order, pursuant to CPLR 3001, declaring Chapter 270, Article IV of the Suffolk County Code unconstitutional, arguing that the use of neutral magistrates to preside over post-seizure retention hearings is an impermissible delegation of judicial authority. In the alternative, defendant argues that plaintiff's motion for summary judgment is premature given the fact that discovery is not yet complete.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer*

v Kramer, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Defendant argues that his conviction on May 16, 1988 is too remote in time to serve as a predicate conviction for the instant forfeiture, and therefore the use of such conviction violates his due process rights. As such, defendant seeks the return of his vehicle. Defendant contends that in New York jurisprudence, convictions of more than ten years old are not relevant in present day proceedings. Initially, the Court notes that Chapter 270, Article IV of the Suffolk County Code does not provide a limitation on the age of a prior conviction which may serve as a predicate for forfeiture (Suffolk County Code §§ 270.27[A] and [B]). In addition, the Judicial Hearing Officer found at the post-seizure hearing on January 4, 2005 that it was likely plaintiff would succeed on the merits of a forfeiture action, implying that defendant's prior conviction was not too remote in time. The statutes and case law cited by defendant in support concern the utilization of convictions in excess of ten years old when attempting to undermine the credibility of a witness, or when determining a sentence of imprisonment for a defendant who may qualify as a second or persistent felony offender (see Penal Law §§ 70.04[1][b][iv] and [v], 70.06[1][b][iv] and [v], 70.08[1][b]; *People v Ellis*, 94 AD2d 652 [1983]; *People v McCleaver*, 78 Misc 2d 48 [Sup Ct, New York County 1974]), and are therefore inapplicable in the instant civil forfeiture proceeding.

Further, defendant cites an unrelated post-seizure retention hearing in which a different Judicial Hearing Officer (Dounias, J.) found that a fifteen-year-old conviction was too remote in time to serve as a predicate conviction for purposes of forfeiture. However, that Judicial Hearing Officer acknowledged that a prior conviction, no matter when it was, should not be taken lightly, and that he was "giving the benefit of the doubt" to the fifteen-year-old conviction. The

decision of that Judicial Hearing Officer was based upon the facts presented in that case, and is not binding herein. Accordingly, the Court finds that defendant's due process rights were not violated by the use of defendant's prior conviction as a predicate for the seizure of defendant's vehicle.

Defendant also submits that the portion of the Suffolk County Code as it relates to the appointment of neutral magistrates by the county executive to preside over the post-seizure retention hearings (Suffolk County Code § 270-26[B][3]) is an impermissible grant of judicial authority in contravention of the New York State Constitution. Defendant's counsel indicates that defendant was in attendance at the post-seizure retention hearing. However, there is no allegation in the papers submitted that defendant challenged the constitutionality of the retention hearing procedures at the hearing, or that defendant commenced an Article 78 proceeding to challenge the January 4, 2005 determination of the Judicial Hearing Officer within the statutory time frame. Based upon the foregoing, the County argues that defendant does not have standing to raise this constitutional argument in the instant cross-motion.

The Court finds that by defendant's failure to raise this constitutional challenge at the retention hearing, defendant has waived his right to contest that portion of the forfeiture law (see *Malafi v A 2002 Chevrolet, VIN No. 1GCEK14W92Z134654*, Sup Ct, Suffolk County, July 5, 2006, Werner, J., Index No. 28216/2005). In any event, it has consistently been held that the granting of adjudicatory powers in an administrative agency does not encroach upon judicial power and does not otherwise violate the New York State Constitution (see 2 NY Jur Administrative Law § 61, citing *Premium Ice Co. v Maltbie*, 266 AD 455 [1943]; see also *Malafi v 2002 Dodge, Vin. No. ID7HU18Z92J206663*, 2006 NY Slip Op 52529[U] [Sup Ct, Suffolk County 2006]; *Purcell v N.Y. City Dep't of Corr.*, 111 Fed Appx 57 [2d Cir 2004]). Furthermore, section 270-26(B)(2) specifically provides that "[n]othing herein shall be construed to preclude a party with a legal interest in the seized property from commencing an action or proceeding in a court of competent jurisdiction for its return" (Suffolk County Code § 270-26[B][2]; *Malafi v 2002 Dodge, Vin. No. ID7HU18Z92J206663*, 2006 NY Slip Op 52529[U], *supra*). Based upon the foregoing, defendant's cross-motion for a declaration that section 270-26 of the Suffolk County Code is unconstitutional is denied.

Finally, although defendant argues in the alternative that plaintiff's motion should be denied as premature given the fact that discovery is not yet

complete, in that the discovery process may reveal a practice by the County of selective enforcement of the statute at issue, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (see *Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]). Accordingly, this argument cannot serve as a basis to deny plaintiff's motion.

In view of the foregoing, plaintiff's application for an Order directing that defendant EDWARD J. RADWINSKY forfeit to the plaintiff, in her capacity as claiming authority, a 1997 FORD, VIN NO. 1FMDU24E0VUC58182, and that it be disposed of pursuant to the provisions of Suffolk County Code Chapter 270, Article IV, is granted. The Court finds that plaintiff has demonstrated, by clear and convincing evidence, that the vehicle in question is subject to forfeiture (see Suffolk County Code § 270-27[H]), and defendant has failed to establish the existence of any material issues of fact that would warrant a trial of this action. Accordingly, plaintiff's motion for summary judgment is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: April 18, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court