

County of Nassau v Weber

2008 NY Slip Op 31902(U)

June 23, 2008

Supreme Court, Nassau County

Docket Number: 6461-04/

Judge: Joseph P. Spinola

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

COUNTY OF NASSAU,
Plaintiff

Trial/IAS Part 19
Index No. 04-16461
Sequence No. 01, 02
Submit Date 3/7/08

against

ROBERT J. WEBER,
Defendants

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

PRESENT: HON. JOSEPH P. SPINOLA

The Plaintiff moves for summary judgment pursuant to Civil Practice Law and Rules §3212 and the Defendant Cross-moves for dismissal of the Complaint. The action is for the forfeiture of a 2000 BMW automobile which the Defendant was operating in the County of Nassau on August 1, 2004, at which time he was arrested and charged with driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2). He subsequently pled guilty to driving while impaired in violation of § 1192(1). The vehicle was never seized nor was it ever transferred to the custody of the Nassau County Property Clerk.

BACKGROUND

Since 1998 Nassau County Administrative Code § 8-7.0 (NCAC) has provided for the seizure of vehicles used as the “instrumentality of a crime”. This ordinance has had a tortured history, with ad hoc amendments in response to judicial determinations as to its legitimacy. Presently pending before the Appellate Division, Second Department, is a consolidated appeal involving 26 separate actions in which Nassau County has brought

forfeiture proceedings against individual owners and lienholders of automobiles whose operator was charged with driving while intoxicated. The lead case is *County of Nassau v. Rojas*, Nassau Co. Index No. 15607/04. The brief for the Appellant can be found at 2007 WL 5037088 (N.Y.A.D. 2 Dept.).

Similar to the situation in this case, the vehicle in *Rojas* was never seized. Among the arguments raised by *Rojas* are those made here. Point I of the brief asserts that the Court is without jurisdiction of the proceeding, since it is in rem in nature, and the County never acquired in rem jurisdiction over the vehicle, as it was never seized. As a consequence, *Rojas* argues in Points II and III that the complaint fails to state a cause of action and that the County does not have standing to bring the action. In Point IV he contends that the cross-motion for dismissal of the complaint should have been granted. Counsel for *Rojas* is Perry & Campanelli, LLC, while counsel in this action is Campanelli & Associates, P.C., both with business addresses at 129 Front Street, Mineola, New York.

Both the brief in *Rojas* and the Memorandum of Law in Support of the Cross-Motion contain a history of the ordinance in question. When the County implemented a vehicle forfeiture program in 1998, rather than creating a separate provision in the NCAC, it sought to incorporate the program into the existing § 8-7.0. That provision created the position of Nassau County Police Department Property Clerk. It provides in part as follows:

§ 87.0 Property clerk; lost, stolen and unclaimed property.

- a. There shall be a member of the police force to be known as the property clerk.
- b. The property clerk shall take charge of all property:
 1. Alleged to have been stolen or embezzled and which shall be brought to the general headquarters;
 2. Taken from the person of a prisoner;
 3. Alleged or supposed to have been feloniously obtained or which has been lost or abandoned; and (a) Which shall come or be taken into the custody of any member of the police force or any criminal court in the County, or (b) Which shall be by such member or court, or by order of any court, given into his custody.

A reading of the foregoing makes it clear that the ordinance was intended to provide for the handling of property which came into the custody of the property clerk. Subdivision (g)2 provides that "proceeds of a crime, substituted proceeds of a crime or

any instrumentality of a crime delivered to the property clerk shall be subject to forfeiture as prescribed in this section". Again, this provision of the ordinance relates specifically to property which has been delivered to the property clerk. Subdivision (g)5 requires that a civil action seeking forfeiture must be brought within 120 days after the seizure of the property, again evincing a legislative intent that the forfeiture proceeding relates to property which has, in fact, been seized.

Between the inception of the seizure program and 2003, the County instituted and continued the practice of seizing vehicles and bringing forfeiture proceedings. Cases cited by the Defendant in the Memorandum of Law, footnoted at p. 3, reflect the fact that vehicles were actually seized and were then the subject of in rem proceeding for their forfeiture.

The program was affected by judicial decisions. *Krimstock v. Kelly*, 306 F.3d 401 (2d Cir. 2002) held that seizure and retention of a vehicle incident to an arrest for driving while intoxicated was unconstitutional, unless there were a provision for a prompt hearing to determine the "probable validity" of the seizure. *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003) was to the same effect, and also concluded that the ordinance was defective for failure to include a limitation on forfeiture liability for innocent owners.

Despite the explicit recommendation of the Court of Appeals that the County rewrite the forfeiture ordinance in its entirety, the County responded with further amendments to the ordinance effective March 10, 2003.¹ They inserted a provision as follows:

Any person from whom property is seized incident to his or her arrest or her arrest for a misdemeanor crime or petty offense will receive written notice at the time the property is seized and inventoried or as soon thereafter as practicable that the County of Nassau may commence an action for forfeiture of such property as the proceeds of a crime, substituted proceeds of a crime or instrumentality of a crime.

They also included amendments which specified Vehicle and Traffic Law § 1192 as the alcohol-related offense to which the ordinance applied, gave the person from whom the property was seized and subject to forfeiture 15 days within which to request a review of the probable validity of the continued retention of the property pending completion of the civil forfeiture proceeding, created an affirmative defense for an innocent owner, and required the County to bring a forfeiture proceeding within 120 days

¹ Exh. "B" to Cross-Motion.

after the seizure of the property.²

The language of the original 1938 ordinance and the foregoing 2003 amendments are couched in terms of the treatment of property which has come into the custody of the Nassau County Property Clerk.

A subsequent amendment, effective March 16, 2004, repealed ¶ 4, enacted in 2003, and substituted a new ¶ 4.³ Subparagraphs (a) and (b) refer to a vehicle “. . . which has been removed and impounded by the police . . .”, and for the retention of a vehicle where the driver has a prior conviction, within the preceding ten years, for an offense involving the operation of a vehicle while under the influence of alcohol or a controlled substance. But subdivision (c) requires the owner of a vehicle subject to forfeiture to notify the County of an intention to surrender ownership or possession. For the first time, then, there is language which anticipates that a forfeiture proceeding may involve property not in the custody of the property clerk. But the legislature made no change in the amendment to ¶ 5 which established the period of limitations within which to bring a forfeiture action to 120 days from the date of seizure.

Sometime at or about the time of the 2004 amendment to the ordinance, the County discontinued the practice of seizing vehicles and transferring them to the property clerk. In such cases, as this one, the vehicle has remained in the custody of the Defendant since his arrest some 4 years ago, and the County, relying on the plea of guilty to driving while impaired, seeks forfeiture of the vehicle pursuant to NCAC § 8-7.0(g)(4).

THE PLEADINGS

The Plaintiff filed a complaint on November 29, 2004,⁴ which alleges the arrest of the Defendant for operating a motor vehicle in an intoxicated state and with his ability to operate a vehicle impaired by alcohol or drugs. It further alleges that the Defendant was the owner of the vehicle, with no other person having an interest, and that it is subject to forfeiture under NCAC § 8-7.0(g). The Defendant served a verified answer dated December 28, 2004, in which he raised affirmative defenses as follows:

- a.) the statute upon which the action is premised is void for vagueness;

² *Id.* at pp. 4 — 6.

³ Exh. “A” to Cross-Motion at pp. 117 — 120.

⁴ Exh. “I” to Motion.

- b.) the statute is unconstitutional in that it deprives the Defendant of due process under the New York and Federal constitutions;
- c.) the statute is unconstitutional as it violates Article I, § 5 and the Eighth Amendment [sic.] to the New York State and Federal constitutions;⁵
- d.) seizure is a condition precedent to the commencement of a forfeiture proceeding;
- e.) the action against the Defendant creates a hardship and violates due process.

DISCUSSION

The issue is whether NCAC § 8-7.0(g) is limited to the forfeiture of property which has been seized and transmitted to the Nassau County Property Clerk. The Defendant contends that the ordinance contemplates an in rem proceeding against the property itself, and that the language of the ordinance is consistent with that interpretation. The Plaintiff's position is that courts of coordinate jurisdiction have consistently determined that forfeiture may proceed along two parallel courses; the first being an in rem proceeding when the vehicle is in the custody of the County, and the other being against owners who have pled guilty to a violation of Vehicle and Traffic Law § 1192. Seizure is a condition precedent to an action under § 8-7.0(g)(3), but not for an action under § 8-7.0(g)(4), for which the precedent is a conviction of a violation of § 1192. For the reasons cited, the Court determines that the Plaintiff's motion for summary judgment should be granted, and the cross-motion for dismissal of the action denied.

NCAC § 8-7.0(g)(4) provides in part as follows:

4. Except for a felony offense, as defined in section eleven hundred ninety-three of the Vehicle and Traffic Law, which may give rise to a forfeiture action pursuant to article thirteen A of the Civil Practice Law and Rules, the County of Nassau may commence a civil action for forfeiture to such county of any vehicle as such term is defined in subdivision fourteen of section 10.00 of the Penal Law when such vehicle is operated by a person charged with a violation of section eleven hundred ninetytwo [sic.] of the Vehicle and Traffic Law and such

⁵ Article VIII of the U.S. Constitution prohibits excessive fines. It is not an Amendment.

person is convicted or pleads guilty to any subdivision of such section where it is proved by a preponderance of the evidence in a civil forfeiture proceeding that such person was driving in violation of such section.

While the piecemeal amendments and modifications of the NCAC have led to confusion, and a wholly new ordinance would have been preferable, the language of § 8-7.0(g)(4) appears adequate to justify the forfeiture action against the individual, as opposed to an in rem proceeding against the seized item. The moving papers show compliance with the mandatory administrative actions which were added in response to the decisions in *Krimstock v. Kelly* and *County of Nassau v. Canavan*. The Plaintiff has established that the Defendant is the owner of the vehicle which he was operating at the time of his arrest for violation of Vehicle and Traffic Law § 1192; that he pled guilty to a violation of § 1192; that the former lienholder has no present interest in the vehicle; that the arresting officer gave the Defendant a Vehicle Seizure Notice on the date of the arrest; that a formal notice dated August 10, 2004 was mailed and received by the Defendant or another person at his residence; that the Defendant pled guilty to the reduced charge of driving while impaired, paid a \$300 fine and had his license suspended for 90 days; the action was commenced within 120 days of the arrest; and that service was made upon a person of suitable age and discretion at the Defendant's residence.⁶

The failure of the legislature to amend the language of § 8-7.0(g)(5) to set the period of limitations as 120 days from the date of seizure or arrest, if there was no seizure, is unfortunate, but not a fatal defect. The purpose of any statute of limitations is to limit the time within which a party is required to initiate the action. The abbreviated period of 120 days is appropriate when the Defendant has had his car impounded, and is being deprived of its use. It may well be argued that failure to seize the car means that the "statute of limitations" simply never begins to run. This does not mean that the County could commence a forfeiture proceeding at any time far into the future, as the equitable doctrine of laches would likely bar such conduct. But it would be unfair to conclude that the failure to amend the language of subdivision (g)(5) to include a starting point from the date of arrest evidenced a legislative intention to render the newly enacted subdivision (g)(4) meaningless.

The Defendant had full and fair notice that his arrest for driving while intoxicated placed him in jeopardy of losing his vehicle. He, at least in theory, had the right to contest the seizure notice by demanding a hearing within 15 days, which he did not do.

⁶ Exhs. "A" — "J" to Motion.

Of course, this is understandable in view of the pending criminal proceeding against him. He pled guilty, thus providing the condition precedent to the forfeiture action under the provisions of § 8-7.0(g)(4).

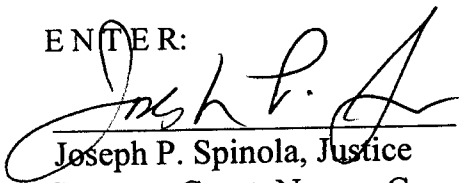
The ordinance, though not a beacon of clarity, is not void for vagueness. The penalty of forfeiture is not an excessive fine which violates either the Federal or New York State Constitutions. *County of Nassau v. Canavan*, 1 N.Y.3d 134, 138 (2003). Seizure of the vehicle is not a condition precedent to the forfeiture action under § 8-7.0(g)(4). The hardship application to which the Defendant refers in his Fifth Affirmative Defense is a post-forfeiture proceeding.

CONCLUSION

For the foregoing reasons, the motion by the Plaintiff for summary judgment directing that the vehicle be forfeited, and title conveyed to the Plaintiff is granted. The cross-motion to dismiss the action is denied.

This constitutes the decision and order of the Court.

ENTER:



Joseph P. Spinola, Justice

Supreme Court, Nassau County

Dated: June 23, 2008
Mineola, NY

ENTERED

JUL 01 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**