

**Matter of Zahr v Property Clerk of N.Y.C.
Police Dept.**

2009 NY Slip Op 30784(U)

April 2, 2009

Supreme Court, New York County

Docket Number: 110234/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Zahr

INDEX NO. 110234/08

MOTION DATE _____

- v -

Property Clerk

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
<u>Petition, Verified Petition</u>	<u>1-7</u>
<u>Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...</u>	<u>1, 2, 3</u>
<u>Verified Answer and Answering Affidavit</u>	<u>4, 5</u>
<u>Answering Affidavits - Exhibits</u>	<u>6</u>
<u>Replying Affidavits</u>	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided
in accordance with the attached decision
and order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 2, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: Hon. MARTIN SHULMAN, Justice

PART 1

In the Matter of the Application of ALI Zahr, et al,

Petitioner

pursuant to Article 78 of the Civil Practice Law and Rules

INDEX NO.: 110234/08

DECISION, ORDER & JUDGMENT

-against-

UNFILED JUDGMENT

THE PROPERTY CLERK OF THE NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK Respondents
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The verified petition in this Article 78 proceeding seeks an order of mandamus compelling respondents the Property Clerk of the New York City Police Department ("Property Clerk") and the City of New York (collectively, "respondents") to release funds claimed to belong to petitioner Ali Zahr ("Zahr" or "petitioner"). Zahr claims that the following currency and money orders belonging to him were taken from him or his alleged bookkeeper, non-party Chiu Hsiu ("Hsiu"), at the time of their March 10, 2007 arrest on charges of violating Penal Law ("PL") §165.71 (Trademark Counterfeiting in the Third Degree): \$5,162.00, \$1,490.00, \$46,693.82 in money orders and \$45,725.00 (collectively, the "property"). On June 20, 2007, the criminal actions against petitioner and Hsiu were dismissed.

Petitioner's counsel's supporting affirmation describes his efforts to recover the property from respondents after the dismissal of the criminal proceedings, stating:

I made inquiries with the Property Clerk's Office, but was under the assumption that when the cases were dismissed the Property Clerk would release the funds back to Petitioner Zahr. It was also my understanding that if the Property Clerk intended to permanently seize the funds, the

Property Clerk would do so through a seizure proceeding which was never done here. Upon further inquiry with the Property Clerk, I was told that I needed to obtain a District Attorney's Release and then present it to the Property Clerk.

Schmukler Aff. in Support at ¶18. Counsel does not provide the dates or other details surrounding his alleged inquiries on Zahr's behalf.

On May 15, 2008, a District Attorney's Release was obtained and presented to respondents. By letter dated June 10, 2008, respondents advised Zahr that his demand was untimely. This Article 78 proceeding ensued. In the verified answer to the petition, respondents reiterate that petitioner's claim is time barred.

The time in which the Property Clerk must commence a forfeiture action has been established in accordance with the decisions in *McClendon v. Rosetti*, 460 F.2d 111 (2nd Cir., 1972), *McClendon v. Rosetti*, 369 F.Supp. 1391 (S.D.N.Y., 1974) and the subsequent regulations set forth in *McClendon v. Rosetti*, 1993 WL 158525 (S.D.N.Y., 1993) by Federal District Judge Lasker, as codified in the Rules of the City of New York ("RCNY"), Title 38, Chapter 12. RCNY 12-35(c) provides:

A demand for the return of property shall be timely if made within 120 days after the termination of criminal proceedings, whether or not the demand is accompanied by a district attorney's release or a statement upholding a denial of the release. A demand may be made in person or by mail by the claimant or by a representative authorized in writing to claim the property on behalf of the claimant.

This record contains no indication that Zahr or his attorney made a timely demand for the return of the property inasmuch as the first documented demand was made on May 15, 2008, almost one year after the criminal proceedings terminated. As respondents aptly observe, the case at bar is distinguishable from *DeBellis v. Property Clerk of the City of New York*, 79 N.Y.2d 49, 58 (1992), where the claimant had made

an initial, albeit premature, demand for his property, thus putting the Property Clerk on notice of the claimant's intention to recover his property.

In his reply affirmation and for the first time, petitioner's counsel insinuates, without affirmatively stating, that Zahr was never provided with instructions on how to retrieve his property at the time of his arrest. This statement by counsel, who lacks personal knowledge, lacks probative value. Such information is required to be provided at the time of the arrest (see RCNY §12-32), and nowhere is it alleged that Zahr and/or Hsiu were not provided with copies of the property vouchers, which detail the requirements for securing the return of seized property on the reverse side.

Nor is the Property Clerk required to commence a forfeiture proceeding where no timely demand for the property has been made. *See generally*, RCNY §12-36. Rather, Admin. Code §14-140(e)(1) authorizes the Property Clerk to dispose of property that remains in its custody "for a period of three months without a lawful claimant entitled thereto . . ." ¹

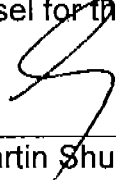
For the above reasons, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

¹ As observed in *DeBellis, supra*, at fn. 1, citing *Moreno v. City of New York*, 69 N.Y.2d 432, 436 (1987), this section does not "extinguish the owner's right to claim the property pursuant to a common-law replevin action." Rather, this provision "simply fixes the point at which the property clerk may be relieved of the responsibility of retaining the moneys in custody . . ." *Id.*

The foregoing constitutes this court's Decision, Order and Judgment. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: April 2, 2009



Hon. Martin Shulman, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 6317A).