

Matter of Marshall v Soares

2009 NY Slip Op 32770(U)

November 30, 2009

Supreme Court, Albany County

Docket Number: 6689/09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

EDDIE MARSHALL,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 6689-09
RJI NO. 01-09-97944

-against-

DAVID SOARES, DISTRICT ATTORNEY
OF ALBANY COUNTY OF THE STATE
OF NEW YORK,

Respondent.

Supreme Court Albany County All Purpose Term, October 30, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Eddie Marshall, 06-A-4217
Petitioner, Pro Se
Clinton Correctional Facility
PO Box 2002
Dannemora, New York 12929

Craig A. Denning, Albany County Attorney
John E. Maney, Esq.
Attorneys for Respondent
112 State Street
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Albany, New York 12207

TERESI, J.:

Petitioner commenced this mandamus to compel proceeding seeking to recover a 2000 Volkswagen Passat, vin number WWMD23B7YP223993 (hereinafter "Passat"), and \$27,964.00. Such property was seized from him as part of a criminal action, which resulted in

his conviction of two counts of criminal sale of a controlled substance in the third degree.

Respondent answered with specific denials and pled a single objection in point of law, failure to state a cause of action. Because Petitioner demonstrated his entitlement to mandamus relief for a portion of the property he seeks, his petition is granted in part, but is otherwise denied.

It is well established that mandamus to compel “is an extraordinary remedy which lies only to compel performance of acts which are mandatory, not those that are discretionary.” (Barnwell v. Breslin, 46 AD3d 990, 991 [3d Dept. 2007]; Klostermann v. Cuomo, 61 NY2d 525, 539 [1984]; Gimprich v. Board of Education of City of New York, 306 N.Y. 401 [1954]). Additionally, as “conditions precedent to a proceeding in the nature of mandamus to compel action, such as we have here, there must be a demand upon a public body or officer to perform a duty and a refusal by the body or officer to perform.” (Matter of Remedy for Infinite Unconcern for Mentally & Physically Handicapped (TRIUMPH) v O'Shea, 77 AD2d 363, 365 [3d Dept. 1980]; Schwartz v. Morgenthau, 23 AD3d 231, 233 [1st Dept. 2005]; Vestal Teacher's Ass'n v. Vestal Cent. School Dist., 5 AD3d 922 [3d Dept. 2004]; Hassig v. New York State Dept. of Health, 5 AD3d 846, 848 [3d Dept. 2004] [stating that a “petitioner seeking relief in the nature of mandamus to compel is not aggrieved until an appropriate demand is made and refused.”]).

Focusing first on the Passat, Petitioner demonstrated his demand and Respondent’s refusal. On March 21, 2006, Petitioner, by his attorney, demanded the Passat’s return. Such demand was specifically noted in the Decision and Order of Hon. Stephen Herrick, in which “the Court order[ed the] return of [Petitioner’s] vehicles, on or after April 11, 2006, unless a forfeiture proceeding has been commenced prior to that date.” (People v. Marshall, Et. Al., County Ct. Alb. County, March 23, 2006, Herrick, JCC, indictment #23-9476 [hereinafter “March 23, 2006

Order”). Petitioner demonstrated that while Respondent returned one seized vehicle to him, the Passat has not been returned. Petitioner further demonstrated that no forfeiture proceeding was commenced prior to April 11, 2006, or since. Because Petitioner established Respondent’s failure to comply with the mandatory, non discretionary, March 23, 2006 Order, he demonstrated his entitlement to mandamus relief.

In opposition, Respondent failed to controvert Petitioner’s showing. Respondent does not deny receiving Petitioner’s demand for the return of his Passat or the March 23, 2006 Order. Nor does Respondent allege that he returned the Passat or commenced a forfeiture proceeding. As such, Respondent does not contest the unequivocal mandate which he failed to comply with. Respondent instead alleges that on December 21, 2005 he forwarded to Petitioner a “Notice of Abandonment”. Respondent did not, however, demonstrate that his notice complied with Vehicle and Traffic Law §1224 (Abandoned Vehicle Law). Moreover, Respondent took no action on such notice until he “applied for title” to the Passat, by the detective who authored the “notice”, in August 2007. Such showing demonstrates neither compliance with the March 23, 2006 Order nor a valid excuse from compliance. Rather, Respondent’s application for title, because the vehicle was “abandoned”, directly disregarded the March 23, 2006 Order’s clear and unequivocal mandate. The March 23, 2006 Order requires Respondent to commence a forfeiture proceeding or return the Passat. As Respondent commenced no forfeiture proceeding, he must return the Petitioner’s Passat.

Turning to that portion of the petition seeking return of \$27,964.00, Petitioner failed to demonstrate his entitlement to mandamus relief. On this record, Petitioner failed to demonstrate that he duly demand Respondent return such money. The petition merely alleges, in conclusory


fashion with no supporting documentation, that he demanded Respondent return his money “during February 2009.” Such unsupported allegation fails to demonstrate that Petitioner duly demanded return of his \$27,964.00, precluding his entitlement to mandamus relief. (See Vestal Teacher's Ass'n, supra). Petitioner’s reply papers, which attach a letter dated April 12, 2009 directed to the Hon. Stephen Herrick, are also unavailing. Such letter does not demonstrate that Petitioner demanded Respondent return his \$27,964.00, nor may it be considered because it impermissibly introduces “new assertions which should have been included in the petition.” (Crawmer v. Mills, 239 AD2d 844-845 [3d Dept.1997]; see also Roanoke Sand & Gravel Corp. v. Town of Brookhaven, 24 AD3d 783 [2d Dept.2005]).

Accordingly, Petitioner’s mandamus proceeding is granted only to the extent that Respondent is hereby Ordered to return Petitioner’s 2000 Volkswagen Passat, vin number WWWMD23B7YP223993 to him. To the extent not otherwise granted, the petition is dismissed.

This Decision and Order is being returned to the attorney for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 30, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated August 20, 2009, Petition, dated July 27, 2009, with attached Exhibits A-C, Affidavit of Eddie Marshall, dated July 27, 2009.
2. Verified Answer, dated October 22, 2009, with attached Exhibits A-E.
3. Affidavit of Eddie Marshall, dated October 29, 2009, with attached Exhibits A-E.