

<b>Matter of Rosado v New York Police Dept.</b>
2010 NY Slip Op 30371(U)
February 12, 2010
Supreme Court, New York County
Docket Number: 401133/2009
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

1/m/10 Application of Steve Rosado

INDEX NO. 40/133/09

MOTION DATE 2/19/10

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

NY PD, Property Clerk of the 26th Precinct, and New York County District Attorney

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

Notice of Motion/Petition — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Notice of Cross-Motion — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

**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 1418).**

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ORDERED that this motion

**PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.**

NY PD & Property Clerk appeared.  
NY County District Attorney defaulted.

Dated: 2/19/2010

Paul J. Feinman  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 DO NOT POST  REFERENCE  
 Preliminary Conf. \_\_\_\_\_  Compliance Conf. \_\_\_\_\_

Courtesy copies mailed.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of  
STEVE ROSADO,

Petitioner,

Index Number 401133/2009

Mot. Seq. No. 001

- against -

NEW YORK POLICE DEPARTMENT, PROPERTY  
CLERK OF THE 26<sup>th</sup> PRECINCT and NEW YORK  
COUNTY DISTRICT ATTORNEY,  
Respondents.

**DECISION, ORDER and  
JUDGMENT**

-----X  
**For the Petitioner:**

Steve Rosado, *pro se*  
Wyoming Correctional Facility  
PO Box 501  
Attica, NY 14011

**For City Respondent:**

Michael A. Cardozo, Corporation Counsel  
By: Eva Marie Russo, Esq.  
Two Lafayette Street, 5<sup>th</sup> Floor  
New York, NY 10007

**For District Attorney:**

*did not appear*

Papers considered in review of this petition to review the denial of petitioner's appeal:

Papers	Numbered
Order to Show Cause	1
Petition and Annexed Affidavit and Exhibits	2
Respondent's Affirmation in Response	3
Petitioner's Letter dated June 19, 2009	4
Respondent's Supplemental Affirmation in Response	5
Petitioner's Reply Affidavit	6
Petitioner's Supplemental Reply Affidavit	7
Petitioner's Letter dated August 14, 2009	8
Petitioner's Affidavit to Amend Pleadings	9
Notice of Petition and Amended Petition	10

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**PAUL G. FEINMAN, J.:**

This is a special proceeding by a self-represented incarcerated petitioner who seeks to compel the return of certain personal property pursuant to CPLR 7803 (1).<sup>1</sup> Respondent New York City Police Department answered the petition by asserting that it was not in possession of

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<sup>1</sup>Petitioner's separate request for the appointment of the Legal Aid Society, Civil Division to represent him in this matter cannot be granted. County Law § 722 concerns appointing representation for only persons charged with a crime, or in Family or Surrogate's Court.

the property. By affirmation dated June 26, 2009, respondent's attorney indicated that Assistant District Attorney Michelle Warren of the New York County District Attorney's office had signed out the property in her name in July 2005, and that Warren had confirmed with respondent's attorney that she was in possession of the property (Resp. Suppl. Aff. in Response ¶ 4).

By interim decision and order dated October 28, 2009, petitioner was granted permission to add as a respondent the office of the New York County District Attorney, and to serve an amended petition on both respondents. Respondents were to serve answers and supporting affidavits thereafter. The New York City Police Department has not submitted any additional papers. The District Attorney has not answered.

According to the amended petition, subsequent to petitioner's arrest, two search warrants were executed at petitioner's residence which resulted in the seizure of certain property, including, among other things, a computer and VHS tapes (Am. Pet., Exs. Property Clerk's Invoice dated Oct. 19, 2004 [Voucher M456515]; Property Clerk's Invoice dated Nov. 16, 2004 [Voucher M456749]). According to the petition, the items were "deemed inadmissible" at the criminal trial (N.Y. Index No. 5715/2004), which was then "on direct appeal" (Am. Pet. ¶ 5 [a]). Petitioner unsuccessfully sought the return of the items in letters dated September 24, 2008 addressed to the Property Clerk of the 26<sup>th</sup> Police Precinct and to ADA Michelle Warren who apparently prosecuted the case against him (Am. Pet. ¶ 5[a]).

After petitioner commenced this proceeding against the Property Clerk of the 26<sup>th</sup> Precinct, the respondent answered and indicated that it was "not refusing to release the items [and has] no objection to the release of [the] items to [p]etitioner so long as [p]etitioner complies with the procedural requirements" (Resp. Aff. in Response ¶ 6). As noted above, the District

Attorney's office has not answered or otherwise submitted any explanation of why petitioner's request is not being honored.

A petition seeking mandamus to compel seeks to command a ministerial act, required by law (*Matter of Scherbyn v Wayne-finger Lakes BOCES*, 77 NY2d 753 [1991]). Under section 14-140 of the New York City Administrative Code, the property clerk of the city's Police Department vouchers all property obtained or found by the department. With the exception of vehicles which are handled somewhat differently, all property taken from a prisoner including that taken as evidence in a criminal investigation or proceeding, is taken into the custody of the property clerk (NYC Admin. Code § 14-140 [b]). Property held as evidence in any criminal investigation need not be returned until the investigation or proceeding is terminated (NYC Admin. Code § 14-140 [g]). A claimant must establish his or her lawful title to the property and that the property was used in a lawful manner (NYC Admin. Code § 14-140 [f]). The police commissioner may determine that property that was used in a crime or in furtherance of a crime, may direct the property clerk to destroy the particular property or to convert it to use by a governmental agency (NYC Admin. Code § 14-140 [e] [2]).

Under New York law, the property clerk may dispose of the property if a claimant does not demand the property within 90 days after the termination of criminal proceedings or within 90 days of the issuance of a District Attorney's release, but must return the property if the claimant's demand is timely and accompanied by sufficient evidence of ownership and a release issued by the District Attorney (*DeBellis v Property Clerk of N.Y.*, 79 NY2d 49, 53 [1992]; *Property Clerk, N.Y.C. Police Dept. v Seroda*, 131 AD2d 289, 293 [1<sup>st</sup> Dept.1987]). The property need not be returned if, within 10 days after the claimant has submitted his or her

request, the property clerk initiates a forfeiture proceeding which requires the State to prove that it is legally justified in continuing to retain the property (*DeBellis*, at 53-54). Where the legal proceedings have terminated, or where it is determined that the property is not related to or not needed for those proceedings, the property must be returned upon demand unless the government can establish a new basis for its detention (*DeBellis*, at 57).

Here, the property clerk has indicated through its attorney that it has no reason to keep petitioner's property, and the police have no objections to its release following proper procedures. The issue is that although petitioner contacted the District Attorney's office in September 2008, that office has failed to respond or provide a release as required under the law, and now offers no explanation for its silence or its retention of the property.<sup>2</sup>

The verified amended petition does not in itself establish that the criminal matter, including appeals, is in fact terminated, which would trigger petitioner's right to demand return of the property. However, given that the office of the District Attorney has never responded and failed to answer the petition, the court directs that the petition is granted to the extent that by March 15, 2010, the office of the New York County District Attorney shall return petitioner's items of property to the care of the New York City Police Department Property Clerk at One Police Plaza, and issue a release at that time. Petitioner may then submit the proper documentation as required by the law, to retrieve the property. If the District Attorney's office

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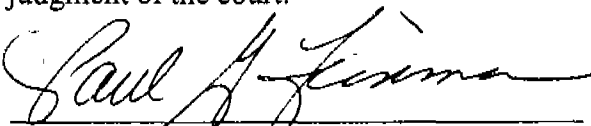
<sup>2</sup>According to the affidavit of service attached to the amended petition, a copy of the amended petition and the court's interim decision and order, were mailed by first class mail on November 12, 2009, to both the office of the Corporation Counsel and to the office of the New York County District Attorney, as well as to the Police Department Property Clerks at One Police Plaza and the 26<sup>th</sup> Precinct. A properly executed affidavit of service raises a presumption that a proper mailing occurred (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

\* 6]  
fails to comply, or to otherwise separately move for relief either by Order to Show Cause or upon Notice of Motion, petitioner may move for an order of contempt. It is

ORDERED AND ADJUDGED that petitioner's motion is granted to the extent that by March 15, 2010, the Office of the New York County District Attorney shall return petitioner's property to the care of the New York City Police Department Property Clerk at One Police Plaza, and issue a release at that time, and is otherwise denied.

This constitutes the decision, order and judgment of the court.

Dated: February 19, 2010  
New York, New York

  
\_\_\_\_\_  
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 1418).**