

City of New York v Penzella

2010 NY Slip Op 30899(U)

April 2, 2010

Supreme Court, New York County

Docket Number: 401124/09

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 401124/2009
CITY OF NEW YORK
VS.
PENZELLA, DAVID
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. 401124/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-J
Answering Affidavits — ~~Exhibits~~ _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

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

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: APR 2 2010

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
THE CITY OF NEW YORK,

Plaintiff,

Index No.: 401124/09

Decision, Order & Judgment

- against -

DAVID PENZELLA, MELANIE POMERLEE,
Property Seized and Vouchered under Police
Property Clerk Invoice No. P640233,

Defendants.

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 141B).

-----X
HON. MARTIN SHULMAN, J.S.C.:

In this civil forfeiture action, the City of New York ("City" or "plaintiff") seeks to retain custody of merchandise (the "property") seized from a sidewalk vendor pursuant to N.Y.C. Admin. Code §20-468(c) based upon defendant David Penzella's ("Penzella") sale of merchandise without a license in violation of N.Y.C. Admin. Code §20-453. Penzella pled guilty to this charge on April 24, 2009 (Motion at Exh. D). Defendant Melanie Pomerlee ("Pomerlee" or "defendant") owns the property.

The City moves for a default judgment against Penzella based upon his failure to answer or appear in this action and for summary judgment against Pomerlee.

Pomerlee and Penzella oppose the motion *pro se*.¹

¹ The preamble of the answering papers indicate that only Pomerlee is appearing for purposes of opposing this motion. However, both defendants' notarized signatures appear at the end of the document. Defendants deny that Penzella is in default, stating at paragraph 1 of the opposition that he "did interpose an Answer with the Clerk of the Court on July 8, 2009." There is no allegation that this answer was ever served upon plaintiff and no copy is attached to the opposing papers. Plaintiff's counsel denies receipt thereof (Moed Reply Aff. at ¶4) and there is no copy of either party's answer in the court file.

Default Judgment Against Penzella

The portion of the City's motion seeking a default judgment against Penzella is granted. Penzella's allegation that he answered the amended complaint is not supported by the record (see footnote 1, *supra*).

Accordingly, to oppose this motion for a default judgment, Penzella must demonstrate a justifiable excuse for his default and a meritorious defense. *Johnson v. Deas*, 32 A.D.3d 253 (1st Dept. 2006). Here, the court need not address whether the default was excusable because Penzella cannot establish a meritorious defense in light of his guilty plea to unlicensed vending in violation of N.Y.C. Admin. Code §20-453. Despite his claim that his guilty plea "was not done of 'free will'" (Opp. at ¶4), Penzella has taken no steps to attempt to withdraw or otherwise vacate his plea and he cannot do so before this court.

A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts. *Grayes v. DiStasio*, 166 A.D.2d 261, 262-263 (1st Dept. 1990). Therefore, a defendant who pleads guilty to a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based. *Id.*; *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300 (1973). For the foregoing reasons, the motion for judgment on default against Penzella is granted.

Summary Judgment Against Pomerlee

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943 (1st Dept. 1984), *aff'd* 62 N.Y.2d 938 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). In order to prevail on

a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

In relevant part, N.Y.C. Admin Code §20-453 states:

It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter . . .

N.Y.C. Admin. Code §20-468(c) details the enforcement provisions relating to general vendors and, in pertinent part, states:

a) Any police officer . . . may seize any goods which are being sold by an unlicensed general vendor in violation of section 20-453 and such . . . goods . . . shall be subject to forfeiture upon notice and judicial determination. . . .

The City relies upon Penzella's guilty plea in support of its motion for summary judgment against Pomerlee. In opposition, Pomerlee's answer and opposition argue that the amended complaint alleges no unlawful conduct on her part, fails to state how her behavior caused harm and fails to set forth any details regarding Penzella's actions underlying his arrest.

At the outset, the City is not required to show that either defendant's conduct caused any specific harm. As to the argument that plaintiff alleges no facts detailing Penzella's specific actions resulting in his arrest, in light of his guilty plea, Pomerlee

cannot attempt to establish that Penzella was not actually “vending”. As more fully set forth above, Penzella’s guilty plea conclusively establishes his violation of N.Y.C. Admin. Code §20-453 for vending without a license. In light of this admission, facts detailing his specific actions would be superfluous.

There is no dispute that Pomerlee possessed a valid vendor’s license that allowed her to sell the property and that Penzella lacked the required license. Whether Penzella actually made a sale is irrelevant.² As Pomerlee does not dispute that Penzella was tending her property at the time it was seized, she fails to refute the City’s *prima facie* case for forfeiture of the property.

In *City of New York v. Nadler*, 304 A.D.2d 491 (1st Dept., 2003), the First Department held that where a N.Y.C. Admin. Code forfeiture provision contains “mandatory and unqualified” language, the court lacks discretionary authority to direct the return of seized property. Here, N.Y.C. Admin. Code §20-468(c) provides that goods sold by an unlicensed general vendor in violation of §20-453 may be seized and “**shall** be subject to forfeiture upon notice and judicial determination . . .” (emphasis added). The mandatory language of the food vendor licensing and forfeiture provisions at issue in *Nadler* (N.Y.C. Admin. Code §§ 17-307, 17-321[c] and 17-322[a]) is identical to the language in the general vendor licensing and forfeiture provisions at issue here. Thus, this court must order forfeiture of the property to plaintiff.

Accordingly, it is

² Plaintiff “need not allege either that the defendant verbally offered the goods for sale or that any sale was completed.” *People v. Jobi*, 10 Misc.3d 632, 634-635, 803 N.Y.S.2d 891 (Sup. Ct., NY Co., 2005).

ORDERED, ADJUDGED and DECREED that plaintiff's motion for a default judgment against defendant Penzella and for summary judgment against defendant Pomerlee is granted; and it is further


ORDERED, ADJUDGED and DECREED that the defendant property seized from defendant Penzella and held by plaintiff under Police Property Clerk Invoice No. P640233 be forfeited pursuant to the provisions of the N.Y.C. Admin. Code §§ 20-468 and 20-469; and it is further

ORDERED, ADJUDGED and DECREED that defendants may not lawfully possess the defendant property held under Police Property Clerk Invoice No. P640233; and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's continued possession, custody and retention of the defendant property held under Police Property Clerk Invoice No. P640233 is both lawful and proper.

The foregoing constitutes the Decision, Order and Judgment of this Court. Courtesy copies have been sent to plaintiff's counsel and defendants.

New York, New York
Dated: April 2, 2010



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 741B).