

**City of New York v Babalola**

2011 NY Slip Op 30551(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 402082/09

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

*Justice*

Index Number : 402082/2009  
CITY OF NEW YORK  
VS.  
BABALOLA, AYODEJI  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 402082/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-G  
Answering Affidavits — Exhibits 1-5  
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 based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: February 18, 2011

  
MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

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

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

Plaintiff,

- against -

AYODEJI BABALOLA and Property Seized  
and Vouchered under Police Property Clerk  
Invoice Nos. P73813 and P73815,

Defendants.

Index No.: 402082/09

**Decision, Order & Judgment**

**UNFILED JUDGMENT**

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-----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 property (the "property") seized from defendant Ayodeji Babalola ("Babalola" or "defendant"), a sidewalk vendor, pursuant to N.Y.C. Admin. Code §20-468(c). The City alleges Babalola sold the property in question without a license in violation of N.Y.C. Admin. Code §20-453. The City now moves for summary judgment against defendant, who opposes the motion *pro se*.<sup>1</sup>

In support of the instant motion, the City submits, *inter alia*, the summons and complaint, Notice of Violation and Hearing No. E169 941 265 (the "NOV"), the June 19, 2009 decision of Administrative Law Judge ("ALJ") Sara Plovia which found defendant in violation of Admin. Code §20-453, the December 3, 2009 Environmental Control Board ("ECB") decision affirming ALJ Plovia's determination and defendant's answer

\_\_\_\_\_  
<sup>1</sup> Ms. Babalola's success as a *pro se* litigant against the City of New York is the subject of an article by Alicia Colon entitled "City Hall in Denial", published in *The New York Sun's* November 4-6, 2005 edition. See Exh. 2 to Babalola Aff. In Opp.

wherein she denies having violated Admin. Code §20-453 and reiterates her arguments made at the administrative level, which were ultimately rejected.<sup>2</sup>

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 (1<sup>st</sup> 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:

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<sup>2</sup> The NOV states that Babalola "was observed offering for sale from a table various handbags, jewelry (sic) and other items on a city sidewalk without a vendors license." Defendant does not deny her lack of a vending license. Rather, she alleges that she was offering art objects in exchange for donations to a not-for-profit newspaper called "helloAFRICA", and no license was required for the sale of such items pursuant to *Bery v City of New York*, 97 F3d 689 (2d Cir. 1996), *cert. den.* 520 US 1251 (1997) (preliminary injunction obtained against enforcement of Admin. Code §20-452 *et seq.* where art was offered for sale in public places as licensing requirement impinged upon First Amendment rights).

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 (emphasis added) . . .

Where, as here, an Administrative Code provision contains "mandatory and unqualified" language, the court lacks discretionary authority to direct the return of seized property. See *City of New York v. Nadler*, 304 AD2d 491 (1<sup>st</sup> Dept. 2003).

Here, the ALJ expressly rejected Babalola's argument that she was not required to be licensed because she was offering art objects<sup>3</sup> in exchange for donations for a not-for-profit organization. Defendant pursued an administrative appeal of that decision, which was ultimately affirmed. However, although Babalola exhausted her administrative remedies before the ECB, she never challenged these determinations by commencing an Article 78 proceeding and her time to do so has long expired. As a result, she cannot defend this forfeiture action by collaterally attacking the ECB determinations. See *City of New York v East New York Wrecking Corp.*, 161 AD2d 489 (1<sup>st</sup> Dept. 1990). Nor do defendant's claims of harassment and retaliation, based upon her prior protracted litigation with the City, constitute a defense to this action which would excuse the failure to properly challenge the ECB's decisions.

In light of the foregoing, plaintiff establishes its right to summary judgment in its favor and Babalola fails to raise a triable issue of fact in opposition. Given Admin. Code

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<sup>3</sup> The ECB specifically determined that: 1) the exchange of goods for a voluntary contribution constitutes selling within the meaning of Admin. Code §20-452(h); and 2) the items defendant was selling, such as jewelry hand made from bone and other natural materials (described as "wearable art" by Babalola) and raffia handbags, did not fall within the licensing exemption for paintings, photographs, prints and sculpture, in *Bery v. City of New York*, *supra*.

§20-468(c)'s mandatory language, this court must order forfeiture of the property to plaintiff. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the defendant property seized from defendant Babalola and held by plaintiff under Police Property Clerk Invoice Nos. P73813 and P73815 be forfeited pursuant to the provisions of the N.Y.C. Admin. Code §§ 20-468 and 20-469; and it is further

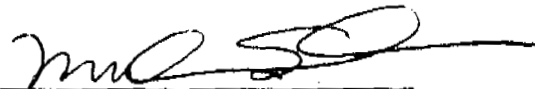
ORDERED, ADJUDGED and DECREED that defendant may not lawfully possess the defendant property held under Police Property Clerk Invoice Nos. P73813 and P73815; and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's continued possession, custody and retention of the defendant property held under Police Property Clerk Invoice Nos. P73813 and P73815 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 defendant Babalola.

New York, New York  
Dated: February 18, 2011

  
Hon. Martin Shulman, J.S.C.

**UNFILED JUDGMENT**

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