

Matter of Rosado v New York Police Dept.
2011 NY Slip Op 31694(U)
June 21, 2011
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: NOA. PAUL G. FERRONE
Justice

PART 12

1/10 Application of Steve Rosado

INDEX NO. 40 1133/2009

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -

NY PD, et al

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED BRIEFING AND ORDER.

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

Dated: 6/21/11

SAF
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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. 002

- against -

DECISION and ORDER

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

-----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, 5th Floor
New York, NY 10007

For the District Attorney:
No Appearance

FILED

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

Papers	Numbered
Order to Show Cause	1
Additional Motion Papers, Exhibits	2
Letter dated 2/10/11 from ADA Warren	3

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PAUL G. FEINMAN, J.:

This is a special proceeding commenced in 2009 by a self-represented incarcerated petitioner who seeks to compel the return of certain personal property pursuant to CPLR 7803 (1). In June 2009, respondent New York City Police Department (NYPD) had answered the petition and affirmed that it was not in possession of the property; rather, it had been signed out in July 2005 by Assistant District Attorney Michelle Warren of the New York County District Attorney's office, a fact that she had confirmed with the NYPD's attorney. The District Attorney's office did not answer or appear. Therefore, by Decision, Order, and Judgment dated February 19, 2010, this court ordered, based on the lack of opposition from the District Attorney,

and the affirmation by the NYPD that its property clerk had no reason to keep the property if it were in its possession, that the District Attorney's office was to return petitioner's property to the care of the New York City Police Department Property Clerk by March 15, 2010, and issue a release at that time. If the District Attorney's office failed to comply or to seek separate relief by Order to Show Cause or upon Notice of Motion, petitioner could move for an order of contempt.

In December 2010, petitioner moved by order to show cause seeking an order holding the District Attorney's Office in contempt of court. The office had not complied with the court's order nor responded to petitioner's September 2010 letter requesting follow-up information from ADA Warren. The proposed order to show cause was signed on January 11, 2011 to the extent that petitioner was directed to serve the motion papers on both defendants by first class mail by February 11, 2011, and the matter was scheduled for February 28, 2011, at the Motion Submission Term, for opposition papers and proof of service. Petitioner timely submitted an affidavit of service by mail dated January 27, 2011, indicating that both defendants were served by mail on that date.

Article 19 of the Judiciary Law provides that a court has "the power to punish, by fine and imprisonment, or either, a neglect or violation of duty. . . by which a right or remedy of a party to a . . . special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753 [A]). The purpose of the fine is not to punish, but to compensate or indemnify the complainant (*see State of New York v Unique Ideas, Inc.*, 44 NY2d 345, 349 [1978]). Fines, costs, and counsel fees may be assessed (Judiciary Law § 773; *see Quantum Heating Services Inc. v Austern*, 121 AD2d 437, 438 [2d Dept 1986]).

Here, petitioner seeks an order directing the District Attorney's office to return the

property to the NYPD Property Clerk within 30 days or be fined a penalty of \$50 a day for each day it does not comply (Aff. in Supp. of Ord. to Show Cause ¶ 3). Neither defendant submitted formal opposition papers. However, by letter dated February 10, 2011, ADA Warren wrote that

“ [t]he property contained under New York City Police Department voucher number M456749 is in the custody of the New York City Police Department. All the items contained in that voucher except for: (i) one VHS-C tape, (ii) short stories of molestation, (iii) letters, and (iv) two magazines, have been returned to the custody of the New York City Police Department.”

(Letter, Feb. 10, 2011, Warren to Court). Thus, it appears that at least some of petitioner's property is now in the possession of the NYPD.

Based on this representation, petitioner may make a formal demand of the NYPD Property Clerk, as provided for by the § 14-140 [g] of the New York City Administrative Code, and the pertinent regulations. Of course, petitioner must establish his lawful title to the property and that the property was used in a lawful manner (NYC Admin. Code § 14-140 [f]). Where the property was used in a crime or in furtherance of a crime, or is determined by the police commissioner to consist of certain statutorily described items which are potentially harmful to the health, safety, and welfare of the public, the property may be destroyed and not returned to the claimant (NYC Admin. Code § 14-140 [e] [2]). Furthermore, the property need not be returned if, within 10 days after the claimant has submitted a request for its return, 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 v Property Clerk of N.Y.*, 79 NY2d 49, 53-54 [1992]).

The letter of ADA Warren is frustratingly incomplete. It is also in inadmissible form. There is no indication of when the items were returned to the NYPD, although presumably this

was *after* the NYPD's June 2009 affirmation stating it did not have possession of any of the property in question. The letter refers only to the items listed in Voucher M456749, and does not refer to the items listed in the other voucher also the subject of the petition, namely Voucher M456515 (see *Matter of Rosado v New York Police Department, et al.*, Sup Ct, New York County, Feb. 19, 2010, Feinman, J., index No. 401133/2009, at p. 2). There is no explanation as to why only certain of the items have been returned to the custody of the NYPD. Finally, the letter itself, an unsworn document, is of little probative force and cannot substitute for answering papers in opposition to a motion (see CPLR 2214; see also *Regent Corp., USA v Azmat Bangl., Ltd.*, 253 AD2d 134, 139 [1st Dept 1999] [in motion for summary judgment, attorney's unsworn letter not in admissible form and failed to raise triable issue of fact]).

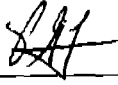
Accordingly, petitioner's motion is granted to the extent that respondent New York County District Attorney shall, within 20 days of the date of receipt of notice of entry of this decision and order, turn over to the custody of the NYPD Property Clerk at One Police Plaza all the items which are the subject of this petition, as listed in Vouchers M456749 and M456515, and shall file a release at that time. For any items not turned over to the custody of the Property Clerk, the District Attorney shall file and serve upon all parties and the court, an affidavit within the same time frame, detailing the whereabouts and status of the remaining items and the reason why they remain in the custody of the District Attorney's Office, and shall also set forth an explanation as to why respondent District Attorney should not be held in contempt. Failure of respondent District Attorney to comply with this order may, upon notice of motion by petitioner, result in a finding of contempt unless good cause is shown otherwise. It is

ORDERED that the motion is granted to the extent set forth above; and it is further

ORDERED that respondent New York City Police Department shall, upon receipt of the release by the District Attorney's office, and upon submission by petitioner of the proper documentation as required by the law, cede control of the items to petitioner or his representative, or provide petitioner with a detailed explanation otherwise.

This constitutes the decision and order of the court.

Dated: June 21, 2011
New York, New York



J.S.C.

FILED
JUN 24 2011
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