

**Property Clerk, N.Y. City Police Dept. v Williams**

2011 NY Slip Op 32510(U)

September 21, 2011

Supreme Court, New York County

Docket Number: 402844/10

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 : 402844/2010

PROPERTY CLERK

vs

WILLIAMS, SHAWN

Sequence Number : 001

DISMISS

INDEX NO. 402844/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to Dismiss complaint

|   | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits ... <u>A-D</u> | <u>1</u>        |
| Answering Affidavits — Exhibits <u>1-29</u>   | <u>2</u>        |
| Replying Affidavits _____   | _____           |

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: Sept. 21, 2011

**MARTIN SHULMAN**  
J.S.C. 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  
PROPERTY CLERK, NEW YORK CITY POLICE  
DEPARTMENT,

Plaintiff,

Index No: 402844/10

-against-

**Decision, Order  
and Judgment**

SHAWN WILLIAMS and KASHEEM WILLIAMS,

Defendants.  
-----X

**Hon. Martin Shulman, J.:**

Defendant Shawn Williams ("Williams" or "defendant") moves to dismiss this civil forfeiture action pursuant to CPLR §§ 306-b and 3211. Plaintiff Property Clerk, New York City Police Department ("plaintiff", "NYPD" or "Property Clerk") opposes the motion.

**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).

**Brief Background**

On this motion, this court revisits its holding in *Property Clerk, New York City Police Dept. v. Ford*, 30 Misc3d 301, 914 NYS2d 594 (Sup. Ct. NY Cty. 2010) ("*Ford*"),<sup>1</sup> which found that the Property Clerk was required to serve process in civil forfeiture actions brought pursuant to NYC Adm Code §14-140 within fifteen (15) days of the expiration of the twenty-five (25) day limitations period provided for in the Rules of the City of New York ("RCNY"), Title 38, §12-36. See also, CPLR §306-b. Also implicated is the Appellate Division, First Department's holding in *Property Clerk, New York City Police Dept. v. Smith*, 62 AD3d 486 (1<sup>st</sup> Dept 2009) ("*Smith*") to the extent that said

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<sup>1</sup> The Appellate Division, First Department's website indicates that plaintiff's appeal of the *Ford* decision will be heard in the December 2011 term.

decision addresses the point at which the twenty-five (25) day statute of limitations period for such actions begins to run.

Pursuant to NYC Adm Code §14-140, plaintiff in this action seeks the forfeiture of a 2000 Dodge, a motor vehicle bearing Vehicle Identification Number 1B3ES46C0YD629014 ("vehicle" or "Dodge"), as an instrumentality of various alleged crimes. Williams is the vehicle's owner. NYPD police officers initially seized the vehicle on the night of September 20, 2010 after arresting and charging defendant's son, co-defendant Kasheem Williams ("Kasheem"), with committing various felony offenses. The NYPD vouchered the Dodge under Property Clerk Invoice No. B332914V.

Kasheem was inside the Dodge at the time of his arrest and was subsequently charged with violating New York Penal Law §§ 160.15 (robbery in the first degree); 160.10 (robbery in the second degree); 165.45 (criminal possession of stolen property in the fourth degree); and 265.01 (criminal possession of a weapon in the fourth degree). The criminal charges remain pending.

Williams alleges that she made the following attempts to retrieve the Dodge: 1) at the time of Kasheem's arrest defendant advised the arresting officers she owned the vehicle and asked that it be turned over to her; 2) in the early morning hours of September 21, 2010 at the police precinct station where Kasheem had been taken;<sup>2</sup> and 3) in early October 2010 after receiving a request form by mail, defendant requested a retention hearing before the New York City Office of Administrative Trials

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<sup>2</sup> Williams alleges that the police officers she spoke to at that time did not: tell her how to get the vehicle back; notify her of her right to a retention hearing; or provide her with an invoice for the Dodge.

and Hearings ("OATH").<sup>3</sup> A retention hearing was scheduled for October 28, 2010, at which time the hearing was adjourned to November 18, 2010 upon the administrative law judge's recommendation that Williams obtain counsel to represent her. On the November 18, 2010 adjourned date, Williams had not retained counsel and opted to withdraw her request for a retention hearing.

In the interim, plaintiff filed its summons and verified complaint (Exh. C to motion) and purchased its index number on October 12, 2010. Thereafter, Property Clerk effectuated service of process on January 24, 2011, more than three (3) months later when its process server personally served Williams and simultaneously served Kasheem via service upon Williams, a person of suitable age and discretion, and completed the subsequent mailing pursuant to CPLR § 308(2) (Exh. D to motion).

#### **The Parties' Arguments**

In support of her motion, defendant argues that plaintiff's belated service of process in accordance with CPLR § 306-b warrants dismissal of this action with prejudice and an order directing plaintiff to return the Dodge. Specifically, using any of the dates of Williams' demands, the latest possible date being the November 18, 2010 adjourned date of the OATH hearing, the Property Clerk failed to serve the complaint herein within fifteen (15) days of the statute of limitations' expiration, as CPLR §306-b requires.

In response, plaintiff contends the statute of limitations never began to run because none of defendant's demands was valid. As to Williams' demands made at

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<sup>3</sup> The record indicates, and plaintiff does not dispute, that the Property Clerk received defendant's request for a hearing on October 19, 2010. See Exh. B to motion.

the time of her son's arrest and at the police station, plaintiff notes that the vehicle was in the arresting officer's custody and had not yet been transferred to the Property Clerk. Further, at that time the District Attorney's Office was not yet involved in the criminal case and was not in a position to determine whether or not the Dodge would be needed for evidentiary purposes. As to the retention hearing request and hearing dates being deemed a demand, plaintiff argues that the retention hearing was never convened within the meaning of *Smith* due to defendant's withdrawal of her hearing request on November 18, 2010. Lastly, the Property Clerk claims to have acted in good faith in refraining from serving the summons and complaint until Williams obtained counsel and as a result, defendant should be estopped from asserting a statute of limitations defense because she caused the delay in service.

Finally, at oral argument on June 21, 2011, plaintiff's counsel advised the court and defendant's counsel that the criminal court had recently issued an ex parte order in the criminal case authorizing retention of the Dodge as evidence (the "retention order"). As a result of this new development, the court permitted the parties to submit further briefs addressing the retention order's effect on this action and motion.

The Property Clerk contends that defendant's motion improperly requests this court to vacate an order of another Supreme Court Justice, as any challenges to the retention order must be made before the criminal court. Williams argues that the retention order, which was issued at the earliest on May 23, 2011,<sup>4</sup> does not excuse

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<sup>4</sup> The retention order does not indicate the date it was signed; however, the affirmation in support thereof is dated May 23, 2011.

plaintiff's failure to timely serve the summons and complaint in this action and indicates that she intends to take steps to challenge same before the criminal court.<sup>5</sup>

### Discussion

The time in which the Property Clerk must commence a forfeiture action has been established in accordance with the decisions in *McClendon v. Rosetti*, 460 F2d 111 (2<sup>nd</sup> Cir. 1972), *McClendon v. Rosetti*, 369 FSupp. 1391 (SDNY 1974) and the subsequent regulations set forth in *McClendon v. Rosetti*, 1993 WL 158525 (SDNY 1993) by Federal District Judge Lasker, as codified in RCNY Title 38, Chapter 12. Where a timely demand for the return of seized property has been made, the Property Clerk has twenty-five (25) days within which to commence a forfeiture proceeding. If a forfeiture proceeding is not commenced within the twenty-five (25) day window period, the Property Clerk must advise the claimant that it will return the property forthwith. RCNY §12-36. As this court previously found in *Ford*, "the 25 day limitations period set forth in 38 RCNY §12-36(a) is a judicially inspired, albeit untraditional statute of limitations."

Because this statute of limitations is for a period less than four (4) months, it implicates CPLR § 306-b which states, in relevant part:

Service of the summons and complaint . . . shall be made within one hundred twenty days after the filing of the summons and complaint, . . . provided that in an action . . . *where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires.* If service is not made upon a defendant within the time provided in this section, the

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<sup>5</sup> As of this date the court has not been apprised whether Williams has moved to vacate the retention order and if so, whether the criminal court has rendered any decision.

court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. (Emphasis added)

This court must determine whether any of Williams' above-cited requests constituted a demand sufficient to trigger the running of the twenty-five (25) day limitations period. During the relevant time frame, the vehicle had not been designated as arrest evidence and as such was "non-contraband property other than arrest evidence" which 38 RCNY §12-35(a) requires the Property Clerk, "[s]ubject to the provisions of §§12-36 and 12-37," to return "to a claimant who produces proper identification and the voucher issued to him or her for the property." Such a demand may be made regardless of whether criminal proceedings have terminated (38 RCNY §12-35[a]) and "may be made in person or by mail by the claimant" (38 RCNY §12-35[c]).

Case law liberally interprets 38 RCNY §12-35's provisions pertaining to demands for the return of property from the Property Clerk. For example, in *DeBellis v Property Clerk of City of New York*, 79 NY2d 49, 52 (1992), the Court of Appeals found that a demand should have been honored notwithstanding the petitioner's failure to "comply with all of the procedural steps that a strict reading of the *McClendon* order would seem to require . . ." Relevant to that court's inquiry was its conclusion that the petitioner's in-person demand coupled with his attorney's written demand "clearly put the property clerk on notice that these claimants were interested in recovering the property in his custody as soon as possible." *Id.* at 58. See also, *Camacho v Kelly*, 57 AD3d 297, 298 (1<sup>st</sup> Dept 2008) (though petitioner failed to precisely follow the Police Department's

procedural rules for the return of property, respondent had sufficient notice petitioner sought the return of his property).

Most recently in *Smith*, the Appellate Division, First Department found that “[d]efendant’s communications with plaintiff’s personnel gave plaintiff notice, by no later than the date the *Krimstock* hearing was convened, that defendant was seeking the return of his vehicle. . .” *Id.* Thus, the relevant inquiry here is when plaintiff was put on notice that Williams wanted the Dodge returned.

At the outset, the court rejects any claim that Williams’ demands at the time of Kasheem’s arrest (*viz.*, at the arrest scene and later at the police station) constituted sufficient demands. As the Property Clerk notes, the vehicle was not yet in its possession and thus, the demand cannot be deemed sufficient to put plaintiff on notice that defendant sought the return of her vehicle.

That leaves the dates plaintiff received Williams’ demand for a retention hearing and the scheduled hearing dates. Plaintiff relies on *Smith*’s finding with respect to the convening of the retention hearing therein. However, in that case, the date the hearing was convened was the last possible date relied upon by the defendant therein, and using that date the complaint was still untimely. The decision on appeal does not identify the exact date when the statute of limitations began to run. What is not apparent from the Appellate Division’s decision is that the defendant in *Smith* made numerous requests for the return of his vehicle in person at the auto pound, by telephone to the Police Department’s Legal Bureau during the course of several

months, in person at the Legal Bureau and finally by requesting a retention hearing, which was ultimately held.

Here, the Property Clerk attempts to distinguish *Smith* by noting that Williams ultimately withdrew her request for a retention hearing and never filed a second hearing request. Plaintiff misses the point: the issue is not, as plaintiff urges, whether the retention hearing was ultimately held, but rather, whether plaintiff was placed on notice that defendant sought the return of her vehicle.

This court must conclude under the facts and circumstances presented here that the Property Clerk was in fact on notice that defendant wanted her Dodge returned, despite the fact that she ultimately withdrew her hearing request. Williams' intent was first made known to plaintiff upon its receipt of the hearing request form on October 19, 2010. Subsequently, defendant reiterated such intent by appearing at the October 28, 2010 OATH hearing and ultimately electing to retain counsel to represent her at a future date. Defendant clearly intended to proceed and the Property Clerk's own opposition notes that Williams appeared on the November 18, 2010 adjourned date and again indicated her desire to retain counsel and pursue her demand for the Dodge's return. However, for unknown reasons, she elected to withdraw the hearing demand rather than obtain a short adjournment.

Plaintiff's estoppel argument is also unavailing. Plaintiff's counsel elected not to serve the summons and complaint in order to give defendant time to obtain counsel. Although defendant benefitted by being permitted to adjourn the retention hearing, she committed no wrongful act to justify estoppel. As Property Clerk failed to serve process no later than the mandatory fifteen (15) day period after the last day of the twenty-five

(25) day limitations period it otherwise had to commence this forfeiture action, dismissal of this forfeiture action is warranted.

Finally, turning to the criminal court's issuance of the retention order, this court agrees with defendant that this development, which occurred months after this action was commenced and this motion was served, does not negate plaintiff's failure to timely serve process in this action. The only effect of the retention order is to delay defendant's ability to enforce the judgment herein by retrieving her Dodge until the criminal court vacates the retention order.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss this action is granted and this forfeiture action is dismissed, with prejudice; and it is further

ORDERED and ADJUDGED that, upon service upon plaintiff of an order of the Supreme Court of the State of New York, County of Queens, Criminal Division, vacating the retention order, plaintiff Property Clerk shall forthwith return to Williams the 2000 Dodge, Vehicle Identification Number 1B3ES46C0YD629014, vouchered under Property Clerk Invoice No.: B332914V, without the imposition of any costs, fees or disbursements.

The Clerk is directed to enter judgment accordingly.

This constitutes this court's decision, order and judgment. Courtesy copies of this decision, order and judgment have been sent to the parties.

Dated: New York, New York  
September 21, 2011

**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).



Hon. Martin Shulman, J.S.C.