

Malafi v Pierson

2012 NY Slip Op 31856(U)

July 12, 2012

Supreme Court, Suffolk County

Docket Number: 10-35250

Judge: Daniel Martin

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SHORT FORM ORDER

INDEX No. 10-35250

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 4-21-11 (#001)
MOTION DATE 5-23-11 (#002)
ADJ. DATE 2-7-12
Mot. Seq. # 001 - MD
002 - MD

<p>-----X</p> <p>CHRISTINE MALAFI, County Attorney for the COUNTY OF SUFFOLK,</p> <p style="padding-left: 100px;">Plaintiff/Claiming Authority,</p> <p style="padding-left: 100px;">- against -</p> <p>a 2002 BMW, VIN NO. WBAET37492NG81059, ERICA DIANE PIERSON,</p> <p style="text-align: right; padding-right: 100px;">Defendant.</p> <p>-----X</p>	<p>X</p> <p>-----X</p>	<p>CHRISTINE MALAFI, SUFFOLK COUNTY ATTORNEY By: Richard H. Weinschenk, Assistant County Attorney Attorney for Plaintiff/Claiming Authority 100 Veterans Memorial Highway, P.O. Box 6100 Hauppauge, New York 11788</p> <p>SCOTT LOCKWOOD, ESQ. Attorney for Defendant 1476 Deer Park Avenue, Suite 3 No. Babylon, New York 11703</p>
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ORDERED that the motion by the plaintiff/claiming authority for an order pursuant to CPLR 3212 granting summary judgment against the defendant Erica Diane Pierson directing her to forfeit to the plaintiff/claiming authority the 2002 BMW bearing VIN No. WBAET37492NG81059 pursuant to Suffolk County Code Article IV Chapter 270, and for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the defendants' counterclaims, is denied without prejudice to submit upon proper papers. The within papers fail to include an original affidavit of service or original signed certifications.

ORDERED that the cross- motion by the defendants for an order declaring that 1) Suffolk County's practice of appointing judicial hearing officers and/or magistrates to determine the propriety of seizures of motor vehicles violates the separation of powers doctrine, 2) the practice of appointing judicial hearing officers in these matters violates the CPLR, 3) Suffolk County Code Article IV Chapter 270 is unconstitutional and in violation of the Municipal Home Rule Law, 4) the policy of the County of Suffolk demanding the forfeiture of vehicles involved in felony driving while intoxicated cases to be unconstitutional, and 5) for an order directing the return of the property seized from the defendant Erica Diane Pierson based on the violation of her due process rights, is denied.

This action was commenced pursuant to Suffolk County Code, Chapter 270, Article IV, seeking the civil forfeiture of the defendant's 2002 BMW automobile bearing VIN No. WBAET37492NG81059. The summons and complaint were served upon the defendant Erica Diane Pierson (defendant) on November 23, 2010, and issue was joined by service of an answer on or about December 30, 2010. In her complaint, the plaintiff/claiming authority (plaintiff) alleges that the defendant committed the crime of driving while intoxicated in violation of Vehicle and Traffic Law (VTL) § 1192.3 on April 27, 2010, that the defendant was previously convicted of violating VTL § 1192.2 and VTL § 1192.3 on November 16, 2009, and that a Notice of Seizure and Hearing was mailed to the defendant, via certified mail, return receipt requested, on April 27, 2010.

When first adopted, Chapter 270, Article IV, of the Suffolk County Code (Code), entitled "Forfeiture of Property Used in or Obtained Through Crime" had as its stated legislative intent, the goal of implementing a statutory scheme to address the use of forfeitures for all misdemeanor criminal activity within the County of Suffolk in a manner consistent with constitutional safeguards of property rights (L.L. No. 18-1999). The Chapter was subsequently amended with the specific legislative intent to ensure its continued efficacy in addressing "repeat offenders of New York's drunk driving laws ... and to maintain the statute's effectiveness and assure consistency with the federal and state constitutions and recent court decisions." To that end, the definition of a "crime" provided in Chapter 270 was amended to reflect the concept of an "offense," and to add violations of VTL § 1192 (2), (2-a), (3) (4) or (4-a), and violations of VTL § 1192-a, operating a motor vehicle having consumed alcohol under the age of 21, and violations of Navigation Law § 49-a, operation of a vessel while under the influence of alcohol or drugs (Code § 270-25).

Suffolk County Code § 270-26, entitled "Warrantless seizures," provides:

A. Any property which constitutes the proceeds of an offense, the substituted proceeds of an offense, or an instrumentality of a offense shall be seized by any peace officer, acting pursuant to his or her special duties, or police officer upon probable cause to believe that an offense, as defined in this article, has been committed, and may be forfeited as hereinafter provided.

Suffolk County Code § 270-27, entitled "Civil authority," provides in relevant part:

A. A civil action shall be commenced by the claiming authority . . . against a defendant to forfeit seized property which constitutes the proceeds of an offense, the substituted proceeds of an offense, or an instrumentality of an offense . . . if it can be demonstrated that the property was seized in connection with the acts of an individual who has been convicted at least once before of any of the following violations of New York Vehicle and Traffic Law § 1192(2), (2-a), (3), (4) or (4-a), § 49-a of the New York Navigation Law or having been found guilty of violating § 1192-a of the New York Vehicle and Traffic Law ...

In order to prosecute the warrantless seizure of property under the statute, the seizing agency is required to send notification of the seizure to all titled owners and registrants on file with the Department of Motor Vehicles by certified mail, return receipt required, within five business days of the seizure and inform the

recipient that there will be a hearing promptly scheduled before a neutral magistrate to determine whether probable cause existed for the defendant's arrest (Code § 270-26 [B] [1]). Said notice must also inform the defendant that the magistrate will determine whether the County is likely to succeed on the merits on the forfeiture action, whether retention is necessary to preserve the property from destruction or sale during the pendency of the forfeiture proceeding, and whether any other measures would better protect the County's interest during the proceedings, including, but not limited to: issuance of a restraining order prohibiting sale, transfer, or loss of the property with imposition(s) of appropriate penalties for violation of said restraining order; taking of a bond; and/or use of an interlock device (Code § 270-26 [B] [1] [a], [b] and [c]). In making his or her determination, the magistrate must review the documents supporting the seizure and any other relevant documents and take any testimony to determine whether the seizing agency has sustained its burden of proof as set forth in Code § 270-26 [B] [1]. If the seizing agency has sustained its burden of proof, the magistrate must authorize the continued retention of the property by the seizing agency pending a judicial determination of any civil forfeiture action (Code § 270-26 [B] [2]). Thereafter, a civil action must be commenced by the County Attorney or her or his designee, against a defendant to forfeit seized property which constitutes the instrumentality of an offense within the 180 days after the seizure (Code § 270-27 [H]).

Here, it is undisputed that a timely notice was mailed to the defendant, and that a hearing was held in which the "neutral magistrate" found probable cause for the defendant's arrest and directed that Suffolk County retain the vehicle pending resolution of a forfeiture proceeding. In addition, it is undisputed that a previous offense for violating the VTL occurred within ten years (VTL § 1193 [1] [c]), and the plaintiff has offered proof of an adjudication of the defendant's arrest as required by CPLR 1311 (1) (a).

In her answer the defendant sets forth nine numbered counterclaims against the plaintiff, alleging that: 1) the seizure of the defendant's vehicle without affording a judicial determination of the propriety of the seizure violates the defendant's due process rights, 2) the failure to afford a prompt judicial determination violates the due process provisions of the Federal and State Constitutions, 3) the appointment of judicial hearing officers (JHOs) to conduct post-seizure hearings violates the State Constitution, 4) the failure to define the rules of evidence at hearings violates the due process provisions of the Federal and State Constitutions, 5) procedures for the use of JHOs and/or referees pursuant to Article 43 of the CPLR were not followed, 6) Code § 270-26 authorizing the Suffolk County Executive to appoint magistrates to conduct post-seizure hearings "violates the separation of powers under New York State government," 7) post-seizure hearings were not enacted and/or promulgated in accordance with the New York State Administrative Procedure Act, 8) Suffolk County "does not employ any internal arrangements to insulate the agency decision makers from pro-agency bias," and 9) that Article 13-A of the CPLR preempts Suffolk County's attempt to legislate the civil forfeiture of vehicles from persons convicted of felonies.

The first and second counterclaims are dismissed for failure to state a cause of action as they consist of nothing more than bare legal conclusions and factual claims contradicted by the record. It is well settled that due process of law only requires a post-seizure, pre-judgment hearing before a neutral judicial hearing officer or administrative officer under the Fourteenth Amendment (*Krimstock v Kelly*, 306 F3d 40 [2d Cir 2002]), and a neutral magistrate under the State Constitution (*Nassau County v Canavan*, 1 NY3d 134, 770 NYS2d 277 [2003]). The allegations in the first counterclaim that a judicial determination of the propriety of the seizure is required is belied by the court decisions holding that a hearing held by a neutral administrative officer or magistrate comports with due process requirements. The allegation in the second counterclaim that a prompt judicial determination was not conducted also consists of bald legal conclusions, fails to allege facts sufficient to show any delay in the conduct of the post-seizure hearing, and taken on its face, is contradicted by the record. In addition, the defendant's affirmative defenses alleging that the seizure of her vehicle violates

the constitutional guarantees against cruel and unusual punishment and excessive fines, are without merit (*Nassau County v Canavan*, supra).

The third and fifth counterclaims respectively contend that the use of JHOs to conduct post-seizure hearings violates the State Constitution, and that the procedures set forth in Article 43 of the CPLR for appointing JHOs and/or referees to conduct hearings were not followed. As set forth above, it has been held that the State Constitution does not require a judicial determination prior to the commencement of a forfeiture action (*Nassau County v Canavan*, *id.*), and that an administrative hearing provides a defendant with due process of law (*Krimstock v Kelly*, supra). Code § 270-26 (B) (3) provides that “The Suffolk County Executive shall designate Neutral Magistrates to conduct hearings in accordance with the Subsection B.” The defendant contends that “neutral magistrate” means a judge of the State of New York. The term “magistrate,” when used in its general sense, is intended to mean a public officer, exercising a public authority; or a public civil officer, possessing such legislative, executive, or judicial power, as the government appointing him or her may ordain (*People ex rel. Hollander v Britt*, 195 Misc. 722, 92 N.Y.S.2d 662 [Sup Ct, Erie County 1949], *affd* 276 AD 815, 93 NYS2d 704 [4th Dept 1949]). In addition, the Public Officers Law lists eligibility requirements for the “office of magistrate” (POL § 16). Here, the enumerated counterclaims consist of bald legal conclusions, fail to allege facts sufficient to show any violation of the State Constitution or the CPLR, and taken on their face, are contradicted by the record. Accordingly, the third and fifth counterclaims are dismissed for failure to state a cause of action.

The fourth counterclaim alleges that the failure to define the rules of evidence at hearings violates the defendant’s due process rights. Generally, the doctrine of exhaustion of administrative remedies requires a party to address his or her complaints to the administrative tribunals considering the matter, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts (*Doe v Axelrod*, 71 NY2d 484, 527 NYS2d 368 [1988]; *Young Men’s Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 372 NYS2d 633 [1975]; *Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 860 NYS2d 573 [2d Dept 2008]). Here, the record reveals that counsel for the defendant failed to raise an issue regarding the evidence presented at the post-seizure hearing, and in fact, stipulated to the introduction of the documentary evidence presented to the neutral magistrate at that hearing. In addition, the subject counterclaim consists of bare legal conclusions, fails to allege facts indicating that there was a failure to define the rules of evidence, and taken on its face, is contradicted by the record. Accordingly, the fourth counterclaim is dismissed for failure to state a cause of action.

The sixth counterclaim alleges that the Code section authorizing the Suffolk County Executive to appoint magistrates to conduct post-seizure hearings “violates the separation of powers under New York State government.” As discussed above, the Code contemplates an administrative hearing to determine the propriety of the claiming authority’s retention of a defendant’s property, and due process requires nothing more (*Krimstock v Kelly*, supra; *Nassau County v Canavan*, supra). Here, the defendant confuses the nature of the post-seizure hearing held in this matter, in effect, alleging that the Suffolk County Executive does not have the power to appoint positions within the context of an administrative scheme duly adopted by the Suffolk County Legislature. Instead the subject counterclaim consists of bare legal conclusions, fails to allege facts indicating that the actions of the Suffolk County Executive interfered with the powers of the State or County legislatures and/or the State judiciary, and taken on its face, is contradicted by the record. Accordingly, the sixth counterclaim is dismissed for failure to state a cause of action.

The seventh counterclaim alleges that post-seizure hearings were not enacted and/or promulgated in accordance with the New York State Administrative Procedure Act (APA). It is well settled that the APA applies only to agencies of the State (APA 102-1; *Tefft v Hutchinson*, 93 AD3d 1332, 940 NYS2d 772 [4th

Dept 2012]; *1777 Penfield Rd. Corp. v Morrison-Vega*, 116 AD2d 1035, 498 NYS2d 653 [4th Dept 1986]; *Incorporated Vil. of Great Neck Plaza v Nassau County Rent Guidelines Bd.*, 69 AD2d 528, 418 NYS2d 796 [2d Dept 1979]). Here, the subject counterclaim consists of bare legal conclusions, fails to allege facts indicating that post-seizure hearings are conducted by a state agency, and taken on its face, is contradicted by the record. Accordingly, the seventh counterclaim is dismissed for failure to state a cause of action.

The eighth counterclaim alleges that Suffolk County's failure to "employ any internal arrangements to insulate the agency decision makers from pro-agency bias" violates the Due Process clauses of the Federal and State Constitutions. Here, the subject counterclaim consists of bare legal conclusions, fails to allege facts indicating that there is a failure to prevent "pro-agency bias", that neutral magistrates appointed under the Code have any personal interest in the outcomes of post-seizure hearings, or that the decision in the subject hearing was influenced by personal interest, bias, or other improprieties. In addition, the counterclaim, taken on its face, is contradicted by the record. Accordingly, the eighth counterclaim is dismissed for failure to state a cause of action.

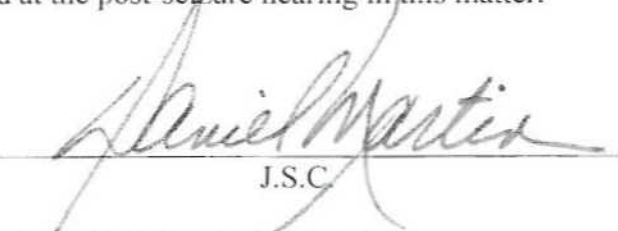
The ninth, and final, counterclaim alleges that Article 13-A of the CPLR preempts Suffolk County's attempt to legislate the civil forfeiture of vehicles from persons convicted of felonies. CPLR 1352 provides in pertinent part:

Preservation of other rights and remedies. The remedies provided in this article are not intended to substitute for or limit or supersede the lawful authority of any public officer or agency or other person to enforce any other right or remedy provided for by law.

It has been held that a county has the authority to enact a code provision authorizing the commencement of a civil forfeiture action to obtain title to instrumentalities of offenses which constitute traffic infractions, as such a provision is neither inconsistent with nor preempted by state law (*County of Nassau v Kilcommons*, 45 AD3d 522, 845 NYS2d 127 [2d Dept 2007], *lv denied* 10 NY3d 703, 854 NYS2d 104 [2008]). Here, the subject counterclaim consists of bare legal conclusions, fails to allege facts that would take this matter outside the controlling precedent, and taken on its face, is contradicted by the record. Accordingly, the ninth counterclaim is dismissed for failure to state a cause of action.

The defendant further contends that summary judgment is inappropriate in that, among other things, the notice mailed to the defendant pursuant to Code 270-26 (B) (1), and advising her of the post-seizure hearing, failed to include the information required therein. A review of record reveals that the notice contains all of the necessary information and complies with the Code provision, that the defendant does not dispute service of the notice, and that the defendant appeared at the post-seizure hearing in this matter.

Dated: JULY 12, 2012



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION