

**Matter of Boney v City of New York Police Dept.**

2013 NY Slip Op 30312(U)

January 30, 2013

Sup Ct, New York County

Docket Number: 401570/12

Judge: Barbara Jaffe

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

PRESENT: JAFFE  
Justice

PART 8 12

BONEY, MURPHY  
- v -  
CITY OF NEW YORK - N.Y.P.D.  
PROPERTY CLERK, ET AL.

INDEX NO. 401570/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion to/for judgment of mandamus

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

**PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED 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: 1/30/13

BARBARA JAFFE 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 12

-----X  
In the Matter of the Application of:  
MURPHY BONEY,

Petitioner,

Index No. 401570/12

Motion date: 8/27/12

Motion seq. no.: 001

**DECISION & JUDGMENT**

For a Judgment of Mandamus pursuant to Article 78 of the  
Civil Practice Law and Rules,

-against-

CITY OF NEW YORK POLICE DEPARTMENT  
PROPERTY CLERK, ROSEMARY CHAO,  
ASSISTANT DISTRICT ATTORNEY, DET. GONZALES,  
DET. O'HALLORAN, DET. ARMANDO COUTINHO,

Respondents.

-----X  
BARBARA JAFFE, JSC:

**For petitioner:**

Murphy Boney, self-represented  
Din. 10-A-1826  
Coxsackie Correctional Facility  
P.O. Box 999  
Coxsackie, NY 12051-0999

**For respondents:**

Robert F. Fodera, Esq.  
NYPD Legal Bureau  
Civil Enforcement Unit  
2 Lafayette Street, 5<sup>th</sup> Floor  
New York, NY 10007-1207  
917-454-1100

By order to show cause dated July 16, 2012, petitioner brings this Article 78 proceeding seeking a judgment of mandamus requiring the return of property seized from him during and after his arrest. Respondents oppose.

I. BACKGROUND

On June 28, 2005, petitioner was arrested and charged with robbery in the second degree, assault in the second degree, and criminal possession of stolen property in the third degree.

(Affirmation of Robert F. Fodera, Esq., in Opposition, dated Aug. 22, 2012 [Fodera Opp. Aff.],

Exh. 1). On the date of his arrest, a watch was seized from him, classified as “arrest evidence,” and vouchered by respondent Police Department Property Clerk. (*Id.*, Exh. 2). On July 8, 2005, two more watches and 46 clear/blue gemstones were seized from him, classified as “investigatory evidence,” and vouchered by the property clerk. (*Id.*).

On October 19, 2009, petitioner was convicted upon verdict after jury trial of robbery in the second degree and criminal possession of stolen property in the third degree. (*Id.*, Exh. 3).

On or around February 17, 2010, one of the watches classified as investigatory evidence was appraised and sold at a public auction. (*Id.*, Exh. 4).

On or around March 15, 2010, the blue/clear stones were appraised and sold at a public auction. (*Id.*, Exh. 4). The remaining watch classified as investigatory evidence was determined to be counterfeit and was destroyed pursuant to Police Department policy. (*Id.*). The watch classified as arrest evidence remains in the property clerk’s custody, being held there pending a formal demand by its true owner, a complainant in the criminal case against petitioner. (*Id.*).

By letter dated July 3, 2011, postmarked July 17, 2011, and received by Corporation Counsel for the City of New York on July 20, 2011, petitioner stated that “he had made several timely request[s] to the [NYPD] for release of [his] property held by . . . [the] property clerk,” that his demand “has not come to fruition,” and that he requests that Corporation Counsel intervene to ensure that his property is released. (*Id.*, Exh. 5).

By letter dated July 11, 2011, petitioner asked that the Queens County District Attorney release his property, and by letter dated July 21, 2011, respondent Assistant District Attorney Rosemary Chao stated, in pertinent part, that she cannot release the property to him unless he demonstrates ownership. (*Id.*, Exh. 7).

By letter dated August 17, 2011, the Police Department advised petitioner that it received his July 3 letter, that having been arrested in Manhattan, he must make a property demand to the Manhattan Property Clerk, that he must request arrest evidence within 120 days after the termination of criminal proceedings, that he must request property not constituting arrest evidence within 120 days of it being vouchered, and that if the requests are untimely, the property may be disposed of “according to law.” (*Id.*, Exh. 6).

On June 27, 2012, petitioner served the property clerk with a “notice of intention to file a complaint.” (*Id.*, Exh. 8). On or about June 28, 2012, petitioner commenced the instant proceeding.

By affidavit of the same date, petitioner states that he owns the vouchered property, that it is worth a total of \$49,700, that, between June 28, 2005 and January 3, 2012, he made “numerous demands” on the Queens County District Attorney and the property clerk for its return, that all of his demands were refused, and that he is seeking either return of the property or \$49,700 “as a conversion.”

## II. CONTENTIONS

Petitioner claims that “at numerous times” and as late as January 3, 2012, he timely requested the return of the property, that his failure to demonstrate ownership of the property does not bar its release, and that it was respondents’ duty to notify him that the property was available for release and to schedule a time for their release to his agent. (Pet.).

In opposition, respondents claim that petitioner’s property demand was untimely. (Fodera Opp. Aff.). Moreover, they assert that the instant proceeding is untimely, as petitioner commenced the instant proceeding more than four months after their August 17, 2011 letter.

(*Id.*). And they claim that insofar as petitioner is asserting a claim for conversion, that claim should be dismissed as he failed to timely file a notice of claim. (*Id.*).

### III. ANALYSIS

Pursuant to CPLR 217(1), an Article 78 proceeding must be commenced within four months after the challenged determination becomes final and binding on petitioner. However, as an Article 78 “proceeding seeking mandamus to compel accrues even in the absence of a final determination, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act.” (*Ruskin Assocs., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 77 AD3d 401, 403 [1<sup>st</sup> Dept 2010]; see also *Academy St. Assocs., Inc. v Spitzer*, 44 AD3d 592, 593 [1<sup>st</sup> Dept 2007]).

Here, as the August 17, 2011 letter constitutes the most recent, and only, documentation of respondents’ refusal to release the property to petitioner, and as petitioner failed to commence the instant proceeding within four months of that date, it is untimely.

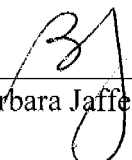
In light of this determination, the parties’ remaining contentions need not be addressed.

### IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is denied in its entirety.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED:        January 30, 2013  
                  New York, New York

**BARBARA JAFFE**  
**J.S.C.**