Property Clerk, New York City Police Dept. v Orellana
2017 NY Slip Op 30286(U)
February 9, 2017
Supreme Court, New York County
Docket Number: 450192/15
Judge: Martin Shulman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. MARTIN SHULMAN, Justice **PART 1**

PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT,

Plaintiff,

- v -

NORMAN E. ORELLANA,

Defendant.

INDEX NO.: 450192/15

DECISION, ORDER & JUDGMENT

In this civil forfeiture proceeding, plaintiff seeks forfeiture of the subject vehicle, a 2002 Honda bearing Vehicle Identification Number 1HGCG165X2A063476 (the "subject vehicle"), which was seized from defendant Norman E. Orellana ("defendant" or "Orellana") and vouchered under Property Clerk Invoice Number 2000319813 as a result of defendant's May 12, 2014 arrest on charges of per se driving while intoxicated (Vehicle & Traffic Law ["VTL"] §1192[2]).[1] Plaintiff now moves for summary judgment in its favor based upon Orellana's April 28, 2015 guilty plea to violating VTL §1192(2). Defendant opposes the motion and cross-moves for summary judgment in his favor dismissing this action.

Plaintiff's Motion for Summary Judgment

In his verified answer (Exh. 2 to Motion), defendant does not deny that he is the registered and titled owner of the subject vehicle, nor does he deny his guilty plea in his opposition. His answer alleges two affirmative defenses, the first of which alleges that forfeiture of the subject vehicle is unconstitutional because the penalty of forfeiture "is

[1] The charges stemming from Orellana's May 12, 2014 arrest were consolidated with those stemming from his May 19, 2013 arrest for *inter alia* driving while intoxicated (VTL §1192[3]).

disproportionate to the lack of any alleged culpability" on Orellana's part, and the second of which alleges failure to state a cause of action.

It is well established that a "criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts." *Grayes v Distasio*, 166 AD2d 261, 262-263 (1st Dept 1990). Therefore, a defendant who pleads guilty to a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based. *Id.*; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-05 (1973).

There can be no dispute that the subject vehicle is the instrumentality of the crime of driving while intoxicated. As stated in *Grinberg v Safir*, 181 Misc2d 444, 694 NYS2d 316 (Sup Ct NY County, 1999), *aff'd* 266 AD2d 43 (1st Dept 1999):

> Operation of a motor vehicle is a necessary element of DWI. VTL §1192(2), (3). A drunk driver's automobile is the quintessential instrumentality of a crime - the *sine qua non* without which the crime could not have been committed.

Id., 181 Misc2d at 448-449, 694 NYS2d at 320.

In accordance with NYC Admin. Code § 14-140 and 38-A RCNY §§ 12-35 and 12-36, plaintiff has established by a preponderance of the evidence that defendant is the registered and titled owner of the subject vehicle and that he used it as the instrumentality of committing the crime of driving while intoxicated. Thus, plaintiff has satisfied the burden of proof and established that the subject vehicle is subject to forfeiture under NYC Admin. Code § 14-140. Defendant's guilty plea in the underlying criminal proceeding collaterally estops him from asserting his innocence in the instant action.

Orellana's Cross-Motion

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 (2d Cir 1972), *McClendon v Rosetti*, 369 FSupp 1931 (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 the Rules of the City of New York ("RCNY"), Title 38, Chapter 12. Where a timely demand for the return of seized property has been made, the Property Clerk has twenty-five days within which to commence a forfeiture action. RCNY § 12-36(a). If no action is commenced, the Property Clerk must advise the claimant that it will return the property forthwith. *Id.*

Although not alleged in his answer, Orellana cross-moves for summary judgment dismissing the complaint on the grounds that this action was not timely commenced.[2] Specifically, defendant argues that plaintiff did not timely commence this forfeiture action because the summons with notice which initiated this action on February 11, 2015 (within 25 days of plaintiff's January 29, 2015 receipt of Orellana's demand for a *Krimstock* hearing) was insufficient.[3] Defendant claims that the summons with notice

---

[2] Defendant preemptively cites *Brill & Meisel v Brown*, 113 AD3d 435 (1st Dept 2014), for the proposition that a cross-motion for summary judgment may be based upon an unpleaded defense. However, as plaintiff notes in reply, in that case the plaintiff did not claim surprise or prejudice as a result of the defense. More importantly, *Brill* is distinguishable here because the defense Orellana seeks to assert is deemed waived if not raised in a pre-answer motion to dismiss or in a responsive pleading. See CPLR 3211(e).

[3] The summons with notice herein (Exh. 8 to Motion) states "that this is an action for forfeiture seeking a 2002 Honda bearing Vehicle Identification Number 1HGCG165X2A063476" and that judgment "for the 2002 Honda" is sought. Orellana argues that the action was not effectively commenced until April 21, 2015 when plaintiff

was inadequate because: (1) "its contents did not satisfy the specifications of CPLR §305(b)"; and (2) it "did not supply reasonable grounds to justify forfeiture" as RCNY §12-36(b) requires.

Regardless of whether or not it is proper for this court to entertain an unpleaded defense, such defense is insufficient to defeat plaintiff's entitlement to summary judgment.[4] In *Property Clerk, New York City Police Dept. v Hylor*, 2016 WL 4194202, 2016 Slip Op 31506(U), this court rejected the very same arguments.[5] As stated therein:

> While plaintiff could have included more information in the summons with notice, such as details regarding defendant's arrest which resulted in the subject vehicle's seizure, such information is not essential. It is clear from the summons with notice that plaintiff seeks the subject vehicle's forfeiture, *i.e.*, to obtain permanent possession of it. Hylor necessarily was aware that plaintiff had seized the subject vehicle at the time of his arrest. Indeed, at the time the summons with notice was served upon him, defendant had requested a *Krimstock* hearing to recover possession. Under the circumstances, the timely served summons with notice provided sufficient notice to Hylor and does not warrant dismissal of this action (footnote omitted).

The summons with notice herein is identical to that in *Hylor*. Accordingly, the same analysis is applicable to Orellana and warrants denial of his cross-motion. Having

---

filed the verified complaint.

[4] Parenthetically, although neither party addresses the merits of these defenses in the instant motion and cross-motion, it is well settled that defenses such as these which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *170 W. Village Assocs. v G & E Realty, Inc.*, 56 AD3d 372 (1st Dept 2008).

[5] The arguments in Orellana's instant memorandum of law are taken verbatim from the defendant's memorandum of law in the *Hylor* case (available at 2016 WL 4262647).

failed to rebut plaintiff's prima facie entitlement to summary judgment, plaintiff's motion must be granted.

For the foregoing reasons, no triable issues of fact exist and it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied and defendant's affirmative defenses are dismissed; and it is further

ORDERED and ADJUDGED that defendant Norman E. Orellana may not lawfully possess the subject vehicle seized from him pursuant to his May 12, 2014 arrest; and it is further

ORDERED and ADJUDGED that if defendant has sold or conveyed the subject vehicle, in any manner, the plaintiff is entitled to the monetary value of the subject vehicle at the time of seizure; and it is further

ORDERED and ADJUDGED that plaintiff is entitled to lawfully possess the subject vehicle, a 2002 Honda, bearing Vehicle Identification Number 1HGCG165X2A063476, and that the subject vehicle is hereby forfeited pursuant to the provisions of the Admin. Code of the City of New York § 14-140.

The Clerk is directed to enter judgment in plaintiff's favor.

Dated: February 9, 2017

Hon. Martin Shulman, J.S.C.