

Rivera v Smith
2026 NY Slip Op 32111(U)
July 16, 2026
Supreme Court, Broome County
Docket Number: Index No. CA2020002535
Judge: Eugene D. Faughnan
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

JOSE RIVERA,

Plaintiff,

vs.

KATIRAE SMITH, VESTAL POLICE
DEPARTMENT and AIRBORNE TOWING
AND ROAD SERVICE,

Defendants.

DECISION AND ORDER

Index No. CA2020002535

EUGENE D. FAUGHNAN, J.S.C.

Plaintiff Jose Rivera has filed a motion seeking the appointment of counsel in this civil action, which is based upon the events surrounding his arrest on or about September 19, 2020. Plaintiff is incarcerated on an unrelated matter and has been representing himself in this case. The Court previously signed an Order dated January 4, 2021, granting permission for Plaintiff to proceed without the payment of filings fees. Rivera states that he is indigent and unable to retain counsel to handle this civil action.

Plaintiff filed an affidavit of service of this motion on March 10, 2026 indicating that he served the motion by mail upon the County Attorney and the “Defendants’ attorney of record, Mr. David S. Berger, Town of Vestal attorney at Town of Vestal, Town Attorney, 605 Vestal Parkway West, Vestal, NY 13850-1486” on February 11, 2026.¹ The motion was designated as on submission, and Defendants did not file any opposition.² After due deliberation, this Decision and Order constitutes the determination of this Court.

¹ David Berger, Esq., was the prior Town of Vestal Attorney and was involved in this litigation from its inception. The Court is aware that Mr. Berger was replaced as the Town Attorney in 2024. Although Plaintiff has updated his address throughout this case, there is no indication that he was notified of the change in Town Attorney. Given his incarceration, he likely would not easily learn of that fact, and the motion was served at the Town Offices, so it should have been provided to the correct attorney. The Court is satisfied that service of the motion was adequate.

² The Court has considered all the papers filed in support of motion, as well as all the other documents contained in the case file.

BACKGROUND FACTS

Rivera claims that on the date in question, at around 1:00 am, he was sitting in his car which was parked in a lot in the Town of Vestal, when he was approached by local police. After questioning, he was given a field sobriety test for possible alcohol intoxication, and then a K-9 search was conducted of his vehicle. The search resulted in the discovery of 135 foil wrapped items in a plastic bag which were believed to be drugs, and Rivera was arrested.

Rivera commenced this action by the filing of a Summons and Complaint on December 28, 2020. At that time, he was incarcerated in New York City (presumably not related to the arrest in September 2020). He claimed that when he was arrested by Vestal Police, he had \$2040 and three cell phones in his possession, but he was not given any receipt or voucher for that property. He was also driving a vehicle which had to be left in the parking lot due to his arrest, and was towed by Airborne Towing. He claims that the vehicle was worth approximately \$16,000 and had a stereo worth \$3,000 and custom wheels valued at more than \$1,500. He had been unable to retrieve the vehicle from the lot. In his original Complaint, he sought damages in the amount of \$26,590 plus costs and disbursements. Rivera alleges that during his arrest by Officer Katirae Smith of the Vestal Police Department, his personal property was either lost, damaged, or otherwise not secured, and that Airborne Towing & Road Service contributed to the alleged loss by failing to safeguard items taken during the towing process.

Rivera filed an Amended Complaint on June 14, 2022, expounding on the allegations in the original Complaint, adding some new details relating to events after December 2020, and adding new causes of action. Among other things, the Amended Complaint stated that the criminal case against him was dismissed in October 2021 and \$2,130 was returned to him but the three cell phones were never returned. The Amended Complaint contains 6 causes of action: the first three involve claims against the Defendants for failure to protect Plaintiff's property to avoid loss, theft, damage or misplacement; the last three are against Smith and the Vestal Police Department for false imprisonment, malicious prosecution and wrongful confinement.

LEGAL DISCUSSION AND ANALYSIS

Under CPLR 1102(a), once poor person status is granted, “the court... may assign an attorney” to an indigent civil litigant. However, private litigants do not have an absolute right to assigned counsel. *Matter of Smiley*, 36 NY2d 433 (1975). “Aside from certain narrow exceptions, the constitutional right to counsel does not extend to civil actions or administrative proceedings” *Matter of Estafanous v. New York City Env'tl. Control Bd.*, 136 AD3d 906, 907 (2nd Dept. 2016); see, *People v. Jornov*, 65 AD3d 363 (4th Dept. 2009). “The underlying principle is that when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture, the right to counsel and due process of law carries with it the provision of counsel if the individual charged is unable to provide it for himself ... No similar constitutional or statutory provision applies to private litigation” *Matter of Smiley*, 36 NY2d at 437-438 (citations omitted). In New York, courts can directed representation in a proper case [*Wills v. City of Troy*, 258 AD2d 849, 849 (3rd Dept. 1999)], but there is no statutory mechanism for payment and the attorney would have to perform services on an unpaid basis. *Morgenthau v. Garcia*, 148 Misc2d 900 (Sup. Ct. New York County 1990).

However, New York courts have long held that appointment of counsel in civil matters is warranted only in cases involving liberty interests or grievous forfeiture of a fundamental right. Rivera’s claims concern alleged loss or damage to personal property, or personal injury damages. Property loss claims and torts do not meet the threshold required for mandatory or compelled appointment of counsel. See, e.g. *Matter of Ellis v. Gardner*, 2016 NY Misc LEXIS 1612 (Sup. Ct. Ulster County 2016); *Matter of Shoga v. Broome County Corr. Facility*, 24 Misc3d 1206(A) (Sup. Ct. Broome County 2009) (keeplock detention, a form of disciplinary confinement for inmates, was not the type of case warranting assignment of counsel); *Franco v. State of New York*, 2024 NY Misc LEXIS 2849 (Ct. of Claims 2024) (claim for damages due to delay in medical care for inmate did not warrant appointment of counsel).

The Court concludes that this case does not meet the criteria for appointment of counsel. That is not a reflection on the potential merits of Plaintiff’s claim or the validity of his concerns about the difficulties presented with discovery. Many litigants would benefit from an attorney assisting them but they cannot afford an attorney. Need or desire is not the test for appointment of counsel. Plaintiff has the same options available to him that are available to other indigent

civil litigants. He may request legal assistance by communicating with the State or local Bar to represent him free of charge; or request legal assistance from other voluntary or government-funded legal organizations. “In the absence of legislative mandate, and any statutory or constitutional mandate, the Court need not put the burden of plaintiff’s representation on the Bar by assigning uncompensated counsel” *Warmus v. Heit*, 2006 NYLJ LEXIS 3930, *20 (Sup. Ct. New York County 2006) (citations omitted).

These holdings directly apply here. Rivera’s claim—alleging negligent handling or loss of personal property, and/or tort claims related to deprivation of personal freedom—are similar to the types of claims rejected in prior cases. As those cases make clear, property loss or personal injury claims do not implicate a fundamental right, nor do they constitute the severe forfeiture necessary to justify appointment of counsel.

CONCLUSION

While Rivera has established indigency, the nature of his claim does not involve a liberty interest or a fundamental right. Under controlling case law, the Court is not compelled to exercise its discretionary authority to appoint counsel in civil actions involving property damage.

Based on the foregoing discussion, it is hereby

ORDERED, that Plaintiff’s motion for appointment of counsel is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: July 16, 2026
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice