

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

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THE CITY OF NEW YORK,

Plaintiff,

-against-

Index No. 400320 / 02

ELFEGO DOMINGUEZ and Property Seized and
Vouchered under Police Property Clerk
Invoice No. 181493

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
AND MOTION FOR PRELIMINARY INJUNCTION**

THE FACTS

Elfego Dominguez is a fifty-two year old Mexican-American entrepreneur who, as licensed street vendor, makes his living selling hot dogs and soda on the Lower East Side. He lives with his wife and five children in a one-bedroom apartment in Manhattan. He speaks very little or no English.

On December 21, 2001, while vending from his usual location, Mr. Dominguez was ticketed for violating Section 17-322 of the New York City Administrative Code – vending food from a pushcart without a Department of Health permit. While Mr. Dominguez had a valid food vendor's license, the permit on his hot dog cart had expired on October 31, 2001. Although Mr. Dominguez was not, and has never been, cited for vending from an unhealthy or unsanitary pushcart, police officers confiscated his pushcart. They told Mr. Dominguez he would be able to get his pushcart back the following day.

Three days later, on December 24, 2001, Mr. Dominguez admitted to an Environmental Control Board judge that the permit on his pushcart had expired. The administrative judge found Mr. Dominguez guilty of violating Section 17-322. Although it was his first violation, Mr. Dominguez received a five hundred dollar fine.

On December 28, 2001, after paying his fine, Mr. Dominguez asked the New York Police Department Property Clerk for this pushcart back. Rather than give it back, however, the City of New York started Mr. Dominguez on a bureaucratic nightmare. The City delayed Mr. Dominguez a week while it searched for his property invoice – a document the police were

legally required to give him in the first place, but didn't. They sent him to the wrong offices. They told him to wait for letters that were never sent. Finally, twenty-six days after Mr. Dominguez first requested his pushcart, the City filed this forfeiture proceeding.

Street vending is the sole means by which Mr. Dominguez supports himself and his entire family. With no pushcart, Mr. Dominguez has been unable to earn a livelihood. With no savings, he has been forced to borrow money to pay his family's basic expenses. His ability to borrow additional funds is in jeopardy. He does not have the financial ability to purchase another pushcart.

The Department of Health has renewed Mr. Dominguez's pushcart permit, allowing him to vend legally beginning April 1, 2002. Mr. Dominguez seeks his pushcart back so that he may return to work.

Additional facts may be set forth in the argument portion of this memorandum.

SUMMARY OF ARGUMENT

As a clear matter of law, this forfeiture proceeding must be dismissed, and Mr. Dominguez's pushcart must be returned to him, because the City did not initiate the proceeding within twenty-five days of Mr. Dominguez's demand, as required by the Rules of the City of New York and Judge Lasker's Order in McClendon v. Rosetti governing the disposition of property seized and vouchered by the New York City Police Department Property Clerk.

A preliminary injunction should be ordered because Mr. Dominguez is likely to succeed on the merits of this case, because the continued loss of his livelihood will cause irreparable harm to Mr. Dominguez and his family, and because the balance of equities is in his favor.

Even if the City had brought this proceeding within the required time, this case must be dismissed, and Mr. Dominguez's pushcart must be returned to him, because Mr. Dominguez did not receive proper notice of the procedures for recovering his property, as required by the Due Process clause and set forth in Judge Lasker's order. Even if Mr. Dominguez had received proper notice of the recovery procedures, the forfeiture of his pushcart, the sole means by which he supports himself and his family, would violate the Eighth Amendment prohibition on Excessive Fines because it would be grossly disproportional to the gravity of his offense -- a mere technical violation of the City's Administrative Code.

ARGUMENT

I. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION ORDERING THE IMMEDIATE RETURN OF MR. DOMINGUEZ'S PUSHCART

This court should issue preliminary injunction requiring the New York City Police Department Property Clerk to immediately return to Mr. Dominguez his pushcart, because Mr. Dominguez has fulfilled the requirements for the granting of a preliminary injunction.

On a motion for a preliminary injunction, the movant must prove three things: (1) that he is likely to succeed on the merits, (2) that he will suffer irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in his favor. See N.Y. C.P.L.R. Art. 63; Albini v. Solork Associates, 37 A.D. 2d 835 (N.Y. App. Div. 2d Dep't 1971). An injunction is appropriate if the activity complained of will cause irreparable injury before a trial can be held to resolve the underlying controversy. See Societe Anonyme Belge D'Exploitation de La Navigation Aerienne, 112 A.D.2d 837, 839 (N.Y. App. Div. 1st Dep't 1985).

First, a preliminary injunction should be issued because Mr. Dominguez is likely to prevail on the merits. To establish a likelihood of success on the merits, the movant need only make a *prima facie* showing of a right to relief; actual proof should be left to further court proceedings. See Gambar Enters. V. Kelly Services, Inc., 69 A.D.2d 297, 306 (N.Y. App. Div. 4th Dep't 1979). For all the reasons stated in this memorandum, Mr. Dominguez makes a *prima facie* showing that he is likely to succeed on the merits.

Second, Mr. Dominguez will suffer irreparable harm if the preliminary injunction is not granted. Any loss that threatens the continuing viability of a party's business is considered irreparable. See Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2nd Cir. 1995). A loss that threatens an individual's continued subsistence is clearly irreparable because it cannot be adequately compensated by a monetary award sometime in the future. See Farmer v. D'Agostino Supermarkets, Inc., 144 Misc. 2d 631, 638 (N.Y. Sup. Ct. 1989) (holding that inability of homeless plaintiffs to redeem aluminum cans at defendants' stores constituted irreparable harm because of their precarious economic position); Padberg v. McGrath-McKechnie, 108 F.Supp. 2d 177 (E.D.N.Y. 2000) (holding that deprivation of taxi driver's license constituted irreparable harm because it deprived him of his livelihood). Because the continued deprivation of Mr. Dominguez's ability to earn a living has placed him and his family in a desperate economic situation, he will suffer irreparable harm if his pushcart is not immediately returned.

Finally, a preliminary injunction should be issued because the balance of equities favors Mr. Dominguez. When balancing the equities, the court should consider whether the injury to be sustained is more burdensome to the movant than the harm caused to the non-movant through imposition of the injunction. See Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 70 A.D.2d 1021, 1022 (N.Y. App. Div. 3d Dep't 1979). In this case, the injury to Mr. Dominguez – the continued loss of his means of earning a livelihood for himself and his family -- is more burdensome to him than any harm the Property Clerk might suffer from returning Mr. Dominguez's pushcart. The balance of equities is therefore in Mr. Dominguez's favor.

While CPLR 6312 requires an undertaking to be filed by the party seeking the injunction in an amount approximating damages the opposing party may sustain, an undertaking is inappropriate in this case because the Property Clerk will suffer no harm in returning Mr. Dominguez his pushcart. See Farmer, 144 Misc.2d at 640.

II. THE PETITION MUST BE DISMISSED BECAUSE THE PROCEEDING WAS NOT BROUGHT WITHIN THE REQUIRED TIME

This case must be dismissed, and Mr. Dominguez's pushcart must be immediately returned to him, because the Property Clerk did not file it within the required time.

Forfeiture proceedings brought by the New York Police Department Property Clerk are governed by the requirements set forth in the unpublished order in McClendon v. Rosetti, in which Judge Lasker declared the City's forfeiture practices unconstitutional and set forth a basic procedure consistent with Due Process. See McClendon v. Rosetti, 460 F.2d 111, 115 (2nd Cir. 1972) (remanding to trial court to determine the rights of the class and fashion appropriate injunctive relief); Debellis v. Property Clerk of New York, 79 N.Y.2d 49, 58-9 (1992). A copy of Judge Lasker's revised order, issued May 12, 1993, has been attached as Exhibit A.

Under Judge Lasker's order, the New York Police Department Property Clerk may refuse to return property in its possession if it "was the proceeds or instrumentality of a crime or otherwise may be subject to forfeiture under any applicable provision of law." Exhibit A, Paragraph 7. However, the Property Clerk may not indefinitely deprive an owner of possession of seized property. See McClendon v. Rosetti, 369 F.Supp. 1391, 1393 (S.D.N.Y. 1974). Once the underlying proceedings against the defendant have been terminated, Due Process requires that his property be returned upon demand unless the government can establish a new basis for its detention. See Debellis, 79 N.Y.2d at 58-9. The burden is on the Property Clerk, and not the claimant, to initiate proceedings over property that is subject to forfeiture. See McClendon, 369

F.Supp. at 1393. Once the claimant has demanded return of his property, the Property Clerk must initiate forfeiture proceedings within twenty-five days. See Exhibit A, Paragraph 7; Grinberg v. Safir, 181 Misc. 2d 444, 455-6 (N.Y. Sup. Ct. 1999), aff'd 266 A.D.2d 43 (1st Dep't 1999) (noting that forfeiture action was properly brought within 25 days of defendant's initial demand). If the forfeiture is not instituted within the required time, the claimant is entitled to recover possession of the property. See Property Clerk v. Madden, 138 Misc. 2d 1023, 1025-6 (N.Y. Sup. Ct. 1988) (petition for forfeiture not commenced within required period, claimant therefore entitled to possession of his vehicle).

The Rules of the City of New York relating to the return of property from the Property Clerk Division have been updated to reflect the requirements of Judge Lasker's order. The Rules state that "[i]f a timely demand is made for the return of property before the forfeiture proceeding is instituted, such proceeding shall be brought no later than ... 25 days after the date of demand." 38 RCNY 12-36 (2001). "If such proceeding is not commenced within this time period, the property clerk shall give written notice to the claimant ... that the property will be returned forthwith." *Id.*

In this case, the petition must be dismissed and Mr. Dominguez's pushcart must be returned to him, because the Property Clerk did not commence the forfeiture proceeding within twenty-five days of Mr. Dominguez' initial demand. Mr. Dominguez first demanded that the New York City Police Department Property Clerk give him back his pushcart on December 28, 2001. The government filed this forfeiture procedure on January 23, 2002, 26 days after Mr. Dominguez's initial demand. Therefore, this forfeiture proceeding was not brought within the required time, and must be dismissed.

III. THE PETITION MUST BE DISMISSED BECAUSE FORFEITURE OF MR. DOMINGUEZ'S PUSHCART WOULD VIOLATE DUE PROCESS

This case must be dismissed, and Mr. Dominguez's pushcart must be immediately returned to him, because he did not receive the constitutionally required voucher containing notice of the procedures for recovering property from the Property Clerk. The failure of the Police Department to give Mr. Dominguez notice of these procedures violated his Due Process rights.

The United States Constitution guarantees that no person will be deprived of property without due process of law. U.S. Const. Amends. V, XIV. The Due Process Clause entitles

individuals whose property interests are at stake to notice and an opportunity to be heard. See United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993).

A claimant whose property is taken and held by the New York Police Department Property Clerk is entitled to notice of the procedures for recovering his property. See McClendon v. Rosetti, 460 F.2d 111, 115 (2nd Cir. 1972).

Notice of the procedures for property recovery would normally be contained in the New York City Administrative Code. However, numerous courts have held that the Administrative Code “fails to reflect in any meaningful respect the actual practices of the Police Department and its property clerk or the existing procedures for reclaiming such property.” Butler v. Castro, 896 F.2d 698, 703 (2nd Cir. 1990). Because the Administrative Code is misleading, a voucher containing the procedures for recovery must be given to every claimant. See Butler, 698 F.2d at 702 (summarizing the requirements of Judge Lasker’s order in McClendon). The voucher “shall be given to the person as a receipt for items taken” and “must provide notice, in plain English and Spanish, in a form approved by the police commissioner, of the basic procedures the claimant must follow to obtain the return of his property.” See Appendix A, Paragraph 3.

Because the Administrative Code does not provide adequate notice, a claimant who does not receive the required voucher is denied due process. See Butler, 896 F.2d at 702. Seeking return of the automobile seized from him during arrest, the plaintiff in Butler claimed his Due Process rights were violated because he was never given a voucher and therefore never received adequate notice of the procedures for recovery of his property. The Court held that the City’s failure to amend its Administrative Code to reflect the actual recovery procedures amounted to a denial of Due Process for plaintiffs who did not receive a voucher. “The harm [the plaintiff] has suffered is the result of an established procedure of misinforming claimants who do not receive notice by voucher of the prevailing procedures for recovery,” the court held. Butler, 896 F.2d at 704; cf. Leyh v. Property Clerk, 774 F. Supp. 742, 746 (E.D.N.Y. 1991) (holding claimant’s due process rights were not denied because she received a proper voucher).

Requiring Mr. Dominguez to forfeit his pushcart would constitute a violation of Due Process because the Police Department did not comply with the constitutional requirements of Judge Lasker’s McClendon order. Whereas the order requires that the voucher be issued when the property is confiscated, Mr. Dominguez did not receive a copy of the voucher until nearly two weeks later, when he retrieved it from the Midtown South Precinct. Additionally, whereas Judge Lasker’s order requires each voucher to provide notice of the recovery procedures in

English and Spanish, the voucher Mr. Dominguez received failed to describe the procedures in Spanish, Mr. Dominguez's language. A voucher that does not comply with Judge Lasker's order does not comport with due process. See Alexandre v. Cortes, 140 F.3d 406, 404 (2nd Cir. 1998) (remanding for determination of whether voucher properly reflected requirements of Judge Lasker's order). Because the City has failed to amend its Administrative Code, because Mr. Dominguez did not receive a voucher until nearly two weeks after his property was taken, and because the voucher he *did* receive did not contain the requisite Spanish-language information, Mr. Dominguez did not receive notice of the recovery procedures. His Due Process rights under the Fifth and Fourteenth Amendments were therefore violated, and this forfeiture proceeding must be dismissed.

IV. THE PETITION MUST BE DISMISSED BECAUSE FORFEITURE WOULD VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

This petition must be dismissed because requiring Mr. Dominguez to forfeit his pushcart, the means by which he earns his livelihood and an asset worth six times the amount of the fine imposed on him, would be grossly disproportionate to the gravity of his offense, and would therefore violate the Excessive Fines Clause of the Eighth Amendment.

A. The Excessive Fines Clause Applies Because New York City Administrative Code Section 17-322 Is Punitive

The Eighth Amendment of the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. A forfeiture is considered a "fine" for purposes of the Eighth Amendment if it was intended, at least in part, as punishment. See Austin v. United States, 509 U.S. 602, 621-22 (1993) (finding federal forfeiture statute was intended in part as punishment, remanding for consideration of whether the forfeiture of mobile home and body shop was excessive). Thus, the Excessive Fines Clause applies if the forfeiture statute does not serve *solely* a remedial purpose, but was also intended to punish or deter. See Austin, 509 U.S. at 620 (examining drug forfeiture statute's legislative history, finding that Congress intended to punish and deter the "enormously profitable trade in dangerous drugs").

A forfeiture statute was intended as punishment if it applies only to those found guilty of committing an underlying crime, if it links the property directly to the crime, and if there is a lack of correlation between the property's value and the crime's social cost. See Grinberg v.

Safir, 181 Misc. 2d at 457-8 (examining New York City’s DWI forfeiture policy, finding it punitive for Eighth Amendment purposes and therefore subject to the Excessive Fines Clause).

Section 17-322 of the New York City Administrative Code was intended as punishment, and is therefore subject to the Excessive Fines Clause. First, it applies, by its language, to “any person found guilty of violating” certain provisions of Section 17-307 – including 17-307(b) for vending food from a pushcart without a permit. See United States v. Bajakajian, 524 U.S. 321, 328 (1998). Second, it links the forfeiture with the commission of a violation because a pushcart is forfeitable *only if* it is used to violate the relevant sections of the Administrative Code. See Austin v. United States, 509 U.S. at 620. Finally, Section 17-322 does not correlate the value of the property forfeited with any damages sustained by society because it makes pushcarts or and vehicles forfeitable regardless of their value or the seriousness of the violation. See Grinberg v. Safir, 181 Misc. at 458. Administrative Code Section 17-322 is therefore punitive and must be analyzed under the Excessive Fines Clause of the Eighth Amendment.

B. Requiring Mr. Dominguez to Forfeit His Pushcart Would Be Excessive

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principal of proportionality. See United States v. Bajakajian, 524 U.S. at 332. The amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish. See id. A forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of defendant’s offense. See id.

If the amount forfeited is many times the value of fine imposed, and the crime is minor, the forfeiture is probably excessive. See Bajakajian, 524 U.S. at 340; United States v. One 1988 White Jeep Cherokee, 1994 U.S. Dist. LEXIS 6813 at *12 (D.V.I. 1994) (finding forfeiture of \$4,500 vehicle was excessive for possession of a marijuana cigarette because “the value of the vehicle far exceeds the gravity of the criminal conduct”); 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 566 (D.C. 1998) (holding that forfeiture of \$15,000 truck was excessive considering that prostitution is a minor crime); Ex Parte Kelley, 766 So. 2d 837, 840 (Ala. 1999) (finding that forfeiture of \$30,000, or six times the maximum fine, was grossly disproportional to the gravity of the minor drug offense).

In Bajakajian, the defendant pled guilty to the federal crime of willfully failing to report that he was transporting more than \$10,000 in currency out of the country. The government sought forfeiture of the entire amount he was carrying -- \$357,000. In its first application of the

Excessive Fines Clause, the Supreme Court held that the forfeiture of \$357,000 was unconstitutional because it was grossly disproportionate to the gravity of the offense. Given that the harm caused was minimal, and that the forfeiture would be many times the \$5,000 fine imposed, the forfeiture would amount to an Excessive Fine and violate the Eighth Amendment, the Court held. See 524 U.S. at 339-340.

In this case, the forfeiture of Mr. Dominguez's pushcart would be excessive because it would be grossly disproportional to the gravity of the offense. Mr. Dominguez was found guilty of technical violation of vending food from a pushcart with an expired permit, a misdemeanor punishable by a maximum of \$1,000 and three months imprisonment. N.Y.C. Admin. Code § 17-325. Mr. Dominguez was not, nor has he ever been, cited for vending from an unhealthy or unsanitary cart. The Environmental Control Board examiner levied a \$500 fine against Mr. Dominguez, which he paid. The City has implicitly agreed that Mr. Dominguez's offense was minor by renewing his permit to vend food from a pushcart. Indeed, Mr. Dominguez's offense is *less grave* than even those violations, such as prostitution and drug possession, found minor in other cases.

In contrast, Mr. Dominguez's pushcart and its contents are worth approximately \$3,000. Requiring Mr. Dominguez to forfeit an asset worth six times the amount of the fine imposed, and three times the maximum fine, would be punishment grossly disproportional to the gravity of the offense. It would therefore deprive Mr. Dominguez of his Eighth Amendment right to be free from excessive fines.

Requiring Mr. Dominguez to forfeit his pushcart would be particularly excessive because it is the means by which he earns his livelihood and supports his family. See People v. Waheed, 630 N.Y.S. 2d 644, 646 (N.Y. Sup. Ct. 1995) (ordering return of property pending hearing on excessiveness issue raised by attempted forfeiture of car allegedly used to solicit prostitution, because owner was livery driver who used it to make a living); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989) (tracing history of Excessive Fines Clause to Magna Carta, under which payments could "not be so large as to deprive" one "of his livelihood").

CONCLUSION

For the foregoing reasons, Elfego Dominguez respectfully requests that the court perform the following: (a) issue a mandatory preliminary injunction requiring the New York Police Department Property Clerk to immediately return to Mr. Dominguez his pushcart, because the city waited too long to initiate this forfeiture proceeding in violation of Judge Lasker's order and

the Rules of the City of New York; (b) declare the plaintiff's conduct complained of herein to be in violation of Mr. Dominguez's rights under the Fifth, Eighth, and Fourteenth Amendments; (c) dismiss this action with prejudice; (d) award such other relief as the court deem just and proper.

Dated: April 2, 2002

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