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Aaron Cunningham vs. Safety

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**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF SAFETY AND HOMELAND SECURITY**

IN THE MATTER OF:

TENNESSEE DEPARTMENT OF SAFETY

v.

Seven Hundred Forty-Two Dollars (\$742)

Seized from: Aaron Cunningham

Claimant: Aaron Cunningham

Seizure Date: April 17, 2013

Lienholder: None

DOCKET NO: 19.01-123080J

DOS CASE NO: N7494

NOTICE OF DEFAULT and INITIAL ORDER

This matter was set to be heard on October 7, 2013, in Nashville, Tennessee, before Kim Summers, Administrative Judge, assigned by the Secretary of State to sit for the Commissioner of the Tennessee Department of Safety. The State of Tennessee was represented by Karen Litwin, attorney for the Department of Safety.

The subject of this hearing was a Pauper's Oath determination pursuant to the proposed forfeiture of the subject property for its alleged use in violation of T.C.A. §§ 53-11-201, *et seq.* and 40-33-201, *et seq.*

Claimant did not appear at the hearing. The State has, therefore, moved for an initial **default** and dismissal of the case and elected to have the Claimant's claim stricken without proceeding with an uncontested hearing.

The motion for default is hereby **GRANTED**, as specified below, based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Claimant's property was seized pursuant to law, resulting in the issuance of a Property Forfeiture Warrant. The Claimant filed a claim seeking the return of the property and requested that a hearing be scheduled for a Pauper's Oath determination.
2. Claimant was sent notice of the hearing by certified mail on December 14, 2012. Postal records indicate that this notice was unclaimed as of the date of the hearing.
3. Claimant failed to appear on the day of the hearing. No attorney appeared on Claimant's behalf, and no request was made for a continuance.

CONCLUSIONS OF LAW and ANALYSIS

1. Department of Safety Rule 1340-2-2-.07 provides:
 - (5) Cost Bonds. A claim shall have a valid cost bond, or no contested case proceeding will commence. The following will be considered a valid cost bond:
 - (e) In Forma Pauperis. Any individual claimant may file a claim without also filing a cost bond if the individual claimant submits an affidavit reflecting the financial position of the individual claimant. The factors that will be considered by the department in determining indigence are yearly income, the value of real and personal property owned and debts.

An Affidavit of Indigency and Pauper's Oath forms provided by the Department of Safety shall be completed by any claimant who files a claim in Forma Pauperis.
 - (g) If a cost bond or a pauper's oath is rejected, then claimant shall have ten (10) days from receipt of notification by United States Mail Return Receipt Requested, or 10 days from the return to the department of the unclaimed notice:
 - (1) To request a hearing on the improper cost bond or pauper's oath. Failure to request a hearing is deemed a waiver of claimant's right to a hearing on the improper cost bond or pauper's oath and shall result in rejection of the claim; or
 - (2) To provide a proper cost bond.

2. Department of Safety Rule 1340-2-2-.11(2) provides:

In serving a “Notice of Hearing,” the Legal Division shall rely upon the addresses of record as given by a claimant or by claimant’s counsel. Proof of service per Rule 1340-2-2-.03(4) to the addresses of record shall establish a rebuttable presumption that claimant or claimant’s counsel received notice of the hearing date.

3. Pursuant to RULE 4.04(11) of the TENNESSEE RULES OF CIVIL PROCEDURE,

the return of the notice as “Unclaimed - Refused” is deemed to be actual service:

When service of summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee’s agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is “unclaimed,” or other similar notation, is sufficient evidence of the defendant’s refusal to accept delivery.

4. Department of Safety Rule 1340-2-2-.17(1) provides, in relevant part:

(d) No default shall be entered against a claimant for failure to attend except upon proof, by the filing of the return receipt card, that the Legal Division has given notice of hearing.

(e) Upon default by a party, an administrative judge may enter either an initial default order or an order for an uncontested proceeding.

5. Department of Safety Rule 1340-2-2-.17(2)(b) states, in relevant part:

Upon a default by a claimant, a claimant’s claim shall be stricken by initial default order or, if the agency requests, the agency may proceed uncontested.

6. The Claimant has chosen to proceed in this matter with a Pauper’s Oath serving as the requisite cost bond. Since, after proper notice, the Claimant failed to appear for the hearing for his Pauper’s Oath determination, he has been found in **DEFAULT**. As a result of the default, his request for *in forma pauperis* status is **DENIED**.

6. If the Claimant still wishes to pursue his claim for return of the seized vehicle, he must file the cost bond or pay the required filing fee within ten (10) days of receipt of this Order. Failure to do so will result in his claim being stricken from the record¹, and the property seized will be forfeited to the Seizing Agency.

7. Should good cause exist for the Claimant's failure to appear / participate in the hearing, he may move to have the default set aside within ten (10) days after service of the order.

The policy reasons for this decision are to uphold the laws of the State of Tennessee and to protect the property rights of individuals.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the _____ day of _____ 2013.

DK Summers

KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the _____ day of _____ 2014.

J. Richard Collier

J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

¹ Striking a claim makes the claim void *ab initio*, as though it had never been filed. See, *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 404 (6th Cir. 1987). Failure to file a claim results in the forfeiture of the property for disposition as provided by law. See, Tennessee Code Annotated § 40-33-206(c).