

No Hearing? No Money: Second Circuit Holds the Government May Not Keep Illegally Seized Rent

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The Second Circuit has recently [held](#) that the Government must account for rental income it denied a property owner during a period of illegal seizure even though the Government was able to establish probable cause at a post-seizure hearing. The appeal stemmed from a decades-long sanctions and civil forfeiture action in which the U.S. Department of Justice has sought to forfeit, among others, a 36-story skyscraper located at 650 Fifth Avenue in Midtown Manhattan co-owned by the Alavi Foundation, an entity accused of laundering money for Iran.

The Government brought the civil action seeking to forfeit Alavi's assets—including the building, valued at nearly \$1 billion—to distribute proceeds to victims of bombings and other attacks linked to Iran. The Government alleged that the property was traceable to violations of the International Emergency Economic Powers Act, money laundering statutes, and Iranian sanctions promulgated by the U.S. Department of Treasury's Office of Foreign Assets Control.

The case has been vigorously litigated for more than 13 years, involving extensive motion practice and years of discovery among hundreds of litigants, and producing several appeals, including an appeal from a judgment for the Government following a month-long jury trial that the Second Circuit vacated in 2019.

In the latest appeal, Alavi challenged the district court's finding of probable cause for the forfeiture, and argued that, even if probable cause existed, Alavi was entitled to the rental income the Government seized before the district court's determination of probable cause. The Second Circuit affirmed the probable-cause finding but agreed with Alavi on the second point.

18 U.S.C. § 983 sets forth the “[g]eneral rules for civil forfeiture proceedings.” It permits courts to issue a protective order to “seize, secure, maintain, or preserve the availability of property subject to civil forfeiture,” and such orders may be entered prior to judgment. *Id.* § 983(j)(1). 18 U.S.C. § 985, however, states that “real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture.” *Id.* § 985(b)(1)(A), (f)(1). Section 985 contains two exceptions to this prohibition on pre-judgment seizures of real property: (1) where, on the Government’s application, the court conducts a pre-seizure probable cause “hearing in which the property owner has a meaningful opportunity to be heard” or (2) where the court determines “that there is probable cause for the forfeiture and that there are exigent circumstances that permit the Government to seize the property without prior notice and an opportunity for the property owner to be heard.” *Id.* § 985(d)(1)(B)(i)-(ii).

The Government argued that the specific provisions in § 985 that require a pre-seizure hearing or showing of exigent circumstances apply only to seizures of real property and not, as here, to a seizure of rental income, and thus the protective order at issue was governed by § 983, not § 985. The Court disagreed. It held that a seizure of rental income is subject to the statutory due process restrictions in § 985 as well as the Due Process Clause of the Fifth Amendment. Because the Government’s seizure of the rental income without a pre-deprivation notice and hearing violated constitutionally protected due process rights, the Court found no need to reach the statutory due process issue, describing it as “academic.” The Court thus concluded that the building had been unlawfully seized until the district court’s hearing on probable cause in October 2020.

The Court then turned to the remedy for the period of illegal seizure. The Government argued that as long as a court eventually determines that probable cause for forfeiture exists, previously unlawfully seized rental income should not be released. The Court disagreed, joining a majority of other circuits holding that the remedy for an illegal seizure where the Government fails to provide pre-deprivation notice and hearing but the property is later found to be subject to forfeiture after due process has been afforded is return of rents or lost profits during the period of illegal seizure. Because the district court did not hold a hearing on probable cause until October 13, 2020, all rental income seized by the Government before that date must be released to Alavi.

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