

**Morgenthow & Latham v Joint Stock Bank
Inkombank**

2007 NY Slip Op 31252(U)

January 25, 2007

Supreme Court, New York County

Docket Number: 0604598/4598

Judge: Herman Cahn

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

HERMAN CAYN

PART 49

PRESENT.
Index Number : 604598/2000

MORGENTHAW & LATHAM

vs
BANK OF NEW YORK

Sequence Number : 017

ORDER OF PROTECTION

C

INDEX NO. _____

MOTION DATE 8/30/06

MOTION SEQ. NO. 017

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 1/25/07

Herman Cayn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
MORGENTHOW & LATHAM, NEW YORK :
INTERNATIONAL INSURANCE GROUP, AND :
ORIENTAL FUNDS, :

Plaintiffs, :

- against - : Index No. 604598/2000

JOINT STOCK BANK INKOMBANK, :

Defendant. :

FILED

JAN 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Herman Cahn, J.

Non-party Alla Morginshteren moves for a protective order, CPLR 2304 and 3103, for fees, costs and sanctions, 22 NYCRR § 130, for an evidentiary hearing, and for leave to serve a subpoena on certain non-parties.

The District Attorney of the County of New York opposes the motion and cross-moves to seal all documents relating to the Morginshteren motion, CPL 190.50(7), CPLR 2215.

Background:

The facts pertaining to the underlying case are included in previous decisions, dated July 9, 2002 and December 7, 2005, as well as the First Department's decision, dated May 20, 2003 (305 AD2d 74), familiarity with which is presumed.

In brief, the underlying amended complaint contains allegations that defendant Joint Stock Bank Inkombank, a now defunct Russian Bank, had links to Russian organized crime. Plaintiffs, three private investment trusts, seek to recover \$40,000,000 that they had invested in Inkombank. A default judgment against Inkombank was rendered on May 4, 2001. Neither

Inkombank nor co-defendants the Bank of New York Company, Inc. and the Bank of New York (together "BoNY") had opposed plaintiffs' motion for entry of a default judgment.

Co-defendants BoNY had moved to dismiss the claims against them. Those claims were dismissed by order of the Appellate Division. *Morgenthau & Latham, et al. v Bank of New York Company, Inc., et al.*, 305 AD2d 74 (1st Dep't 2003).

Thereafter, BoNY moved to vacate the default judgment against Inkombank. In the July 9, 2002 Decision and Order, the Court denied BoNY's said motion.

Plaintiff commenced a special proceeding against non-party Bank of Cyprus Public Company Ltd ("Bank of Cyprus") to collect funds on deposit with Bank of Cyprus allegedly belonging to Inkombank. Bank of Cyprus then moved to vacate the default judgment against Inkombank. In the Court's December 7, 2005 Decision and Order, the Court denied that motion. Bank of Cyprus filed a Notice of Appeal regarding this denial on January 9, 2006, but there has been no decision on the appeal, if it was ever perfected.

The Instant Motion

Movant seeks a protective order and other relief. The relief sought stems from a grand jury subpoena for movant's testimony (the "Subpoena"), issued by the District Attorney of New York County.

Movant asserts that, although not a party to the within action, she testified at a deposition in this matter. She alleges that as "a direct consequence of my testimony in this action I have become a target of harassment, intimidation and false investigations, instigated by defendant-judgment-debtor Inkombank, a now defunct Russian bank. I seek this Court's intervention in

stopping this terror campaign against me, which is based on nothing other than my truthful testimony pursuant to this Court's directives." Morginshteren Aff ¶ 2.

Movant claims that Inkombank,

being gravely concerned with this Court's denial[s] of vacature, [sic] and fearing an unfavorable decision . . . has engaged in a ploy aimed at removing, by improper means, the Judgment of this Court. To that end, Inkombank's ex-principal and their US representatives . . . have instigated an unwarranted investigation by the Manhattan District Attorney's Office concerning the undersigned [Morginshteren], in order to use this 'investigation' on appeal from the Decision of this Court. The scheme is also aimed at intimidating, impeding and harassing the undersigned [Morginshteren] and other non-parties, who testified in these and related proceedings, so as to coerce me and other non-parties to turn false evidence that the Inkombank Judgment was obtained 'By fraud and misconduct' of the plaintiffs, and to further coerce them to retract or alter their testimonies in these and related proceedings. I know this because representatives of the judgment-debtor Inkombank openly and unambiguously so state to me and . . . to at least three other non-parties.

Morginshteren Aff ¶ 5 (emphasis in the original). Movant alleges that an Inkombank emissary instructed her to change her testimony and that if she refused to do so, she would "have problems with the local authorities." *Id.* ¶ 7 (emphasis in original). Movant also alleges that two days after this "threat," investigators from the District Attorney's office visited her home and informed her that a Special Assistant District Attorney commenced an investigation into her credentials and admission to the New York Bar. *Id.* ¶ 8. Movant further alleges that Inkombank, and its representatives in the United States, prompted the Special Assistant District Attorney to issue movant a grand jury subpoena. *Id.* ¶ 6.

Movant asserts that she is not alleging "intentional wrongdoing on the part of the Manhattan DA's Office." *Id.* ¶ 14 (emphasis in original). Rather, she asserts that the evidence is

that Special Assistant District Attorney's actions are in the interest of, and at the behest of, Inkombank, a "widely reported and confirmed to be criminal enterprise and a part of Russian Organized Crime . . . network." *Id.* Movant argues that the pertinent issue is not her fear of testifying, but whether this "investigation or the Subpoena are being used as tool of intimidation and oppression of a witness in these proceedings and in aid of a party in the civil litigation before this Court - - under the color of an 'unrelated investigation' into [her] academic credentials." *Id.*

Movant seeks "this Court's review and determination as to the validity of the Subpoena." *Id.* ¶ 6. She argues that the Court is aware of the situation she describes and that the Court previously stated that "if the witness and her family and fiancée have been subjected to intrusive behavior or harassing behavior by representatives or employees of the defendants and application for sanctions is made, the Court will consider those sanctions." *Id.* ¶ 19 (quoting October 25, 2002 Tr, at 3).

The District Attorney opposes the relief sought. The District Attorney also cross-moves to seal all papers and proceedings on the present application.

Discussion:

Movant's Subpoena

It is worth noting that the District Attorney does not focus on the details of movant's dramatic, and indeed disturbing, allegations. The District Attorney addresses movant's claims only in broad strokes, and focuses his arguments on why denial of the motion is warranted and why the cross-motion should be granted.

The District Attorney argues that the Court has no jurisdiction to grant the relief sought. He notes that this civil action has long been concluded and that neither the movant nor the District Attorney's Office is, or ever was, a party in the above captioned action. The District Attorney emphasizes that this action is marked as "Disposed" on the Court's docket and that the Court entered final judgments regarding all parties to the action, dismissing the claims against the BoNY defendants and awarding a default judgment against Inkombank.

The District Attorney asserts that, to the extent movant seeks to quash or modify the Subpoena, she can only seek that redress before the criminal court that empaneled the grand jury that issued her subpoena. Opp Br ¶¶ 2, 9. In this, the District Attorney is correct. "The proper way to object to the validity of a [grand jury] subpoena duces tecum is by seasonable motion to set aside or vacate, brought before the issuing court." *In the Matter of an Onondaga County Grand Jury Investigation*, 114 Misc2d 923, 924 (Sup Ct, Onondaga County 1982). As such, this court does not have jurisdiction to quash the Subpoena.

Absent jurisdiction, the Court does not need to dwell on the District Attorney's other arguments. However, the Court notes that the District Attorney also argues that the Subpoena was issued in good faith. He argues that he believes "that Alla Morginshteren 'possesses relevant information or knowledge' regarding the subject matter of the Investigation [and for] that reason, and for that reason alone, I caused the Subpoena to be issued." Opp Br ¶ 10. He denies that the District Attorney's office has been manipulated as movant alleges. The District Attorney argues that the grand jury process is essential and all must participate in the process for it to be effective.

Simply stated, it is for the Grand Jury to determine the most efficacious procedure to carry out its investigation, and even

assuming the Grand Jury could have obtained the answers to its stated questions from an alternate source, it was entitled to hear such answers from appellant and probe further into the facts so revealed if it deemed more extensive inquiry necessary to carry out its function.

Matter of Keenan v Gigante, 47 NY2d 160, 169 (1979). Additionally, grand jury subpoenas are presumptively valid. A grand jury subpoena “enjoys a presumption of validity.” *Virag, et al. v Hynes*, 54 NY2d 437, 444 (1981).

Sealing this Application

The District Attorney cross-moves to seal all papers and proceedings regarding movant’s application to the Court, in the interests of grand jury secrecy. Opp Br ¶¶ 2, 16. He argues that movant’s counsel, as well as counsel for the civil-action plaintiffs, consented to his request that the papers regarding the Subpoena be sealed.

Criminal Procedure Law supports this position of sealing the papers surrounding this motion. New York law regarding grand juries and their proceedings is explicit on the subject of disclosure.

Where a subpoena is made pursuant to this section, all papers and proceedings relating to the subpoena and any motion to quash, fix conditions, modify or compel compliance shall be kept secret and not disclosed to the public by any public officer . . . This subdivision shall not apply where the person subpoenaed and the prosecutor waive the provisions of this subdivision.

NY CPL § 190.50(7) (2006). As such, the papers regarding the motion are to be sealed.

Accordingly, it is


ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is granted, and the papers related to this motion and cross-motion are to be kept sealed; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: January 25, 2007

ENTER:



J.S.C.

FILED
JAN 30 2007
NEW YORK
COUNTY CLERK'S OFFICE