

Morgenthau v Kilmer
2007 NY Slip Op 31723(U)
June 14, 2007
Supreme Court, New York County
Docket Number: 0402999/2003
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C. Justice

PART 1

Index Number : 402999/2003
MORGENTHAU, ROBERT M.
vs.
KILMER, CATESBY
SEQUENCE NUMBER : 002
COUNSEL FEES, EXPENSES

INDEX NO. 402999/03
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED

JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 14, 2007


MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
ROBERT M. MORGENTHAU,
District Attorney of New York County,

Plaintiff-Claiming Authority,

Index No.: 402999/03

Decision and Order

- against -

CATESBY "KATE" KILMER,

Defendant.

-----X
HON. MARTIN SHULMAN, J.S.C.:

Defendant Catesby "Kate" Kilmer ("defendant"), by her attorneys, Judd Burstein, P.C., moves pursuant to CPLR §1312(4) for the release of forfeited funds in the amount of \$104,582.76 to pay her reasonable and bona fide legal fees incurred in defending the captioned civil forfeiture action and New York County Indictments numbered 5942/03 and 00208/04. Plaintiff-Claiming Authority District Attorney New York County ("plaintiff" or "DA") opposes the motion.

Plaintiff and defendant entered into a written stipulation dated April 13, 2006 and so-ordered on April 27, 2006 (the "stipulation") governing the payment of fees to defense counsel. The stipulation provides for Kilmer's forfeiture of *inter alia* her share of certain real property co-owned with her husband. Upon the sale of the subject property, paragraph 6 of the stipulation provides that "after payment of any appropriate taxes, mortgages, liens and fees, Defendant will remit 80% of the total proceeds thereof to Plaintiff . . ." Paragraph 15 of the stipulation addresses the payment of counsel fees as follows:

The parties agree that Judd Burstein PC may move for the release of attorneys' fees under CPLR 1312(4). Such motion may or may not be fully litigated by Plaintiff. If it is subsequently decided that Judd Burstein PC is entitled to attorney's fees, those fees will be paid out of the forfeiture amount received by the Plaintiff . . .

By letter dated May 16, 2006, defense counsel forwarded this court the final invoice for Kilmer's representation for review and approval. The DA responded by letter dated May 17, 2006 objecting to counsel's submission by letter rather than by formal motion. Thereafter, in November 2006 the sale of defendant's real property was completed. Defendant served this motion on December 21, 2006.

In opposition to the motion, the DA claims that after closing, \$887,456.11 was paid to the crime victim and no other forfeited funds are available to pay the remaining legal fees. Plaintiff further asserts that Kilmer changed counsel several times during the criminal proceeding and this action, with present counsel having been paid over \$200,000.00 to date.

The DA's opposition also addresses subsequent correspondence from defendant's counsel dated January 25, 2007 (Miner Opp. Aff. at Exh. A), wherein counsel asserts, *inter alia*, that their office was not notified of the closing and the DA's office was on notice that a fee application would be presented. To this, plaintiff responds that: defense counsel should have brought this motion sooner; should have known of the closing from their client; and the stipulation did not require plaintiff to notify defense counsel of the release of the forfeited funds to the victim. The DA notes that the \$887,456.11 obtained from the real property sale and approximately \$40,000.00 from the sale of personal property did not come close to satisfying the \$2,250,000.00

ordered for restitution¹ and asserts that counsel can sue the defendant for outstanding legal fees.

Defense counsel replies that the DA breached the stipulation since the May 16, 2006 letter to the court provided notice that a fee application would be made and the DA had agreed that approved fees would be paid from forfeited funds. As these fees were subject to this court's review and approval, counsel contends that plaintiff denied this court's power of review by turning over funds to the victim. Counsel also reiterates that their office was unaware of the closing of the sale of defendant's real property and the distribution of the proceeds to the victim.²

CPLR §1312(4) provides as follows:

Upon motion of any party against whom a provisional remedy granted pursuant to this article is in effect, the court may issue an order modifying or vacating such provisional remedy if necessary to permit the moving party to obtain funds for the payment of reasonable living expenses, other costs or expenses related to the maintenance, operation, or preservation of property which is the subject of any such provisional remedy or reasonable and bona fide attorneys' fees and expenses for the representation of the defendant in the forfeiture proceeding or in a related criminal matter relating thereto, payment for which is not otherwise available from assets of the defendant which are not subject to such provisional remedy. Any such motion shall be supported by an affidavit establishing the unavailability of other assets of the moving party which are not the subject of such provisional remedy for payment of such expenses or fees.

¹ In the underlying criminal action, Kilmer was ordered to pay restitution of \$2,250,000.00. Exh. Q to motion.

² Defense counsel contends they could not have learned of the sale from their client since she is incarcerated, speculating that the DA improperly contacted defendant directly (or through her husband) to obtain powers of attorney to carry out the sale when they knew defense counsel was holding original powers of attorney for this purpose.

Here, the stipulation does not grant defense counsel an unconditional right to recover fees. Rather, the stipulation expressly provides that court approval and a formal motion would be required, with plaintiff explicitly reserving its right to oppose any such motion. Exh. S to motion at ¶15.


Despite the stipulation's clear language and the DA's May 17, 2006 letter, defense counsel waited until December 21, 2006 to bring this motion. As of that date, the forfeited funds had already been distributed to the crime victim. While the court is not insensitive to the significant amount of fees claimed to be outstanding and the quality and quantity of legal work performed by defense counsel, nonetheless, the court cannot conclude that plaintiff has breached the stipulation. As no forfeited funds remain from which counsel's fees can be paid, the court is constrained to deny the motion. Counsel is free to pursue a judgment against defendant for its outstanding fees.

Accordingly, it is hereby

ORDERED that defendant's motion is denied.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies have been provided to counsel.

Dated: New York, New York
June 14, 2007


Hon. Martin Shulman, J.S.C.

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NEW YORK