

Brennan v Parker

2009 NY Slip Op 30226(U)

January 29, 2009

Supreme Court, New York County

Docket Number: 403772/07

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 405772/2007

BRENNAN, BRIDGET G.

VS.

PARKER, JR. FREE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

405772/07

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-G

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

FILED
FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 29, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: Hon. MARTIN SHULMAN, Justice

PART 1

BRIDGET G. BRENNAN Special Narcotics Prosecutor
for the City of New York,

Plaintiff-Claiming Authority,

- v -

PREE PARKER, JR. and VONMARIE JAZMIN,

Defendants.

INDEX NO.: 403772/07

DECISION & ORDER

FILED
FEB 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff-Claiming Authority, Bridget Brennan, Special Narcotics Prosecutor for the City of New York ("plaintiff" or "claiming authority"), commenced this CPLR Article 13-A civil forfeiture action against defendant Vonmarie Jazmin¹ ("defendant" or "Jazmin"), seeking, *inter alia*, the forfeiture of currency in the amount of \$10,574.00. Plaintiff alleges that these funds constitute the proceeds and/or substituted proceeds and/or the instrumentalities of defendant's crime of possession of a controlled substance. Plaintiff now moves for summary judgment on its verified complaint herein. Jazmin opposes the motion *pro se*.

On July 23, 2007, defendant pled guilty to Criminal Possession of a Controlled Substance (Penal Law §220.16[1]), a class B felony, and was sentenced to probation as an adjudicated Youth Offender on September 18, 2007 (Exhs. D & E to motion). Plaintiff urges that summary judgment should be granted in its favor against Jazmin

¹ By short form order dated February 27, 2008, this court granted judgment in plaintiff's favor on default as against co-defendant Pree Parker, Jr.

based upon her guilty plea and the rebuttable presumption contained in CPLR

§1311(3)(d), which provides in relevant part:

In a forfeiture action commenced by a claiming authority against a defendant, the following rebuttable presumption shall apply: all currency or negotiable instruments payable to the bearer shall be presumed to be the proceeds of a pre-conviction forfeiture crime when such currency or negotiable instruments are . . . (ii) found in close proximity to any quantity of a controlled substance or marihuana unlawfully possessed by such defendant in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, distribute, package or otherwise prepare for sale such controlled substance or marihuana.

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

The claiming authority contends that Jazmin's answer² contains no defenses or facts based upon personal knowledge. Plaintiff's motion also cites statements contained in defendant's affidavit submitted in opposition to plaintiff's prior motion for a default judgment and her notarized letter to plaintiff dated March 15, 2008 (Exh. C to motion).

As she did in opposition to plaintiff's default judgment motion, Jazmin continues to deny that the funds to be forfeited are the proceeds of a crime, alleging instead that the currency in question is derived from a prior civil lawsuit brought on her behalf when she was a minor child. Defendant again attaches the same bank records she used to substantiate the foregoing claim in opposition to the default motion.

Plaintiff's motion emphasizes the proximity of the seized funds to drugs and weapons found at the time of defendants' arrest. The court also duly notes the New York City Police Department Property Clerk's Invoice listing the denominations of the subject currency as being primarily ones (354), fives (252), tens (136) and twenties (300), which is consistent with a drug trafficking enterprise. Nonetheless, while Jazmin's allegations and bank records do not affirmatively establish her claims, they do create an issue of fact which cannot be resolved on a summary judgment motion. See, e.g., *People v. Carver*, N.Y.L.J. 8/31/93, p. 25, col. 1 (Sup. Ct., Kings Cty.).

For the foregoing reasons, it is

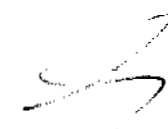
² It is unclear from this record what document plaintiff is citing as being defendant's answer to the complaint. In the motion's supporting affirmation, plaintiff states that the answer "contains but one handwritten sentence, to wit: 'There should be no reason why I can't get my money back.'" See Philippe Aff. in Support of Motion at ¶8. However, there is no document in the motion papers or in the court file which contains the foregoing statement.

* 5]
ORDERED that plaintiff's motion for summary judgment is denied.

The parties are directed to appear for a preliminary conference on February 24, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

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

Dated: January 29, 2009



Hon. Martin Shulman, J.S.C.

FILED
FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK