

**Morgenthau v Joseph Stevens & Co., Inc.**

2009 NY Slip Op 31772(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 401244/09

Judge: Martin Shulman

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

PRESENT: SHULMAN  
Justice

PART 1

ROBERT M. HONGELTHAU, DISTRICT ATTORNEY OF N.Y. COUNTY

INDEX NO. 401244/09

Joseph Stevens  
MASSIMIO MARTINUCCI, ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

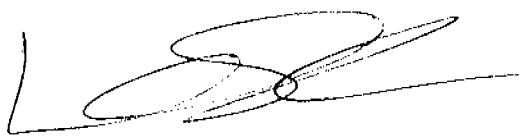
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
<del>Notice of Motion</del> / Order to Show Cause – Affidavits – Exhibits <u>A-C</u>	<u>1</u>
Answering Affidavits – Exhibits <u>A-D</u>	<u>2</u>
Replying Affidavits – <u>Exh. A</u>	<u>3</u>

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**  
AUG 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK



Dated: August 4, 2009

**MARTIN SHULMAN** 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: IAS PART 1

-----X  
ROBERT M. MORGENTHAU, DISTRICT  
ATTORNEY OF NEW YORK COUNTY,

Plaintiff-Claiming Authority,

Index No.: 401244/09

Decision and Order

- against -

JOSEPH STEVENS & COMPANY, INC., et al

Defendants.

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

**FILED**  
AUG 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff-Claiming Authority District Attorney New York County ("plaintiff" or "DA") commenced this CPLR Article 13-A civil forfeiture action against defendants seeking, *inter alia*, the forfeiture of \$151,441,432.44 in defendants' assets or, in the alternative, the entry of a money judgment in that amount plus costs and disbursements of this action. Plaintiff alleges that these assets constitute the proceeds and/or substituted proceeds of defendants' alleged felony criminal activity of *inter alia* enterprise corruption, securities fraud and grand larceny. On May 18, 2009, this Court issued a temporary restraining order (the "TRO") barring defendants from transferring or otherwise disposing of any assets valued up to that amount.

Defendant Massimo Martinucci ("Martinucci" or "defendant")<sup>1</sup> moves by order to show cause ("OSC") to modify the TRO to permit him to obtain funds for reasonable living expenses and bona fide attorney's fees and expenses relating to his

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<sup>1</sup> Martinucci worked as a trader at defendant Joseph Stevens & Co., Inc. for twelve years. Murray Aff. in Support of OSC at ¶ 4.

representation in this action and the underlying criminal action. See CPLR §1312(4).<sup>2</sup> Specifically, defendant seeks \$7,100 from two restrained bank accounts and approximately \$24,000 from an IRA account. The OSC further requests that it be sealed because it contains confidential financial information.

The DA opposes the OSC on the grounds that Martinucci: 1) has not met his burden of demonstrating that he has no unrestrained funds; 2) has not demonstrated that the living expenses for which he seeks funds are reasonable and necessary in that he has not provided backup documentation or demonstrated that all of the expenses are necessary; 3) has not demonstrated that the requested funds are for bona fide or reasonable attorney's fees since he has not submitted a copy of defense counsel's retainer agreement;<sup>3</sup> and 4) fails to establish that the funds sought to be released came from a legitimate source of income.

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<sup>2</sup>.CPLR § 1312(4) provides that:

[u]pon 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.

<sup>3</sup> Defendant's counsel has submitted a copy of the retainer agreement to the court for *in camera* review.

### Reasonable Living Expenses

In support of the OSC, defendant attaches a list of his monthly expenses totaling \$6,600, consisting of the following: mortgage \$2,800; car lease and gas \$1,150; utilities \$450; health insurance \$600; life insurance \$100; food \$1,000; clothing \$200; and miscellaneous (school, sports, etc.) \$300 (Exh. A to OSC).<sup>4</sup> Apparently, these expenses were previously provided to the DA, who objected (and continues to object) to the lack of documentation substantiating the above expenditures. Plaintiff also objected to defendant's failure to fully complete a financial disclosure affidavit (Exh. B to OSC).<sup>5</sup> For this and other reasons, counsel for the parties were unable to stipulate to the release of funds for living expenses and this OSC resulted.

In reply, Martinucci's counsel attempts to answer certain of the DA's concerns and objections and attaches limited backup documentation.<sup>6</sup> Defense counsel emphasizes that Martinucci, whose spouse is a homemaker, is unemployed and has

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<sup>4</sup> In addition to requiring backup documentation for defendant's expenses, the DA contends that life insurance is not a necessary living expense and the miscellaneous expenses are vague.

<sup>5</sup> Plaintiff requests a supplemental affidavit from defendant as to items M through Q of the financial disclosure affidavit and further contends Martinucci has failed to disclose his unemployment compensation income and provide backup documentation therefor. Plaintiff further seeks additional information regarding custodial bank accounts for defendant's children. Finally, the DA notes discrepancies in certain of defendant's responses to questions regarding whether he has other retirement accounts in addition to his IRA, the value of his life insurance policy(ies) and the amount of equity he has in his home.

<sup>6</sup> Exhibit A to defendant's counsel's reply affirmation consists of a June 2009 mortgage statement, automobile lease account statements dated April 2, 2008 and April 14, 2008 for two separate vehicles, auto insurance statements with payment due dates of March 29, 2008 and August 7, 2009, utilities bills dated March 30, 2009 and June 24, 2009, an invoice for alarm security services dated April 27, 2007 and health insurance statement dated June 26, 2009.

three children and limited assets. In fact, it appears that the proposed liquidation of his two bank accounts and IRA account will leave him with very little assets other than his home.

In *Morgenthau v A.S. Goldmen & Co., Inc*, N.Y.L.J., October 4, 1999, at 28, col. 4, *affd* 283 A.D.2d 212 (1<sup>st</sup> Dept., 2001), Justice Tompkins described the comprehensive form affidavit required by defendants seeking a negotiated release of restrained funds from the DA. In requiring that the same information be provided to the court to support the defendants' applications for the release of funds for legal fees and reasonable living expenses, Justice Tompkins noted that "[t]he thoroughness of the information is appropriate to insure that only reasonable living expenses are released." *Id.*

In the instant matter, the court is frustrated by defendant's lack of thoroughness in establishing his expenses and his refusal to fully and properly respond to plaintiff's reasonable requests for further information and/or clarification. It is undisputed that certain items in the financial disclosure affidavit were left blank. In response to the DA's June 8, 2009 letter requesting additional information (Exh. A to Guilmain Aff. in Opp. to OSC), Martinucci forwarded an undated and unacknowledged affidavit. *Id.* at Exh. B. While defense counsel attempts to explain and clarify defendant's responses in her affirmations and letters, nonetheless, such averments from counsel lack probative value.<sup>7</sup>

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<sup>7</sup> The court must decline defense counsel's request to conduct a hearing at which plaintiff can question Martinucci with respect to the deficiencies in his financial disclosure. Such an expenditure of judicial resources is unnecessary when a simple, properly executed affidavit from defendant can be submitted.

More troubling is the fact that defendant's submissions lack specificity. For example, the court cannot discern from this record what, if anything, defendant currently owes for his mortgage and the other listed expenses (e.g., there is no delineation as to whether the mortgage and other bills have been paid for June and July 2009 or whether there is a balance due). Further, no indication is given as to how the claimed monthly expenses will be paid in the future if the requested accounts are liquidated. For the above reasons, in the absence of thorough affidavits supported by comprehensive information from which this court can conclude that defendant's claimed expenses are reasonable and necessary and that no other unrestrained assets are available to pay such expenses, the motion to release funds to pay living expenses is denied without prejudice.

#### Attorney's Fees

Martinucci's counsel seeks the release of \$25,000 for reasonable and bona fide attorney's fees arising from this civil forfeiture action and the related criminal action. In support of the OSC, defendant's counsel submits her retainer agreement to the court *in camera*.<sup>8</sup> Recognizing that plaintiff had no basis to determine whether the proposed fees were reasonable, on the return date of the OSC, the court directed Martinucci's counsel to provide redacted time sheets to plaintiff and the court, which were ultimately

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<sup>8</sup> The OSC does not argue that the retainer is in any way privileged or otherwise indicate how defendant might be prejudiced by its disclosure. Indeed, the salient terms of the retainer are summarized in Martinucci's financial disclosure affidavit at page 22 and counsel's billable rate per hour is readily discerned from her time sheets. Upon reviewing the retainer, the court finds no reason why the retainer should not be provided to plaintiff in connection with any future applications.

supplied. These records indicate that defendant's legal fees as of July 5, 2009 total \$22,440.00.

The court has no reason, at this juncture, to dispute the reasonableness of the requested attorneys' fees. However, the absence of sufficient supporting documentation and full financial disclosure as discussed above mandates the denial of this application, without prejudice to a further application.

#### Sealing of File

Defendant's OSC summarily requests that the OSC file be sealed because it contains "confidential financial information." Although the DA does not object to the sealing request, 22 NYCRR § 216.1(a) states:

*Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. . . (emphasis added).*

Preliminarily, courts are generally reluctant to allow court records to be sealed even when both parties request such relief (see *Gryphon Domestic VI, LLC v. APP Int'l. Finance Co., B.V.*, 28 A.D.3d 322, 814 N.Y.S.2d 110 [1<sup>st</sup> Dept., 2006]). "Since the right is of constitutional dimension, any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access." 28 A.D.3d at 324, 814 N.Y.S.2d at 113. And the "court is always required to make an independent determination of good cause before it may grant a request for sealing. . . " *Id.*

Good cause can be shown when a sealing order has a sound basis. *Gryphon, supra*, 28 A.D.3d at 325, 814 N.Y.S.2d at 114. Here, the motion file contains documents bearing sensitive information such as defendant's social security number, account numbers and date of birth. No purpose is served by making such information publicly available. Accordingly, this portion of the motion is granted. However, in the future, such information should be redacted from documents submitted to the court.

This decision and order is being issued without prejudice to defendants' right to make future applications pursuant to CPLR § 1312(4) if restrained assets are needed to pay for ongoing reasonable living expenses and attorneys' fees. Of course, such future applications must be supported by detailed affidavits and financial disclosure information. Accordingly, it is

ORDERED that the portion of defendant's OSC for the release of funds to pay reasonable living expenses and attorney's fees is denied without prejudice; and it is further

ORDERED that the portion of the OSC seeking to seal this motion file is granted and upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk is directed to seal the following documents filed in this action:

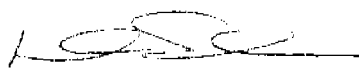
1. Order to Show Cause dated June 25, 2009, together with Affirmation of JaneAnne Murray, Esq. dated June 23, 2009 and Exhibits A through C thereto; and
2. Affirmation in Opposition of Madeleine Guilmain, Esq. dated July 7, 2009, together with Exhibits A through D thereto; and

3. Affirmation of JaneAnne Murray, Esq. dated July 10, 2009 and Exhibit A thereto; and it is further

ORDERED that, absent further order of this Court, the Clerk shall deny access to the sealed documents to anyone except for a party, counsel of record to any party in this case, and any representative of counsel of record to a party upon presentation to the Clerk of written authorization from said counsel.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies have been sent to counsel for plaintiff and defendant Martinucci.

DATED: New York, New York  
August 4, 2009

  
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Hon. Martin Shulman, J.S.C.

**FILED**  
AUG 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK