

Morgenthau v Western Express Intl., Inc.

2009 NY Slip Op 32269(U)

September 17, 2009

Supreme Court, New York County

Docket Number: 400516/06

Judge: Martin Shulman

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

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

PART 1

Index Number : 400516/2006

MORGENTHAU, ROBERT

INDEX NO. 400516/07p

vs
WESTERN EXPRESS

MOTION DATE _____

Sequence Number : 005

MOTION SEQ. NO. 005

COUNSEL FEES, EXPENSES

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>A-E</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A-F</u>	<u>2</u>
Replying Affidavits <u>A-K</u>	<u>3,4</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
SEP 22 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: September 17, 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.: 400516/06

Decision and Order

- against -

WESTERN EXPRESS INTERNATIONAL, INC.,
 VADIM VASSILENKO, et al,

Defendants.

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

In this CPLR Article 13-A civil forfeiture action, defendants Vadim Vassilenko ("Vassilenko") and Western Express International, Inc. ("defendants")¹ move pursuant to CPLR §1312(4) to release restrained funds in the amount of \$68,055.00² in payment of bona fide attorney's fees and expenses (motion sequence no. 005). Plaintiff-claiming authority ("plaintiff" or "DA") opposes the motion and moves for entry of a default judgment against defendants pursuant to CPLR §3126(3) based upon his refusal to participate in discovery (motion sequence no. 006). Motion sequences 005 and 006 are consolidated for disposition.

Background

Plaintiff commenced this action seeking forfeiture of \$4,782,910.66 in defendants' assets or, in the alternative, the entry of a money judgment in that amount

¹ With respect to the two remaining named defendants, this action was discontinued as to defendant Yelena Barysheva and was dismissed as to defendant Alexey Barishev.

² In his reply affirmation, defendants' counsel includes additional fees for legal work he performed and requests that the amount awarded be increased to \$68,820.00.

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 Operating as an Unlicensed Money Transmitter, Unlicensed Check Cashing and Falsifying Business Records.³

On or about February 14, 2006, this Court issued a temporary restraining order (the "TRO") barring defendants from transferring or otherwise disposing of any assets valued up to \$4,782,910.66. Defendants entered a plea of guilty and upon their sentencing on September 21, 2006, the stay of this action pursuant to CPLR §1311 was vacated. This Court ultimately issued an order of attachment and preliminary injunction on default on January 20, 2009, which remains in effect.

In the interim, plaintiff moved for entry of a default judgment against defendants and by decision and order dated July 10, 2008, this Court granted plaintiff a judgment as to liability, with the only remaining issue being the amount of damages plaintiff is entitled to recover. The parties were directed to proceed with discovery regarding the amount of damages and entered into a preliminary conference order ("PCO") on August 5, 2009 (Exh. D to Plaintiff's Motion). However, defendants invoked their right against self-incrimination and have declined to provide discovery or submit to a court-ordered deposition.

³ In or about October 2007 the DA commenced a second forfeiture action against defendants and others under New York County Index No. 406648/07 (the "second forfeiture action") based upon a second indictment. This Court issued a TRO in the second forfeiture action, which is presently stayed pending the determination of the criminal proceedings.

The Attorney's Fees Motion

Defendants' motion specifically seeks the release of funds in the approximate amount of \$66,000.00 held in a Canadian bank account in defendant Vassilenko's name.⁴ In support of the motion, defendants' counsel attaches invoices substantiating the sums sought. See Exh. A to motion.

The DA opposes the motion claiming defendants: 1) improperly seek payment for legal fees incurred in an unrelated criminal action, *viz.*, the crimes charged in the indictment which is the subject of the second forfeiture action; 2) fail to demonstrate they have no unrestrained funds to pay attorney's fees; 3) fail to demonstrate the requested funds are for bona fide and reasonable legal fees; and 4) fail to demonstrate their assets come from legitimate sources. Plaintiff primarily challenges the thoroughness of the financial disclosure affidavit defendants provided to the DA.

In response to the foregoing, defendants contend that: 1) this forfeiture action is related to the pending criminal case⁵; 2) there can be no unrestrained funds from which to pay legal fees since the preliminary injunction restrains all of defendants' assets; 3) the fees sought are bona fide and reasonable; and 4) CPLR §1312(4) contains no requirement that defendants demonstrate the source of frozen funds. Further, in

⁴ Defendants' counsel avers that he has a power of attorney from defendant Vassilenko with respect to this account, which was revoked after this motion was served. While a foreign bank is not bound by the preliminary injunction issued by this Court, plaintiff urges that this Court could direct defendant to instruct the bank to turn the funds over to plaintiff to satisfy any judgment which may ultimately be issued against defendants.

⁵ Specifically, defendants note that both forfeiture proceedings have the same parties, seek forfeiture of the same assets and involve a common criminal pattern by defendants arising from the same transactions and relevant time period. Further, both indictments were part of the same investigation.

response to the DA's claim that Vassilenko's financial disclosure affidavit is insufficient, defendants submit a supplemental affidavit from Vassilenko, to which plaintiff has had no opportunity to respond.

Plaintiff's Motion for Discovery Sanctions

As previously stated, counsel for plaintiff and defendants' prior counsel entered into the PCO on August 5, 2008. Thereafter, the DA promptly moved for an order requiring Vassilenko, who is incarcerated, to be produced for an examination before trial. That motion was granted without opposition on September 18, 2008 (Exh. F to Plaintiff's Motion). Thereafter, defendants' present counsel filed a notice of appearance in this action and plaintiff served a demand for a bill of particulars and notice of discovery and inspection (the "demands", at Exh. H to Plaintiff's Motion) upon him. Defendants' counsel defaulted in appearing for a March 10, 2009 compliance conference and subsequently, by letter dated March 11, 2009, advised the Court that, in light of the pending second indictment which "involve[d] the same nucleus of operative fact" as in the instant case, defendants invoked their right against self-incrimination, thus "respectfully declin[ing] to provide any discovery and declin[ing] to submit to a deposition." See Exh. M to Plaintiff's Motion. Defendants summarily oppose the DA's motion.

Analysis

CPLR §1312(4) provides in relevant part:

[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 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.

While sensitive to the plight of defendants and their counsel, this Court must nonetheless conclude that ordering the unsecured release of restrained funds is inappropriate on this record. Defendants fail to proffer thorough affidavits supported by comprehensive information from which this Court could conclude that they have no unrestrained assets that are available to pay attorneys' fees.

In *Morgenthau v A.S. Goldmen & Co., Inc*, N.Y.L.J., October 4, 1999, p. 28, col. 4, *affd* 283 A.D.2d 212 (1st 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 absence of thorough affidavits supported by comprehensive information from which this Court could conclude that defendants have no unrestrained or secreted assets that are available for attorneys' fees precludes this Court from ordering the unsecured release of restrained funds.

As this Court noted in *District Attorney, New York County v. Efgan*, 2006 WL 2066685, at *2, "[t]he DA's financial disclosure form does not require exactitude. Significantly, neither this Court nor the DA will find it prejudicial or perjurious if

defendants indicate their uncertainty of any information provided in defendants' respective affidavits or on their disclosure forms. Further, defendants are free to estimate the amount of funds held in any account they hold." Here, Vassilenko submits a single affidavit on behalf of himself and Western Express. This affidavit is inadequate for the reasons set forth in plaintiff's opposition. See Guilmain Opp. Aff. at ¶50. Nor does defendant's belated reply affidavit correct the deficiencies. Specifically, defendants fail to give any estimation of the amount of their assets and liabilities, thus leaving the Court unable to assess whether funds are available to pay reasonable attorney's fees. Defendants continue to assert that they do not have access to their financial records, which the DA seized. However, like the defendants in *Efargan, supra*, defendants offer no indication that the financial data required to fully respond to the disclosure statements cannot be obtained from any other source, such as their accountant.

Finally, Vassilenko's refusal to participate in discovery (see discussion *infra*) and his prior violation of the TRO by selling his New Jersey home without plaintiff's or the Court's permission indicate a lack of forthrightness on his part. As defendants have failed to meet their burden under CPLR §1312(4) to establish their entitlement to a modification of the preliminary injunction, the Court need not address the parties' remaining arguments.

Turning to the DA's motion for discovery sanctions, plaintiff seeks entry of a default judgment against defendants pursuant to CPLR §3126(3) as a penalty for their refusal to comply with their demands and submit to a deposition. Alternatively, the motion seeks an order pursuant to CPLR §3126(1) finding "that the issues to which the

information is relevant shall be deemed resolved . . . in accordance with the claims of the party obtaining the order”.

Here, in violation of the PCO, defendants’ counsel summarily objected to the demands some five months after they were served and refused to be deposed. As plaintiff aptly notes, defendant can invoke his Fifth Amendment rights in response to specific questions but not in a blanket attempt to avoid his obligation to participate in discovery. *See generally, Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160 (2d Dept. 1988), *aff’d* 73 N.Y.2d 875 (1988).

Defendants’ refusal to provide discovery and be deposed is clearly inappropriate. Nevertheless, in the interest of permitting this case to be decided on the merits, defendants will be granted one final opportunity to expeditiously complete discovery (*see Baker v. General Mills Fun Group, Inc.*, 101 Misc.2d 193, 196-197, 420 N.Y.S.2d 820, 822-823 [Sup. Ct., NY County, 1979]). Plaintiff has already been awarded judgment on default as to liability and it is therefore appropriate to grant the relief requested pursuant to CPLR §3126(1). Accordingly, should defendants fail to respond to plaintiff’s demands within 30 days from the date of service of a copy of this decision and order with notice of entry and/or fail to appear for a deposition within 60 days of such service, counsel for plaintiff shall submit an affirmation detailing defendants’ default and shall settle an order and judgment on notice resolving the amount of damages due from defendants in accordance with plaintiff’s claims as alleged in the complaint.

Accordingly, it is


ORDERED that defendants' motion (sequence no. 005) is denied in its entirety;
and it is further

ORDERED that plaintiff's motion (sequence no. 006) is granted unless
defendants comply with plaintiff's discovery demands and appear for a deposition in
accordance with the directives set forth above.

Counsel for the parties are directed to appear for a compliance conference on
October 27, 2009 at 9:30 a.m., at I.A.S. Part 1, 111 Centre Street, Room 1127B, New
York, New York.

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

Dated: New York, New York
September 17, 2009



Hon. Martin Shulman, J.S.C.

FILED
SEP 22 2009
COUNTY CLERK'S OFFICE
NEW YORK