

Morgenthau v Joseph Stevens & Co., Inc.

2009 NY Slip Op 33073(U)

December 11, 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

MARTIN SHULMAN

PRESENT: J.S.C.
Justice

PART 1

Index Number : 401244/2009
MORGENTHAU, ROBERT
vs.
JOSEPH STEVENS &
SEQUENCE NUMBER : 003
MODIFY

INDEX NO. 401244/09
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

In this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-G
Answering Affidavits — Exhibits A-F
Replying Affidavits _____


| PAPERS NUMBERED | |
|-----------------|-------|
| 1, 2 | _____ |
| 3 | _____ |
| 4, 5 | _____ |

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
DEC 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Dec - 11, 2009


MARTIN SHULMAN *J.S.C.*

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

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

- against -

JOSEPH STEVENS & COMPANY, INC., et al,
Defendants.

Decision and Order

FILED

DEC 18 2009

NEW YORK
COUNTY CLERK'S OFFICE

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

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 James Rathgeber ("Rathgeber" or "defendant")¹ moves to modify the TRO to permit him to obtain funds for reasonable living expenses. See CPLR §1312(4).² Specifically, defendant requests that funds be released from joint accounts

¹ Rathgeber was employed by defendant Joseph Stevens & Co., Inc. for fourteen years. Fischetti Aff. in Support of Motion at ¶ 16.

² CPLR § 1312(4) provides that:

maintained at Citibank, N.A. (the "Citibank account") and TD Bank (the "TD Bank account").³ Rathgeber also seeks an order permitting him to deposit his current wages⁴ into the TD Bank account and to use these funds to pay for reasonable living expenses.

The DA opposes the Motion on the grounds that Rathgeber: 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; and 3) fails to establish that the funds sought to be released came from a legitimate source of income.

In reply, Rathgeber's counsel summarily denies withholding financial information and documentation. He further submits that the TRO does not restrain defendant's future earnings, which he should be permitted to use to pay living expenses.

[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.

³ Both joint accounts are maintained with defendant's spouse. The Citibank account allegedly contains approximately \$8,000.00 and the TD Bank account approximately \$3,000.00. See Fischetti Aff. in Support of Motion at ¶¶ 4 and 13.

⁴ Rathgeber is presently employed on a commission basis. Fischetti Aff. in Support of Motion at ¶18; Exh. D to motion at ¶10.

Discussion

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 (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 his supporting affirmation, defendant's counsel includes a list of his monthly expenses totaling approximately \$14,000, consisting of the following: mortgage \$6,200;⁵ car leases/payments for three vehicles, totaling \$1,479.00; gas \$600; car insurance \$575.00; health insurance \$835; life insurance \$479; disability insurance \$536; home heating \$200.00; electricity \$400; minimum payment on credit card debt \$800.00; cable \$240; groceries \$800; and incidentals \$700.00.⁶ This list of expenses was previously provided to the DA, who objected (and continues to object) to the reasonableness of the expenses and lack of substantiating documentation.

A review of this record reveals that Rathgeber submitted a financial disclosure affidavit to the DA on or about June 2, 2009. See Exh. B to motion. By subsequent

⁵ The mortgage was allegedly eight (8) months in arrears as of the date of defendant's motion.

⁶ Rathgeber's Supplemental Affidavit of Financial Information (Exh. D to motion) delineates the "incidentals" as including "soccer, flag football, not on a monthly basis, just incidentals in general".

letter, plaintiff posed various questions regarding defendant's responses and requested documentation, none of which had been provided with the initial affidavit. Defendant responded by submitting a supplemental affidavit of financial information together with copies of his 2007 and 2008 tax returns. See Exhs. C & D to motion. Plaintiff again requested further information which was provided by defendant's counsel in the form of two letters together with copies of various documents, including a bank statement, credit card bills, etc. See Exhs. E, F & G to motion. During this process, the DA learned that Rathgeber opened the TD Bank account after the TRO was in effect, and allegedly deposited his state tax refund payment therein and his paychecks from his current employer.

In this case, despite defense counsel's protests to the contrary, Rathgeber has not fully and properly responded to plaintiff's reasonable requests for further information, documentation and/or clarification. As plaintiff's opposition notes, the record lacks backup documentation pertaining to defendant's monthly mortgage payment, the monthly payments for two of his three cars, car insurance, health insurance, cable and "incidentals." See Guilmain Aff. in Opp. at ¶43. Further, despite disclosing the existence of the TD Bank account, no statements for this account are provided. Where backup documentation is provided, it generally consists of statements and invoices for only one month.

It does not appear that it would be onerous for defendant to provide the requested information and documents, as well as affidavits sworn to by Rathgeber. This motion is bereft of an affidavit from Rathgeber and his counsel's letter responses to plaintiff's inquiries are insufficient. As defendant's counsel is well aware, having

referenced this court's prior decision denying co-defendant Martinucci's motion for similar relief (see Fischetti Reply Aff. at ¶4), averments from counsel lack probative value.

In addition to the lack of documentation, defendant has not responded to plaintiff's inquiries regarding: the date of his federal tax refund and where those funds are; how he disposed of his state tax refund deposited into the TD Bank account; the status of his application to modify his mortgage; and inconsistencies such as the balance in the Citibank account, his present income and the value of his home. See Guilmain Aff. in Opp. at ¶¶ 37 - 41. For all of the foregoing reasons, defendant's motion to modify the TRO to release funds for the payment of living expenses must be denied without prejudice to defendant's right to make future applications pursuant to CPLR § 1312(4) if restrained assets are needed to pay for ongoing reasonable living expenses. Of course, such future applications must be supported by detailed affidavits and financial disclosure information.⁷

Finally, it is unnecessary for the court to address the parties' dispute regarding whether Rathgeber's current income is subject to the TRO. As previously noted, no

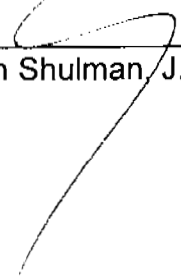
⁷ Noting that Rathgeber's monthly expenses appear to exceed his present income, the DA disputes that defendant's proposed monthly living expenses are necessary and reasonable. For example, plaintiff claims that: life insurance is not a necessary living expense; it is unnecessary for defendant to maintain three automobiles and make minimum credit card payments; and the incidental expenses are vague. Guilmain Aff. in Opp. at ¶¶ 44, 45, 47, 48. Finally, despite acknowledging that mortgage payments are generally necessary to preserve a defendant's assets, here plaintiff argues that release of the "small amount of frozen funds" to pay Rathgeber's mortgage, which is substantially in arrears, will not prevent its ultimate and likely foreclosure. *Id.* at ¶46. Given the determination that defendant's financial disclosure is insufficient, the court does not address whether the defendant's proposed expenses are reasonable and necessary.

statements for the TD Bank account have been submitted, nor are there any sworn statements from defendant regarding this account. As such, the court cannot determine the source of the funds. Accordingly, it is hereby

ORDERED that defendant Rathgeber's motion for the release of funds to pay reasonable living expenses is denied without prejudice.

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

DATED: New York, New York
December 11, 2009



Hon. Martin Shulman, J.S.C.

FILED
DEC 16 2009
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