

Morgenthau v DiNapoli
2010 NY Slip Op 30683(U)
March 12, 2010
Supreme Court, New York County
Docket Number: 402477/09
Judge: Martin Shulman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/18/2010

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Robert M. Magathan

INDEX NO. 402477/09

MOTION DATE _____

Joseph DiNapoli

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits A-C
~~Notice of Cross-Motion~~
Answering Affidavits – Exhibits _____

PAPERS NUMBERED

1
2, 3, 4, 5, 6
7, 8

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motions are
decided in accordance with the attached
decision and order.

FILED

MAR 18 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 12, 2010

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):

[* 2]
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,

-against-

JOSEPH DINAPOLI,
MATTHEW MADONNA
ANTHONY "SONNY" CROCE,
MICHAEL GUERRIERO,
GARY MEDURE,
JOSEPH PRELLI,
MICHAEL BARBIERI,
STEPHEN ROCCO,
DENNIS "CAPI" BURBRIDGE,
EDWARD "ACKIE" ACKERMAN,
HAROLD THOMAS,
JOHN CALISE,
MICHAEL SCARPELLI,
JOSEPH "SONNY" BRANCACCIO,
CARMINE "SNAPPY" FRANCOMANO, SR.,

FRANK FRANCOMANO,
CARMINE FRANCOMANO, JR.
ANGEL LUIS AVILES,
EXEL PLASS,
EARL PRENTICE,
THOMAS MASUCCI,

RICHARD KELLY,
COSTEL MIRAUTI,
NICOLETT MOSKOVER,
STEVEN GOWOREK,
WAYNE SCHUMER,
LEO DOYLE,
MICHAEL LEON
ABANNO BUILDING MAINTENANCE, INC.,
EURO EXCAVATION, INC.,
SFG ASSOCIATES, INC., and
UCON CORPORATION,

Criminal Defendants.

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

Index No.: 402477/09
DECISION and ORDER

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

By order to show cause ("OSC"), the New York County District Attorney and Plaintiff-Claiming Authority ("Plaintiff", "DA" or "Claiming Authority") in this action, moves for a Preliminary Injunction and Order of Attachment on Notice and a Temporary Restraining Order ("TRO") pursuant to CPLR §§1312, 1316, 1333 and 1335 upon property held by Joseph DiNapoli ("DiNapoli"), Matthew Madonna ("Madonna"), Anthony "Sonny" Croce ("Croce"), Michael Guerriero, Gary Medure ("Medure"), Joseph Prelli ("J. Prelli"), Michael Prelli ("M. Prelli"), Michael Barbieri ("Barbieri"), Stephen Rocco, Denis "Capi" Burbridge, Edward "Ackie" Ackerman, Harold Thomas, John Calise, Michael Scarpelli, Joseph "Sonny" Brancaccio, Carmine "Snappy" Francomano, Sr., Frank Francomano ("Frank"), Carmine Francomano, Jr. ("Carmine Jr."), Angel Luis Aviles ("Aviles"), Exel Plass, Earl Prentice, Tomas Masucci ("Masucci"), Richard Kelly, Costel Mirauti ("Mirauti"), Nicolett Moskover, Steven Goworek, Wayne Schumer, Leo Doyle, Michael Leon, Abanno Building Maintenance, INC. ("ABM"), Euro Excavation, Inc., SFG Associates, Inc. ("SFG") and Ucon Corporation ("Defendants", "co-defendant" or "co-defendants", where applicable).

Plaintiff alleges Defendants jointly and severally committed certain acts of Enterprise Corruption (Penal Law § 460.20[1][a]), six counts of Promoting Gambling in the First Degree (Penal Law § 225.10[1]), two counts of Possession of Gambling Records in the First Degree (Penal Law § 225.20[1]), Bribery in the Second Degree (Penal Law § 200.03), seven counts of Bribery in the Third Degree (Penal Law § 200.00), Bribe Receiving in the Second Degree (Penal Law § 200.11), seven counts of Bribe Receiving in the Third Degree (Penal Law § 200.10), four counts of Rewarding Official Misconduct in the Second Degree (Penal Law § 200.20), seven counts of

Receiving Reward for Official Misconduct in the Second Degree (Penal Law § 200.25), Offering a False Instrument for Filing in the First Degree (Penal Law § 175.35), Grand Larceny in the Second Degree (Penal Law § 155.40[2][c]), and related crimes. Because these crimes constitute felony crimes in New York, Plaintiff seeks civil forfeiture from Defendants of certain property, viz., \$411,773,536.80 (Four Hundred and Eleven Million, Seven Hundred and Seventy-Three Thousand, Five Hundred and Thirty-Six Dollars and Eighty Cents)("forfeitable sum"), which constitutes the "proceeds" and "substituted proceeds" and "instrumentalities" of the felony crimes for which Defendants have been indicted. Alternatively, Plaintiff seeks a money judgment against Defendants for the forfeitable sum.

After reviewing the initial ex-parte application for provisional relief, this court issued the TRO pending the hearing of Plaintiff's application for a preliminary injunction and order of attachment. The TRO *inter alia* bars Defendants from disposing of any and all assets they own valued up to the forfeitable sum.

Defendants DiNapoli and Madonna oppose the OSC and cross-move for an order vacating the TRO as it affects their respective properties held in their names, vacating the TRO as it affects their respective properties held in the name of other non-parties (e.g., family members) and directing the DA to furnish DiNapoli and Madonna with a list of all restrained assets and properties and their amounts and/or values.

DiNapoli also seeks an order permitting him to sell one of his homes.¹

¹ DiNapoli's separate motion for an order permitting him to swap one of his residences with that of a non-party has not yet been submitted for determination and as such will not be addressed here.

Defendant Mirauti individually and as owner of ABM also opposes the OSC seeking a preliminary injunction and attachment order and cross-moves to vacate the TRO as it affects his property interests. The OSC and cross-motions are consolidated for disposition.

BACKGROUND

To support the provisional relief, the DA refers the court to the parallel criminal proceeding against these 33 individual and corporate Defendants, not only relying on a voluminous multi-count grand jury indictment (Exhibit C to OSC), but also the accompanying 125 page affidavit of Detective William Dwyer ("Dwyer Aff." as Exhibit B to OSC)². To appreciate the dynamics and inter-related nature of the criminal enterprise (e.g., illegal sports betting³, loansharking⁴, construction-related DOB bribery

² Detective Dwyer ("Dwyer") is a 25 year veteran of the New York City Police Department ("NYPD") and a specialist in organized criminal activity who has been tasked to the NYPD's Organized Crime Investigations Division ("OCID") for the last 14 years (Dwyer Aff. at ¶ 2). The factual background comes from either Detective Dwyer's personal knowledge and/or knowledge he gained from other information sources *inter alia* through his participation in the 2 year investigation into the Lucchese Crime Family ("LCF") and its members (e.g., physical surveillance, court authorized eavesdropping and search warrants, authorized pen registers and computer programs [to record numbers dialed from a particular telephone line and/or cell phone and monitor internet communications], documents, oral and written reports of other law enforcement personnel, confidential informants, and undercover police officers, etc.).

³ Typically, an illegal sports betting operation involves a network of relationships and the operation of a wire room. A wire room operator or bookmaker can be analogized to a restaurant chain franchise owner. The wire room is generally the information center of the illegal betting operation which gathers the particular sport contest results, records the bets and determines the wins and losses on these illegal wagers. The wire room operator has salespersons who hold sheets (betting customer lists) and are largely responsible for recruiting bettors, taking their bets on credit and making collections on losses (the amount of the losing wager plus a surcharge) as well as pay outs on winnings. These sheet holders often resort to threats or actual acts of violence to ensure wager collections. Each person in this operation takes a certain percentage of the illegal profits as a commission relative to his position in this criminal enterprise food chain. In this context, this type of illegal operation can utilize off-shore wire rooms and the internet, the latter of which serves as a virtual wire room for on-line betting (Dwyer Aff. at ¶¶ 8-9, see generally, ¶¶ 15-18). And relevant here, "[s]ports betting operations based in New York City and its environs are often operated by or under the protection and control of members and associates of organized crime families [i.e., the LCF] . . ." (bracketed matter added)(*Id.* at ¶ 19).

⁴ Loan sharking is where a criminal-creditor offers an unsecured loan at usurious rates of interest (juice loans) and usually obtains debtor-compliance with the onerous principal/interest payment schedule

schemes, etc.) Defendants jointly and severally engaged in, Dwyer places the Defendants into three discrete categories: the first 16 named co-defendants are LCF members, associates and/or friends ("Lucchese Group"); the second 6 co-defendants are either New York City Department of Buildings ("DOB") employees, former DOB employees and/or LCF associates or friends ("DOB Group"⁵); and the third remaining 11 co-defendants are in the real estate and construction industry ("RE/const. Group").

Summarizing the seemingly diverse nature of the criminal enterprise, the three discrete groups of Defendants jointly and severally engaged in a variety of crimes which generated the forfeitable sum. They include bribe taking/receiving, trafficking in narcotics and weapons, extortion, illegal gambling and filing false instruments at the DOB. Some members of the Lucchese Group were also DOB employees who took bribes relative to their employment duties while concomitantly committing these other series of crimes (Dwyer Aff. at ¶ 23). The RE/const. Group allegedly became partners in the criminal enterprise by giving bribes "to corrupt DOB employees . . . to obtain building permits, expedite inspections and avoid building violations." (*Id.*)

DiNapoli and Madonna were LCF members and street bosses who managed its daily businesses. It is alleged that they received a percentage of the criminal proceeds (i.e., the forfeitable sum) from supervising and controlling the various "revenue-generating offenses" their subordinate co-defendants committed to further the criminal enterprise that is now the subject of the DA's criminal prosecution (*Id.* at ¶¶ 29-30). As

through threats or actual acts of violence and blackmail (Dwyer Aff. at ¶ 6).

⁵ As indicated in the Dwyer Aff. at ¶ 45, fn. 15, the co-defendants named in the DOB Group had resigned from their DOB positions as a result of the underlying investigation prior to the commencement of this action and the parallel criminal prosecution against Defendants.

will be discussed, these crimes can similarly be broken down into three discrete categories.

Sports Betting Operations⁶

Dwyer specifically details the varied illegal gambling operations the Lucchese Group engaged in. The following illustrates how one of a number of illegal sports betting operations worked:

[Co-][d]efendant . . . Croce is an acting capo⁷ in the Lucchese Crime Family. . . . Croce controlled and provided protection to a gambling sheet that operated through the Costa Rica wire room and that was maintained by [co-][d]efendants [J.] Prelli, [M.] Prelli and . . . Barbieri, for which he received regular payments. . . . Croce also settled disputes that [co-][d]efendants [M.] Prelli and [J.] Prelli had with bettors regarding differences in balances and delinquency in payments. . . . Croce met regularly with [co-][d]efendants [J.] Prelli, [M.] Prelli, Medure, Madonna and DiNapoli to provide proceeds from and discuss issues pertaining to this gambling operation. Eavesdropping evidence, supported by surveillance, showed that several meetings concerning the illegal gambling business took place between [co-][d]efendant DiNapoli and/or [co-][d]efendant Madonna, [co-][d]efendants Croce, the Prellis [sic] and [co-][d]efendant Medure. These activities furthered the affairs of the criminal enterprise.

(Bracketed matter added) (Dwyer Aff. at ¶¶ 31 and 63-78).

As stated earlier, Dwyer details an alleged number of illegal gambling operations the Lucchese Group members jointly and severally organized, promoted and operated which generated millions of dollars and constituted the forfeitable sum. A number of

⁶ In this round of motion practice, it is unnecessary to identify each of Defendants and describe their alleged crimes which comprise the criminal enterprise. This court will briefly discuss one example in each category of crimes, and in doing so, does not consider any individual co-defendant mentioned in these illustrative examples to have a greater likelihood of being convicted than any other co-defendant.

⁷ A capo, a shortened version of the term caporegime, is a captain or leader of a crew consisting of 10-20 soldiers, all members of an organized crime family, and any number of additional associates. The capo usually reports to a boss and of course gives that boss a percentage of his earnings from revenue generating offenses comprising a criminal enterprise.

the Lucchese Group members also profited from the illegal sale of cocaine, narcotics and firearms⁸ (*Id.* at ¶¶ 41-42 and 44).

Bribery at the DOB

As Dwyer more fully attests to, the Lucchese Group members, including DiNapoli and Madonna, *inter alia* received respective percentages of the proceeds of a bribe taking/receiving scheme with the RE/const. and DOB Group members, some of the latter of whom are also LCF associates. The criminal enterprise involved the DOB Group members receiving bribes to use their respective positions of influence as a DOB inspector, supervising Inspector, scaffold safety inspector and/or Inspector manager.

How did this alleged scheme work on a simple level? One DOB Group member, Carmine Jr., had associates (i.e., RE/const. Group members) who developed properties or did construction work for developers and required expedited building inspections to get the required DOB sign-offs to enable the developers to begin tenanting their buildings. These DOB Group associates bribed Carmine Jr. to use his influence to get them favorable treatment. He then reached out and presumably paid a portion of his bribery proceeds to Avelis, his DOB superior, to get the DOB Group associates' inspections, otherwise scheduled on a first come, first served basis, taken out of turn and expedited. Carmine Jr. passed along a portion of these more favorable treatment funds to Lucchese Group members (Dwyer Aff. at ¶¶ 47-48).

Parenthetically, this typical bribery activity squarely fits with the counts in the indictment charging Marauti and ABM (see Count 15 at p. 80 as Exhibit C to OSC) with

⁸ In highlighting these illustrative examples of criminal activity referable to each discrete group of Defendants, this court is also not suggesting that there is a less than substantial probability the DA will not obtain convictions against Defendants for trafficking in cocaine, narcotics and firearms (see indictment at pp. 61-74 as Exhibit C to OSC).

engaging in the foregoing bribery scheme with a DOB Group member to obtain the removal of a DOB violation cited during the course of a contracted for rigging job at 11 West 25th Street, New York, New York. (Dwyer Aff. at ¶¶ 52 and 58; *see also*, ¶¶ 134-144 [transcribed wire-tapped conversations *inter alia* between Marauti and Carmine Jr. regarding demanded payments for a favorable outcome regarding the disposition of the DOB violation]).

Joint Criminal Projects Between the DOB and RE/Const. Groups

However, other alleged projects comprising the criminal enterprise under this particular category were more creative. For example, Masucci, an owner of SFG, a construction company and an LCF associate worked closely with Frank, another LCF associate with a day job as a DOB Inspector with the Bronx Construction Division. Their scheme played out where Frank would issue DOB violations (presumably real rather than imagined) against property owners and then steer them to SFG to do the requisite construction work to remove those violations. After SFG was paid for its construction services, Masucci would share these payments with Frank (Dwyer Aff. at ¶¶ 50 and 60; *see also*, ¶¶ 235-354 [transcribed wire-tapped conversations between Frank and Masucci engaged in these illegal DOB violations/construction schemes]).

DA's OSC

Based on this record, Plaintiff claims it has met its burden in establishing a substantial probability of prevailing in this action as it will obtain Defendants' convictions entitling the DA to a judgment for the forfeitable sum in this action. The DA further contends that the forfeitable sum being sought here constitutes the proceeds, substitute proceeds and instrumentalities of the various crimes comprising the criminal enterprise,

and that the DA requires the preliminary injunction and order of attachment to preserve this potentially forfeitable property and restrain Defendants, jointly and severally, from attempting to remove such property from the court's jurisdiction or render such property unavailable if Plaintiff prevails here. Finally, Plaintiff argues that such restraints to preserve any of Defendants' property interests to be potentially seized to satisfy the plaintiffs' judgment for the forfeitable sum far outweighs any hardship such restraints impose on Defendants.

DINAPOLI'S and MADONNA'S CROSS-MOTION

In their respective opposition to the DA's OSC and in support of their cross-motions *inter alia* seeking the vacatur of the TRO and restrained assets information, these co-defendants initially discuss what they perceive to be a stalled criminal investigation that started in 2005 into LCF's loan sharking and illegal gambling activities in New Jersey. That investigation, which was the impetus for this New York criminal prosecution, led to the arrest of 22 people including DiNapoli. However, unlike New York, there have been no New Jersey indictments to date (Rudman Opp. Aff. at ¶¶ 7, 9, and 15).

As stated earlier, both DiNapoli and Madonna jointly claim that: judicial scrutiny of the Dwyer Aff. will disclose little in the way of evidentiary detail to demonstrate that Plaintiff will prevail in the parallel criminal prosecution either because such evidence is either non-existent or being withheld; the DA impermissibly restrains the co-defendants' respective bank accounts jointly owned with non-party family members; Dwyer's inferences of illegal conduct (i.e., divvying up the proceeds from illegal gambling operations, etc.), comprising the criminal enterprise based upon the September 2008

surveillance of either DiNapoli or Madonna and the "innocuous snippets of intercepted conversations . . ." (Madonna Memorandum of Law at p. 17) in September and October 2008 either between these co-defendants and the other co-defendants or between/among the other co-defendants are speculative and conclusory and will not withstand legal muster at trial; Dwyer's evidence-based description of the DOB bribery scheme and the joint criminal projects between the DOB Group and RE/const. Group members (and where a percentage of the proceeds from these crimes is allegedly funneled upward to the higher LCF members) does not directly implicate either DiNapoli or Madonna; the DA wrongly used search warrants to seize co-defendants' bank accounts and circumvented the statutory due process constraints of CPLR Article 13-A; Plaintiff's Asset Forfeiture Unit impermissibly shares defendants' financial disclosure information with the fellow criminal prosecutors chilling defendants' rights under CPLR §1312(4)⁹ for reasonable living expenses and attorneys' fees for defending these co-defendants in the criminal prosecution as well as in the forfeiture action; and particular to DiNapoli, the DA wrongly compels his production of a detailed financial disclosure statement to green-light an arms-length transaction with an identified non-party to exchange their respective residences coupled with DiNapoli's additional deposit of \$200,000 into one of the restrained bank accounts.

⁹ CPLR § 1312(4) allows 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."

In reply, Plaintiff highlights the following:

- The issuance of the multi-count indictment against DiNapoli and Madonna ("Here, the [co-]defendants were indicted on not one, but seven felony charges, including an Enterprise Corruption charge that is supported by no less than 31 criminal acts involving both of these two [co-]defendants . . ." [Gullmain Reply Aff. at ¶ 10]) is a good indicator that the DA has a substantial probability of prevailing here when it obtains convictions against these co-defendants;
- While the Dwyer supporting affidavit for provisional relief must "include evidentiary detail stronger than the summary and conclusory allegations that suffice in a pleading . . ." (Gullmain Reply at ¶ 12), here, plaintiff is neither required to produce its entire proof beyond a reasonable doubt nor present the "same level of proof required for an indictment before a Grand Jury . . ." (*Id.*);
- The section of the Dwyer Aff. describing the structure of an organized crime family and various illegal schemes comprising the criminal enterprise that generate millions of dollars of revenue flowing to its members is fact based and not fanciful or speculative and will be part of the body of evidence to be presented to the jury during criminal prosecution against these co-defendants;
- Defendants' counsel's characterization of a portion of the Dwyer Aff. furnishing a macro view of organized crime families and their roles in criminal enterprises in a "Preamble Section" having little evidentiary value is self-serving and misplaced;
- Dwyer summarized and categorized the two year investigation and furnished factual examples of how the illegal sports betting operations (and for that matter the trafficking of firearms, cocaine and narcotics), DOB bribery schemes and illegal construction projects were carried out and how the cash proceeds therefrom follow a "pattern of money being sent up the command chain. . ." (Gullmain Reply Aff. at ¶ 14);
- It is proper for the court on this application for provisional relief to draw varied inferences from "the many observations, surveillances and wiretaps he [Dwyer] reviewed in order to reach the conclusions he did . . ." (*Id.* at ¶15);
- Defendants' counsel's interpretation of the intercepted conversations as being innocuous as well as the limited number of times these co-defendants' names are mentioned in them (and out of context) are not dispositive as to whether Plaintiff will not succeed in its criminal prosecution of DiNapoli and Madonna;

- This court in a civil forfeiture action is not the forum for challenging the DA's alleged misuse of any search warrants to discover these co-defendants' financial assets;
- The prior wrongful seizure of certain financial assets should not adversely affect the propriety of the DA obtaining a TRO and eventual preliminary injunction and Order of Attachment here;
- These co-defendants may choose to avail themselves of CPLR §1312(4) remedies, thus, the DA's conduct does not chill this statutory privilege;
- In any event, co-defendants cannot point to any statute, rule and/or case law compelling the creation of a Chinese wall between the attorneys in the DA's Asset Forfeiture Unit *inter alia* tasked with assets seizure and the attorneys in a particular bureau tasked with the criminal prosecution from sharing asset information the former discovered at or about the time of the commencement and pendency of an asset forfeiture action;
- The mere listing of a non-party family member's name on a frozen asset is not competent proof that the asset in issue belongs to that non-party family member;
- The DA does not have to acquiesce to DiNapoli's house swap request without the latter furnishing all the relevant documentation for the proposed transaction and a financial disclosure statement; and
- At this nascent stage, co-defendants are not entitled to CPLR §3102 discovery and their attempts to discover what the DA has learned about their own assets may be driven by their desire "to move or dissipate assets without being discovered by the Plaintiff . . ." (Guilmain Reply Aff. at ¶ 31, fn. 2).

MIRAUTI'S and ABM's CROSS-MOTION

Mirauti and his company, ABM, have been charged with enterprise corruption (Count 1 of the Indictment as Exhibit C to OSC at p. 8), bribery (Counts 13 and 15 of the Indictment as Exhibit C to OSC at pp. 79-81) and offering a false instrument for filing with the DOB (Count 16¹⁰ of the Indictment as Exhibit C to OSC at p. 81).

¹⁰ Count 16 states: "the defendants [Mirauti and ABM], in or about August 2008, in the County of New York, knowing that a written instrument contained a false statement and false information, and with

In his opposition to Plaintiff's OSC for a preliminary injunction and order of attachment and cross-motion to vacate the TRO or, alternatively, modify the restraints on his assets, this co-defendant attests that: (1) Mirauti is a licensed special rigger and in 2007, the DOB started a disciplinary proceeding with the New York City Office of Administrative Trials and Hearings ("OATH") to revoke his license based upon certain alleged misconduct (i.e., purportedly unresolved, albeit dated, violations)(Mirauti Opp. Aff. at ¶ 2); (2) after engaging in certain settlement meetings with the DOB under OATH auspices, a stipulation was executed whereby Mirauti would pay \$10,000 to the DOB¹¹, Mirauti's special rigger's license would be subject to a 6 month probationary period and the DOB would discontinue the license revocation proceeding, with prejudice (see Exhibit A to Mirauti Cross-Motion); (3) Mirauti soon learned that he and ABM were listed on a DOB website with other licensees as being fined and disciplined and, as a result, he started an Article 78 proceeding for the Supreme Court to review the DOB's improper action; (4) while the Article 78 proceeding was pending, the same parties executed a second settlement stipulation (Exhibit B to Mirauti Cross-Motion) which required the DOB to amend the website listing to reflect that Mirauti's license revocation proceeding was withdrawn pursuant to a settlement requiring a monetary payment and 6 month's probation; (5) given that Mirauti executed two stipulations which expressly make it clear that this co-defendant's agreement to be on probation neither constituted

intent to defraud the state and any political subdivision, public authority and public benefit corporation of the state, offered and presented it to a public office, public servant, public authority and public benefit corporation, with the knowledge and belief that it would be filed with, registered and recorded in and otherwise become part of the records of such public office, public servant, public authority and public benefit corporation."

¹¹ In the stipulation, this \$10,000 was not characterized as a fine. Nor was there any provision in the stipulation reciting Mirauti's admission of any wrongdoing or misconduct.

a censure, penalty or other disciplinary act nor an admission of any wrongdoing or misconduct, Mirauti should not have been charged with intent to defraud the DOB based upon a truthful written response he gave to a question¹² on the General Contractor Registration form filed with the DOB; (6) Plaintiff is leveraging its right to seek provisional remedies against this co-defendant (already suffering severe financial hardship as a result of the TRO), to coerce his cooperation and testimony implicating one or more co-defendants which he declined to do (Mirauti Opp. Aff. at ¶ 9); and (7) he strenuously questions whether the DA will prevail in obtaining his conviction on Counts 1 and 16 *inter alia* because his alleged acts of bribery are more akin to the acts of an illegal sports betting customer or illegal drug customer.¹³

In conclusion, Mirauti and ABM maintain that since there is no probability Plaintiff will be awarded a forfeiture judgment against these co-defendants for the forfeitable sum, no showing on this record that Mirauti and ABM would dissipate their assets and/or no showing that Plaintiff's interest in their assets far outweighs the real hardship Mirauti, his family and his business are experiencing, their cross-motion should be

¹² Mirauti claims he correctly answered "no" to the question "Have any licenses, certifications, registrations issued to any person named in this application ever been censured or disciplined?"

¹³ As set forth in his Memorandum of Law in Support of Cross-Motion at pp. 7 and 11-16, these co-defendants argue that a conviction on these respective charges will be unavailing because the DA will never be able to prove a pattern of illegal conduct reflecting their ongoing participation in any criminal enterprise (see Penal Law § 460.10[4]); the OATH and Supreme Court stipulations did not constitute acts of censure or discipline against Mirauti as a licensed special rigger; his filed General Contractor Registration Form containing his negative response to a question about the existence of any discipline history as a licensee was in good faith and, even if wrong, did not constitute an intent to defraud the DOB, an essential element of a false filing accusation; he was wholly ignorant of the existence of any criminal organization; and his two accused acts of bribery with Carmine Jr., a DOB Group member, even if the latter is allegedly active in the criminal enterprise, does not perforce make him an active participant in an enterprise corruption scheme.

granted either vacating the TRO or modifying the TRO to impose more equitable restraints in their favor.

Plaintiff's reply affirmation to Mirauti's and ABM's cross-motion and opposition to the OSC is substantially similar to its reply to DiNapoli's and Madonna's cross-motions, therefore, its primary contentions will not be repeated here. However, Plaintiff raises certain contentions particular to Mirauti and ABM. First, these co-defendants do not even dispute the likelihood of being convicted for bribery. Second, based on the indictment and Dwyer Aff., Plaintiff has shown a substantial probability that these co-defendants will be convicted for enterprise corruption. Third, their defense to the false filing accusation is best left to the criminal court to determine the evidentiary sufficiency of this charge.¹⁴ Fourth, the DA does not have to show that these co-defendants will dissipate their assets, "but only that they *may* dissipate assets." (emphasis supplied in the original)(Guilmain Reply Aff. at ¶ 15). Fifth, these co-defendants have conceded the potential for joint and several liability under CPLR Article 13-A, thus, it is unnecessary for Plaintiff to show how much these co-defendants actually contributed to the criminal enterprise at issue and/or how much of the proceeds of these crimes they actually received. Sixth, the DA maintains a "policy against simultaneously negotiating and litigating . . ." (see Guilman Reply Aff. at ¶ 19, fn. 2) with a defendant in an asset forfeiture action and is not refusing to negotiate to leverage Mirauti to testify against his co-defendants. Seventh, any perceived hardship Mirauti, his family and his company

¹⁴ Parenthetically, five months before the issuance of the indictment, counsel for these co-defendants sent the DA a March 3, 2009 letter discussing the lack of merit to any possible false filing charge to prevent Mirauti's potential arrest (Exhibit C to Mirauti Opp. Aff.) and has made this same argument here in opposition to provisional relief. Yet, the Grand Jury found the evidence the DA presented sufficient to indict Mirauti and ABM *inter alia* for enterprise corruption (Guilmain Reply Aff. at ¶ 13).

are experiencing as a result of the TRO is of their own making as they can clearly avail themselves of CPLR §1312(4) remedies. Finally, Mirauti's suggestion that Plaintiff accept confessions of judgment in consideration for vacating the TRO "is not an option contemplated by CPLR Article 13-A . . . and [co-]defendants cannot simply do an end-run around the requirements of this provision [CPLR 1312(4)] by offering a solution that they would find less onerous." (bracketed matter added)(Guilmain Reply Aff. at ¶ 20).

DISCUSSION

It is well settled that a court may grant an application for a provisional remedy when it determines that: (a) there is a substantial probability that the claiming authority will prevail on the issue of forfeiture and that failure to enter the order may result in the property being destroyed, removed from the jurisdiction of the court, or otherwise be unavailable for forfeiture; and (b) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order may operate. CPLR § 1312(3); *Morgenthau v. Citisource, Inc.*, 68 NY2d 211, 218 (1986); *Morgenthau v. Figliola*, 4 Misc3d 1025A, 798 NYS2d 346 [*2] (Sup Ct NY Co 2004).

To support its application for provisional remedies, the DA presents a 92 page multi-count indictment alleging 38 counts of extensive criminal activity. Count 1 charges Defendants with Enterprise Corruption and within the body of the indictment details 105 discrete criminal acts and overt conspiracies relative thereto Defendants jointly and severally engaged in (Exhibit C to OSC at pp. 1-74). These criminal acts and the remaining counts alleged criminal conduct that runs the gamut of illegal gambling operations, illegal possession and sale of narcotics, illegal possession and

sale of cocaine, illegal possession and sale of firearms, bribe taking and receiving at the DOB and related official misconduct, all involving the joint and individual participation of the Lucchese, DOB and RE/const. Group members. In determining whether to grant the DA provisional relief and as noted in *Morgenthau v. Vinarsky*, 21 Misc3d 1137A, 875 NYS2d 821 [*3-4] (Sup Ct NY Co, 2008), this court is not required to test the sufficiency of the indictment, but can otherwise weigh the adequacy of:

[a]n . . . Indictment regular on its face [which] must be presumed to have been properly returned by the Grand Jury. **People v. Smith**, 128 NYS2d 90, aff'd 283 A.D. 775, 129 N.Y.S2d 492 [1st Dept., 1954]. Furthermore, Grand Jury proceedings carry a presumption of regularity and to overcome that presumption, there must be a showing by the defendant of a particular need or gross and prejudicial irregularity in the proceedings or some other similarly compelling reason. **People v. Lewis**, 98 A.D.2d 853, 470 N.Y.S.2d 834 [3rd Dept., 1983] . . . (bracketed matter added).

See People v. Connolly, 28 Misc.3d 1117A, 856 N.Y.S.2d 500

(Sup. Ct., Seneca Co., 2008).

The indictment coupled with the 125 page Dwyer Aff. does more than furnish vague and conclusory allegations. Contrarily, Dwyer attests to detailed factual allegations about the different categories of illegal activity comprising Defendants' criminal enterprise. Except for Mirauti's sworn affidavit challenging the false filing charge (Count 16 of the Indictment), no other co-defendant having personal knowledge controverted any of Dwyer's factual allegations. *See Kuriansky v. Bed-Stuy Health Care Corp.*, 135 AD2d 160, 170 (2nd Dept 1988).

As previously noted in similar decisions and orders, this court clearly recognizes DiNapoli's and Madonna's understandable desire not to compromise their 5th Amendment rights by choosing not to file dueling affidavits which could have potentially

controverted the many factual allegations contained in the Dwyer Aff. in support of the OSC for provisional remedies. However, except for their names, their memoranda of law for the most part appear to be identical in content. And although these memoranda cite to portions of the Dwyer Aff. and to an affidavit filed in the criminal action (i.e., three references to an eavesdropping affidavit not part of the record on this round of motion practice), nonetheless, other than making arguments claiming factual/legal insufficiencies, their counsel's dismissive analysis of Plaintiff's factual allegations contained in co-defendants' memoranda of law, while fair game, can never have the same probity as a fact-laden affidavit by an individual with personal knowledge.

Kuriansky, supra.

To expand on this point, on page 8 of the DiNapoli memorandum of law, counsel refers to Dwyer's description of September 24, 2008 surveillance of at least 6 co-defendants entering and exiting a private club and engaging in conversations. Those observations coupled with a review of wire tapped telephone conversations preceding that afternoon meeting enabled Dwyer to reasonably infer the meeting involved the settling of certain gambling debts. Counsel for DiNapoli and Madonna gives short shrift to these inferences contending the wire-tapped conversations are innocuous and the surveillance of the meeting are not direct evidence of any crime.

What is seemingly overlooked is the fact that the telephone conversations and meeting cannot be viewed in a vacuum. Defendants' actions must be viewed against the backdrop of how an organized crime family such as the LCF operates and how its members, friends and associates generate and distribute alleged ill-gotten revenue from such diversified criminal activities. In this context, Plaintiff aptly observed, "the

[co-]defendants [DiNapoli and Madonna] — both experienced members of an organized crime family — made an obvious effort to hide their activity, by such means as using forms of code when speaking on the telephone, avoiding the use of each others' names on the phone and meeting in a private club so as to make more difficult to obtain direct evidence of the [co-]defendants' crimes." (Guilmain Reply Aff. at ¶ 15).

That being said, it will ultimately be up to a jury to draw the appropriate inferences in determining Defendants' guilt or innocence. Interestingly, the federal court in denying a motion to set aside a jury verdict recently concluded that jurors were fully capable of drawing appropriate inferences about heroin trafficking from "coded" discussions gleaned from intercepted telephone conversations without the need for a special expert to interpret these codes. Thus, that court concluded that the transcripts of these intercepted telephone conversations as well as the testimony of investigative officers and the expert testimony of a Special Agent of the Organized Crime Drug Enforcement Strike Force were sufficient to sustain the conviction (*see U.S. v. Magassouba*, ___ FSupp2d ___, 2010 WL 624284 [S.D.N.Y.]).

Here, for purposes of Plaintiff's application for a preliminary injunction and an order of attachment, in the absence of sworn factual allegations to the contrary, this court need not second guess Dwyer and can reasonably rely metaphorically on the criminal enterprise tapestry Dwyer weaves as a veteran investigator with OCID and expert on organized crime families and their illegal revenue producing activities, viz., the reasonable inferences drawn regarding the alleged crimes Defendants jointly and severally committed from information based on his personal knowledge or gained from other sources, substantially hearsay or otherwise (e.g., voluminous amount of evidence

inter alia gathered during the two year investigation from eavesdropping and search warrants, surveillance, documents [gambling records, etc.], physical evidence [firearms, narcotics, cocaine, etc.] and written and oral reports from eye witnesses [confidential informants, undercover law enforcement agents, etc.]). On this record, the DA has demonstrated a substantial probability of being successful in this forfeiture action.

Mirauti's challenge to the DA being unlikely to obtain a conviction on the enterprise corruption and false filing charges presents a closer question. This co-defendant goes to great lengths to convince the court that his false filing of the relevant DOB form was at best not false and at worst not an intentional act. Nonetheless, Mirauti did not controvert the factual allegations concerning the bribery charges and his corrupt dealings with Carmine Jr., a DOB Group member, LCF associate and active participant in the alleged criminal enterprise. And while Mirauti's experienced counsel characterizes Mirauti as an alleged bribe giver and not a racketeer (see Mirauti's Memorandum of Law in Support of Cross-Motion at p.7), it will be up to Justice Zweibel of the Supreme Court Criminal Term to determine the sufficiency of Counts 1 and 16 as they pertain to Mirauti and ABM. Upon granting provisional relief, Mirauti and ABM will not be "separated from the pack."

As *Figliola, supra*, further noted (see 4 Misc3d 1025A, 798 NYS2d 346 at [*3]):

"A high degree of proof is not necessary to demonstrate that the failure to enter the order may result in the property being destroyed or otherwise unavailable for forfeiture [citing to *Morgenthau v. Clitsource, supra*]." *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc.2d 489, 494 (Sup. Ct., Westchester Co., 1986). "An actual assignment or dissipation of the property is not necessary." *Holtzman v. Samuel*, 130 Misc.2d 976, 983 (Sup. Ct., Kings Co., 1985).

In the parallel criminal prosecution, Defendants have been *inter alla* charged with committing enterprise corruption, illegal gambling, firearms, cocaine and narcotics trafficking, bribery and other felony crimes and upon conviction, could receive lengthy prison sentences. Plaintiff has persuaded this court that the pervasive and deceptive nature of the varied illegal acts purportedly comprising the criminal enterprise render it more likely than not that Defendants may well seek to dissipate assets that could help satisfy a potential judgment. Because DiNapoli and Madonna focused their efforts in challenging the factual allegations in support of the DA's application for provisional relief, they made no serious effort to show how the purported hardship caused by the TRO and eventual preliminary injunction and attachment order outweighs the risks that their assets, if unrestrained, will be unavailable for forfeiture. For that matter, this court also finds co-defendants' remaining cross-motion requests to be without merit.


True, Mirauti, on behalf of his family and business, did make an effort to convey their alleged collective hardship as a result of the TRO and annexed proof of their business and personal related monthly expenses depicted in a chart format as well as their counsel's retainer agreement without time sheets (Exhibits D, E and F to Mirauti Cross-Motion). However, they did not formally move for CPLR §1312(4) relief and supply the court with the requisite information to warrant a modification of the TRO issued pursuant to CPLR §1312. See *Morgenthau v. A.S. Goldman & Co., Inc.*, NYLJ, October, 4, 1999, p. 28, col. 4, *affd* 283 AD2d 212 (1st Dept 2001)(complete financial disclosure is a prerequisite for CPLR 1312[4] relief). "While sensitive to the plight of the [cross-]movants and their counsel, this court must nonetheless conclude that ordering the unsecured release of restrained funds is inappropriate on this record . . ." *District*

Attorney, New York County v. Efgan, 12 Misc3d 1186, 824 NYS2d 761 [*2] (Sup Ct NY Co 2006).

Accordingly, this Court grants plaintiff's OSC for a preliminary injunction (CPLR §1333) and the order of attachment (CPLR §1316). Plaintiff is directed to submit an appropriate proposed order on notice for this Court's signature. DiNapoli's, Madonna's, Mirauti's and ABM's respective Cross-Motions are denied in their entirety.

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

Dated: New York, New York
March 12, 2010



Hon. Martin Shulman, J.S.C.

FILED
MAR 18 2010
NEW YORK
COUNTY CLERK'S OFFICE