

**District Attorney N.Y. County v Premier Med. Care,
P.C.**

2010 NY Slip Op 32205(U)

August 16, 2010

Supreme Court, New York County

Docket Number: 400295/05

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.

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

PRESENT: **MARTIN SHULMAN**
Index Number : 400295/2005 **J.S.C.**
DISTRICT ATTORNEY
vs
PREMIER MEDICAL CARE
Sequence Number : 008
OTHER

PART 1

INDEX NO. 400295/05
MOTION DATE _____
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

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


	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>A-D</u>	<u>1</u>
Notice of Cross-Motion Answering Affidavits — Exhibits <u>A-F</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 and cross-motion
are decided in accordance with the
attached decision and order.

FILED
AUG 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 16, 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
DISTRICT ATTORNEY
New York County,

Plaintiff-Claiming Authority,

-against-

PREMIER MEDICAL CARE, P.C., et al.,

Defendants.
-----X

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

Index No.: 400295/05

Decision & Order

FILED
AUG 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff commenced this civil forfeiture action pursuant to CPLR Article 13-A seeking forfeiture of \$7,681,228.53 from the named defendants, jointly and severally, as the proceeds of the felony crimes of *inter alia* enterprise corruption, insurance fraud and grand larceny. Upon the commencement of this action plaintiff sought a preliminary injunction and order of attachment against all of the defendants (motion sequences 001 and 002) and obtained a temporary restraining order ("TRO") restraining the assets of each defendant.

The action has been discontinued as to all defendants except defendants Gerardo Yanayaco, M.D. and Victor Basbus, M.D. (collectively "defendants"). Plaintiff has recovered the sum of \$4,000,000.00 from the former defendants, leaving a balance of \$3,681,228.53 (the "forfeitable sum") which plaintiff seeks to recover from the remaining two defendants.

After a jury trial, both defendants were found guilty of various felonies in the underlying criminal action. On February 11, 2008, defendants were sentenced, thereby terminating the criminal proceedings. *See Morgenthau v Basbus*, 68 AD3d 442 (1st Dept 2009). At that juncture, the stay of this civil forfeiture proceeding pursuant to

CPLR 1311(1)(a) automatically expired and defendants' time to appear in this action began to run. See *Morgenthau v Rodriguez*, 261 AD2d 165, 165-166 (1st Dept 1999).

Subsequently, by short form order dated August 7, 2008, this court denied Basbus' motion (sequence 005) to stay this action pending his appeal of the criminal conviction. Plaintiff then moved for a default judgment (sequence 007) against defendants based upon their failure to answer the amended summons and complaint. This court granted the default motion as to Yanayaco for liability only but was compelled to hold the motion in abeyance as to Basbus in light of the Appellate Division, First Department's December 5, 2008 issuance of a stay of this action pending Basbus' appeals of the criminal conviction and this court's stay denial, both of which ultimately were affirmed on December 3, 2009. *Morgenthau v Basbus, supra; People v Basbus*, 68 AD3d 441 (1st Dept 2009). Finally, on March 2, 2010 the Court of Appeals denied Basbus' motion for leave to appeal the First Department's affirmance of his criminal conviction. *People v Basbus*, 14 NY3d 797 (2010).

On March 31, 2010, plaintiff served the instant motion seeking: 1) a preliminary injunction and order of attachment against both defendants;¹ and 2) to mark the prior motion for a default judgment (sequence 007) which was previously held in abeyance submitted as to Basbus without opposition. On the same date, Basbus served an answer to the amended complaint. Basbus opposes the instant motion and cross-moves for yet another stay of this action, this time pending the criminal court's

¹ The same relief is sought in motion sequences 001 and 002. Neither defendant ever filed opposition to these motions and the court was never advised that they should be marked submitted. Motion sequences 001 and 002 are thus being marked submitted and are determined in accordance with the decision herein.

determination of his motion to set aside the conviction pursuant to CPL §440.10.²

Yanayaco has not interposed opposition to the motion.

Preliminary Injunction and Order of Attachment

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] (NY Sup Ct. 2004).

As further noted in *Figliola, supra*, (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. Citisource, 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).

Here, in light of defendants’ convictions for the underlying crimes, there can be no serious dispute that plaintiff has established a substantial probability that it will prevail on the issue of forfeiture. Indeed, Basbus’ opposition to the instant motion does not

² This motion was returnable July 2, 2010. The parties have not advised if a decision has been rendered.

address plaintiff's request for a preliminary injunction and order of attachment other than to summarily state that it is premature and the amount to be forfeited is disputed.

That Basbus disputes the amount to be forfeited is irrelevant to determining whether a preliminary injunction and order of attachment should issue. The purpose of the preliminary injunction and order of attachment is to preserve potentially forfeitable property and restrain defendants from attempting to remove such property from the court's jurisdiction or render such property unavailable if plaintiff prevails in this action. Finally, Basbus does not allege that he has suffered³ or will suffer any hardship if this relief is granted. For all of the foregoing reasons, the portion of plaintiff's motion seeking a preliminary injunction barring defendants from disposing of any and all of their assets valued up to the forfeitable sum and an order of attachment is granted.

Judgment on Default

Plaintiff's motion requests that its prior default motion (sequence 007) be deemed submitted without opposition from Basbus. The court grants the motion to the extent that motion sequence 007 is deemed renewed and submitted, but deems Basbus' opposition herein to also be submitted in opposition to the prior default motion.

Basbus denies that he is in default because he served his answer on March 31, 2010, within 30 days of the Court of Appeals' March 2, 2010 denial of his application for leave to appeal. Basbus' counsel further contends appellate counsel for both him and the DA's office agreed that this forfeiture action would be stayed until the Court of

³ The TRO has remained in effect since the inception of this action and, during the stay of this action pursuant to CPLR 1311(1)(a), counsel for Basbus and plaintiff entered into various so-ordered stipulations to modify the TRO to release restrained funds for payment of Basbus' living expenses and attorney's fees.

Appeals determined his motion. Plaintiff denies that such a purported agreement was valid because it was neither in writing nor was counsel herein (the DA's asset forfeiture unit) aware of or in agreement with same. In any event, plaintiff argues that even if the parties had agreed to a stay pending the determination of Basbus' motion for leave to appeal to the Court of Appeals, he is still in default because his answer should have been served 20 days, not 30 days, from the motion's denial. In fact, plaintiff contends Basbus is in default several times over, having failed to timely answer the complaint after his February 11, 2008 conviction, this court's August 7, 2008 denial of his motion for a stay and the Appellate Division's December 3, 2009 dismissal of his appeals.

The court agrees that Basbus is in default. Although he promptly moved for a stay pending appeal after his conviction, he did not seek or obtain an interim stay of this forfeiture action. When this court denied his motion for a stay on August 7, 2008, Basbus also did not seek a stay from the Appellate Division until December 5, 2008. Thus, when the Appellate Division granted a stay, Basbus was already in default. In light of the foregoing, it is unnecessary for the court to consider the parties' arguments concerning whether Basbus timely served his answer after the Court of Appeals denied his motion for leave to appeal.

In order for Basbus to successfully oppose a motion for a default judgment, he must demonstrate a justifiable excuse for his default and a meritorious defense. *Johnson v. Deas*, 32 A.D.3d 253 (1st Dept. 2006). No reasonable excuse is offered for the inordinate delay, as detailed above, in serving the answer herein and in obtaining the untimely stay from the Appellate Division. Nor does Basbus elaborate upon the merits of his defenses, which consist of bald claims that: 1) the amended complaint fails

to state a cause of action; 2) forfeiture is barred by the Double Jeopardy Clause; 3) forfeiture would constitute an excessive fine; 4) the amount sought is disproportionate to Basbus' minimal role in the underlying criminal enterprise; and 5) the conviction was a result of prosecutorial misconduct. In any event, as this matter must be set down for an inquest to determine the amount to be forfeited, Basbus can challenge such amount at the inquest. For the above reasons, the motion is granted to the extent that plaintiff is entitled to a default judgment as to liability against Basbus, the matter shall proceed to inquest and the motion is otherwise denied.

Cross-Motion to Stay Proceedings

Basbus' cross-motion to stay this forfeiture action is denied. No compelling basis exists for imposing a stay and further delaying this action. Even if the Criminal Court grants Basbus' motion and vacates his conviction, such an outcome would not be dispositive of the instant civil forfeiture action. *Property Clerk, New York City Police Dept. v. Hurlston*, 104 AD2d 312 (1st Dept 1984)(dismissal of criminal charges is not determinative of issues to be resolved in civil forfeiture proceeding). As stated in *Property Clerk v. Ferris*, 77 NY2d 428, 430-431 (1991):

Because forfeiture is a civil proceeding, petitioner need only prove by a preponderance of the evidence that the property is subject to forfeiture (see, *Property Clerk v Hurlston*, 104 AD2d 312, 313). . . . Indeed, the outcome of the underlying criminal charges is irrelevant to the outcome of the civil forfeiture proceeding (*Property Clerk v Conca*, 148 AD2d 301, 302; *Matter of Property Clerk v Batista*, 111 AD2d 135, 136; *Property Clerk v Hurlston*, *supra*, at 313). Because of the differing degree of proof, even acquittal would not necessarily prevent a subsequent forfeiture under the Code's provisions (see, *Property Clerk v Conca*, *supra*, at 302; *cf.*, *People ex rel. Matthews v New York State Div. of Parole*, 58 NY2d 196, 202-203 [an acquittal on criminal charges ordinarily will not have collateral estoppel effect in a subsequent parole revocation proceeding evolving from those same charges, because of the higher degree of proof the People must meet in the criminal action]).

Accordingly, it is hereby:

ORDERED that motion sequences 001 and 002 are decided in accordance with the instant decision and order; and it is further

ORDERED that the portion of plaintiff's motion seeking a preliminary injunction is granted and defendants Basbus and Yanayaco and all persons or entities having property of said defendants in their possession are hereby restrained and enjoined from removing, transferring, assigning, disposing of, encumbering and/or secreting any legal, equitable, custodial or beneficial interest of said defendants including, but not limited to, any legal, equitable, custodial or beneficial interests said defendants have in any real or personal property wherever located, or whether jointly or individually held, or in any debts owed to said defendants, to the extent of \$3,681,228.53 (Three Million Six Hundred Eighty One Thousand Two Hundred Twenty Eight Dollars and Fifty Three Cents); and it is further

ORDERED that the portion of plaintiff's motion seeking an order of attachment against defendants Basbus and Yanayaco is granted and plaintiff is directed to submit an appropriate proposed order for this court's signature; and it is further

ORDERED that the portion of plaintiff's motion seeking a default judgment as against defendant Basbus is granted as to liability and the Clerk is directed to enter judgment in plaintiff's favor accordingly; and it is further


ORDERED that an inquest for the assessment of damages is directed as to defendants Basbus and Yanayaco; and it is further

ORDERED that, on or before September 30, 2010, plaintiff shall file with the Clerk of the Trial Support Office a copy of this order with notice of entry and a note of issue and shall pay the appropriate fee, if any, and said Clerk is directed thereupon to place this matter on the appropriate calendar for the assessment herein above directed; and it is further

ORDERED that defendant Basbus' cross-motion is denied.

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
August 16, 2010



Hon. Martin Shulman, J.S.C.

FILED
AUG 19 2010
NEW YORK
COUNTY CLERK'S OFFICE