

**Vance v Franklin**

2011 NY Slip Op 30768(U)

March 30, 2011

Supreme Court, New York County

Docket Number: 402530/10

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: Shulman  
Justice

PART 1

CYRUS VAN COTT  
- v -  
ARTHUR FRANKLIN

INDEX NO. 402530/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
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 ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</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**  
APR 01 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 30, 2011

MARTIN SHULMAN J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

CYRUS R. VANCE, DISTRICT ATTORNEY  
OF NEW YORK COUNTY,  
Plaintiff-Claiming Authority,  
  
-against-

Index No: 402530/10  
  
Decision & Order

ARTHUR FRANKLIN a/k/a "Joe" a/k/a "Leelee,"  
JOSEPH SIMMS, a/k/a "Dad,"  
VINCENT FRANKLIN,  
YVONNE HARRIS, a/k/a "Mom,"

**FILED**

APR 01 2011

Criminal Defendants

-----X

HON MARTIN SHULMAN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff-Claiming Authority District Attorney of New York County ("plaintiff" or "DA") commenced this CPLR Article 13-A asset forfeiture action seeking forfeiture of \$740,360.63 in the above-named criminal defendants' assets, which allegedly constitutes the proceeds and/or substituted proceeds of their various felony crimes in connection with an alleged identity theft ring. On September 8, 2010, this court issued a temporary restraining order ("TRO") enjoining defendants from transferring or otherwise disposing of any assets valued up to \$740,360.63 pending a hearing on plaintiff's order to show cause ("OSC") for an order of attachment and preliminary injunction.<sup>1</sup>

Criminal Defendant Joseph Simms ("Simms" or "defendant") now moves, *pro se*, pursuant to CPLR §§ 1311(4) and 1312(4) to dismiss the action in the interest of justice and to vacate and/or modify the TRO. Plaintiff opposes Simms' motion.

-----  
<sup>1</sup> Determination of the DA's OSC (motion seq. 001) is presently stayed pursuant to CPLR §1311(1)(a).

Between October 2008 and October 2009 Simms and the co-defendants herein allegedly engaged in conduct “constituting the crimes of identity theft, criminal possession of forged instruments, criminal possession of stolen property, scheme to defraud and larceny.” (Guilmain Aff. in Response to Motion to Dismiss, ¶ 3). Simms allegedly worked as the supervisor of this identity theft ring. New York County Indictment Number 5749/09 charges Simms with one hundred and eighty-nine (189) offenses.

### ANALYSIS

Simms argues the restraint and forfeiture of his property violates various constitutional rights, including but not limited to the rights to due process, equal protection, freedom from unreasonable searches and seizures and double jeopardy. Defendant also argues he was not served with the OSC and summons and complaint.

The court first addresses defendant's lack of service claim. Specifically, Simms claims he was never served with the OSC and as a result he was denied notice and an opportunity to be heard. In response to this claim, the DA submits an affidavit of service from Detective Hector Rodriguez (“Rodriguez”), averring that he personally served the OSC and supporting papers upon Simms on September 9, 2010 at the Criminal Court building located at 100 Centre Street, New York, New York. Guilmain Aff. at Exh. A. Additionally, plaintiff's counsel states that she was present at that time and saw Rodriguez hand the papers to Simms.

Simms does not respond to the DA's opposition or otherwise specifically refute the affidavit of service. Simms' bald conclusion that the OSC was not served upon him is insufficient to rebut the presumption of delivery raised by the affidavit of service. See

*Slater v. Congress of Racial Equality, Inc.*, 48 AD2d 623 (1<sup>st</sup> Dept. 1975). Defendant therefore fails to establish that he was denied notice and an opportunity to be heard.

**Plaintiff's Authority to Commence this Action and Obtain Provisional Remedies**

Simms essentially challenges the DA's right to bring this forfeiture action and obtain the TRO restraining his assets pending the hearing of plaintiff's OSC. Although defendant is thorough in citing various provisions of CPLR Article 13-A, he nonetheless overlooks the express provisions thereof specifically authorizing plaintiff to commence this forfeiture action prior to conviction and to obtain the provisional remedies of *inter alia* attachment and injunction for the purpose of preserving assets for forfeiture.

Specifically, CPLR §1311(1) authorizes the DA's commencement of this forfeiture action:

A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime or the real property instrumentality of a crime or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.

Nor is it improper for plaintiff to commence this forfeiture action prior to defendant's conviction. While the ultimate forfeiture of a criminal defendant's property requires a felony conviction, the statute specifically permits the DA to obtain provisional remedies such as attachment and injunctions during the pendency of the forfeiture action:

An action relating to a post-conviction forfeiture crime must be grounded upon a conviction of a felony . . . A court may not grant forfeiture until such conviction has occurred. However, an action may be commenced,

and a court may grant a provisional remedy provided under this article, prior to such conviction having occurred. . . .

CPLR §1311(1)(a); *see also*, CPLR §1312(1); *Morgenthau v Citisource, Inc.*, 68 NY2d 211, 219 (1986).

Based upon the foregoing, defendant fails to establish that: 1) the complaint fails to state a cause of action; 2) he has been denied notice and an opportunity to be heard in violation of his due process rights; 3) the restraint of his property is an illegal seizure; 4) the TRO violates equal protection<sup>2</sup>; 5) he has been deprived of his property without due process or just compensation; 6) the action should be dismissed in the interest of justice pursuant to CPLR §1311(4)<sup>3</sup>; and 7) granting the TRO and other provisional remedies violates the presumption of innocence.

#### **Vacatur and/or Modification of the TRO**

In support of his request to vacate and/or modify the TRO, Simms challenges the sufficiency of plaintiff's proof, and particularly the affidavit of the investigating detective, submitted in support of the OSC. Simms also challenges the TRO's restraint of the entire amount sought to be forfeited, rather than each defendant's share of proceeds allegedly earned.

---

<sup>2</sup> Simms does not allege any specific facts to support this claim.

<sup>3</sup> CPLR §1311(4) permits the court to dismiss a forfeiture action in the interest of justice "if it finds that such relief is warranted by the existence of some compelling factor, consideration or circumstance demonstrating that forfeiture of the property of [sic] any part thereof, would not serve the ends of justice." CPLR §1311(4)(d). Here, Simms fails to demonstrate the existence of any compelling factor, consideration or circumstance.

With regard to the amount the DA has restrained, where, as here, the criminal defendants allegedly participated in a common scheme or plan they may be held jointly and severally liable for the entire amount ultimately forfeited. There is no requirement that a criminal defendant benefit from the crime in order to be held liable. *Kuriansky v Natural Mold Shoe Corp.*, 506 NYS2d 940, 947 (Sup. Ct. Westchester Co. 1986), *mod on other grounds*, 519 NYS2d 88 (1987). Accordingly, it is proper for plaintiff to restrain Simms' assets for the full amount sought to be forfeited.

As to the sufficiency of plaintiff's proof, CPLR §1312(3) provides in pertinent part that a provisional remedy may be granted where:

(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 . . . or otherwise . . . unavailable for forfeiture;

(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; . . .

Here, the indictment contains 198 counts against Simms and provides ample basis for this court to conclude plaintiff is likely to prevail in this forfeiture action. See *Pirro v Schaible*, N.Y.L.J. September 17, 1998, at p. 25, col. 6 (Sup. Ct. Westchester Co.) (fact that an indictment is filed against a defendant is influential and often determinative of the issues of substantial probability of success). Defendant only summarily alleges the investigative detective's affidavit is incredible, yet he does not sufficiently refute the detailed allegations contained therein. Further, the fact that the same affidavit is being used in the criminal case is not a double jeopardy violation. See *Nassau County v Bigler*, 1 Misc3d 910(A), 781 NYS2d 626 (Sup. Ct. Nassau Co. 2001) ("Civil forfeiture

cases do not implicate this constitutional protection provided they are not so harsh and extreme as to constitute criminal sanctions").

Nor does Simms sufficiently allege any hardship. While he requests the release of funds for living expenses and attorney's fees, he does not submit a financial disclosure affidavit and as such his request is premature.

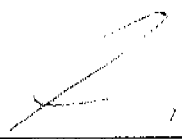
Simms' remaining arguments are also unavailing but will be briefly addressed. First, remission pursuant to CPLR §1311(7) is improper because no judgment has been entered in this action and as found above, defendant received notice of this action. Second, Simms characterizes the seizure of his motor vehicle at the time of his arrest as an illegal seizure and/or taking of property without just compensation. Further, defendant requests a hearing with respect thereto in accordance with *Krimstock v. Kelly*, 306 F3d 40 (2d Cir. 2002), *cert. den.* 539 U.S. 969 (2003). The request for such a hearing must be made to the New York City Police Department in accordance with the New York City Administrative Code §14-140, *et seq.* and the Rules of the City of New York, Title 38, Chapter 12.

All other arguments not specifically addressed herein have been considered and are lacking in merit. For all of the foregoing reasons, it is hereby

ORDERED that defendant Simms' motion is denied in its entirety.

The foregoing is this court's decision and order. A copy of this decision and order has been sent to plaintiff's counsel and to Simms.

Dated: New York, New York  
March 30, 2011

  
\_\_\_\_\_  
Hon. Martin Shulman, J.S.C.

FILED

APR 1 2011

-6-

NEW YORK  
CITY CLERK'S OFFICE