

**Vance v Bunin**

2011 NY Slip Op 31840(U)

July 5, 2011

Supreme Court, New York County

Docket Number: 400841/11

Judge: Martin Shulman

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

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

PRESENT: \_\_\_\_\_

PART 1

Index Number : 400841/2011 *Justice*

VANCE, JR., CYRUS R.

INDEX NO.

400841/11

vs

BUNIN, CARY

MOTION DATE

Sequence Number : 003

MOTION SEQ. NO.

003

DISMISS

MOTION CAL. NO.

The following papers, numbered \_\_\_\_\_, are submitted in support of this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits - Exhibits

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: July 5, 2011

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X  
CYRUS R. VANCE, JR., DISTRICT ATTORNEY  
OF NEW YORK COUNTY,

Plaintiff-Claiming Authority,

Index No: 400841/11

Decision & Order

-against-

CARY BUNIN, INTERNATIONAL BARCODE  
CORPORATION aka BTI, ANDOVER  
CONSULTING SERVICES, LTD.,

Criminal Defendants,

ELAYNA SCOTT,

Non-Criminal Defendant.

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

Non-criminal defendant Elayna Scott ("Scott") moves pursuant to CPLR 3211(a)(7) to dismiss the complaint in this CPLR Article 13-A asset forfeiture action or, alternatively, to vacate the temporary restraining order ("TRO") this court issued on March 28, 2011 in connection with motion sequence number 001.<sup>1</sup> Plaintiff-Claiming Authority District Attorney of New York County ("plaintiff" or "DA") opposes the motion.

The verified complaint seeks forfeiture of \$3,853,750.00 from the above-named criminal defendants and Scott, which allegedly constitutes the proceeds and/or substituted proceeds of the criminal defendants' various felony crimes sounding in fraud. Scott is criminal defendant Cary Bunin's wife and a former employee of co-defendant International Bar Code Corporation ("BTI"), of which Bunin is the chief

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<sup>1</sup> The TRO enjoins defendants from transferring or otherwise disposing of any assets valued up to \$3,853,750.00 pending a hearing on plaintiff's order to show cause ("OSC") for an order of attachment and preliminary injunction. Determination of the OSC is presently stayed pursuant to CPLR §1311(1)(a).

executive officer. The verified complaint alleges that from 2004 through 2009 "Bunin transferred hundreds of thousands of dollars into Scott's name and paid for, at least, one real property placed in her name." See Verified Complaint at Exhibit A to Motion, ¶15.

The verified complaint contains two causes of action originally asserted against both the criminal defendants and Scott for forfeiture of \$3,853,750.00 (first cause of action) and a monetary judgment in that amount (second cause of action). As the DA concedes in its opposition, CPLR §1311(1) does not permit recovery of a monetary judgment against a non-criminal defendant. Accordingly, plaintiff has voluntarily withdrawn the second cause of action against Scott and as such, the portion of Scott's motion seeking dismissal of that cause of action is now moot.

Scott makes the following arguments in support of her claim that the verified complaint fails to state a cause of action<sup>2</sup> against her:

- plaintiff cannot establish that Scott received the actual proceeds of any crime, because BTI's bank records reveal that the funds the alleged fraud victims invested in BTI were deposited in BTI's bank accounts rather than given directly to Scott;
- as to substituted proceeds of the alleged crimes, CPLR §1311(3)(b)(iii) does not permit forfeiture against a non-criminal defendant on the grounds he or she should have known that such property was derived from a crime; as such, the first cause of action is improperly pleaded and the "should have known" language should be stricken, as plaintiff must establish Scott had actual knowledge that property obtained from the criminal defendants was derived from a crime;
- the verified complaint lacks particularity as to the specific property to be forfeited; and

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<sup>2</sup> The court declines to treat this motion to dismiss as one for summary judgment as the motion is not supported by an affidavit of a party having personal knowledge.

- the funds sought to be forfeited represent a mere 14% of all sums BTI received from investors, lenders and licensees and as such, the DA cannot establish the property Scott allegedly received is directly traceable to the criminal proceeds.

In opposition, plaintiff contends that:

- Scott has not submitted an affidavit and makes no factual allegations as to the source of her assets;
- the motion to dismiss is premature because this case is stayed during the pendency of the underlying criminal action;
- the rebuttable presumptions contained in CPLR §1311(3)(c)(I)<sup>3</sup> and (iv)<sup>4</sup> apply to Scott; and
- criminal defendant Bunin systematically transferred assets to Scott's name.

### **Motion to Dismiss**

This court agrees that Scott's motion is premature in light of the stay of this action pursuant to CPLR §1311(1)(a). A review of CPLR §1311's provisions indicates only two (2) circumstances where this forfeiture action may proceed despite the stay: 1) in connection with granting or continuing any provisional remedy; and 2) a motion to dismiss in the interests of justice pursuant to CPLR §1311(4), which may be brought at

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<sup>3</sup> CPLR §1311(3)(c)(I) provides that "a non-criminal defendant who did not pay fair consideration for the proceeds of a crime, the substituted proceeds of a crime or the instrumentality of a crime shall be presumed to know that such property was the proceeds of a crime, the substituted proceeds of a crime, or an instrumentality of a crime."

<sup>4</sup> CPLR §1311(3)(c)(iv) provides that "a non-criminal defendant who participated in or was aware of a scheme to conceal or disguise the manner in which said non-criminal obtained his or her interest in the proceeds of a crime, substituted proceeds of a crime, or an instrumentality of a crime is presumed to know that such property was the proceeds of a crime, the substituted proceeds of a crime, or an instrumentality of a crime."

any time during the pendency of the forfeiture action. Indeed, dismissing the complaint for failure to state a cause of action at this juncture would be prejudicial to the DA, who is stayed from obtaining disclosure from the defendants to support its claims.

In any event, regardless of whether determination of Scott's motion to dismiss pursuant to CPLR 3211(a)(7) is stayed, Scott fails to establish her entitlement to the relief requested.

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 (a) [7]), a court must take all allegations of the complaint as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Caron v. Hargro Fabrics*, 91 NY2d 362 (1998); *Marini v. D'Atolio*, 162 AD2d 391 (1<sup>st</sup> Dept 1990). In assuming that the complaint's allegations are true, the court must deem the complaint to allege whatever can be reasonably inferred therefrom however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 AD2d 105 (1<sup>st</sup> Dept 1985); *see also, McGill v. Parker*, 179 AD2d 98 (1<sup>st</sup> Dept 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co.*, 91 AD2d 173 (1<sup>st</sup> Dept 1983).

The DA is not required to prove its case in the complaint. Taking the complaint's allegations as true, plaintiff's claims that Scott and Bunin had a close, long term relationship and that Bunin systematically transferred virtually all of his assets to Scott during the period covered by the indictment more than sufficiently state a viable cause of action for forfeiture against Scott as a non-criminal defendant. The complaint's allegations are bolstered by the detailed affidavit of Investigator Winters submitted in

motion sequence 001 and the court further notes that Scott does not specifically deny the majority of the complaint's allegations, instead denying only scienter.

A motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.C.*, 125 Misc2d 530, 534-535 (Sup. Ct., Rich. Co., 1984). Here, Scott's arguments are completely factual in nature. For the foregoing reasons, the branch of Scott's motion to dismiss the complaint for failure to state a cause of action against her is denied.

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

In support of her alternative request to vacate the TRO and deny the preliminary injunction, Scott argues that: 1) plaintiff cannot establish that it has a substantial probability of prevailing on the issue of forfeiture for the same reasons cited above in support of dismissal; 2) the DA has not identified the specific property sought to be forfeited from this non-criminal defendant; and 3) plaintiff seeks to restrain and attach \$3,853,750.00 of Scott's assets despite the fact that the affidavits submitted in support of plaintiff's OSC account for only the sum of \$1,111,380.00<sup>5</sup> being transferred to Scott, and the amount restrained should be limited accordingly.

CPLR §1312(3) provides in pertinent part that a provisional remedy may be granted where:

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<sup>5</sup> Of this amount, \$606,250.00 represents Scott's salary from BTI over a six (6) year period. In her reply papers, Scott argues her salary was legitimately earned and should be deducted from \$1,111,380.00, leaving a balance of \$505,130.00 which Scott argues is the maximum amount the DA should be able to restrain.

(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; . . .

See also, *Morgenthau v. Citisource, Inc.*, 68 NY2d 211, 218 (1986); *Morgenthau v. Figliola*, 4 Misc3d 1025A, 798 NYS2d 346 [\*2] (NY Sup Ct. 2004).

To support its application for provisional remedies, the DA presents a 33 count indictment against the criminal defendants and a detailed 17 page affidavit from Investigator Winters, attesting to detailed factual allegations about the alleged crimes and Bunin's transfer of funds to Scott. These allegations are sufficient to establish 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 unavailable for forfeiture.

As to the amount of Scott's assets to be restrained, plaintiff argues that the sum of \$1,111,380.00 is the minimum amount of proceeds and/or substituted crime proceeds transferred to Scott. The DA further avers that upon serving the TRO on various financial institutions, it learned that only a nominal amount of money is held in Bunin's name. At this time, with criminal investigations ongoing and discovery in this action stayed, the TRO should remain in effect for the full amount sought to be forfeited. Scott is not without remedy in that she has already obtained an interim release of funds by availing herself of CPLR §1336's protections and can also move for

relief under CPLR §1312(4). For all of the above reasons, the court denies the branch of Scott's motion seeking vacatur of the TRO.

Finally, Scott specifically requests that the restraint on a Citibank account in her name containing \$212,347.02 be vacated.<sup>6</sup> Scott submits documentation and a sworn affidavit establishing the source of these funds, which belonged to Scott as early as December 2000, prior to BTI's existence. These funds clearly cannot be traced to the criminal defendants.

This court acknowledges that CPLR Article 13-A permits a claiming authority to seize assets originating from legitimate sources. See *Morgenthau v DiNapoli*, 84 AD3d 692 (1<sup>st</sup> Dept 2011). Presumably, permitting the seizure of such untainted funds facilitates satisfaction of any monetary judgment that may ultimately be rendered in a forfeiture action. However, as discussed above, a non-criminal defendant such as Scott is not subject to a monetary judgment, so the foregoing consideration is inapplicable. Accordingly, Scott's motion is granted solely to the extent that the Citibank account is to be released, and the TRO modified accordingly.

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 the branch of non-criminal defendant Scott's motion seeking dismissal of the complaint is denied; and it is further

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<sup>6</sup> Although this request is made for the first time in her reply papers, it was thoroughly argued before this court on the return date, thus giving plaintiff sufficient opportunity to be heard on this issue.

ORDERED that the complaint is deemed amended to reflect that the second cause of action has been withdrawn as to defendant Scott; and it is further

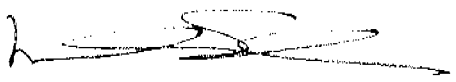
ORDERED that the branch of non-criminal defendant Scott's motion to vacate the TRO is denied; and it is further

ORDERED that the TRO is hereby modified to permit the release of funds held in Scott's Citibank account number 56779631.

Counsel for defendant Scott is directed to submit a proposed order to this court on notice to plaintiff providing for the release of Scott's Citibank account.

The foregoing is this court's decision and order. A copy of this decision and order has been faxed to counsel for plaintiff and Scott.

Dated: New York, New York  
July 5, 2011

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Hon. Martin Shulman, J.S.C.