

Vance v Haggerty

2011 NY Slip Op 32019(U)

July 14, 2011

Sup Ct, NY County

Docket Number: 401544/10

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: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Cyrus R. Vance, Jr.

INDEX NO. ~~4015~~ 401504/10

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

John Haggerty & My Independence Party

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

| | PAPERS NUMBERED |
|--|-----------------|
| Motion/Order to Show Cause - Affidavits - Exhibits ... <i>TS</i> | <u>1</u> |
| Answering Affidavits - Exhibits <i>A-F</i> | <u>2</u> |
| Replying Affidavits - Exhibits | <u>3, 4</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

JUL 19 2011

NEW YORK COUNTY CLERK'S OFFICE

Date: July 14, 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.

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, JR., DISTRICT ATTORNEY
OF NEW YORK COUNTY,

Index No: 401544/10

Plaintiff-Claiming Authority,

Decision & Order

-against-

JOHN HAGGERTY
SPECIAL ELECTION OPERATIONS,

Criminal Defendants,

FILED

THE NEW YORK STATE INDEPENDENCE
PARTY,

JUL 19 2011

Non-Criminal Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
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 the above-named defendants seeking, *inter alia*, the forfeiture of \$1,100,000 in defendants' assets. The amended verified complaint alleges that these assets constitute the proceeds and/or substituted proceeds of the criminal defendants' alleged felony crimes of grand larceny, money laundering and falsifying business records.

This action arises from the criminal defendants' alleged fraudulent scheme to obtain funds from New York City Mayor Michael R. Bloomberg in connection with his 2009 re-election campaign. Criminal defendant John Haggerty ("Haggerty") is the sole member of co-defendant Special Election Operations ("SEO"), a limited liability company which purported to implement an Election Day ballot security and poll watching operation on behalf of non-criminal defendant the New York State

Independence Party (the "Party") and its candidates, the most notable of whom was Mayor Bloomberg.

To this end and at Haggerty's suggestion, Mayor Bloomberg contributed \$1.2 million to the Party's housekeeping account. Plaintiff alleges that \$1.1 million of this contribution was to be expended on the ballot security operation, with the Party retaining the balance of \$100,000. Ultimately, the Party paid Haggerty and/or SEO over \$750,000 of the funds received from Mayor Bloomberg. However, the DA alleges SEO and Haggerty failed to provide ballot security services and Haggerty allegedly used the money he obtained from the Party to purchase a home.¹ Plaintiff alleges the Party knew or should have known of the fraudulent scheme allegedly perpetrated against Mayor Bloomberg by Haggerty and/or SEO.

The DA moves by order to show cause ("OSC") in motion sequence 003 for *inter alia* a preliminary injunction and order of attachment against the Party. On February 9, 2011, this court issued a temporary restraining order (the "TRO")² barring the Party from transferring or otherwise disposing of any assets valued up to that amount pending a hearing on the OSC.³

¹ Party Chairman Frank MacKay submits an affirmation (the "MacKay Aff." at Exh. A) in support of the Party's motion in which he avers that \$200,000 of Mayor Bloomberg's initial contribution remains and presently is being held in escrow (hereinafter the "escrowed funds").

² Upon the DA's inability to timely serve the Party with the OSC, this Court issued subsequent identical TRO's on February 10, 2011 (motion seq. 004) and February 15, 2011 (motion seq. 005). Motion sequences 003, 004 and 005 are consolidated herein for disposition.

³ Prior to joining the Party as a non-criminal defendant in this action, this Court issued a similar TRO against the criminal defendants (motion sequence 001). Criminal

The Party opposes the OSC and moves⁴ to dismiss this action pursuant to CPLR §1311(4) or, alternatively, “for a modification of the current order of attachment” pursuant to CPLR §1312(4) to permit the Party to operate, meet its legitimate expenses and pay counsel fees.⁵ The DA opposes the Party’s request. On March 8, 2011, this Court denied the portions of the Party’s motion to dismiss and to vacate the TRO on the record, reserving decision on the issue of whether or not the TRO should be modified to release funds to permit the Party to pay its attorney’s fees⁶ and operating expenses.

The Party urges that the DA cannot establish that it knew or should have known of the criminal defendants’ alleged fraud. Further, the Party contends that the funds from Mayor Bloomberg were a contribution, to be used as the Party saw fit with the balance to be retained by the Party. The Party asserts that it needs the money in question to operate and meet its expenses, without which “thousands of voters” will be “alienate[d] and disenfranchise[d].” MacKay Aff. at ¶28.

Plaintiff responds that under no circumstances should a party be permitted to use stolen funds for any purpose. While the Party denies that the remaining funds

defendant Haggerty’s assets were released from that TRO’s constraints upon his agreement to permit plaintiff to file a *lis pendens* against his home.

⁴ The Party moves by notice of motion which was not properly filed with the Motion Support Office. Nonetheless, this Court is treating the motion as a cross-motion.

⁵ As no order of attachment has been issued, this Court will treat the application as seeking modification of the TRO.

⁶ The Party specifically requests that up to \$45,000 be released “to pay attorneys’ fees in connection with this litigation and related court proceedings.” Wexler Aff. dated March 6, 2011 at ¶21.

were stolen at the time it obtained them, the Party concedes that the escrowed funds are directly traceable to Mayor Bloomberg's contribution. As such, the DA contends that the Party cannot establish that a legitimate source exists from which money can be released. Plaintiff also argues it is unnecessary to release funds to the Party, citing its counsel's alleged statements made to a reporter after a court appearance in this case to the effect that the Party can raise revenue by holding fundraisers and/or its officers can forfeit their salaries. Finally, the DA disputes that payment of the Party's prior outstanding bills is a necessary and reasonable living expense under CPLR §1312(4).

CPLR § 1312(4) provides as follows:

Upon 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.

While sensitive to the Party's plight, this Court must nonetheless conclude that ordering the release of the escrowed funds is inappropriate at this juncture. The Party fails to establish that the escrowed funds are derived from a legitimate source. See *District Attorney, New York County v Efgan*, 12 Misc3d 1186(A), at *2 (Sup. Ct., NY Cty., 2006); *Vergari v Lockhart*, 144 Misc2d 860, 870 (Sup. Ct., Westchester Cty.,

1989). Plaintiff makes a colorable claim that the escrowed funds rightfully belong to Mayor Bloomberg and that the Party knew or should have known of the alleged fraud.⁷ The Party essentially requests that this court determine one of the ultimate issues to be resolved in this case in the event the criminal defendants are convicted, *viz*, whether the escrowed funds are the proceeds or substituted proceeds of the alleged crimes and the Party's culpability, if any. At this stage, it is premature for the court to reach these issues. Moreover, that these monies were not stolen at the time the Party acquired them is of no import.

In any event, the Party fails to support its request for attorney's fees with supporting documentation. While counsel for the Party states in his reply letter dated April 15, 2011 that same can be provided to the court upon a finding that the Party is entitled to the release of attorneys' fees, without supporting invoices and time records the court is unable to determine whether the fees charged are reasonable and necessary. Finally, this court agrees with plaintiff that CPLR §1312(4) does not authorize disbursement of restrained funds to pay the Party's prior debts, such as an outstanding catering bill or prior legal fees. See *Morgenthau v Clifford*, 157 Misc2d 331, 345 (Sup. Ct., NY Cty., 1992).

For all of the foregoing reasons, it is hereby

⁷ Plaintiff specifically alleges, *inter alia*, that: the Party failed to disclose payments made to Haggerty as required by law; the Party wired funds to Haggerty's personal; SEO was not formed until after Election Day 2009; the Party gave blank signed checks to Haggerty and gave him control over its bank accounts; the Party paid Haggerty over \$750,000 without ever being provided with a pollwatching plan as agreed; and Haggerty and Party Vice Chairman Thomas Connolly tailored their stories to conceal the alleged improprieties. See Miner Aff. in Supp. of OSC at ¶95; Affidavit of Investigator Matthew A. Paul (*id.* at Exh. 1B).

ORDERED that non-criminal defendant The New York State Independence Party's motion is denied in its entirety.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for plaintiff and the Party.

Dated: New York, New York
July 14, 2011



Hon. Martin Shulman, J.S.C.

FILED
JUL 19 2011
NEW YORK
COUNTY CLERK'S OFFICE