

Vance v Flouras

2013 NY Slip Op 30957(U)

May 1, 2013

Supreme Court, New York County

Docket Number: 402181/12

Judge: Martin Shulman

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

PRESENT: SHULMAN
Justice

PART 1

CYRUS R. VANCE, JR.

INDEX NO. 402181/12

- v -
CONSTANTINE FLOURAS

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to modify TRO

~~Notice of Motion/~~ Order to Show Cause — Affidavits — Exhibits A-D
Answering Affidavits — Exhibits A-B
Replying Affidavits — Exhibits A-B

PAPERS NUMBERED	
1	_____
2	_____
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.

FILED
MAY 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 1, 2013

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: PART 1

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

Plaintiff-Claiming Authority,

-against-

CONSTANTINE FLOURAS,

Criminal Defendants.
-----X

Index No: 402181/12

Decision & Order

Motion Seq. 002

FILED

MAY 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

HON MARTIN SHULMAN, J.S.C.

Plaintiff-Claiming Authority ("plaintiff" or "DA") commenced this CPLR Article 13-A civil forfeiture action against the defendant Constantine Flouras ("defendant" or "Flouras") seeking, *inter alia*, the forfeiture of \$1,080,807.15 in defendant's assets. The verified complaint alleges that Flouras' assets constitute the proceeds and/or substituted proceeds of his alleged felony crimes of grand larceny and attempted grand larceny.

This action arises from defendant's alleged theft of payroll funds from his former employer from January 2007 through March 2012. Previously, the DA moved by order to show cause in motion sequence 001 for *inter alia* a preliminary injunction and order of attachment. On October 4, 2012, this court issued a temporary restraining order (the "TRO") barring Flouras from transferring or otherwise disposing of any assets valued up to \$1,080,807.15 pending the hearing thereof. Determination of the DA's order to show cause is stayed pending completion of the underlying criminal proceedings pursuant to CPLR §1311(1)(a).

In the interim, counsel for the parties entered into a stipulation dated December 3, 2012 which this court so-ordered on December 5, 2012 (the "stipulation"). The

stipulation permitted Flouras and his wife, non-party Evie Flouras, to sell their home, with half of the proceeds to be given to Mrs. Flouras and the other half to be held in escrow by plaintiff. In accordance with the stipulation, the home has been sold and \$153,732.54 was turned over to Mrs. Flouras.¹ The same amount was turned over to the DA and is being held in escrow (the "escrowed funds").

Defendant now moves by order to show cause ("OSC") pursuant to CPLR §1312(4) to modify the TRO and the stipulation to release \$100,000 of the escrowed funds to pay past and future legal fees in this forfeiture action and in the underlying criminal action. This amount is to be applied to past due legal fees of \$66,745.35 and the remainder presumably would be applied to future fees. In support of the OSC, defendant argues he will be denied his Sixth Amendment right to counsel of his choice if the OSC is denied.²

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

¹ Mrs. Flouras, who is now estranged from defendant, avers that she has spent her share of the sale proceeds to pay post-closing real estate taxes and "to satisfy pre-existing debts incurred to pay my family's living expenses, and to pay legal fees." See Aff. of Evie Flouras, Exh. C to OSC.

² As of the OSC's filing date, defense counsel anticipated a trial date would be set in the criminal matter at the next appearance on April 9, 2013. The Hon. Jill Konviser, the presiding criminal court judge, has indicated that once a trial date is set she will not entertain a motion to withdraw by defense counsel. Defense counsel maintains they cannot continue representing Flouras without being compensated and request an expedited determination of this OSC. Subsequently, defense counsel advised this court that the criminal case had been adjourned from April 9, 2013 to May 3, 2013, at which time a trial date will be set.

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. (Emphasis added).

The DA opposes defendant's OSC on the grounds that Flouras (1) fails to demonstrate that the escrow funds are derived from a legitimate source of income and (2) has not met his burden of demonstrating he has no other unrestrained funds to pay attorney's fees. On the first point, Flouras responds by noting that CPLR §1312(4) does not expressly require a showing that the funds sought to be released are derived from a legitimate source of income, a fact plaintiff concedes. Defendant contends that the statute only requires him to show he has no other unrestrained assets and the legal fees are bona fide and reasonable.³ Addressing the DA's second point, Flouras relies upon his and his wife's financial disclosure to the DA to establish a lack of unrestrained funds from which to pay counsel fees. See OSC at Exhs. A and B.

Turning to the DA's claim that defendant must establish a legitimate source for the escrow funds, plaintiff relies upon federal case law for the proposition that a defendant who wishes to have restrained funds or assets released to pay for counsel

³ Flouras' counsel provided this court with copies of the invoices for their legal services and provided plaintiff's counsel with redacted copies of same. Plaintiff does not dispute that the fees sought are reasonable and bona fide.

fees must demonstrate that he legitimately owns the funds or assets in question.⁴ The DA further cites case law from New York, including this court's own decisions, confirming this prerequisite to the release of restrained funds for payment of attorney's fees.⁵ Plaintiff also submits an affidavit from Senior Financial Investigator Biagio Rosano painstakingly detailing deposits from Flouras' employer into his personal bank accounts from 2009 (when he and his wife purchased their home) through 2012 and payments from those accounts for the mortgage and other expenses allegedly related to renovations. The DA concludes that mortgage payments for the home totaled \$175,298.14 and thus, the sale proceeds plaintiff is presently holding in escrow are directly traceable to money Flouras allegedly stole.

Defendant counters that CPLR §1312(4) was amended in 1990, after the U.S. Supreme Court's decisions in *Caplin & Drysdale* and *Monsanto* (cited by plaintiff) and the decision in *Vergari*. Flouras argues that had the legislature intended to require a forfeiture defendant to prove a legitimate source prior to releasing funds, it would have done so. Finally, in the event this court determines that funds to be released must be untainted, defendant urges that a hearing on the issue must be held.

Consistent with its prior rulings, this court agrees that the escrowed funds cannot be released to pay Flouras' attorney's fees because he fails to establish that they are

⁴ See *Caplin & Drysdale, Chartered v U.S.*, 491 US 617, 626 (1989); *U.S. v Monsanto*, 491 US 600, 613 (1989).

⁵ See *Vergari v Lockhart*, 144 Misc2d 860, 870 (Sup. Ct., Westchester Co., 1989); *Vance v Haggerty*, 2011 WL 3020868 (Sup Ct, NY co., Shulman, J.); *Morgenthau v Western Express Int'l Inc.*, N.Y. County Index No. 400516/06, Sep. 22, 2009 (Shulman, J.), *affd* 83 AD3d 521 (1st Dept 2011); *Morgenthau v Efargan*, N.Y. County Index No. 401214/05, Nov. 2, 2005 (Shulman, J.).

derived from a legitimate source. Although CPLR §1312(4) does not expressly require such a showing, in granting the TRO, this court found that the DA had shown a substantial likelihood of succeeding on the merits of its forfeiture cause of action. In light of this prior finding, allowing the release of funds would be improper. See *Corporacion Nacional del Cobre de Chile v Orrego Hirsch*, 242 AD2d 183, 184-185 (1st Dept 1998)(lower court improvidently exercised its discretion in releasing a portion of attached funds for payment of defendants' attorney's fees in view of its prior finding that plaintiff had demonstrated a substantial likelihood of succeeding in showing the funds were the product of fraudulent transfers). Citing *Caplin & Drysdale, supra*, the First Department stated that "there is no constitutional right in criminal cases for a defendant to spend someone else's money for his defense." *Id.*⁶ Here, defendant does not refute any of the facts alleged in plaintiff's investigator's affidavit tracing the use of allegedly tainted funds to purchase the house. As a result, and in light of this court's further findings *infra*, no evidentiary hearing is warranted.

Notwithstanding the foregoing analysis, even if this court were to agree that defendant was not required to demonstrate that the escrowed funds came from a legitimate source, the OSC would still be denied because Flouras has not demonstrated that he has no unrestrained funds from which to pay legal fees. Plaintiff claims defendant's financial disclosure is inadequate because it did not include backup documentation and is otherwise incomplete. Specifically, as detailed in plaintiff's

⁶ Defendant summarily attempts to distinguish *Corporacion Nacional* on the grounds that it is not a forfeiture action. This court finds no relevance to the purported distinction or any reason why the general principle underlying its holding would have no application in the context of a forfeiture action.

investigator's affidavit, significant funds were withdrawn from a particular Chase bank account during the relevant time period which cannot be accounted for. Plaintiff notes that Flouras failed to disclose the existence of this Chase bank account, as well as other accounts, in his financial disclosure affidavit.

In reply, Flouras explains that when he completed the affidavit on March 18, 2013, the account in question had been closed since December 12, 2012. Counsel also notes that the DA's financial disclosure affidavit form does not request backup documentation or require defendant to account for his spending during the period of the indictment. Under these circumstances, it cannot be said that Flouras' responses to the financial disclosure affidavit were made in bad faith or with the intention of being misleading or evasive. However, plaintiff correctly contends that further information is required with respect to the unaccounted for withdrawals and payments cited in the investigator's affidavit. Accordingly, defendant's OSC must be denied on the additional ground that Flouras has not sufficiently established that no other unrestrained funds are available to pay counsel fees.

Finally, though not addressed by either of the parties, the OSC asks this court to modify not only the TRO but also the stipulation. Here, the parties, while represented by counsel, specifically stipulated that plaintiff would be permitted to hold half of the net proceeds of the sale of defendant's house in escrow. This court is loathe to grant Flouras' OSC to release the escrowed funds on the additional ground that doing so would effectively eviscerate the parties' agreement. It is well settled that, absent an affront to public policy, parties to a civil dispute have the right to chart their own litigation course. *Trump v Trump*, 179 AD2d 201, 204 (1st Dept 1992). Only where there is

cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, none of which is present in the case at bar, will a party be relieved from the consequences of a stipulation made during litigation. *1420 Concourse Corp. v Cruz*, 135 AD2d 371 (1st Dept 1987), citing *Hallock v State of New York*, 64 NY2d 224, 230 (1984); *Matter of Frutiger*, 29 NY2d 143, 149-150 (1971).

The court has considered the parties' remaining arguments and finds them unavailing. For all of the foregoing reasons, it is hereby


ORDERED that defendant's OSC is denied in its entirety; and it is further

ORDERED that defendant's counsel shall retrieve his unredacted billing records submitted for this court's *in camera* review from the Part 1 Clerk (60 Centre Street, Room 325) on or before May 15, 2013 and, in the event they are not retrieved on or before that date, they shall be destroyed.

The foregoing is 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
May 1, 2013

FILED



Hon. Martin Shulman, J.S.C.

MAY 02 2013

NEW YORK
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