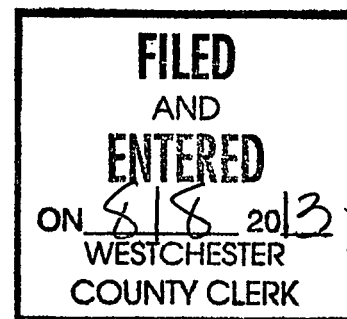


People v Pantoja
2013 NY Slip Op 34158(U)
August 8, 2013
County Court, Westchester County
Docket Number: 07-0265
Judge: Barry E. Warhit
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK,



-against-

DECISION AND ORDER

RAFAEL PANTOJA,

Ind. No.: 07-0265

Defendant

WARHIT, J.

FILED TR
AUG - 8 2013
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

By Notice of Motion, dated April 1, 2013, the defendant, Rafael Pantoja, has moved, pursuant to CPL § 440.10, for an order setting aside and vacating the judgment of conviction entered under indictment number 07-0265. The defendant alleges the People "exchanged the truth of Banco Popular (as a convicted bank) for the lie that PHH Mortgage Corp. ("PHH") was the purported lender of the mortgage" and in so doing violated the disclosure obligations of Brady. The defendant also claims the People concealed documentation that the appraisal of the property located at 764 Lake Street, which secured the \$600,000 mortgage the defendant fraudulently obtained from Countrywide Mortgage ("Countrywide"), was conducted by an appraiser who had a conflict of interest based upon his alleged affiliation with Countrywide. Defendant also sought a stay of the within proceeding. The People oppose the defendant's applications in their entirety.

In deciding this application, the court has read and considered the following papers:

Notice of Motion, Affidavit in Support,
and annexed Exhibits 1 and 2,
dated April 1, 2013

Defendant's Memorandum of Law
dated April 8, 2013

People's Affirmation in Opposition,
Memorandum of Law, and
annexed Exhibits 1 through 17
filed May 15, 2013

Defendant's Reply Memorandum
and annexed Exhibits A through
G

Defendant's Correspondence,
dated June 13, 2013,
seeking a Stay of the Proceeding

People's Correspondence, dated
June 17, 2013, opposing a
Stay of the Proceeding and
Related Exhibits received
June 18, 2013

Defendant's Correspondence,
dated June 26, 2013

PROCEDURAL HISTORY

On May 17, 2007, the defendant was charged under the within indictment with fourteen counts of criminal conduct including grand larceny, identity theft and forgery. The charges arose in relation to the defendant having completed and submitted fraudulent loan applications and mis-represented his status as an attorney and having stolen money from individuals who purchased real estate he exercised control over or owned.

A jury trial was commenced with respect to the within indictment. On the third

day, on February 6, 2008, the defendant interrupted the trial and pleaded guilty to one count of grand larceny in the first degree and one count of grand larceny in the second degree. The court accepted the defendant's pleas in full satisfaction of the twelve remaining counts and expressly conditioned the plea upon the defendant's consent to have civil restitution judgments entered against him in the amounts of \$1,186,250; \$600,000 and \$356,000 in favor of the aggrieved mortgage and title companies (Hubert, J.).

The count of grand larceny in the first degree to which the defendant pleaded guilty concerned his having stolen \$1,186,250 from PHH Mortgage Corp. ("PHH") in mortgage proceeds by completing and executing a fraudulent loan application in which he represented his father's social security number to be his own and also falsely representing his status as an attorney¹. The count of grand larceny in the second degree to which the defendant also pleaded guilty related to a transaction in which the defendant procured a \$600,000 mortgage from Countrywide Mortgage by misrepresenting his social security number and his status as an attorney.

In accordance with the court's sentencing promise, on March 4, 2008, the defendant was sentenced as a second felony offender to concurrent terms of incarceration of 4 ½ to 9 years. Judgements of restitution were ordered including one in the amount of \$1,186,250.00 in favor of PHH.

Despite having expressly waived his right to appeal as a condition of the negotiated plea, within three weeks of having been sentenced, the defendant served a notice of appeal. On September 16, 2008, the Appellate Division, Second Department

¹ Defendant was disbarred from the practice of law in New York State on February 8, 1996.

granted the defendant's motion for poor person relief and for the assignment of appellate counsel. Upon review of the record, counsel for the defendant submitted a brief to the Appellate Division, Second Department attesting there existed no non-frivolous grounds upon which appellate review was warranted.² The defendant then sought leave to file and did file a *pro se* supplemental appellate brief. Upon consideration of counsel's submission as well as the defendant's supplemental brief, the Appellate Division, Second Department unanimously affirmed petitioner's convictions on grounds that there exist no non-frivolous issues worthy of appellate review (87 AD3d 555 [2d Dept. 2011], leave denied, 18 NY3d 961 [2d Dept. 2012]).

In addition to pursuing a direct appeal, the defendant, appearing *pro se*, has also filed prior motions, pursuant to Criminal Procedure Law (CPL) Article 440, to vacate his conviction and to vacate the portion of his sentence directing that he pay restitution. Specifically, on July 1, 2009, the defendant moved, pursuant to CPL § 440.10, to vacate his convictions on grounds that the People had induced his plea of guilt though the alleged introduction of a fraudulent document during the trial he chose to abort. This motion was dismissed for lack of merit (People v. Pantoja, Decision and Order, February 18, 2009 (Zambelli, J)).

The defendant has filed three motions, pursuant to CPL § 440.20, to set aside the civil restitution judgments ordered by the court. In his first such application, the defendant sought to vacate the civil judgment in the amount of \$1,186,250 owed by him

²Counsel's Anders brief conceded that the defendant wrongfully used the social security number assigned to his father, rather than himself, to procure the mortgage at issue and that the defendant falsely represented himself to be an attorney as the petitioner was disbarred in 1996 as a result of pleading guilty in New York County on September 15, 1995 to three counts of grand larceny in the second degree, two counts of attempted grand larceny in the second degree and one count of grand larceny in the third degree.

to PHH due to the sentencing court having allegedly misled the defendant concerning the effect that the order and judgment of restitution would have on foreclosure proceedings relating to the same property. This court dismissed the defendant's motion (People v. Pantoja, Decision and Order, February 18, 2009 (Zambelli, J)). On August 25, 2010, the defendant, appearing *pro se*, filed substantially the same motion in which he re-asserted his claim that the sentencing court improperly advised him concerning the effect the judgment and order of restitution would have on the foreclosure action PHH and its successors were pursuing against defendant. This court denied the defendant's motion (People v. Pantoja, Decision and Order, January 3, 2011 (Cacace, J.)). On February 15, 2013, the defendant filed another *pro se* motion, pursuant to CPL § 440.20, seeking to vacate all of the judgments of restitution on grounds that they had allegedly been fully satisfied. By Decision and Order, filed May 22, 2013, this court (Warhit, J.) dismissed the defendant's motion, which was replete with self-serving and unsubstantiated claims, for failure to notify or proceed against any of the parties who he alleged had been made whole.

The defendant has also pursued federal relief to vacate his convictions by pleas of guilty. On or about September 21, 2011, the defendant commenced an action, pursuant to 42 USC § 1983 and 28 USC §§ 2241 and 2254, in the Eastern District of New York (People's Affirmation in Opposition, Exhibit 12). On December 21, 2011, Federal District Judge Gleeson transferred the claims the defendant raised under 28 USC § 2254 to the Southern District of New York and dismissed the other claims.

On or about February 3, 2012, the defendant filed a petition for a writ of habeas corpus in the Southern District of New York claiming the Westchester County District

Attorney's office knew of criminal charges pending against Banco Popular but failed to disclose this information to the defendant during his aborted trial. Defendant claimed this alleged act constituted a Brady violation. On March 8, 2013, the federal court dismissed this action without prejudice to the defendant's right to litigate the claim in State court (People's Affirmation in Opposition, Exhibit 16, Order Adopting Report and Recommendation (Seibel, J)). As a result, on April 19, 2013, the defendant filed the within *pro se* motion, pursuant to CPL § 440.10 motion.

The defendant herein asserts the People were cognizant, at the time of his indictment and subsequent trial, that Banco Popular was the subject of a criminal investigation, but failed to disclose this information to the defendant in violation of the prosecutor's obligations under Brady v. Maryland (373 US 83 [1963]). Additionally, with respect to the charge of grand larceny in the first degree to which he pleaded guilty, the defendant claims the People improperly identified PHH, rather than Banco Popular, as the lender of the mortgage.

The defendant also claims a Brady violation with respect to his conviction for grand larceny in the second degree. Specifically, the defendant claims the People withheld information that the appraiser of the residential property, located at 764 Lake Street in Harrison which secured the mortgage the defendant procured from Countrywide, was affected by a conflict of interest. Defendant asserts the appraiser's lack of independence constitutes exculpatory evidence.

The People oppose the defendant's claims in their entirety and seek dismissal of the within motion.

LEGAL ANALYSIS

In addition to this motion, the defendant has filed two separate habeas petitions which remain pending in federal court. The defendant has sought to have this court withhold its determination of the instant motion until such time as the prosecutor who had handled this indictment is “subpoenaed to testify at a hearing” in federal court. Defendant’s request for a stay of this proceeding is denied.

Firstly, the defendant has failed to demonstrate a legal basis in support of his application for a stay. Secondly, according to Assistant United States Attorney Elizabeth Geddes, there is presently no hearing scheduled in federal court (see, Related Exhibits received June 18, 2013, e-mail correspondence of AUSA Geddes dated June 13, 2013). Moreover, it does not appear that such a hearing is owed to the defendant as a matter of right. Consequently, this court finds it appropriate to determine the instant matter and finds no basis to hold its decision in abeyance.

CPL § 440.10 is a mechanism whereby a defendant may challenge a judgment of conviction based upon facts which do not appear in the record and which undermine the legitimacy of the judgment (People v. Crimmins, 38 NY2d 407 [1975]). To prevail upon a motion to vacate judgment, a defendant must raise and satisfy one or more of eight enumerated grounds (CPL §§ 440.10(1)[a-h]).

Nevertheless, an application, pursuant to CPL § 440.10, does not lie where a defendant has previously raised the ground or issue advanced in the motion on direct appeal (CPL § 440.10(2)(a)). Defendant herein directly appealed his convictions. With respect to that endeavor, he filed a *pro se* Supplemental Brief in which one of his chief complaints concerned the People’s alleged improper identification of PHH as the

mortgage lender rather than Banco Popular (People's Affirmation in Opposition, Exhibit 3, Supplemental Brief for the Defendant-Appellant, pp. 4-5). The People's Supplemental Brief bore directly upon this claim and, importantly, in affirming the defendant's convictions, the Appellate Division, Second Department made specific reference to the defendant's Supplemental Brief (People's Affirmation in Opposition, Exhibit 4, Supplemental Brief for Respondent, Point 1; and, (Pantoja, 87 AD2d at 556).

Consequently, CPL § 440.10[2](a) bars the defendant from raising claims which concern the People's alleged substitution of PHH for Banco Popular. It is without moment that on appeal the defendant did not raise the particular claims he raises in the within motion as the defendant's failure to raise the Brady claim he now raises is unjustified (CPL § 440.10(2)[c]).

As above discussed, the defendant moves for dismissal of his convictions for grand larceny in the first degree and grand larceny in the second degree on grounds of alleged Brady violations. CPL § 440.10 is an improper procedural vehicle under which to alleged Brady violations (CPL 440.10[1][g]); see, People v. Huggins, 105 AD3d 760 (2d Dept. 2013)(by pleading guilty, the defendant forfeited his right to seek review of any alleged Brady violation); People v Kidd, 100 AD3d 779 lv denied, 20 NY3d 1062 [2d Dept. 2013]; People v Philips, 30 AD3d 621 (2d Dept. 2006).

The significant procedural bars aside, the defendant's claim, this court finds no basis to credit the defendant's claim that the People maliciously or improperly substituted PHH for Banco Popular as the mortgage lender. Documentary proof unequivocally established that on the date of or before closing on the mortgage, the defendant was fully aware the lender was PHH, not Banco Popular. Defendant

executed a "Notice of Assignment, Sale or Transfer of Servicing Rights" acknowledging the mortgage had been assigned, sold or transferred to PHH (People's Affirmation in Opposition, Exhibit 17).

Defendant's claims that during the prosecution of the within indictment the People were aware of criminal proceedings or investigations involving Banco Popular and withheld this information and that the prosecutor had knowledge that the appraiser who valued the property which secured the Countrywide Mortgage had a conflict of interest and had inflated the residence's worth. These claims are completely self-serving and are not supported by affidavits or other evidence. Accordingly, it is within this court's sound discretion to dismiss this motion without a hearing (CPL § 440.30[4](d) (see, People v. Session, 34 NY2d 254 [1974])).

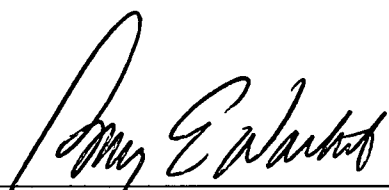
Even assuming, arguendo, Banco Popular was under criminal investigation for wrongdoing and that the appraiser had a conflict of interest and improperly valued the securing property, the defendant has not established how these allegations are material and exculpatory to his convictions for grand larceny in the first degree and grand larceny in the second degree. Defalcations on the part of Banco Popular concerning its business practices lack a nexus to the defendant's criminal conduct of falsely representing himself as an attorney to the lender and his fraudulent use of his father's social security number to qualify for the loan. Similarly, the defendant has not demonstrated how proof of an untoward relationship between Countryside and the involved appraiser bears upon the defendant's criminal conduct and misrepresentations in securing that loan. Accordingly, even if the defendant's claims were not procedurally barred, they would lack merit.

All other claims raised by the defendant have been considered and have been deemed lacking in merit.

For all the foregoing reasons, the defendant's motion is summarily denied in its entirety and is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

Dated: White Plains, New York
August 8, 2013



Hon. Barry E. Warhit
Westchester County Court