Vance v Aglialoro
2014 NY Slip Op 31240(U)
May 8, 2014
Supreme Court, New York County
Docket Number: 450122/14
Judge: Martin Shulman

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

CYRUS R. VANCE, JR.,
District Attorney of New York County,
Plaintiff-Claiming Authority,

- against -

ANN MARIE AGLIALORO, et al,
Defendants.

Index No.: 450122/14

Motion Seq. 001

Decision & Order

The following papers were read on this motion for an order of attachment & preliminary injunction

	Papers Numbered
Order to Show Cause - Affirmation - Exhibits A-D (E-Filed Doc. Nos. 1-5, 10)	**1**
Answering Affirmations - Memoranda of Law - Exhibits	
E-Filed Doc. No. 34 (Kull)	**2**
E-Filed Doc. Nos. 35-36 (Wiltbank)	**3**
E-Filed Doc. No. 38 (Hurley)	**4**
E-Filed Doc. No. 42 (Lieberman)	**5**
E-Filed Doc. Nos. 43-44 (Martin)	**6**
E-Filed Doc. Nos. 45-46 (O'Hara)	**7**
E-Filed Doc. No. 47 (Gergenti)	**8**
E-Filed Doc. Nos. 48-49 (Aglialoro)	**9**
E-Filed Doc. No. 50 (Polite)	**10**
Notice of Cross-Motion - Affidavit/Affirmation - Exhibits A-C	
E-Filed Doc. Nos. 29-33 (Dinkelacker)	**11-13**
Replying Affidavits	
E-Filed Doc. Nos. 76, 78, 80, 82, 84, 99, 102, 105, 108, 111 (Plaintiff)	**14-23**
E-Filed Doc. No. 114 (Dinkelacker Cross-Motion Reply)	**15**

CROSS- MOTION: **Yes**

Hon. Martin Shulman, J.S.C.:

Plaintiff Cyrus R. Vance, Jr., District Attorney of New York County ("plaintiff" or "DA") commenced this civil forfeiture action pursuant to CPLR Article 13-A seeking forfeiture of funds totaling $21,462,206.10 from the over 100 defendants named in this

action. The complaint alleges that each defendant fraudulently obtained Social Security Disability Insurance ("SSDI") benefits in specified amounts from the Social Security Administration ("SSA"), which plaintiff contends are the proceeds, substituted proceeds and/or instrumentalities of the defendants' felony crimes of second degree grand larceny and related crimes as charged in the underlying indictment.

Upon commencing this action the DA brought the within order to show cause ("OSC") seeking a preliminary injunction and order of attachment. Upon signing the OSC, this court issued a temporary restraining order ("TRO") restraining each defendant's assets pending the OSC's hearing.

The following defendants[1] have submitted written opposition to the OSC: Aglialoro, Gergenti,[2] Hurley, Kull, Lieberman, Martin, O'Hara,[3] Polite and Wiltbank. Defendant Dinkelacker opposes the OSC and cross-moves to vacate the TRO or alternatively to modify it to permit him access to $60,000 of his restrained funds for payment of attorney's fees and living expenses.

JURISDICTIONAL CLAIMS

Defendants Wiltbank and Lieberman contest service of the OSC on two grounds. First, they argue that, as out of state residents who waived extradition and voluntarily

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[1] Defendant Mahoney withdrew his opposition to the OSC, which is deemed resolved as to him pursuant to stipulation. See E-filed documents 8 and 69.

[2] Plaintiff subsequently discontinued this action as to defendant Gergenti and as such his arguments in opposition are now deemed moot and/or withdrawn.

[3] Plaintiff and defendant O'Hara have since stipulated to release joint bank accounts held with his father as well as two (2) credit card accounts, thus partially resolving the issues raised in this defendant's opposing papers. See E-filed documents 132 and 141.

appeared in New York to be arraigned in the criminal proceeding, they were immune from service of process under CPL §570.58. Second, these defendants contend that it was improper for plaintiff to serve them with the OSC and underlying papers (including the summons and complaint) in the court house on the day of their arraignment. As a result, these defendants claim that the TRO is invalid as to them and this court lacks personal jurisdiction.

The DA concedes that the OSC was served upon defendants after the arraignment proceedings, but claims such service was effectuated with that court's permission. As stated in *Raymond v Marchand*, 22 Misc3d 1113(A), 880 NYS2d 875 (Sup Ct, Kings County, 2009), "[w]hile Courts do not look favorably on service of civil process in any part of the courthouse building, it is not unlawful to serve a defendant in a courthouse, unless it is done in a manner that causes a disturbance to Court proceedings." *Id.* at *2. Here, plaintiff attaches a copy of the transcript from the arraignment proceedings indicating that service caused no disturbance to the criminal court proceedings and in fact was effectuated with that court's consent. Accordingly, service upon Wiltbank and Lieberman was not defective by virtue of having taken place in the criminal court building after their arraignments.

Turning to defendants' CPL §570.58 (formerly Code Crim. Proc. §855) immunity argument, that statute provides in relevant part:

> A person brought into this state on or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding . . . until he has been convicted in the criminal proceeding, or if acquitted, until he has had reasonable opportunity to return to the state from which he was extradicted (sic).

This court found few cases interpreting this statutory provision. As stated in *Mance Corp. v Rullo*, 58 Misc2d 887, 888 (Sup Ct, Westchester County), *affd* 32 AD2d 1065 (2d Dept 1969), this statute "was enacted for the purpose of assuring the asylum state that non-resident criminals, or non-residents charged within our jurisdiction, would not be dealt with civilly until the crime was proven (citation omitted)."

In opposition, plaintiff cites cases interpreting the common law immunity rule "that a suitor in attendance in a court outside the territorial jurisdiction of his residence is immune from service of civil process while attending court and for a reasonable time before and after . . ." *Thermoid Co. v Fabel*, 4 NY2d 494, 498 (1958). The rationale for granting such immunity "is to encourage nonresidents to come within the jurisdiction of this State to attend judicial proceedings where if they had remained outside of the State they would not be subject to the jurisdiction of our courts." *Brause 59 Co. v Bridgemarket Assocs.*, 216 AD2d 200 (1st Dept 1995). Thus, where a defendant can be served outside New York, the immunity doctrine is inapplicable. See also, *Weichert v Kimber*, 229 AD2d 998, 999 (4th Dept 1996) (nonresidents lose their immunity if they are amenable to long arm jurisdiction under CPLR §302); *Raymond v Marchand, supra*.

Here, the DA argues that New York has long arm jurisdiction (CPLR §302) over Wiltbank and Lieberman based upon their tortious acts committed within New York (i.e., filing of allegedly fraudulent applications within New York) and, as a result, they are not immune from service in New York. While long arm jurisdiction may exist, plaintiff does not address CPL §570.58's express grant of immunity from service of civil process in actions arising from the same facts as the criminal proceedings to non-resident criminal

defendants who voluntarily waive extradition. The legislature has seen fit to codify the common law immunity rule in this limited situation, without exceptions. Although this court is mindful of the fact that the DA will inevitably re-serve these defendants in their home states with the summons and complaint[4] and a new application, nonetheless, statutory mandates cannot be ignored. Accordingly, as Wiltbank and Lieberman were immune from service of process in connection with this civil forfeiture action, the TRO must be vacated as to them.[5]

PROVISIONAL REMEDIES

With respect to the provisional remedies available to the plaintiff claiming authority in CPLR Article 13-A forfeiture actions, CPLR §1312(3) sets forth the DA's burden for obtaining such relief, providing in relevant part that:

> A court may grant an application for a provisional remedy when it determines that: (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 from the jurisdiction of the court, or otherwise be unavailable for forfeiture; [and] (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. . . (bracketed matter added).

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

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[4] Plaintiff has 120 days from filing the summons and complaint to effectuate service upon defendants. CPLR §306-b

[5] In light of the foregoing, it is no longer necessary for this court to address these defendants' remaining arguments, including Lieberman's position that the DA cannot obtain equitable relief because it has "unclean hands" based upon its alleged attachment of out of state property (to wit, a Florida bank account and safe deposit box).

opposing the OSC argues that the DA has failed to establish one or more of the foregoing requirements.

A. Substantial Probability of Prevailing on the Issue of Forfeiture

The remaining defendants primarily argue that plaintiff fails to demonstrate a substantial probability of prevailing on the issue of forfeiture. The gravamen of defendants' argument is that the OSC's supporting papers, consisting of an attorney's affirmation, an investigator's affidavit and a draft indictment, lack particularized allegations regarding each defendant's alleged criminal conduct. Defendants thus contend that, on this record and without further details, the DA cannot establish that each defendant is likely to be convicted of the crime of second degree grand larceny.

In response to defendants' collective claims that the DA's allegations against them are too generalized, conclusory and vague, plaintiff makes the following points: (1) by granting the TRO, this court implicitly found that plaintiff had satisfied its burden of proof to obtain provisional relief; (2) the grand jury indictment alone provides ample basis for this court to determine that defendants are likely to be convicted; and (3) other facts indicative of defendants' guilt are set forth in Supervising Investigator Donato Siciliano's supporting affidavit ("Siciliano Aff." as Exhibit B to OSC)[6] which describes

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[6] Supervising Investigator Siciliano ("Siciliano") has been employed as an investigator with the D.A.'s office since 2009 and prior thereto was a member of the New York City Police Department ("NYPD") for 25 years (Siciliano Aff. at ¶ 2). Siciliano obtained the information summarized in his affidavit from various sources, including witnesses, documents, physical surveillance, court authorized eavesdropping, search warrants, social media, oral and written reports of other law enforcement personnel (including from Special Agent Peter Dowd of the SSA Office of the Inspector General, Office of Investigations) and undercover operations, etc. *Id.* at ¶ 4.

defendants' alleged conduct in creating and submitting fraudulent SSDI applications with the assistance of four separately indicted individuals.

The court may consider the issuance of a grand jury indictment based upon probable cause when evaluating the likelihood that plaintiff will prevail in a forfeiture action. *Morgenthau v A.S. Goldmen & Co., Inc.,* NYLJ, October 4, 1999, at 28, col. 4, *affd* 283 AD2d 212 (1st Dept 2001). The fact that an indictment is filed against a defendant is influential and often determinative of the issues of substantial probability of success, if combined with other facts indicative of the defendant's guilt and the strength of the claiming authority's case. *Pirro v Schaible*, NYLJ September 17, 1998, at 17, col. 6 (Sup Ct, Westchester County).

In determining whether to grant the DA provisional relief and as noted in *Morgenthau v Vinarsky*, 21 Misc3d 1137A, 875 NYS2d 821 [*3-4] (Sup Ct, NY County 2008), this court is not required to test the sufficiency of the indictment, but can otherwise weigh the adequacy of:

> [a]n . . . [i]ndictment regular on its face [which] must be presumed to have been properly returned by the Grand Jury. *People v Smith*, 128 NYS2d 90, *aff'd* 283 AD 775, 129 N.Y.S2d 492 [1st Dept 1954]. Furthermore, Grand Jury proceedings carry a presumption of regularity and to overcome that presumption, there must be a showing by the defendant of a particular need or gross and prejudicial irregularity in the proceedings or some other similarly compelling reason. *People v Lewis*, 98 AD2d 853, 470 NYS2d 834 [3rd Dept 1983] . . . (bracketed matter added).

See People v Connolly, 28 Misc3d 1117A, 856 NYS2d 500 (Sup Ct, Seneca County 2008).

Here, Investigator Siciliano concedes in his affidavit that "the facts and circumstances of this investigation have been summarized for the specific purpose of

the application being made." Siciliano specifically states that he has not "set forth each and every fact learned during the course of this investigation" (¶ 5).

At first glance, defendants' argument that the OSC's supporting allegations are too generalized is convincing. However, each of the over 100 defendants herein is accused of the same crime, to wit, submitting fraudulent applications for SSDI benefits. Defendants are necessarily aware of the contents of their applications and the circumstances under which they were submitted. Further, the supporting papers differentiate each defendant's alleged crime by indicating the time period during which it allegedly occurred and the amount of benefits obtained.

The DA is not required to allege every fact within its knowledge. As found in *Morgenthau v A.S. Goldmen & Co., Inc.*, NYLJ, October 4, 1999, at 28, col. 4 *affd* 283 AD2d 212 (1st Dept 2001):

> [W]hile [plaintiff] could have additional facts, [plaintiff's showing] is not rebutted by any facts presented by any defendant. Plaintiff could provide additional details. However, it is not necessary to identify each and every transaction that each individual defendant engaged in at this stage. To satisfy his burden, plaintiff must support his contentions "by affidavit and such other written evidence as may be submitted", CPLR 1334.

Under these circumstances, the indictment coupled with the Siciliano Aff. sufficiently describe the crimes charged and meet the DA's burden of showing a likelihood of prevailing on the issue of forfeiture. Further, like the defendants in *Morgenthau v A.S. Goldmen & Co., Inc.*, the defendants herein have not adequately rebutted plaintiff's supporting allegations, having submitted either affidavits merely denying the crimes charged in general terms, or affirmations from their counsel, who lack personal knowledge.

B. Availability of Property for Forfeiture

Defendants also claim that the DA fails to demonstrate that their assets may be destroyed, removed from the jurisdiction of the court, or otherwise be unavailable for forfeiture absent the court granting the provisional remedies sought. As plaintiff notes, "[a] high degree of proof is not necessary to demonstrate that the failure to enter the order may result in the property being destroyed or otherwise unavailable for forfeiture." *Kuriansky v Natural Mold Shoe Corp.*, 133 Misc2d 489 (Sup Ct, Westchester County, 1986). No actual assignment or dissipation of the property is necessary. *Holtzman v Samuel*, 130 Misc2d 976 (Sup Ct, Kings County, 1985).

Here, considering the nature of the criminal charges (e.g., grand larceny), namely the fraudulent and deceptive nature of the alleged crimes, it is more likely than not that defendants may well seek to dissipate assets that could help satisfy a potential judgment. See *Figliolia, supra*, at *3. Moreover, "the governmental need to preserve available assets is particularly appropriate in this case where the profits of the criminal defendants' alleged crimes are misappropriated public funds which can potentially be restored to tax payers." *Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160 (2d Dept), *affd* 73 NY2d 875 (1988) (involving alleged fraudulent scheme to improperly obtain public funds under the State Medicaid Program).

C. Hardship to Defendants

Defendants also contend that plaintiff has failed to meet its burden of establishing that the need to preserve the availability of defendants' property through the entry of a preliminary injunction and order of attachment outweighs any hardship on

defendants or any others against whom such an order may operate. However, the defendants have not demonstrated how any hardship they may face as a result of an order of attachment outweighs the need to preserve the availability of the property to satisfy a potential judgment. See *Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160 (2d Dept), *affd* 73 NY2d 875 (1988) ("the defendants' failure to come forward with sworn financial disclosure leaves this Court without sufficient information to ascertain the extent of [their] hardship").

For example, defendants Aglialoro, Kull, O'Hara and Polite generally claim that the restraint on their assets is a hardship because they are unable to pay their household expenses. Defendants Kull and Polite further claim that the restraint on bank accounts jointly held with their spouses is a hardship since their spouses are not accused of any crime, and also contend that attachment of their bank accounts into which pension funds are deposited violates Retirement & Social Security Law §110(2).

However, none of the foregoing defendants has moved to vacate or modify the TRO pursuant to CPLR §1312(4), or even submitted supporting financial documentation to substantiate their claims.[7] As these defendants have neither formally moved for relief or otherwise supplied the court with the requisite information to warrant a modification of the TRO, no CPLR §1312(4) relief can be granted. *See Morgenthau v. A.S. Goldmen & Co., Inc.*, NYLJ, October, 4, 1999, p. 28, col. 4, *affd* 283 AD2d 212 (1st Dept 2001)(complete financial disclosure is a prerequisite for CPLR 1312[4] relief).

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[7] Kull and Polite merely submit affirmations from their attorneys, who lack personal knowledge as to the ownership of their clients' bank accounts and the source of funds deposited therein.

CROSS-MOTION

Defendant Dinkelacker cross-moves to vacate the TRO or alternatively to modify it to permit him access to $60,000 of his restrained funds for payment of attorney's fees and living expenses. More specifically, he states he needs to repay his sister $40,000, which she loaned to him for payment of his counsel's retainer fees of $20,000 each for legal representation in this action and the underlying criminal proceedings. Dinkelacker further proposes to have his counsel hold the remaining $20,000 in escrow to use for living expenses upon advance notice to the DA.

In support of his request, Dinkelacker submits plaintiff's standard form Affidavit of Financial Information (cross-motion at Exh. A), along with copies of his counsel's retainer agreements and an affidavit from his sister. He further states that funds in certain bank accounts were derived from an inheritance, and urges that his pension of approximately $8,250 per month provides a stream of income that is available to satisfy any judgment plaintiff may potentially obtain.

Although the DA responds to Dinkelacker's opposition, plaintiff appears to overlook his cross-motion and fails to address it at all. Notwithstanding the DA's oversight, this court has reviewed the financial information submitted and concludes that further information should be obtained before restrained funds are released. Plaintiff seeks forfeiture of over $195,000. Dinkelacker's financial disclosure affidavit is mostly complete but contains some omissions which should be filled in.[8] Supporting

[8] For example, no response is given at page 10, item J (deferred compensation) or page 19, item K (contingent interests), nor has defendant totaled his assets and liabilities.

documentation of the source of his funds should also be provided. From the information given thus far, it appears defendant has approximately $90,000 in various bank accounts, yet seeks release of two-thirds of that amount ($60,000). Under these circumstances it is far from clear whether his monthly pension payments are sufficient to satisfy a potential judgment. It also appears that Dinkelacker has obtained the DA's permission to receive and use his monthly pension payments going forward, so he is not entirely without funds.

Accordingly, it is

ORDERED that the TRO is vacated as to defendants Wiltbank and Lieberman; and it is further

ORDERED that plaintiff's motion for an order of attachment (CPLR §1316) and preliminary injunction (CPLR §1333) is granted; and it is further

ORDERED that plaintiff shall submit an appropriate proposed order on notice for this court's signature; and it is further

ORDERED that Dinkelacker's cross-motion is denied without prejudice.

This constitutes the Decision and Order of this Court.

Dated: New York, New York
May 8, 2014

Hon. Martin Shulman, J.S.C.