

Vance v Esposito

2014 NY Slip Op 31331(U)

May 20, 2014

Supreme Court, New York County

Docket Number: 450120/14

Judge: Martin Shulman

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**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 -

JOSEPH ESPOSITO, THOMAS HALE, RAYMOND
LAVALLEE and JOHN MINERVA,

Defendants.

Index No.: 450120/14

Motion Seq. 001

Decision & Order

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 above named defendants. The complaint alleges that from 1988 to approximately December 2013 the four (4) above named defendants engaged in a fraudulent scheme whereby they assisted 102 applicants¹ in creating and submitting fraudulent applications and obtaining unauthorized Social Security Disability Insurance (“SSDI”) benefits from the Social Security Administration (“SSA”). Plaintiff contends the funds sought to be forfeited are the proceeds, substituted proceeds and/or instrumentalities of the defendants’ felony crimes of first and 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

¹ The DA is simultaneously pursuing a separate forfeiture action against these individuals. See *Vance v. Aglioloro, et al*, N.Y. County Index No. 450122/14.

OSC, this court issued a temporary restraining order (“TRO”) restraining each defendant’s assets pending the OSC’s hearing.

Only defendant Raymond Lavalée (“defendant” or “Lavalée”), an attorney, has interposed opposition to plaintiff’s OSC. One issue raised in this defendant’s opposition involves the DA’s restraint of certain exempt funds. Counsel for the parties later resolved this issue by stipulation dated April 4, 2014 and so-ordered on April 8, 2014 (see E-filed document 20).²

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, Lavalée opposes the OSC on the grounds that the DA has failed to establish any of the foregoing requirements.

² Plaintiff and Lavalee also entered into a stipulation releasing his attorney IOLA account, an issue not raised in his opposition. See E-filed document 19.

A. Substantial Probability of Prevailing on the Issue of Forfeiture

Lavallee argues that plaintiff fails to demonstrate a substantial likelihood he will be convicted, specifically arguing:

- Supervising Investigator Donato Siciliano's supporting affidavit ("Siciliano Aff." as Exhibit B to OSC)³ contains only conclusory allegations and no direct evidence against Lavallee;
- the 102 SSDI applications at issue were filed over a 25 year period (approximately 4 per year) and thus are "not the main portion of the disability claims" defendant filed and as such were not a pervasive part of his law practice such that he would have noticed any alleged irregularities;
- there is no evidence Lavallee received anything other than the statutorily authorized fee in connection with the subject applications;
- Lavallee's co-defendants do not implicate him; and
- search warrants the DA executed yielded large cash sums in the possession of all defendants except Lavallee.

In response, the DA 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 Lavallee's guilt are set forth in the Siciliano Aff., which describes each defendant's

³ 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.

alleged involvement in the creation and submission of fraudulent SSDI applications as part of a larger overall scheme.

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).

Regardless, Siciliano sufficiently describes the alleged scheme between Lavallee and his fellow co-defendants. While Lavallee’s alleged role may have been less active than those of his co-defendants, nonetheless, sufficient facts are stated to establish his participation therein.

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.*, Lavallee has not adequately rebutted plaintiff’s supporting allegations, having submitted only an affirmation from his counsel, who lacks personal knowledge.

B. Availability of Property for Forfeiture

Lavallee also contends that the DA fails to demonstrate that his 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. The basis for this

argument is defendant's "unblemished personal history and honorary service".

Specifically, Lavallee's counsel avers that he is an 83 year old veteran who has been licensed to practice law in New York since 1959, whose career includes service as an FBI agent and an assistant district attorney. He has lived on Long Island his entire life, owns his home and has been married for 56 years. Given his "clean record", it is urged that Lavallee is unlikely to flee or otherwise compromise his assets.

In response, the DA notes that "[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 defendant 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

Lavallee also contends that plaintiff fails to meet its burden of establishing that the need to preserve the availability of his property through the entry of a preliminary injunction and order of attachment outweighs any hardship on him, citing his advanced age, as well as that of his elderly wife, who he claims is an innocent spouse who is financially dependent upon him and unable to seek other income. Moreover, even if this defendant was involved criminally, the DA's proffered evidence indicates that "he of all the participants received the smallest share of the proceeds", the majority of which went to the 102 applicants and co-defendants Esposito and Minerva.

This court is not persuaded by these arguments. As plaintiff notes, defendant has not moved to vacate or modify the TRO pursuant to CPLR §1312(4), or submitted complete financial documentation to substantiate his claims. *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). In any event, since Lavallee interposed his opposition, he has entered into stipulations with plaintiff releasing his attorney IOLA account and permitting him to use his pension funds for living expenses. Under these circumstances, this court finds no appreciable hardship to this defendant.

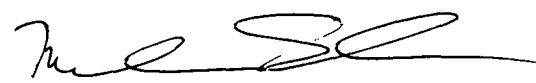
Accordingly, it is

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.

This constitutes the Decision and Order of this Court.

Dated: New York, New York
May 20, 2014



Hon. Martin Shulman, J.S.C.