

**Vance v Azzato**

2014 NY Slip Op 31564(U)

June 17, 2014

Supreme Court, New York County

Docket Number: 450449/14

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

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

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CYRUS R. VANCE, JR.,  
District Attorney of New York County,

Plaintiff-Claiming Authority,

- against -

FRANK AZZATO III, et al,

Defendants.

Index No.: 450449/14

Motion Seq. 001

**Decision & Order**

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**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 \$6,223,171.70 from the 28 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.

Only defendant Geoffrey Davila (“defendant” or “Davila”), has interposed opposition to plaintiff’s OSC.<sup>1</sup> The complaint alleges Davila fraudulently obtained SSDI benefits totaling \$226,636.90 from February 2010 through June 2013. Davila denies the foregoing, citing the SSA Appeals Council’s decision dated April 16, 2010 (“SSA decision”), which determined *inter alia* that he became disabled as defined in the Social Security Act on June 2, 2005.<sup>2</sup> Defendant urges this court to take judicial notice of the SSA decision and deny the OSC, asserting that he has “an absolute defense” to the complaint.

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, although Davila’s opposition does not specifically address the foregoing requirements, he essentially

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<sup>1</sup> Plaintiff has entered into stipulations with approximately 22 of the 28 defendants, either resolving the OSC or discontinuing the action.

<sup>2</sup> The SSA decision states as follows at page 3, item 2: “[Davila] has the following severe impairments: status post lumbar surgery with insertion of rods and screws, major depressive disorder, panic disorder, [and] chronic pain syndrome . . .” (Bracketed matter added).

contends that the SSA decision precludes a finding of substantial probability that the DA will prevail on the issue of forfeiture.

This court cannot conclude as a matter of law that the SSA decision establishes an absolute defense to this forfeiture action. While certainly relevant, the decision in that administrative appeal was issued on April 16, 2010. As such, it is not dispositive of whether or not defendant remained disabled during the entire period he obtained benefits (to wit, through 2013). At most, the SSA decision raises an issue but does not definitively refute the grand jury indictment (OSC at Exh. C) and the affirmation of Senior Investigator Donato Siciliano (OSC at Exh. B).

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 (1<sup>st</sup> 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 [1<sup>st</sup> 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 [3<sup>rd</sup> Dept 1983] . . . (bracketed matter added).

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

Under these circumstances, the indictment coupled with the investigator's affirmation sufficiently describe the crimes charged and meet the DA's burden of showing a likelihood of prevailing on the issue of forfeiture. This court further notes that, like the defendants in *Morgenthau v A.S. Goldmen & Co., Inc., supra*, Davila submits only an affirmation from his counsel, who lacks personal knowledge.


For the foregoing reasons, 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  
June 17, 2014

  
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Hon. Martin Shulman, J.S.C.