

**Vance v DePalo**

2016 NY Slip Op 30566(U)

April 5, 2016

Supreme Court, New York County

Docket Number: 451712/15

Judge: Martin Shulman

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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,

Index No. 451712/15

Plaintiff-Claiming Authority,

**Decision & Order**

-against-

Robert DePalo, Sr., Joshua Gladtko, Pangaea  
Trading Partners, LLC, Excalibur Asset  
Management, LLC,

Criminal Defendants,

Rosemarie DePalo,

Non-Criminal Defendant.

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**HON. MARTIN SHULMAN, J.S.C.**

Plaintiff-Claiming Authority, Cyrus R. Vance, Jr., District Attorney of New York County ("plaintiff" or "DA"), commenced this CPLR Article 13-A civil forfeiture action against the above-named defendants seeking the forfeiture of \$6,500,000 of the criminal defendants' assets as well as forfeiture of certain specifically identified personal property held or owned by the non-criminal defendant up to the amount of \$103,450, which property allegedly was purchased with funds traceable to the proceeds of the criminal defendants' alleged crimes. The verified complaint alleges that these assets constitute the proceeds, substituted proceeds and/or instrumentalities of the criminal defendants' alleged felony crimes of first and second degree grand larceny, first and second degree money laundering, first degree scheme to defraud, securities fraud, second and third degree criminal possession of stolen property, second and third degree criminal tax fraud, and other related crimes.

The DA moves by order to show cause ("OSC") seeking, as to the criminal defendants:

(1) an order of attachment pursuant to CPLR §§ 1312 and 1316 against the assets of the criminal defendants and any interest they may have in personal and/or real property or any debt owed to them, situated in the state of New York, to the extent of \$6,500,000;

(2) in furtherance of the order of attachment, an order directing criminal defendant Robert DePalo, Sr. ("DePalo") and his wife, non-criminal defendant Rosemarie DePalo ("Mrs. DePalo"), as garnishees of property subject to attachment, to deliver certain property in their custody to plaintiff as claiming agent, including but not limited to a 2012 Bentley automobile bearing Vehicle Identification Number SCBDU3ZA9CC075031; a life sized bronze horse statue purchased for \$22,500; various watches valued between \$6,975 and \$31,100; and all items owned by DePalo up to a value of \$6,500,000;

(3) for a preliminary injunction pursuant to CPLR §§ 1312, 1333 and 1335 enjoining the criminal defendants and any garnishees from transferring, assigning, disposing of, encumbering or secreting any of their assets to the extent of \$6,500,000; and

(4) for discovery in aid of attachment pursuant to CPLR §§ 3102[c] and 1326.

On May 19, 2015, this court issued a temporary restraining order ("TRO") restraining and enjoining the criminal defendants and any garnishees "from removing, transferring, assigning, disposing of, encumbering, and/or secreting" their assets up to a value of \$6,500,000 pending the OSC's hearing.

As to Mrs. DePalo, the DA's OSC seeks the same relief as above solely with respect to \$103,450, constituting the proceeds of the criminal defendants' crimes and including substituted proceeds in the form of the aforementioned horse statue and watches. The TRO similarly restrains Mrs. DePalo from disposing of the foregoing assets. Criminal defendants DePalo and Excalibur Asset Management, LLC

("Excalibur"), and non-criminal defendant Mrs. DePalo (collectively "defendants") oppose the DA's OSC.<sup>1</sup>

### FACTUAL ALLEGATIONS

This action arises from the criminal defendants' alleged participation, from in or about September 2010 to in or about December 2014, in "an unregistered securities fraud scheme involving the solicitation of investment funds from approximately 22 foreign investors into a holding company named Pangaea Trading Partners, LLC . . . thereby stealing approximately \$6,500,000.00 . . ." See Bhatia Aff. in Supp. of OSC ("Bhatia Aff.") at ¶8. Plaintiff alleges that the scheme was based upon misrepresentations DePalo and co-defendant Joshua Gladtko ("Gladtko") made to investors promising to deposit invested funds into Pangaea Trading Partners, LLC ("Pangaea").<sup>2</sup> *Id.* at ¶9. The funds invested into Pangaea were to be used as operating capital and for further investments in Arjent, LLC ("Arjent U.S.") and Arjent Limited ("Arjent U.K."), registered broker-dealers in the United States and the United Kingdom, respectively. The DA alleges these funds were used in ways other than as set forth in the Private Placement Memorandum, as amended ("PPM", *id.* at Exh. B.3), which DePalo issued to investors in his capacity as Pangaea's president. Specifically, DePalo

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<sup>1</sup> Determination of the OSC as to the moving defendants was held in abeyance while counsel for the parties attempted to resolve the issues raised herein by having DePalo deposit assets valued at \$6,500,000 with plaintiff to be held in escrow to secure any potential forfeiture judgment pending the final determination of the criminal proceeding and this civil forfeiture action.

<sup>2</sup> Pangaea is a Delaware limited liability company with offices in Manhattan. *Id.* at ¶8. During the relevant time period DePalo was Pangaea's managing member and president and Gladtko was its vice president. *Id.* at ¶9.

allegedly diverted invested funds from Pangaea's bank accounts into his personal checking account and did not invest such funds in accordance with the PPM's representations. *Id.* at ¶9.

It is further alleged that co-defendant Excalibur<sup>3</sup> "was used to steal and hide investor funds under the guise of being a company receiving 'advisory services pay' or 'employee compensation', according to the PPM." *Id.* at ¶11. The DA claims that investor funds were diverted to Excalibur's accounts but Excalibur never performed any consulting services. As to Mrs. DePalo, plaintiff claims that she received investor funds from DePalo and used such funds to purchase a statue and jewelry. *Id.*

In opposition, defendants argue that the following facts, which they support with documentary evidence including the PPM and accounting records, contradict the DA's allegations or, at a minimum, raise issues of fact warranting a hearing prior to granting plaintiff provisional relief:

- the PPM advised investors of potential risks in detail, stated that there were no assurances that they would receive a return on their investment and included audited financial statements for Arjent U.S. and Arjent U.K. (Moskowitz Aff. in Opp. to OSC at ¶¶ 7-19);
- the unregistered nature of the offering was disclosed to investors and is not indicative of fraud (*id.* at ¶21);
- a June 4, 2012 amendment to the PPM provided that, of the approximately \$6.5 million invested, Arjent U.K. and Arjent U.S. were to receive \$4,375,000 as operating capital and DePalo was to receive \$2,000,000, however, DePalo received only \$722,741, substantially less than what he was entitled to (*id.* at ¶¶ 23, 26; see also Moskowitz Aff. in Opp. to OSC, reports as Exhs. 1 and 2);<sup>4</sup>

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<sup>3</sup> DePalo is Excalibur's president and sole member. *Id.* at ¶11.

<sup>4</sup> Plaintiff concedes the foregoing in the affidavit of Deputy Chief Investigator Santiago Batista ("Batista"), of the New York County DA's Investigations Bureau (Bhatia

- Prior to raising any money from investors, DePalo invested \$400,000 of his own funds in Arjent U.S. and after the offering, contributed \$8,000,000 to Arjent U.K. (*id.* at ¶¶ 28 and 30; Exh. 2.C), all to the benefit of the investors now claiming to have been defrauded;
- investors' funds were used in accordance with the PPM (*id.* at ¶29; Exh. 2C), and the DA's claim that the PPM required investors' funds to be applied in a specific order, which defendants did not follow, constitutes a misreading of the PPM since DePalo, as managing member, had the right to apply offering proceeds as he saw fit where, as here, the offering did not immediately sell out (*id.* at ¶¶ 33-38);
- Arjent U.S. and Arjent U.K.'s shares were timely transferred to Pangaea (*id.* at Exh. 4);
- payments to Excalibur were appropriate and were disclosed in the PPM (*id.* at ¶¶ 49-51), and DePalo provided consulting services to Arjent U.K. for which he was entitled to be paid through Excalibur (*id.* at ¶52);
- Gladtk's alleged misrepresentations cannot be attributed to DePalo or Excalibur and, in any event, any alleged misrepresentations conflict with the PPM's disclaimers;
- Mrs. DePalo is the president and owner of Allied International Fund, Inc. ("Allied") and the \$180,250 Batista cites at paragraph 21 of his affidavit represents repayment of a December 14, 2011 loan of \$181,000 from Allied to Arjent U.K. (*id.* at Exh. 2.F);
- transfers Mrs. DePalo received from her husband are legal and plaintiff cannot rely upon CPLR 1311[3][c][iii]'s presumption that a non-criminal defendant who did not pay fair consideration for proceeds of a crime knew that such property was the proceeds of a crime (see *Commodity Futures Trading Comm. v Walsh*, 17 NY3d 162, 176 [2011]); and
- in 2011, DePalo had income of \$1,300,000 from other wages and commissions, thus he had more than sufficient money in his accounts from other sources to cover transfers to his wife.

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Aff. at Exh. B, ¶32).

## DISCUSSION

CPLR §1312[3] provides in pertinent part that a provisional remedy may be granted where:

(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;

(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; . . .

See also, *Morgenthau v Citisource, Inc.*, 68 NY2d 211, 218 (1986). In opposition to the OSC, defendants argue that the DA's request for provisional relief should be denied because plaintiff cannot meet the foregoing statutory requirements.

### Substantial Probability of Prevailing on the Issue of Forfeiture

Defendants argue that plaintiff fails to establish a substantial probability of prevailing on the issue of forfeiture based upon the "detailed factual showing" summarized above. Characterizing the DA's statements in support of the OSC as conclusory and unsupported, defendants contend that their opposition and supporting documentation contradict every significant allegation against them, rendering the indictment and the DA's moving affidavits insufficient to meet plaintiff's burden. Defendants also argue that plaintiff fails to show that the property sought to be restrained constitutes the "proceeds of a crime" or "substituted proceeds of a crime" as CPLR 1310 defines those terms, making only conclusory claims without any supporting evidence that certain property was purchased with funds traceable to investors' money.

At a minimum, defendants urge that an evidentiary hearing is warranted prior to granting any provisional relief to plaintiff.

At the outset, this court agrees with plaintiff that the criminal court is a more appropriate forum for evaluating the parties' conflicting factual allegations. Further, this court is persuaded by virtue of the grand jury indictment that plaintiff has satisfied its burden of demonstrating a likelihood of prevailing in this forfeiture action. *Morgenthau v A.S. Goldmen & Co., Inc.*, NYLJ, October 4, 1999, at 28, col. 4, *aff'd* 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).

Here, as the DA notes, defendants' supporting proof is largely unreliable and/or unverifiable, having either been created by defendants or offered by their associates or interested witnesses. See Bhatia Aff. at ¶¶ 30 through 32. For example, exhibit 2 consists of an affirmation from Philip Parsons ("Parsons"), the chief financial officer of Arjent U.K., with attached spread sheets Parsons prepared based upon his review of bank records and discussions with Arjent U.K.'s management. No corroborating bank records are submitted and as the DA notes, DePalo was Parson's superior at Arjent U.K. at the time of the alleged fraudulent scheme.

Under these circumstances, the indictment coupled with Batista's detailed affidavit (Bhatia Aff. at Exh. B) sufficiently describes the crimes charged and meets the DA's burden of showing a likelihood of prevailing on the issue of forfeiture. See *Morgenthau v Vinarsky*, 72 AD3d 499 (1<sup>st</sup> Dept 2010) (criminal indictment, assistant district attorney's affirmation and police detective's affidavit demonstrated substantial probability that claiming authority would prevail on forfeiture). Given the lack of verifiable support for defendants' factual claims in opposition, no evidentiary hearing is warranted, as plaintiff sufficiently establishes a likelihood of success on the merits on the issue of forfeiture.

#### **Availability of Property for Forfeiture**

Defendants argue that plaintiff fails to establish that provisional relief is necessary to ensure that funds will be available for forfeiture. Specifically, defendants claim to have been aware of the underlying criminal investigation for almost two years yet they took no steps to secrete or dispose of assets. They further note that DePalo's

assets include a large stake in RoomLinx, a publicly traded company, and that there are no allegations that Mrs. DePalo has taken steps to dispose of her assets.

As the DA observes, “[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 Cty, 1986). No actual assignment or dissipation of the property is necessary. *Holtzman v Samuel*, 130 Misc2d 976 (Sup Ct, Kings County, 1985).

Plaintiff claims to have met this burden by alleging that “the criminal defendants have engaged in a long-standing and systematic unregistered securities fraud scheme designed to steal money obtained from foreign investors based on misrepresentations.” *Bhatia Aff.* at ¶33. The DA further notes that none of the investors has received any return on their investment (*id.* at ¶35) and financial records reveal that investor deposits were withdrawn from Pangaea’s accounts and transferred to DePalo’s personal bank accounts, while investor deposits that were transferred to Arjent U.S. and Arjent U.K. were ultimately transferred to accounts in the name of DePalo and Excalibur, then used to pay personal expenses (*id.* at ¶¶ 36-38). As to Mrs. DePalo, plaintiff notes DePalo disbursed \$411,574 to her, \$103,450 of which was used to purchase a statue and watches (*Bhatia Aff.* at ¶39).

Here, considering the nature of the criminal charges (e.g., grand larceny, money laundering, scheme to defraud, etc.), namely the fraudulent and deceptive nature of the alleged crimes, as well as DePalo’s facility at moving funds, it is more likely than not

that defendants may well seek to dissipate assets that could help satisfy a potential judgment. Accordingly, plaintiff has met the burden of showing 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.

### **Hardship to Defendants**

The DA argues that the need to preserve assets for forfeiture outweighs any potential hardship to defendants, reasoning that defendants have no rightful claim to the restrained funds and in any event, can request the release of funds pursuant to CPLR §1312[4] for reasonable living expenses and attorney's fees. Defendants do not specifically address this point and in reply, plaintiff notes that they have not sought relief from the TRO, thus confirming that they are suffering no hardship. Under the circumstances, plaintiff has satisfied this element and is entitled to an order of attachment and preliminary injunction.

### **Non-Criminal Defendant Rosemarie DePalo**

The DA likewise has sustained its burden of establishing entitlement to provisional relief as against Mrs. DePalo. To prevail against a non-criminal defendant, plaintiff:

must prove by a preponderance of the evidence that, *inter alia*, the defendants knew or should have known that the proceeds were obtained through the commission of a crime or that they fraudulently obtained their interest in the proceeds as part of a scheme to avoid forfeiture. (See, CPLR 1311 [3] [b].)

*Morgenthau v A.J. Travis Ltd.*, 184 Misc2d 835, 840 (Sup Ct, NY County 2000).

Here, the DA also relies on CPLR §1311[3][c]'s rebuttable presumptions of knowledge. Under CPLR §1311[3][c][i], a non-criminal defendant who did not pay fair consideration for the property at issue is presumed to know that such property was the proceeds, substituted proceeds or instrumentality of a crime.

As to Mrs. DePalo, plaintiff cites her alleged lack of an independent source of income and the fact that money was transferred into her name after a search warrant was executed at the DePalo residence. The DA further cites the DePalos' close relationship and the fact that they reside together, as well as the fact that the financial analysis in this case has not revealed that Mrs. DePalo ever paid any consideration for the statue and watches she purchased with alleged criminal proceeds DePalo transferred to her. Finally, plaintiff observes that the horse statue in question is physically on the property the DePalo's share, thus "evincing [DePalo's] control of the asset." Bhatia Aff. at ¶51.

In opposition, defendants allege Mrs. DePalo is the president and owner of Allied and the \$180,250 Batista cites at paragraph 21 of his affidavit represents repayment of a December 14, 2011 loan of \$181,000 from Allied to Arjent U.K. Defendants cite *Commodity Futures Trading Comm. v Walsh*, 17 NY3d 162, 176 (2011) ("*Walsh*") for the proposition that a husband is legally entitled to share marital assets with his wife, who is presumed to have given fair consideration for them. As such, defendants argue that transfers Mrs. DePalo received from her husband are legal and plaintiff cannot rely upon CPLR §1311[3][c][ii]'s presumption that a non-criminal defendant who did not pay fair consideration for proceeds of a crime knew that such property was the proceeds of a crime.

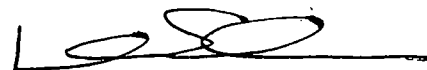
Mrs. DePalo does not deny plaintiff's foregoing allegations with respect to her lack of an independent source of income and the transfer of assets into her name after the search warrant was executed. Moreover, *Walsh's* holding is not as broad as defendants claim and fails to rebut CPLR §1311[c][ii]'s rebuttable presumption of knowledge. Should provisional relief be denied as to Mrs. DePalo, she will be in a position to remove assets from this jurisdiction, potentially defeating any forfeiture judgment.

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

ORDERED that plaintiff's OSC is granted in its entirety as to DePalo, Excalibur and Mrs. DePalo, and plaintiff's counsel shall submit a proposed order of attachment and preliminary injunction for this court's signature forthwith.

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  
April 5, 2016



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Hon. Martin Shulman, J.S.C.