

Brennan v Cotto

2016 NY Slip Op 31427(U)

July 22, 2016

Supreme Court, New York County

Docket Number: 453244/15

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. MARTIN SHULMAN, JusticePART 1

BRIDGET G. BRENNAN, Special Narcotics Prosecutor
for the City of New York, in her capacity as

Plaintiff-Claiming Authority,

INDEX NO.: 453244/15

- v -

DECISION & ORDER

RALPH BEN COTTO,

Defendant.

MARTIN SHULMAN, J.:

Plaintiff-Claiming Authority, Bridget G. Brennan, Special Narcotics Prosecutor for the City of New York ("plaintiff" or "claiming authority"), commenced this CPLR Article 13-A civil forfeiture action against defendant, Ralph Ben Cotto ("defendant" or "Cotto"), seeking forfeiture of: (1) the sum of at least \$210,000 (or a money judgment in such amount), representing the purported street value of the six kilograms of cocaine found in Cotto's possession (first cause of action); (2) certain jewelry seized from defendant's residence during the execution of a search warrant (the "jewelry") (second and fourth causes of action); and (3) U.S. currency in the amount of \$4,548 (the "cash") also seized from defendant's residence (third and fourth causes of action), all of which are alleged to represent the proceeds, substituted proceeds or instrumentalities of defendant's narcotics trafficking crimes.¹ See Summons and Verified Complaint at Exh. 5 to Motion.

¹ The complaint's first through third causes of action are alleged against Cotto in his capacity as a criminal defendant. The fourth cause of action is alleged against Cotto as a non-criminal defendant and seeks forfeiture of both the jewelry and the cash.

The claiming authority now moves for summary judgment on the first cause of action, specifically requesting a judgment for damages in the amount of \$150,000. Plaintiff intends to sell the jewelry, which is allegedly valued at \$116,150, and apply the proceeds therefrom and the cash towards satisfaction of the anticipated \$150,000 judgment (Goodman Aff. in Supp., ¶3). Cotto opposes the motion.

Plaintiff's motion for summary judgment is predicated upon Cotto's December 17, 2015 guilty pleas and convictions, under two separate indictments, to the felony crime of Operating as a Major Trafficker in violation of Penal Law ("PL") §220.77(3). Defendant was sentenced on February 2, 2016. *Id.* at ¶6; Motion at Exhs. 2 and 3. The claiming authority maintains that damages of at least \$150,000 are established as a matter of law because the crime to which Cotto pleaded requires, by definition, possession of a narcotic drug worth at least \$75,000. Having pleaded guilty to the subject crime under two separate indictments, defendant admitted to two separate criminal transactions, each involving the sale of narcotics having a value of at least \$75,000, for a combined value of at least \$150,000, as borne out by the December 17, 2015 transcript of Cotto's plea allocution before the criminal court. *Id.* at ¶7 and Exh. 4 to Motion (12/17/15 Transcript, p 4, lines 5-21).

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept 1984), *affd* 62 NY2d 938 (1984); *Andre v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate

any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In opposition to plaintiff's motion, Cotto makes the following arguments:

- summary judgment must be denied because the claiming authority's supporting affirmations of ADA Lynn Goodman and U.S. Drug Enforcement Administration (DEA) Special Agent Andrew Butorac (Butorac) are not based upon personal knowledge;
- the appraisal valuing the jewelry at \$116,150 is unsigned, contains no representations as to the appraiser's qualifications or the basis for the findings therein and, in any event, is invalid because the appraiser misrepresents herself as being licensed by the International Society of Appraisers (ISA), yet defense counsel's internet search reveals otherwise;
- Cotto has "repudiate[d], disavow[ed] and retract[ed] the statements he made during and in relation to his entry of a plea of guilty . . . , i.e., that on two separate occasions he possessed narcotics with a value of no less than \$75,000" (Mirigliano Aff. in Opp. at ¶122), and "he is not judicially estopped from denying, withdrawing and retracting [such] statements" (*id.* at ¶125) (bracketed matter added); and
- forfeiture in this case would constitute an excessive fine and penalty in violation of the Eighth Amendment to the U.S. Constitution and the New York State Constitution.

A. Sufficiency of Supporting Affirmation and Affidavit

Defense counsel maintains that ADA Lynn Goodman's affirmation and Butorac's affidavit are insufficient to meet the claiming authority's burden of proof on a motion for summary judgment since they lack personal knowledge of the underlying facts. In support of this position, Cotto cites Goodman's recitation that her supporting affirmation

is "based upon (a) conversations with the assistant district attorney assigned to the criminal case and (b) a review of certain files maintained in this action and in the related criminal investigation." See Goodman Aff. in Supp., ¶1. Similarly, Butorac, who participated in the underlying investigation into Cotto's drug trafficking activities (jointly conducted by the DEA, New York City Police Department and the New York County District Attorney's Office), avers that his familiarity with the underlying facts is based upon "personal knowledge, reports made by, and my conversations with, members of the above-listed agencies, as well as other law enforcement authorities" (Butorac Aff. at ¶2). He further states that evidence in the case includes surveillance, court-authorized wiretaps, and documents/physical evidence obtained from executed search warrants (*id.*).

Here, the documentary evidence attached to plaintiff's counsel's affirmation, which consists of copies of the underlying criminal indictments, minutes of defendant's guilty plea, plea agreement and sentencing before the criminal court and the Butorac affidavit (Exhs. 1, 2, 3 and 4 to Motion), more than sufficiently establishes a basis for counsel's personal knowledge. See *Beagle v Parillo*, 116 AD2d 856, 857 (3d Dept 1986)(documentary evidence in conjunction with attorney's affidavit sufficiently supported motion for summary judgment). Accordingly, this court rejects Cotto's claim that plaintiff's motion's supporting affirmation and affidavit are inadmissible hearsay and lack probative value since they purportedly are not based upon personal knowledge.

B. Defendant's Attempted Withdrawal of Factual Admissions

Through counsel, Cotto attempts to explain the reasons for his guilty plea and cites case law (primarily from New Jersey and other jurisdictions) which purportedly

supports his position that he should not be judicially estopped from retracting the statements and admissions made during his plea allocution. However, a criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts. *Grayes v DiStasio*, 166 AD2d 261, 262-263 (1st Dept 1990). Thus, a defendant who pleads guilty to or is convicted of a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based. *Id.*; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300 (1973).

Given the foregoing, the reasons underlying Cotto's decision to plead guilty are of no moment, as is his failure to submit his own affidavit attesting to his repudiation of the facts underlying his pleas.² Based upon Cotto's guilty pleas and convictions, the claiming authority has met its burden of establishing its right to forfeiture by a preponderance of the evidence. Defendant pleaded guilty to violating PL §220.77(3), which expressly provides that:

A person is guilty of operating as a major trafficker when: . . . (3) As a profiteer, such person knowingly and unlawfully possesses, on one or more occasions within six months or less, a narcotic drug with intent to sell the same, and such narcotic drugs have a total aggregate value of seventy-five thousand dollars or more.

Cotto's conviction in the underlying criminal proceeding collaterally estops him from denying any of the foregoing in the instant action with regard to the crimes for which he was convicted. In so pleading, defendant necessarily admitted to possessing narcotics having a combined value of at least \$150,000 during the prescribed period of time. Moreover, the plea transcript expressly includes Cotto's admission to each

² In reply, the claiming authority objects to Cotto's repudiation of the facts underlying his guilty plea because he solely relies upon an affirmation of his attorney.

element of the charged crime. See Goodman Aff. in Supp. at ¶7 and Exh. 4 to Motion (12/17/15 Transcript, p 4, lines 5-21).

Federal precedent supports the claiming authority's request for a forfeiture judgment for the value of the narcotics defendant possessed. *U.S. v Awad*, 2007 WL 3120907, at *5 (SDNY), *affd* 598 F3d 76 (2d Cir), *cert den* 562 US 1054 (2010). Here, the narcotics Cotto possessed are, at a minimum, the instrumentality of his crime in the sense that there can be no violation of PL §220.77(3) without possession of same. Accordingly, summary judgment is granted as to the first cause of action for forfeiture and plaintiff is entitled to a judgment for damages in the amount of \$150,000.

C. The Cash and Jewelry

This court makes no determination as to plaintiff's right, if any, to apply the cash and proceeds from the sale of the jewelry towards satisfaction of the within judgment. Plaintiff did not seek summary judgment on the second, third and fourth causes of action seeking forfeiture of these items and the action is severed and continued as to these remaining causes of action. Whether or not the jewelry and cash are assets against which the judgment may be enforced pursuant to CPLR Article 52, without regard to whether or not the jewelry and cash are subject to forfeiture under CPLR Article 13-A, is not before the court.

D. Excessive Fine/Penalty

Cotto argues that granting forfeiture would constitute an excessive fine in violation of the Eighth Amendment of the United States Constitution. This court disagrees. As the Court of Appeals stated in *County of Nassau v Canavan*, 1 NY3d 134, 140 (2003):

... a punitive forfeiture of an instrumentality of a crime "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." [citations omitted]. . . . In determining gross disproportionality, we consider such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant.

Here, forfeiture of \$150,000 is not grossly disproportionate to defendant's offense. As reflected in the transcript of defendant's plea allocution and sentencing, he was given a lenient sentence of twelve and a half years rather than the maximum possible sentence of twenty-five years to life. See Ex. 4 to Motion, 12/17/15 Transcript, at pp 5-6; and 2/2/16 Transcript, at p 6, lines 15-22. And as Justice McLaughlin observed during Cotto's sentencing, drug related crimes destroy communities and lives (*id.*, 2/2/16 Transcript at p 7, lines 1-6). There is a strong public interest in deterring such crimes and in preventing those who engage in them from profiting therefrom.

E. Jewelry Appraisal

Finally, by letter dated April 27, 2016 defense counsel requested oral argument primarily to address plaintiff's attempt in its reply papers to rehabilitate its jewelry appraiser's credibility and clarify her credentials. Ultimately it was unnecessary to hear argument on this point because the appraisal was irrelevant to determining this motion. This is because there is no guarantee that a sale of the jewelry will yield the appraised amounts. The amount actually obtained at any potential sale is the relevant sum to be applied towards satisfying the judgment. Parenthetically, this court agrees that the appraisal is not in admissible form.

This court has considered defendant's remaining arguments and finds them unavailing. Accordingly, it is hereby

ORDERED that the motion partial for summary judgment is granted on the first cause of action against defendant Ralph Ben Cotto and plaintiff is awarded judgment in the amount of \$150,000; and it is further

ORDERED that the New York County Clerk is directed to enter judgment in plaintiff's favor and against defendant Ralph Ben Cotto upon plaintiff's counsel's submission of an appropriate judgment for entry.

Counsel for the parties are directed to appear for a preliminary conference on August 9, 2016 at 9:30 a.m., at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: July 22, 2016



Hon. Martin Shulman, J.S.C.