

Vance v Aglialoro

2018 NY Slip Op 32340(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 450122/14

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 -

ANN MARIE AGLIALORO, et al,

Defendants.

Index No.: 450122/14

Motion Seq. 11

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 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 moved by order to show cause (OSC) for 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. This court ultimately granted the OSC by decision dated May 8, 2014, and entered an order granting the preliminary injunction and order of attachment on December 16, 2016.

Plaintiff now moves pursuant to CPLR 3217(b) for an order voluntarily discontinuing this action without prejudice as to defendant Daniel Mallo ("Mr. Mallo" or "defendant"),¹ and vacating the preliminary injunction and order of attachment as to him.² Mr. Mallo, who is self-represented, opposes the discontinuance without prejudice and asks that the action be discontinued against him with prejudice. He also requests the release of his restrained funds and related relief.³

Voluntary Discontinuance

Here, the DA candidly admits that Mr. Mallo was not properly served with the summons and complaint herein and thus, personal jurisdiction over him is lacking. Plaintiff seeks voluntary discontinuance without prejudice in order to commence a new action against the defendant. As previously stated, Mr. Mallo urges the court to grant discontinuance with prejudice.

CPLR 3217(b) provides, in relevant part, that:

an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

¹ In the underlying criminal action, defendant was convicted after trial of second degree grand larceny. He presently is appealing his conviction.

² The branch of the DA's motion seeking withdrawal of its prior motion for a default judgment against Mr. Mallo (motion sequence 10, hereinafter the "default motion") is now moot in light of this court having issued a short form order dated July 12, 2018 permitting that motion to be withdrawn.

³ Defendant's responsive papers to the instant motion are identified as being a cross-motion and affirmation in opposition. Although not properly noticed as a cross-motion in accordance with the CPLR, this court will consider Mr. Mallo's requests for relief in light of his status as a *pro se* litigant.

At the outset, this court rejects defendant's argument that CPLR 3217(b) requires the parties to stipulate to any discontinuance once the matter "has been submitted to the court or jury to determine the facts". Mr. Mallo contends that plaintiff's case against him has been submitted to the court for determination based upon plaintiff's prior default motion. However, a motion for a default judgment is not the equivalent of a cause being submitted to the court for factual determination and, in this case, this court permitted that motion to be withdrawn.

Relevant to the court's determination of a CPLR 3217(b) application is "the nature of the litigation . . . at the time the application for discontinuance is interposed, including the extent to which pretrial proceedings have progressed (citations omitted)." *Keefe v Hanover Ins. Group*, 2008 WL 695033 (Sup Ct, Suffolk). Also relevant is the Court of Appeals' holding in *Tucker v Tucker*, 55 NY2d 378, 383-384 (1982):

While the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217 (subd [b]) by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (4 Weinstein-Korn-Miller, NY Civ Prac, par 3217.06). *Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or . . . obligatory.* (Emphasis added).

In the case at bar, no special circumstances warrant this court denying discontinuance and the DA should not be compelled to litigate this matter, particularly where personal jurisdiction over Mr. Mallo is lacking. Although this action was commenced in 2014, it was stayed pursuant to CPLR §1311(1)(a) until Mr. Mallo was sentenced on January 11, 2017. No discovery or other pre-trial proceedings have begun at this juncture, and defendant has defaulted in answering the complaint. As

such, defendant cannot claim prejudice based upon delay. See *Bank of America, Natl. Assn. v Douglas*, 110 AD3d 452 (1st Dept 2013) (no special circumstances shown where action was still in the early stages of litigation); see also *Keefe, supra*. In any event, “[d]elay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for a voluntary discontinuance under CPLR 3217(b) (citations omitted).” *Eugenia VI Venture Holdings, Ltd. v Maplewood Equity Partners, L.P.*, 38 AD3d 264, 265 (1st Dept 2007).

Nor is this a case where the DA seeks discontinuance in order to avoid an adverse determination. See *NBN Broadcasting, Inc. v Sheridan Broadcasting Networks, Inc.*, 240 AD2d 319 (1st Dept 1997) (lower court “properly discontinued the action with prejudice where plaintiff’s request for a discontinuance without prejudice was an apparent attempt to evade the consequences of an adverse order on defendant’s pending motion for summary judgment and preserve its ability to commence a Federal action”); *Bank of America, Natl. Assn. v Douglas, supra*; *Ansley v Wyeth*, 2009 WL 4905232, 2009 Slip Op 32905(U) (Sup Ct, NY County) (discontinuance denied where plaintiff sought to avoid New York’s statute of limitations in order to recommence in a more favorable forum). Rather, in this case the DA seeks to correct an admitted procedural defect brought to its attention when Mr. Mallo opposed the default motion.

Plaintiff preemptively argues that a newly commenced action against Mr. Mallo will not be barred by CPLR §1311(1)’s five year statute of limitations for bringing civil forfeiture actions. The DA contends that defendant’s conviction was based upon grand larceny which continued through December 2013, thus making any subsequent action

timely. In opposition, Mr. Mallo contends that the statute of limitations should begin to run not when his crime ended, but rather, when it commenced. He asserts that the DA in the criminal action claimed his crime began in 2009, and thus he will suffer prejudice if this court allows plaintiff to re-commence an untimely action.

For purposes of determining whether or not Mr. Mallo will be prejudiced by a discontinuance without prejudice due to expiration of the statute of limitations, it is unnecessary for this court to determine when the statute of limitations begins to run for a continuing crime. Defendant does not dispute plaintiff's allegation that at least a portion of his crime occurred through December 2013, a date within the five year limitations period. The issue raised is more properly determined in any subsequently commenced action. Finally, the foregoing analysis supports this court's determination that discontinuance without prejudice is appropriate.

Defendant's Remaining Arguments

Mr. Mallo makes a number of arguments, initially raised in his opposition to the DA's default motion, which are irrelevant to the determination of this motion.⁴ In his present opposition, defendant argues that plaintiff's withdrawal of the default motion was an improper attempt to circumvent this court's determination of the points he raised in opposition thereto. Moreover, he incorrectly contends that the DA conceded his claims by failing to address them in their reply, which merely requested withdrawal of the default motion based upon lack of personal jurisdiction and advised that the instant motion to discontinue was pending. However, upon learning that personal jurisdiction

⁴ Defendant raises, *inter alia*, questions of improper venue, federal preemption and violations of his Constitutional rights, 7 of 8

was lacking, it was unnecessary for plaintiff and this court to address any remaining issues. *A fortiori*, it is again unnecessary, and in fact improper, for this court to render any further determinations in this action when it lacks personal jurisdiction over Mr. Mallo. While this court makes no determination as to the merits of defendant's various claims, he is free to raise them as defenses in any newly commenced action.

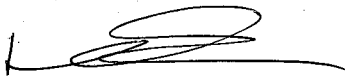
In light of this action's discontinuance, the branch of the DA's motion seeking vacatur of the preliminary injunction and order of attachment is granted, and any of the defendant's restrained assets must be released forthwith. As to Mr. Mallo's further requests concerning the manner in which his assets are to be released (*i.e.*, regarding any late fees/penalties and confirmation of the release of his assets being sent to him), defendant must contact the relevant financial institutions, as they are not parties to this action. For all of the foregoing reasons, it is

ORDERED that plaintiff's motion is granted to the extent that this action is discontinued without prejudice as to defendant Daniel Mallo and the preliminary injunction and order of attachment are vacated with respect to him; and it is further

ORDERED that plaintiff is directed to immediately take all necessary steps to release defendant's restrained assets and accounts and to provide defendant with confirmation that such action has been taken.

This constitutes this court's decision and order.

Dated: New York, New York
September 17, 2018



Hon. Martin Shulman, J.S.C.