

Vance v Lopreto

2019 NY Slip Op 31259(U)

May 6, 2019

Supreme Court, New York County

Docket Number: 450933/18

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 the COUNTY OF NEW YORK, in his capacity as

Index No.: 450933/18

Plaintiff-Claiming Authority,

DECISION & ORDER

- against -

VINCENT LOPRETO,

Defendant.

-----X
HON. MARTIN SHULMAN, J.S.C.:

In this civil forfeiture action, plaintiff-claiming authority moves for judgment on default against defendant Vincent LoPreto ("defendant"). Although the self-represented defendant has not answered the complaint, he attempted to submit his own "Notice of Motion to Dismiss" prior to plaintiff serving and filing the instant motion.¹ Although dated October 10, 2018, defendant's motion inexplicably was not processed and calendared by the General Clerk's office. It was only received in chambers when defendant sent a follow-up letter dated January 14, 2019 enclosing a copy. Although defendant's motion is procedurally defective in that it was not noticed in accordance with CPLR 2214, this court will consider it both as a motion and as opposition to plaintiff's motion for a default judgment. Plaintiff will not be prejudiced inasmuch as plaintiff's supporting affirmation addresses the arguments raised in defendant's submission.

¹ Defendant initially sought dismissal of this forfeiture action before the criminal court contending, *inter alia*, that the DA's commencement of this action violated the terms of his plea agreement. Justice Melissa C. Jackson, who presided over the criminal action, ultimately denied defendant's application and referred the matter to this court.

As alleged in paragraph 14 of the verified complaint, the property sought to be forfeited consists of an Epson Stylus Pro 9880 printer and nine electronic devices consisting of cell phones, a tablet, a laptop and hard drives (identified as items [a] - [j]), which were seized from defendant's residence in New Orleans pursuant to a search warrant. Plaintiff alleges that these items are the instrumentalities of defendant's crimes of grand larceny and scheme to defraud. On September 29, 2017 defendant pled guilty to the foregoing felony crimes and was sentenced on October 11, 2017.² He is presently incarcerated.

Although the complaint seeks forfeiture of ten items, plaintiff's motion seeks forfeiture of only the printer, an iPhone 6S plus, two Samsung Android phones, a Macbook laptop and a G 0G02229 hard drive (items [a] - [e] and [h]) (collectively, the "subject property"). Defendant's applications to the criminal court and his current motion only request the return of the iPhone, the laptop, the tablet and three hard drives (items [b], [e] and [g] - [j]).

At the outset, defendant has not requested the return of the two Android phones and the printer and as such, plaintiff's motion is granted to the extent that plaintiff is granted a judgment of forfeiture as to same (items [a], [c] and [d]). Further, plaintiff is willing to release the tablet and two of the three hard drives (items [g], [i] and [j]) to a representative of defendant's designation. This leaves only the iPhone, the laptop and one of the three hard drives at issue (items [b], [e] and [h]).

² Defendant admitted in his plea agreement that he and two criminal co-defendants knowingly sold counterfeit prints by the artist Damien Hirst, falsely representing that they were authentic. Defendant acknowledged creating the fake prints along with documentation purportedly confirming their provenance.

Plaintiff has met his prima facie burden of establishing that the subject property was the instrumentality of defendant's crimes. Specifically, plaintiff alleges, and defendant does not deny, that: (1) the iPhone contains images of Hirst prints and communications between defendant and his criminal co-defendants and victims; (2) the laptop contains Hirst print/provenance images; and (3) the hard drive contains counterfeit artwork.

In order to successfully oppose a motion for a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense. *Johnson v Deas*, 32 AD3d 253 (1st Dept 2006). Here, defendant cites the challenges of defending this action as an incarcerated litigant, noting that he does not have immediate access to legal research materials. In light of these limitations, defendant states that he could not possibly respond to the summons and complaint within 20 days of being personally served as the CPLR requires. It is readily apparent that defendant had no intention of defaulting in this action. He actively pursued court intervention, albeit with the criminal court rather than this court, promptly upon being served with the summons and complaint. For the foregoing reasons, defendant's default is excusable.

However, the defenses proffered in support of defendant's motion lack merit and as such plaintiff's motion for a default judgment must be granted and defendant's motion to dismiss must be denied. First, in commencing this action plaintiff did not renege on the plea agreement and forfeiture stipulation entered into in the criminal action. Defendant correctly notes that the forfeiture stipulation states that it is the parties' complete agreement, whereby he agreed to forfeit \$2,163.71 and a watch. However, the stipulation states that it is the complete agreement solely with respect to

that property. The terms of the forfeiture stipulation and plea agreement do not, as defendant urges, preclude plaintiff from pursuing this civil forfeiture action seeking forfeiture of other seized property.

Secondly, defendant claims the search warrant under which the subject property was seized is defective because it authorized a search in a jurisdiction other than New York (to wit, Louisiana) and thus "Louisiana has purview of property seized under a New Orleans, Louisiana warrant." However, defendant pled guilty prior to the criminal court deciding his motion challenging the warrant. Ultimately, the criminal court denied the same motion brought by the criminal co-defendants.

Third, defendant argues that plaintiff merely speculates as to the contents of the subject property, noting that no "certified forensic report establishing seized electronic hardware was used for criminal activity" was ever submitted to the court. However, the complaint is verified by an investigator employed in plaintiff's Investigation Bureau who was involved in the underlying criminal investigation and describes the subject property's contents. This is sufficient to establish the facts constituting plaintiff's claims. See CPLR §3215(f). Further, as previously stated, defendant does not deny plaintiff's allegations as to the subject property's contents.

Next, defendant contends that it is unnecessary for plaintiff to obtain funds for restitution as the four New York County victims were already compensated. He further states that plaintiff "has not made the court aware of any other claims for restitution nor have I been notified for refunds by any past clients . . ." As plaintiff notes, defendant admitted selling counterfeit Hirst prints, along with two criminal co-defendants, to more

than 35 buyers, obtaining almost \$400,000. In any event, CPLR Article 13-A authorizes forfeiture of criminal instrumentalities regardless of the victims' residences.

Finally, defendant' arguments regarding improper venue are meritless. Venue is proper in New York County, where the underlying criminal action was prosecuted. See CPLR §1311(10)(b). The court has considered defendant's remaining arguments and finds them lacking in merit. Accordingly, plaintiff's motion for a default judgment is granted with respect to the subject property and defendant's motion to dismiss is denied.

For the foregoing reasons, it is

ORDERED that plaintiff's motion for a default judgment is granted to the extent that the following property is forfeited:

- Epson Stylus Pro 9880 printer;
- iPhone 6S plus
- Samsung Android SM-G360Tphone
- Samsung Android SPH-L710
- Macbook laptop; and
- G 0G02229 hard drive

and it is further

ORDERED that, upon defendant designating a representative to receive the following property on his behalf, plaintiff shall release same to such designee:

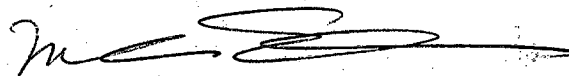
- Apple A1396 tablet;
- Lacie RUGU3M2 hard drive; and
- Iomega RPHD-UG hard drive

and it is further

ORDERED that defendant's motion to dismiss is denied.

Plaintiff's counsel is directed to submit an appropriate judgment and order to chambers. The foregoing constitutes this court's decision and order, a copy of which has been mailed to defendant.

Dated: May 6, 2019
New York, New York



Hon. Martin Shulman, J.S.C.