

Vance v Mallo

2019 NY Slip Op 31716(U)

June 14, 2019

Supreme Court, New York County

Docket Number: 451905/18

Judge: Martin Shulman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. MARTIN SHULMAN, JusticePART 1

CYRUS R. VANCE, JR., DISTRICT ATTORNEY of the
COUNTY OF NEW YORK, in his capacity as

Plaintiff-Claiming Authority,

INDEX NO.: 451905/18

- v -

DECISION & ORDER

DANIEL MALLO,

Defendant.

MARTIN SHULMAN, J.:

In this civil forfeiture action commenced pursuant to CPLR Article 13-A, plaintiff-claiming authority, Cyrus R. Vance, Jr., District Attorney of the County of New York ("plaintiff" or the "DA"), moves for summary judgment against defendant Daniel Mallo ("defendant" or "Mallo"). The complaint seeks forfeiture of the sum of \$116,070 (the "funds"), alleged to represent the proceeds, substituted proceeds or instrumentalities of the felony crime of second degree grand larceny.

Plaintiff's motion for summary judgment is predicated upon Mallo's conviction after trial of the foregoing crime. The funds in question were fraudulently obtained Social Security Disability Insurance ("SSDI") benefits which defendant allegedly received from March 2013 through January 2014.¹

¹ The DA brought a prior forfeiture action against Mallo and over 100 other defendants based upon their alleged fraudulent obtainment of SSDI benefits (*Vance v Aglioloro, et al*, N.Y. County Index No. 450122/14). After moving for a default judgment against Mallo in the prior action, plaintiff moved to voluntarily discontinue it against defendant upon learning that personal jurisdiction over Mallo was lacking. By decision and order dated September 17, 2018, this court granted the motion to voluntarily discontinue the prior action as to defendant. The complaint in the prior action sought

Mallo, who is presently incarcerated and self-represented, served an answer to the complaint dated October 28, 2018 which contains ten affirmative defenses. In response to the instant motion, Mallo submitted a January 28, 2019 request to essentially stay this action until he is released from prison. He has not, however, opposed the instant motion² other than to state in his request for a stay that, contrary to the DA's representations, he does in fact dispute the amount sought, and intends to pursue his affirmative defenses, including but not limited to his claim that his due process rights have been violated.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 (2005). The movant's failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers. *Id.*

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).

Therefore, a defendant who pleads guilty to or is convicted of a criminal charge is

forfeiture of SSDI benefits in the amount of \$98,187.90 that defendant allegedly obtained during the period of September 2010 through June 2013.

² Plaintiff agreed to extend defendant's time to submit opposition to this motion to February 28, 2019.

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).

By virtue of Mallo's conviction, plaintiff has established by a preponderance of the evidence that Mallo committed the crime of second degree grand larceny. Any proceeds, substituted proceeds and/or instrumentalities of that crime are thus subject to forfeiture. The DA therefore has established its entitlement to summary judgment as to liability.

As to damages, plaintiff bases the amount sought upon the criminal trial testimony of a Social Security Administration employee. However, despite his conviction, nothing in the excerpts from the criminal trial transcript indicates that the amount of criminal proceeds was determined in the criminal action, and the DA does not submit any documentary evidence establishing the amount sought and the relevant time period.³ In any event, the figure must be recalculated based upon this court's finding (discussed below) that the applicable statute of limitations has expired with respect to a portion of the funds sought. Accordingly, summary judgment as to damages is denied without prejudice.

Mallo's answer does not specifically admit or deny each of the complaint's allegations. However, his defenses allege: (1) lack of subject matter jurisdiction under the Social Security Act ("SSA"); (2) improper venue; (3) expiration of CPLR §1311(1)'s

³ Notably, the criminal trial transcript does not indicate the period of time during which defendant allegedly received \$116,070 in SSDI benefits. Further, as noted in footnote 1 above, the complaint in the prior action sought forfeiture of a lesser amount of SSDI benefits received during a different time period. These discrepancies further warrant denial of summary judgment as to damages.

five year statute of limitations; (4) expiration of the six year statute of limitations for fraud (CPLR §213[8]); (5) plaintiff has violated the supremacy clause and equal protection clause by violating his due process rights under the SSA; (6) this court lacks subject matter jurisdiction since the Social Security Administration has not determined that he owes any monies and is in the process of reviewing whether or not he is disabled; (7) the supremacy clause preempts plaintiff from bringing this forfeiture action and “[u]surping the federal process of the [Social Security Administration]”; (8) failure to plead fraud with sufficient particularity (CPLR 3016[b]) and pendency of a Social Security Administration redetermination process; (9) failure to join the Social Security Administration as a party to this action; and (10) violation of 42 USC §407.

For the reasons set forth in the moving affirmation, the allegations contained in defenses one, two, four, five, six, seven, eight, nine and ten lack merit and are insufficient to rebut the DA's prima facie showing of entitlement to summary judgment as to liability. Accordingly, these defenses are dismissed.

However, the third affirmative defense is meritorious to the extent that plaintiff seeks recovery for any SSDI benefits defendant obtained prior to September 25, 2013 (five years prior to the September 25, 2018 commencement of this action).

Accordingly, summary judgment is granted in the DA's favor as to liability, however proof and recalculation of the claimed damages is required before judgment can be entered.

Finally, defendant's request for a stay is denied. No basis exists for such relief and although incarcerated, Mallo is nonetheless capable of defending himself in this action.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted solely as to liability, and is denied without prejudice as to damages; and it is further

ORDERED that the defendant's first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth affirmative defenses are dismissed.

The foregoing constitutes this court's decision and order. A courtesy copy of this decision and order has been mailed to defendant Mallo.

Dated: June 14, 2019



Hon. Martin Shulman, J.S.C.