

People v McGowan

2023 NY Slip Op 34849(U)

March 6, 2023

County Court, Westchester County

Docket Number: Indictment No. 22-71169

Judge: George E. Fufidio

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FILED

MAR 07 2023

**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 22-71169

MATTHEW McGOWAN,

Defendant.

-----X
FUFIDIO, J.

Defendant, MATTHEW McGOWAN, having been indicted on or about May 16, 2022 on four counts of grand larceny in the third degree (Penal Law § 155.35[1]) and one count of scheme to defraud (Penal Law § 190.65) filed an *omnibus* motion which sought, among other items of relief, a dismissal or reduction of the indictment or of certain charges therein. On December 1, 2022, the Court decided the Defendant's *omnibus* motion and agreed that one of the counts, Count 3, the one that pertained to Deborah Schmidt as a victim, should be dismissed. Of the items that the Court denied was the Defendant's application to reserve the right to file additional motions should he feel the need to. As a result the Defendant has now moved by order to show cause pursuant to CPL 255.20 for an order of the Court that would dismiss the entire indictment in the interests of justice. He now argues that the evidence that supported the count that pertains to the victim Sharon Leslie, Count 4, was factually insufficient to support the charge and in support of this contention he has attached items to his Order to Show Cause to shed light on the factual insufficiency of the charge, such as communications between the Defendant and Ms. Leslie's attorneys and the contract of sale for the property in question. He further argues that because the grand jury heard such factually insufficient evidence as it pertained to Ms. Leslie and before that Ms. Schmidt, the grand jury presentation as a whole was so irredeemably corrupted so as to invalidate the entire indictment.¹

In support of his Order to Show Cause, the Defendant has attached the contract that was at the heart of property transaction which makes up the basis of the criminal charge, as well as communications between the Defendant and the purported victim and her various attorneys and a letter from the 9th Judicial Grievance Committee that found the Defendant had not committed professional misconduct in his dealings with Ms. Leslie. Although the Defendant has not stated a legal basis for dismissal, other than simply mouthing that it is in the interests of justice to do so, upon consideration of his attached documents and a review of the grand jury minutes, the Court finds that there is good cause to at least review the grand jury presentation in general with a specific eye on the count concerning Sharon Leslie as a victim to determine whether it should stand. The facts that the Court finds relevant are that the Defendant was representing the seller of a building in Portchester, New York which Ms. Leslie intended to purchase. In furtherance of this contemplated purchase, Ms. Leslie entered into a contract of sale with the seller without an

¹ Although the Defendant cites no authority for his positions, a fair reading of his attorney's affirmation suggests that the motion is being brought in the interests of justice (CPL 210.40, *People v Clayton*, 41 AD2d 204 [2nd Dept. 1973]) and that he be allowed to reargue his original motion to dismiss based on evidence that "were not available at the time the original Motion was submitted"

attorney advising her. There was no mortgage contingency clause in the contract, nor was the sale contingent upon Ms. Leslie selling another piece of property. In addition, there was a clause that stated if the Purchaser defaulted that the remedy for the seller was that he would get to keep the down payment as damages. Finally, in a rider to that contract there was a “time is of the essence” clause which stated that in the event that the sale was not completed by the anticipated closing date the contract would be terminated and the seller, “may retain the down payment as liquidated damages.” The whole of Ms. Leslie’s complaint is that the Defendant, who was holding the down payment in escrow, did not return that money to her.

The People argue that the Defendant has not complied with CPL 255.20, in that he has not shown good cause as to why this information was not set forth in his original *omnibus* motion for the Court’s consideration at the time that motion was decided and that because the Court has already decided the *omnibus* motion it has found no fault with the Leslie count and other remaining counts.²

The Court disagrees with the People’s arguments and in light of the exhibits attached to the Defendant’s Order to Show Cause and the inherent authority of the Court to correct its own orders and rectify mistakes of law and/or fact (*People v Worten*, 286 AD2d 189 [4th Dept 2001]) and its authority under CPL 210.40 finds as follows:

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant’s commission thereof (CPL §70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). “In the context of a grand jury proceeding, legal sufficiency means *prima facie* proof of the crimes charged, not proof beyond a reasonable doubt.” *People v Bello*, 92 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). In rendering a determination, “[t]he reviewing court’s inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt.” *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008-- internal quotations omitted). Upon its initial review of the grand jury minutes the Court was of the impression that the evidence as it was presented barely cleared the low bar for indictment. Upon the Court’s re-review of the evidence underpinning the Leslie count, the Court finds the evidence to be insufficient. The Court, upon a closer reading of the grand jury testimony, cannot say with confidence that if the evidence as it was presented to the grand jury, without contradiction or without explanation, was tested in front of a petit jury that it would warrant conviction (*People v Pelchat*, 62 NY2d 97 [1984]).

The gravamen of the complaint is that the Defendant, acting as attorney for the seller of a property in Portchester, New York held Ms. Leslie’s down payment money in escrow and upon the real estate deal falling through, did not return that money to her. Upon review, it is evident through the questions posed to the witness by grand jurors that they had more insight into the intricacies and details of the deal than Ms. Leslie did. Through her testimony, Ms. Leslie is unable to show that she even has a right to the down payment money much less that the

² In the December 1, 2022 *omnibus* decision the Court dismissed the count pertaining to the victim Deborah Schmidt, finding that the People did not present sufficient evidence to sustain the indictment. The Court was unable to discern which counts in the indictment pertained to which victim, so has, instead of referring to them by number, resorted to describing them by the purported victim’s names.

Defendant wrongfully withheld it from her. Indeed, when she was asked by a grand juror beginning on page 8 of the May 16, 2022 grand jury presentation, this exchange occurred:

A JUROR: yes, yes, yes. Am I understanding correctly there was a contract in place that indicated in writing that if the sale did not go through of the home that she would get back the forty thousand dollars, be refunded?

Q: Ms. Leslie, to your knowledge was the contract, was the down payment refundable if the sale did not go through? To your knowledge was your down payment refundable or not refundable depending on the sale going through?

A: Well, it was based on the sale of our home.

Q: So was the sale of your home, to your knowledge, if you've didn't sell your home in the Bronx, was the down payment supposed to be returned or not returned?

A: It was all based upon the sale of our home.

Q: So the sale of the home was contingent upon the sale or the purchase of this property in Port Chester?

A: Right.

Q: To your knowledge, the sale the purchase of the home you had that you were purchasing in Port Chester, to your knowledge –

MS. ROWE-SMITH: She might not be the right witness.

Q: But to your knowledge Ms. Leslie, the purchase of the home in Port Chester, the contract you had with the seller, once you provided the down payment and also there was a contingency of the purchase of your home you had to sell your property in the Bronx?

A: Right.

Q: If you did not sell the property in the Bronx, if you know, did the contract reflect that the down payment was not to be returned to you?

A: *I'm not sure of that...* (emphasis added)

The victim herself was unable to tell the grand jury whether or not she was actually entitled to a return of the down payment such that it's non-return by the Defendant constituted a larceny. Further, there was no other evidence, such as the contract itself or conversations with the Defendant that would show her legal entitlement to a return of the money or that the Defendant wrongfully withheld it. The closest that the witness came to establishing a right to the money was in her rambling answer to this direct question in the grand jury presentation, "Did they, to your knowledge, did the sellers sign the modified contract?" Ms. Leslie answered, "They were in agreement that we would get the mortgage. They modified it to that point, but they didn't do what the bank required so the bank didn't release the money and by right just looking at it they needed to have refund the money. The still have the property and the money and they said it was stolen. The money was stolen." The Assistant District Attorney then said, "Ladies and gentlemen, just disregard the last statement the witness made."

Finally, at least one juror was as confused as the Court is concerning what, exactly, was going on with this real estate transaction as demonstrated by this exchange:

A Juror: Can I ask is there going to be, just because I don't know if I should continue down this road or seek clarification through another witness, but is there additional witnesses you will be calling in this particular case to clarify what is going on?

Ms. Rowe-Smith: I will be calling additional witnesses that will help you and the grand jurors in your deliberations.

A Juror: Okay.

Ms. Rowe-Smith: Any further questions for this witness?

A Juror: You don't have the contract as evidence?

Ms. Rowe-Smith: The document that I will be providing you, you will see what I have and that will help you in your deliberations.

A Juror: Thank you.

Although, later, there is testimony from a forensic investigator who analyzed the Defendant's bank accounts, and an introduction into evidence of those bank records, that testimony does not add to Ms. Leslie's claim that that the Defendant wrongfully withheld the down payment after the sale fell through and although it does suggest that the Defendant was misusing his client accounts and that the money might not have been disbursed to the seller of the property either, there is no testimony from the seller as to any larceny nor can the Court reach such an inference from the evidence before it.

Next, turning to an interests of justice consideration, a generous reading of this testimony in light of the contract that was supplied by the Defendant in his Order to Show Cause and the attached conversations between the Defendant and Ms. Leslie's various attorneys shows that the witness was virtually clueless as to the terms of the sale and likely had no business entering the contract without an attorney; which was something that the Defendant told Ms. Leslie in communications with her while she was representing herself. A cynical reading of this testimony shows a witness who, through the evasiveness her answers to direct questions regarding whether she knew she was entitled to a return of the down payment knew she was not entitled to a return of the down payment, yet was attempting to use the legal system to gain a windfall for herself. Regardless, at best she has shown that she gave money in a down payment in anticipation of this sale, what was not shown is that she was somehow entitled to that money after the sale fell through, nor that the Defendant has wrongfully withheld it from her; which is a proposition that is utterly refuted by the sales contract that plainly states that she is not entitled to such money and that also plainly states that there was never any contingency regarding her getting a mortgage or selling her property in the Bronx that had any impact on the potential sale. In fact, one of Ms. Leslie's attorneys attempted to negotiate a new contract with the seller that would include contingency provisions and a return of the down payment, but was unable to convince the seller to re-negotiate. When those negotiations proved fruitless, Ms. Leslie's attorney actually threatened and then presumably followed through on reporting the Defendant to the 9th Judicial District grievance committee, which ultimately cleared him of violating any code of professional conduct in his handling of this sale, but did find a litany of other professional misconduct violations.³

The Court can, even without a motion by either party, dismiss an indictment in the furtherance of justice (CPL 210.40 (3)). However, that authority cannot be used with impunity and must be used in a consideration of the totality of the circumstances surrounding the entire case (*People v Collier*, 85 Misc.2d 529 [Sup. Ct. New York Co. 1975]) and the factors set forth

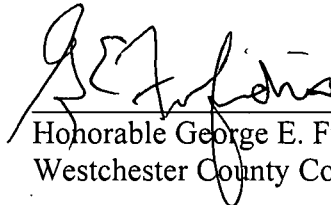
³ Contrast this outcome with that of a decision wherein the Defendant was found to have misappropriated funds belonging to Mr. Dong, who is also a named victim of this indictment and Georgiana Krish, whose daughter, Deborah Schmidt, was also a named victim in this case, but whose count the Court dismissed because the People did not prove their case in the grand jury by sufficient evidence (*Matter of McGowan*, 183 AD3d 196 [2nd Dept. 2020]).

in CPL 210.40. Regarding the circumstances, as described above, although the Defendant has been shown to be a disgrace to the legal profession (*see, Matter of McGowan, supra*), it does not mean that he should be held to account for crimes of which it is patently obvious the People lack any evidence of him having committed as demonstrated by the grand jury testimony of Sharon Leslie and in light of the contract that she willingly, although foolishly without counsel, entered. To hold otherwise would serve to further undermine public faith in a judicial system which has, of late, become increasingly under suspicion by various and diverse segments of the public at large (CPL 210.40 (1)(g)).

Accordingly, Count 4 of the indictment, the Count with Sharon Leslie as a victim is dismissed. Further, because there have now been two counts dismissed from this indictment, and only two remain, the charge alleging scheme to defraud is also dismissed because there is also now insufficient evidence to sustain that count. That said, the Court at this point does not see any reason to disturb the remaining two counts of the indictment. Although the Defendant has argued that the grand jury was irredeemably corrupted by hearing evidence concerning Ms. Leslie's failed real estate transaction, the Court does not see it that way. The remaining two counts are entirely evidentiarily independent of Ms. Leslie's count and they are entirely independent of one another as well. Furthermore, the Court has re-reviewed the grand jury testimony of the other two victims and has determined that sufficient evidence exists for the counts to remain in place. The People are granted leave to re-present Count 4 to the grand jury, should they choose to.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
March 6, 2023


Honorable George E. Fufidio
Westchester County Court Justice

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