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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY AND IMPROVEMENTS
LOCATED AT 1419 CAMELLIA DRIVE, EAST
PALO ALTO, CALIFORNIA, ASSESSOR'S
PARCEL NUMBER 063-412-010,

Defendant.

No. C 09-02577 CW

ORDER DENYING
PLAINTIFF'S MOTION
TO STAY AND MS.
JAMES'S MOTION TO
EXPUNGE LIS PENDENS
(Docket Nos. 14, 16)

_____ /

The government moves to stay this civil forfeiture action pursuant to 18 U.S.C. § 981(g)(1). Monetta James opposes this motion and moves to expunge the notice of lis pendens filed by the government on June 19, 2009. The government opposes Ms. James's motion. The matter was heard on September 29, 2009. Having considered oral argument and all of the papers submitted by the parties, the Court DENIES both the government's motion to stay and Ms. James's motion to expunge the notice of lis pendens.

BACKGROUND

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2 On March 4, 2009, a federal grand jury filed an indictment
3 against Lowell Curtis James, Christine Ann James, Desean Gardner
4 and thirty-four other defendants for their alleged participation in
5 a drug trafficking conspiracy. The indictment included a criminal
6 forfeiture allegation against the property at 1419 Camellia Drive,
7 East Palo Alto, CA, Assessor's Parcel Number 063-412-010. Based on
8 the indictment, the government filed a notice of lis pendens on the
9 property in March, 2009. Ms. James filed a motion to expunge this
10 notice of lis pendens on April 14, 2009. At a May 21, 2009 hearing
11 on the motion before the Honorable Wayne D. Brazil, the government
12 decided that a civil forfeiture action would be more appropriate.
13 Judge Brazil stayed proceedings on Ms. James's motion pending the
14 government's filing of the instant action. Thereafter, the Court
15 adopted Judge Brazil's recommendation that Ms. James's motion be
16 dismissed without prejudice on the condition that the government
17 diligently prosecuted the instant civil forfeiture action. United
18 States v. Gardner, et al., No. 09-0203 (N.D. Cal.) (Jul. 24, 2009
19 order adopting report and recommendation re: motion to expunge lis
20 pendens).

21 On June 10, 2009, the government filed the instant civil
22 forfeiture complaint under 21 U.S.C. § 881(a)(7). The government
23 filed a notice of lis pendens on June 19, 2009. In support of its
24 complaint, the government alleges that the above-mentioned criminal
25 defendants used the property during their alleged conspiracy.
26 Specifically, the complaint states that Desean Gardner conducted
27 drug sales on or in the vicinity of the property between March 18,
28 2008 and December 3, 2008. The complaint also states that on

1 January 7, 2009, Desean Gardner stopped at the property to obtain
2 drugs for later sale. Because of the common issues, the Court
3 related this case to the underlying criminal case. (Docket No.
4 13.)

5 On June 30, 2009, Ms. James claimed an interest in the
6 property and filed an answer to the civil forfeiture complaint.
7 (Docket Nos. 7-8.) On September 3, 2009, she filed, pursuant to
8 state law, a motion to expunge the civil lis pendens. (Docket No.
9 16.)

10 DISCUSSION

11 I. Motion to Stay

12 In opposing the government's motion to stay, Ms. James
13 suggests that she will assert an innocent owner defense in this
14 action. See Opp'n at 15; Reply at 6; James Decl. at 3-5. To
15 assert this defense, Ms. James must show by a preponderance of the
16 evidence that

17 she did not know of the conduct giving rise to
18 forfeiture or;

19 upon learning of the conduct giving rise to the
20 forfeiture, did all that reasonably could be
21 expected under the circumstances to terminate
22 such use of the property.

21 Id. at § 983(d)(2)(A)(i)-(ii). The government moves to stay this
22 case because it asserts that any discovery here will prejudice its
23 ability to prosecute the Gardner case.

24 "Upon the motion of the United States, the court shall stay
25 the civil forfeiture proceeding if the court determines that civil
26 discovery will adversely affect . . . the prosecution of a related
27 criminal case." 18 U.S.C. § 981(g)(1). To determine whether a
28 criminal case is related to the civil proceeding, "the court shall

1 consider the degree of similarity between the parties, witnesses,
2 facts, and circumstances involved in the two proceedings, without
3 requiring an identity with respect to any one or more factors."
4 Id. § 981(g)(4). The related criminal case must also be in
5 progress at the time a stay is requested. Id.

6 A stay may be unnecessary "if a protective order limiting
7 discovery would protect the interest of one party without unfairly
8 limiting the ability of the opposing party to pursue the civil
9 case." Id. § 981(g)(3). This alternative is unavailable, however,
10 "if the effect of such [a] protective order would be to allow one
11 party to pursue discovery while the other party is substantially
12 unable to do so." Id.

13 At this stage, the government does not show the necessity of
14 staying this case. To support its motion, the government asserts
15 that the factual allegations underlying both cases are "nearly
16 identical," and notes that the Court related the two cases. It
17 further asserts that it "may need to depose" various witnesses to
18 develop its affirmative case. Showing similarities between the
19 cases and predicting what type of discovery may occur, however, is
20 insufficient. Such a result would undercut Congress's intent to
21 provide an innocent owner defense, which Ms. James asserts here,
22 and to create "a more just . . . procedure for Federal civil
23 forfeitures" under the Civil Asset Forfeiture Reform Act of 2000.
24 Pub. L. No. 106-185, 114 Stat. 202. In the event that civil
25 discovery is propounded that would intrude upon the government's
26 criminal case, the government can move for a protective order or
27 renew its motion to stay.

28 The government cites United States v. \$247,052.54, 2007 WL

1 2009799 (N.D. Cal.). However, \$247,052.54 is distinguishable.
2 There, the court denied a criminal defendant-claimant's motion to
3 lift an existing stay on a civil forfeiture case. Id. at *1. The
4 criminal and civil cases had factual allegations of drug sales and
5 distribution in common, and, as here, the government claimed that
6 it would have to prove the same facts in the civil case as it would
7 in the criminal case. Id. at *2. But unlike the claimant in
8 \$247,052.54, Ms. James is not a defendant in the criminal action.
9 The \$247,052.54 court was primarily concerned with the criminal
10 defendant-claimant deposing government witnesses in the forfeiture
11 action in advance of the criminal trial, giving the defendant-
12 claimant insight into the government's criminal trial strategy.
13 Id. Although Ms. James's son and daughter-in-law are defendants in
14 the criminal trial, an appropriate protective order can be obtained
15 if necessary.

16 The government claims that a protective order would be
17 insufficient. However, its arguments rest upon speculation as to
18 what depositions may be noticed. Until discovery is sought, the
19 Court cannot determine whether a protective order would be
20 insufficient.

21 The government also argues that it will not be able to
22 complete its discovery while the criminal case is pending because
23 the criminal defendants would assert their Fifth Amendment rights.
24 While this is true, it does not mean that some discovery and motion
25 practice could not proceed in the interim. Accordingly, the Court
26 denies the government's motion to stay.

27 II. Motion to Expunge Notice of Lis Pendens

28 Ms. James moves to expunge the notice of lis pendens, claiming

1 that the government cannot establish a real property claim; the
2 claim lacks probable validity; notice has not been properly served,
3 filed or recorded; and there is a denial of due process.¹ In the
4 alternative, Ms. James requests an undertaking of \$250,000 for the
5 government to maintain the notice. Ms. James also seeks \$3,150 in
6 attorneys' fees, in the event she prevails on this motion.

7 Ms. James appears to assert that lis pendens is improper
8 because a forfeiture action does not constitute a "real property
9 claim." See James's Mem. of P&A 9-11. However, California Penal
10 Code § 186.4 requires a prosecuting agency to file a lis pendens
11 notice in criminal forfeiture actions, thereby implying that a
12 forfeiture claim suffices as real property claim. The Court
13 accordingly finds the government's complaint to assert a sufficient
14 property claim.

15 Under California law, a notice of lis pendens is filed "to
16 give constructive notice of an action affecting real property to
17 persons who subsequently acquire an interest in that property, so
18 that the judgment in the action will be binding on such persons
19 even if they acquire their interest before the judgment is actually
20 rendered." Bishop Creek Lodge v. Scira, 46 Cal. App. 4th 1721,
21 1733 (1996). This notice clouds title, "effectively preventing
22 sale or encumbrance until the litigation is resolved or the lis
23 pendens is expunged." Amalgamated Bank v. Superior Court, 149 Cal.
24 App. 4th 1003, 1011 (2007). Such notice is filed by the claimant

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26 ¹ The Court asserts supplemental jurisdiction over the state
27 law motion because it is transactionally related to the
28 government's federal forfeiture action. See 28 U.S.C. § 1367;
Adams v. United States, 2008 WL 5114483, *7 (E.D. Cal.) ("[A]ny
jurisdiction to consider [the] . . . motion to expunge would
necessarily arise out of 28 U.S.C. § 1367").

1 pursuing the action. Cal. Civ. Proc. Code § 405.1. Here, the
2 government is the claimant for the purposes of the expungement
3 statutes because it filed the civil forfeiture action.

4 After the notice is filed, a party with an interest in the
5 real property can file a motion to expunge. Id. § 405.30. The
6 notice must be expunged "if the court finds that the claimant has
7 not established by a preponderance of the evidence the probable
8 validity of the real property claim." Id. § 405.32. "Probable
9 validity" exists when "it is more likely than not that the claimant
10 will obtain a judgment . . . on the claim." Id. § 405.3. The
11 burden of proof falls on a claimant to show probable validity. Id.
12 § 405.30. A court's probable validity determination requires "a
13 judicial determination of the merits." Amalgamated Bank, 149 Cal.
14 App. 4th at 1012. A court shall award reasonable attorneys' fees
15 to the party prevailing on an expungement motion, unless it finds
16 that "the other party acted with substantial justification or that
17 other circumstances make the imposition of attorney's fees and
18 costs unjust." Cal. Civ. Proc. Code § 405.38.

19 The government incorrectly characterizes Ms. James's motion to
20 expunge the lis pendens as a motion to dismiss the forfeiture
21 action under Federal Rule of Civil Procedure 12. See Opp'n to Mot.
22 to Expunge at 1. The government asserts that Ms. James failed to
23 identify federal authority supporting her motion. However, a
24 notice of lis pendens is filed in a county records office pursuant
25 to state law. Thus, California law applies when analyzing the
26 government's lis pendens claim. See, e.g., Orange County v.
27 Hongkong & Shanghai Banking Corp., 52 F.3d 821, 823-24 (9th Cir.
28 1995) (applying California lis pendens standard); Oliver v. NDEX

1 West, LLC, 2009 WL 2486314 (E.D. Cal.); Ritchie v. Cmty. Lending
2 Corp., 2009 WL 2486575 (C.D. Cal.); see also Cal. Civ. Proc. Code
3 § 405.5. The government must show that it meets the "probable
4 validity" standard under California law.

5 The government satisfies the California standard. The
6 verified complaint contains allegations regarding criminal activity
7 at the property. These allegations arise out of the criminal
8 indictment and are verified by an FBI agent. Thus, the government
9 establishes that its civil forfeiture claim has probable validity.
10 The lis pendens notice shall not be expunged and attorneys' fees
11 are not warranted.

12 Ms. James alternatively requests that the Court require the
13 government to provide an undertaking as a condition of maintaining
14 the lis pendens. See Cal. Civ. Proc. Code § 405.34. This request
15 is denied.

16 III. Evidentiary Objections

17 Ms. James makes evidentiary objections to paragraphs eight
18 through twenty-two of the government's civil forfeiture complaint
19 submitted in support of its lis pendens notice. As stated above,
20 these are factual allegations verified by an FBI agent. Verified
21 allegations can serve as evidence. See Johnson v. Meltzer, 134
22 F.3d 1393, 1399-1400 (9th Cir. 1998). The Court therefore
23 OVERRULES Ms. James's objections.

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CONCLUSION

For the foregoing reasons, the Court DENIES the government's Motion to Stay. (Docket No. 14) If the government finds that civil discovery necessitates a protective order, it may move for one when such discovery is propounded. The Court DENIES Ms. James's Motion to Expunge Lis Pendens and alternative request for the government to provide a bond (Docket No. 16).

IT IS SO ORDERED.

Dated: 10/13/2009



CLAUDIA WILKEN
United States District Judge