

Vance v Parkside Constr. Bldrs. Corp.
2021 NY Slip Op 32441(U)
November 23, 2021
Supreme Court, New York County
Docket Number: Index No. 450900/2018
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

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INDEX NO. 450900/2018
MOTION DATE 04/21/2021
MOTION SEQ. NO. 002

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

Plaintiff-Claiming Authority,

- v -

PARKSIDE CONSTRUCTION BUILDERS CORP. a/k/a,
PARKSIDE CONSTRUCTION CONTRACTORS, INC. a/k/a
GS&F ENTERPRISES, LLC,
FRANCESCO PUGLIESE,
SALVATORE PUGLIESE,
MICHAEL DIMAGGIO,
YENNY DUARTE,
JAMES LYONS,
AFFINITY HUMAN RESOURCES, LLC, and
JERRY HAMLING,

Defendants.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for Remittal of forfeiture/restoring proceeds to Petitioner.

Around May 16, 2018, plaintiff-Claiming Authority Cyrus R. Vance, Jr., in his capacity as District Attorney for New York County ("Vance"), filed this action to obtain funds that defendants 1) allegedly had stolen from their workers through their failure to pay them for all hours worked, and 2) fraudulently withheld from the New York State Insurance Fund (NYSIF) when they underreported the size of their payroll (*see* NYSCEF Doc. No. 1 [Summons and Verified Complaint]). On February 20, 2020, Vance entered into a stipulation with Parkside Construction Builders Corp. a/k/a Parkside Construction Contractors, Inc. a/k/a GS&F Enterprises, LLC (Parkside) and Francesco Pugliese (the settling defendants) in which the settling defendants entered a guilty plea to several criminal charges and agreed to pay \$1.4 million in restitution. As part of the agreement, the two defendants forfeited the funds in

several bank accounts, totaling \$106,266. This money went to NYSIF. In addition, the two defendants agreed to pay NYSIF \$68,733.43 and to pay NYSIF an additional \$1.225 million (*see* NYSCEF Doc. No. 24 [Stipulation and Order Settling Action as to Certain Defendants]).¹

On October 2, 2020, USC-Kings, LLC (petitioner) filed this motion seeking access to the forfeited funds. The petition, which petitioner's counsel verified, states that, “[u]pon information and belief, Petitioner, as a trust fund beneficiary under the New York Lien Law 3-A, was the true owner of some of the Forfeited Property (if not all) because said monies were received by Defendants Parkside Construction and F. Pugliese in connection with the improvement of real property, constituting trust assets” (NYSCEF Doc. No. 42, ¶ 6 [underlining in original]). The petition asserts that, in particular, the settling defendants owe petitioner \$71,281.61 for the ready-mix concrete it supplied to them for various construction projects, “including . . . the Marriott Hotel[] at 215 Pearl Street” (*id.*, ¶ 7). Accordingly, petitioner seeks remittal of the forfeited property and payment of the \$71,281.61 the settling defendants allegedly owe to it. In support, petitioner includes several pages of invoices dated between December 2017 and April 2018, and a copy of an authorization dated March 13, 2018, which allowed USC Atlantic² access to information concerning Parkside's financial information at Alma Bank and granted USC Atlantic permission to enforce a guarantee (NYSCEF Doc. No. 33). The Court notes that prior to March 13, 2018, the settling defendants had agreed to turn over the Alma funds to Vance.

Vance opposes petitioner's application. First, he contends that petitioner has not satisfied its evidentiary burden. He notes that “priority is not given to those with liens on nonforfeited property of the person whose property was forfeited, nor is it given to those with claims against the person or corporation

¹ Earlier, Vance had “obtained a temporary restraining order [which authorized] the restraint of up to \$9,557,456.90 . . . based upon a calculation showing that Parkside had unlawfully underpaid their employees by at least \$1,749,765.75 and had unlawfully underpaid [NYSIF] by at least \$7,807,691.15” (NYSCEF Doc. No. 36 [Aff in Opp], ¶ 4).

² USC-Kings, LLC is part of USC Atlantic.

whose property was forfeited. The statute was carefully drawn to recognize only liens against, and claims of title to, the forfeited property” (*Morgenthau v Citisource, Inc.*, 148 Misc 2d 83, 86 [Sup Ct, NY County 1990] [*Morgenthau*]). Here, Vance contends, petitioner has not shown a connection between the forfeited funds and the trust funds – that is, it has not shown that the funds in the accounts were funds from the jobs related to the settling defendants’ debts. Petitioner relies entirely on an affirmation by its counsel, rather than an affidavit by a party with personal knowledge of the facts, to support its claims.

Further, Vance argues that petitioner’s evidence regarding Alma Bank is unpersuasive. As support, Vance submits copies of two affidavits that Francesco Pugliese (Pugliese) filed in connection with a Kings County action involving Alma Bank (NYSCEF Doc. No. 39). In the latter of these affidavits, Pugliese referenced the criminal action and the current lawsuit, and he indicated that “the monies on deposit were dedicated for payroll” (*id.*, ¶ 5), and that “the district attorney was fully aware that the funds at Alma Bank were to be used to cash the employee payroll checks” (*id.*, ¶ 6).

In reply, petitioner’s counsel alleges that his client cannot have personal knowledge connecting the forfeited funds to the debt in question. However, he alleges, his client does have personal knowledge that the settling defendants “were paid for Petitioner’s ready-mix concrete, and they failed to pay Petitioner” (NYSCEF Doc. No. 43, ¶ 6), and it is reasonable to surmise that petitioner has a valid claim on the forfeited property. Accordingly, he states that it is prejudicial to deny his client’s application. Counsel further states that, by acknowledging that Vance released funds to defendants for attorneys’ fees and “to allow various defendants to remain in business, receive funds and pay expenses in the ordinary course of business” (NYSCEF Doc. No. 36 [Aff in Opp], ¶ 5), According to petitioner, Vance presumably intended for those funds to pay petitioner the money it was due. Finally, on the issue of evidentiary support, petitioner claims that the petition, which counsel verified, suffices as an affidavit in support of the motion.

Analysis

“CPLR article 13–A authorizes District Attorneys and the Attorney–General, as claiming authorities, to recover, as against a criminal defendant, real property, personal property, money, negotiable instruments, securities, or other items of value, which constitute the proceeds, substituted proceeds, or an instrumentality of a crime” (*Dillon v Farrell*, 230 AD2d 818, 819 [2d Dept 1996]). For example, in *Morgenthau v Khalil* (73 AD3d 509, 511 [1st Dept 2010]), the First Department concluded that, where the defendant was guilty of a check cashing scheme, “the total face value of the checks involved in that scheme is arguably the fruit of the broader criminal scheme, and therefore may constitute forfeitable proceeds.” Similarly, in the case at hand, the total value of the funds that defendants withheld from their employees and from NYSIF arguably constitute forfeitable proceeds. That is the type of connection that petitioner must make under CPLR 3211 (7) in order to assert a viable claim against the forfeited money in order to show its right to remittal of the funds.

Petitioner has not satisfied its burden in this matter. As Vance notes, plaintiff did not provide supporting evidence for the statements in counsel’s affirmation in support. Although defendants granted petitioner access to the funds in question in March 2018, this is not sufficient to show the required connection between the money in the Alma account and the debt at issue.

Further, plaintiff is correct that petitioner has not provided evidentiary support for the statements in counsel’s affirmation. In particular, the Court notes that there is little context for the financial documents filed as NYSCEF Doc. No. 33 and no verification of their import by a party with personal knowledge. For example, the ultimate fate of the application for business credit is unknown. There also is information suggesting that a bond was posted with Allied World Insurance Company (*see* NYSCEF Doc. No. 33 at 3). One of the pages is a typed list with certain items scratched out (*id.* at 6). Finally, no party with personal

knowledge testifies as to whether any of the invoices were paid in part or in full. Especially when considered alongside affidavits from Pugliese, petitioner's petition is not sufficient.

Moreover, contrary to petitioner's assertion, the petition itself does not make up for these deficiencies. The petition is verified by counsel, who affirms that "[t]he contents are true to the deponent's own knowledge except as to those matters which are alleged upon information and belief" (NYSCEF Doc. No. 42 at 4). Although the CPLR allows the petition to be considered as an affidavit, it is of evidentiary support only where it is verified by the petitioner or someone who possesses personal knowledge. Therefore, counsel's verification does not raise a factual issue (compare *Tupi Cambios S.A. v Morgenthau*, 48 AD3d 278, 280 [1st Dept 2008] [petition supported claims where document was "verified by both petitioners"]). Further, counsel's personal speculation that, logically, the money in the bank accounts must consist of profits from the contracts with petitioner, does not raise a factual issue (*cf. Yellowstone Contrs. Corp. v A.F.C. Enters.*, 237 AD2d 434, 435 [2d Dept 1997] [affidavits in opposition to lien foreclosure lacked merit because not based on personal knowledge]). Similarly, counsel's speculation that Vance meant for the funds to cover claims such as petitioner's lacks merit, especially when Vance's office makes a contrary argument.

Accordingly, it is hereby ORDERED that the petition/application is denied. This constitutes the decision and order of the Court.

11/23/2021

DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE