

rec'd 9/23/13

NO. 13CI0969

JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN (13)
FREDERIC J. COWAN, JUDGE

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, ET AL

PLAINTIFFS

V.

ORDER

HALLEM DURU, ET AL

DEFENDANTS

This involves an action for forfeiture of currency initiated by Louisville/Jefferson County Metro Government pursuant to KRS 218A.410 and 218A.240. The Defendant has moved for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment. After a careful review of the record and the law, and after having heard argument of counsel, the Court, finding that there are genuine issues of material fact, **HEREBY DENIES** the Motion.

I. FACTS.

This case began when a package shipped via UPS was passing through the worldwide sorting facility of UPS at the Louisville International Airport on October 16, 2012. Louisville Metro Police narcotics officers, working with other law enforcement officers and with UPS employees, identified the package, which was being shipped from Houston, Texas, to Mableton, Georgia, as "suspicious." The package was identified as suspicious because it had an "H.V." marking on it, which was a mark no longer utilized by UPS but was formerly a mark utilized to identify a "High Value" package. In addition, the package's return address was the UPS shipping facility itself rather than a business or residential address. The package was pulled off

the sorting facility and a Customs and Border Patrol dog trained to sniff illegal drugs alerted on the package. The package was then opened by UPS employees. Inside were three "book safes," which upon being opened, revealed contents of some \$21,990 in cash. Thereupon, the cash was seized by Metro Police. In a post-seizure investigation, the Metro Police were unable to locate any person by the name of the sender listed on the package, "Tesi Benjamn." Further, they identified Mableton, Georgia as an area known for narcotics trafficking. Finally, they identified a business, presumably operated by the Defendant, but found that it was not registered to do business with the Georgia Secretary of State's Office. As of January 22, 2013, no claim had been filed with UPS for the currency.

Subsequently, Louisville Metro Government initiated this action pursuant to KRS 218A.410 asking this court to enter a judgment of forfeiture of the cash. The Defendant answered, filed a cross-claim and asked that the seized cash be delivered to him forthwith. After some discovery, the Defendant filed this motion.

II. LAW--SUMMARY JUDGMENT STANDARD.

Although the Defendant styled his motion in the alternative, the Court shall treat this motion as a motion for summary judgment since matters outside the pleadings have been submitted. CR 12.03.

Summary judgment is used to terminate litigation when, as a matter of law, it appears impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. *Steelvest v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480-82 (Ky. 1991); and *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). In deciding whether to grant summary judgment, the Court must view the factual record in a light most favorable to the party opposing the motion and all doubts are to be resolved in his favor. *Steelvest* at 480. The

movant bears the initial burden of convincing the court by evidence of record that no genuine issue of material fact is in dispute, but then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing there is a genuine issue of material fact for trial. *Id.* at 482. The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment. *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky.2001). Summary judgment is appropriate where the nonmoving party relies on little more than speculation and supposition to support his claims. *Blackstone Mining Company v. Travelers Insurance Company*, 351 S.W.3d 193, 201 (Ky.2010), *citing O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky.2006).

The trial judge must examine the evidence not to decide any issue of fact but, rather, to discover if a genuine issue exists. *Steelvest* at 480. While the Kentucky Supreme Court in *Steelvest* used the word “impossible” in describing the strict standard for summary judgment, the Court later stated that the word is to be applied “in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992), *citing Paintsville Hospital, supra*, 683 S.W.2d at 256. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*, *citing* CR 56.03. Accordingly, the Court's focus should be on what is of record rather than what might be presented at trial. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004), *citing Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky.1999).

III. ANALYSIS.

The issue therefore is whether under the forfeiture statute, KRS 218A.410, there is a genuine issue of material fact.. KRS 218A.140(j) states:

Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, **traceable to the exchange**, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a **rebuttable presumption that all moneys, coin and currency found in close proximity to controlled substances**, to drug manufacturing or distributing paraphernalia, or to the records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence.

(Emphasis added.)

Osborne v. Commonwealth, 839 S.W.2d 281, 284 (Ky.1992) provides some explanation:

The Commonwealth may meet its initial burden by producing **slight evidence of traceability**. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce **some evidence** that the currency or some portion of it has been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

(Emphasis added.)

See, also, Hill v. Commonwealth, 308 S.W.3d 227 (Ky.App.2010).

The forfeiture statute does not require a criminal conviction of the person whose property is forfeited. *Osborne, supra*, at 283; KRS 218A.240(5).

In this case, considering all evidence in a light favorable to Metro as the opponent of the motion, Metro has produced evidence sufficient to create a genuine issue of material fact as to whether there is traceability.

The Defendant, relying on *Osborne, supra*, argues that Metro has failed to show a nexus between the cash and its use in an illegal narcotics transaction. In other words, the Defendant argues, the fact that there was cash found in a package is not evidence, by itself, that it was used in a drug deal. But *Osborne* only requires the Commonwealth to “first produce *some* evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction.” 839 S.W.2d at 284. (Emphasis added). The Court believes that the Commonwealth has met that burden for summary judgment purposes.

Existence of probable cause

The Defendant also argues that Metro officers lacked probable cause to seize the currency after UPS personnel had opened it. KRS 218.415(1). Probable cause is an objective, flexible, common-sense standard which deals with probabilities as understood by those versed in the field of law enforcement. *U.S. v. Cortez*, 449 U.S. 411 (1981). Probable cause exists when, at the time the judge issues the warrant or the police officer performs the search or seizes property, there are reasonably trustworthy facts and circumstances that are sufficient, given the totality of the circumstances, to lead a reasonable person to believe that there is a fair probability that the items sought constitute fruits, instrumentalities, or evidence of crime. L. Abramson, 8 *Kentucky Practice, Criminal Practice and Procedure*, §18.21 (Thomson West 4th Ed. 2003), citing, *Illinois v. Gates*, 462 U.S. 213 (1983); *Drake v. Commonwealth*, 222 S.W.3d 254 (Ky.App.2007); *Commonwealth v. Baldwin*, 199 S.W.3d 765 (Ky.App. 2006). Moreover, KRS

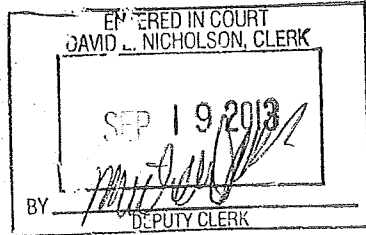
218.415(1) further provides the parameters of probable cause when it says that the officer must have probable cause “to believe that the property is subject to forfeiture *pursuant to this chapter*” (emphasis added).

The Court finds that based upon the evidence presented there was probable cause to seize the currency. The package was noted as suspicious. A drug-sniffing dog alerted on its contents. A large sum of cash was found inside. It was determined that the sender may have been fictitious. There were significant unanswered questions about the addressee. No claim was made for the currency. To a trained law enforcement officer, these facts and circumstances provide probable cause to allow the seizure.

IV. CONCLUSION.

At this point in the proceedings, the Commonwealth has met its burden of demonstrating that there is a genuine issue of material fact, namely that the currency was part of some aspect of illegal narcotics activity. Ultimately, the Commonwealth must prove at trial, by direct and circumstantial evidence, that the currency meets the definitional requirements of subsection (j) of KRS 218.410 and is subject to forfeiture. In that regard, this action is a civil proceeding guided by the Kentucky Rules of Civil Procedure. Any failure to comply with those rules may result in sanctions as provided therein.

IT IS SO ORDERED.



A large, stylized handwritten signature in black ink, appearing to read "F. Cowan".

FREDERIC J. COWAN, JUDGE
JEFFERSON CIRCUIT COURT

9-15-13

DATE

cc: *Stephanie French*
Counsel for Plaintiffs

Carroll M. Redford III
Counsel for Defendants

