2018 IL App (3d) 170160-U

Order filed September 5, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JAMES W. GLASGOW, STATE'S ATTORNEY of WILL COUNTY, ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,	)	
v.	)	
$21,426.25 in U.S. Currency,	)	Appeal No. 3-17-0160 Circuit No. 15-MR-2983
Defendant	)	
(Low Frank's Tobacco, Inc., d/b/a Low Bob's Discount Tobacco,	)	
Claimant-Appellee).	)	The Honorable Carmen J. Goodman Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: In a civil forfeiture case, the circuit court did not err when it granted summary judgment in favor of the claimant regarding the State's count based on alleged violations of the Controlled Substances Act. However, the court erred when it

granted summary judgment in favor of the claimant regarding the State's count based on alleged violations of the money laundering statute.

¶ 2 After conducting a raid on Low Bob's Discount Tobacco in Bolingbrook, the State filed a complaint for the forfeiture of certain property seized in the raid, including $21,426.25 in United States currency and a bill-counting machine. The claimant, Low Frank's Tobacco, Inc., d/b/a Low Bob's Discount Tobacco, filed a motion for summary judgment, which the circuit court granted. On appeal, the State argues that the circuit court erred when it granted the motion because the court decided issues of material fact, rather than simply determining if genuine issues of material fact existed. We affirm in part and reverse in part and remand for further proceedings.

¶ 3 FACTS

¶ 4 On December 23, 2015, the State filed a complaint for forfeiture, alleging in part that certain property was subject to forfeiture due to felony violations of the Controlled Substances Act (720 ILCS 570/100 to 603 (West 2014)) and the money laundering provision of the Criminal Code of 2012 (720 ILCS 5/29B-1 (West 2014)). The complaint alleged in count I that Low Bob's Discount Tobacco sold a look-alike controlled substance to a confidential informant on three occasions and in count II that it had sold either a look-alike substance or an illegal substance, as well as contraband cigarettes, and comingled the proceeds from those sales with the store's other funds.

¶ 5 The State amended its complaint on April 27, 2016, to which limit the property allegedly subject to forfeiture to $21,426.25 and a bill-counting machine. The amended complaint alleged that on three separate occasions in October 2015, a confidential informant purchased an alleged look-alike controlled substance called "Vise" from Low Bob's Discount Tobacco in Bolingbrook that field-tested positive for the probable presence of phencyclidine (PCP). On each of these

occasions, the confidential informant requested the "special vials" from the cashier, who retrieved certain E-cigarette vials from behind the counter. The safety seals on the vials were allegedly broken at the time of purchase. The amended complaint further alleged that these vials were substantially more expensive than other vials of similar product; were kept behind the counter and also stored in the office in the rear of the building; and "were impliadly [*sic*] represented to be a controlled substance, or appeared in such a manner as would lead a reasonable person to believe it was a controlled substance." Later testing of the substance revealed that it was not PCP but AB-PINACA, a synthetic cannabinoid. The amended complaint stated that AB-PINACA was not illegal in Illinois at the time of the raid, but it was illegal under federal law.

¶ 6 Regarding the contraband cigarettes, the amended complaint alleged that in a rear room, a hidden compartment was found that contained approximately 6,200 cigarettes in 31 boxes. The cigarettes appeared to be handmade and their boxes did not contain tax stamps. An electric cigarette-rolling machine was also found in another room in the rear of the store, which was running at the time of the raid and was being operated by an alleged employee of the store.

¶ 7 The State did not file an affidavit from the confidential informant at any time.

¶ 8 Counsel for the claimant, Low Frank's Tobacco, Inc., filed an appearance and answer on behalf of the claimant, which alleged, *inter alia*, that the property seized was all acquired in the normal, legitimate, and legal conduct of its licensed retail business. The claimant also alleged that it was not legally accountable for any of the conduct allegedly giving rise to the seizure of its property.

¶ 9 The claimant filed a motion for summary judgment on June 1, 2016. The motion argued that the State could not prove a nexus between any allegedly illegal activity and the property

seized because the substance found in the vials was legal in Illinois at the time of their seizure. Appended to the motion were the affidavits of Efrain Aguilera, the claimant's president and secretary; and two employees of the claimant—Gregory Hoyos and Johnathon Schultz. Using these affidavits and other documents appended to the motion, the claimant alleged that it sold only lawful products it obtained from reputable wholesale vendors. Further, all three affiants disavowed knowledge of the term "Vise" and claimed they were not aware of any product offered for sale in the store called or referred to as "Vise." In addition, they averred that no one affiliated with the claimant tampered with any products sold in the store, and Aguilera stated that he had communicated to all employees a procedure to ensure that products found to be defective are not sold, which included temporarily placing the defective product out of public view behind the sales counter and then later placed in the storage room. Aguilera also stated he had identified certain vials that had been targeted by shoplifters and, as a security measure, placed those vials behind the sales counter. Other items kept behind the counter included customer orders from catalogs, discontinued products, new stock needing to be put on display, customer returns, damaged items, and product samples received from vendors. Thus, customers who wished to purchase those vials had to specifically request them.

¶ 10 Regarding the allegation of selling contraband cigarettes, the claimant first alleged that it subleased certain space starting in 2013 in the rear of the building to the Smokin' Angels Club (SAC), a nonprofit organization that existed for purely social activities.[1] At the time of the raid, the rooms in which the officers found the cigarette-rolling machine and the boxes of allegedly

[1] Appended to the motion was a sublease agreement between the claimant and SAC. The agreement was signed by Aguilera on behalf of the claimant and by an individual on behalf of SAC whose name was not printed on the agreement and whose signature was illegible.

hand-rolled cigarettes were rooms subleased by SAC. The claimant further alleged that SAC was a wholly separate entity, and neither Aguilera nor the claimant was responsible for any of SAC's operation. At the time of the raid, Donald Snider was on SAC's premises and was the person the State claimed was operating the cigarette-rolling machine, which was previously owned by the claimant but had been sold in 2012. However, the claimant asserted that Snider was not, and never had been, an employee of the claimant, and he was not operating the machine for the benefit or on behalf of the claimant. The claimant further averred that it did not sell illegal or hand-rolled cigarettes.

¶ 11 In its response, the State argued that many genuine issues of material fact existed. Based largely upon the affidavit of Bolingbrook police officer Jon Moritz, the State alleged that surveillance video indicated that an employee of the claimant (Hoyos) had rung up empty cigarette tubes and loose tobacco on the cash register three separate times on October 27, 2015, even though those customers had not presented any items for purchase, and he then retrieved contraband cigarettes from the room with the hidden compartment (which the State alleged belonged to the claimant, not SAC) and handed those handmade cigarettes to the customers. In contrast, on that same day, Hoyos rang up a sale for tubes and tobacco that a customer had presented for purchase; Hoyos did not retrieve any cigarettes from the room with the hidden compartment for that customer. Other video footage allegedly showed employees of the claimant ringing up tubes and tobacco but retrieving rectangular boxes from the room with the hidden compartment and handing those boxes to customers.

¶ 12 The State also emphasized that the video showed Aguilera and other employees of the claimant performing maintenance on the cigarette-rolling machine and assisting in the

manufacture of the contraband cigarettes.[2] Also, surveillance video showed the machine being moved between alleged SAC premises and another room that was part of the claimant's premises. In addition, the State claimed that it found a 2013 document in the office in the rear of the building that indicated Aguilera was the owner of the cigarette-rolling machine, despite his claim in his affidavit that he had sold the machine in 2012.

¶ 13 Regarding the vials, the State claimed that it in addition to the vials containing AB-PINACA found in a wooden cigar box underneath the sales counter, a large quantity of the vials were also found in the office in the rear of the building. All of these vials had their safety seals broken, and "[a]ll other vials of smoking or vaping e-liquid that were not suspected of containing drugs had their safety seals intact."

¶ 14 Regarding SAC, Moritz alleged in his affidavit that Bolingbrook had no record of SAC as a registered business or nonprofit organization. In addition, membership applications to SAC were found in the claimant's office in the rear of the building, as well as a corporate credit card that had been issued to SAC in Aguilera's name. Another document located in the office listed the mailing address for SAC as the address of Aguilera's residence.

¶ 15 On February 8, 2017, the circuit court held a hearing on the claimant's motion for summary judgment. After hearing arguments, the court, focusing on the fact that AB-PINACA was not illegal in Illinois at the time of the seizure, ruled that there was no nexus between any alleged criminal activity by the claimant and the property seized. Accordingly, the court granted summary judgment in favor of the claimant.

¶ 16 The State appealed.

[2] The surveillance video apparently showed Snider (whom the claimant alleged was not its employee) behind the sales counter in the store several times carrying what appeared to be handmade cigarettes.

¶ 17 ANALYSIS

¶ 18 The State's sole argument on appeal is that the circuit court erred when it granted summary judgment in favor of the claimant. Specifically, the State alleges that genuine issues of material fact existed regarding whether the "special vials" constituted a look-alike controlled substance and whether the claimant or a distributor was responsible for the product in the "special vials." In addition, the State claims that genuine issues of material fact existed as to whether the cigarettes constituted contraband; who was manufacturing the cigarettes, who had control over their manufacture, and who was selling them. The State contends that rather than determine whether genuine issues of material fact existed, the circuit court decided these factual issues.

¶ 19 Initially, we note that the claimant asserts that this appeal is moot because the subject property was returned to it in March 2017. Regarding the money, the claimant states that it had been deposited into an account and then used, in its entirety, to pay bills. In response, the State claims that nothing exists in the record to indicate the money has been spent and that even if there was such evidence, the case is not moot because an actual controversy exists in the contested grant of summary judgment.

¶ 20 In general, courts are precluded from considering moot questions. *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). A question can become moot when events have transpired that make it impossible for a court to grant effective relief. *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984).

¶ 21 We are not persuaded by the claimant's mootness argument. While it is true that the money has been spent and those *specific* bills cannot be recovered, the *res* is ultimately money and can be substituted with ease. See *Columbia Mutual Insurance Co. v. Herrin*, 2012 IL App

(5th) 100037, ¶ 11 (citing *First National Bank of Jonesboro v. Road District No. 8*, 389 Ill. 156, 162-63 (1945) and holding that even if certain insurance funds had been spent from an estate, the administrator could be required to make restitution). Accordingly, we reject the claimant's mootness argument and will address the appeal on its merits.

¶ 22 Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). We review a circuit court's decision on a summary judgment motion *de novo*. *Id.*

¶ 23 A forfeiture action is a civil, *in rem* judicial proceeding. *People v. $174,980 United States Currency*, 2013 IL App (1st) 122480, ¶ 21. Forfeiture actions can be initiated under both the Drug Asset Forfeiture Procedure Act (725 ILCS 150/1 to 20 (West 2014)) and the money laundering statute of the Criminal Code of 2012 (720 ILCS 5/29B-1 (West 2014). Notably, neither a criminal conviction nor even the filing of criminal charges is a prerequisite to bringing a civil forfeiture action. *People v. $52,204 United States Currency*, 252 Ill. App. 3d 778, 781 (1993); see 725 ILCS 150/9 (West 2014); 720 ILCS 5/29B-1(l)(10) (West 2014). In this case, count I of the complaint was brought under the Drug Asset Forfeiture Procedure Act, while Count II was brought under the money laundering statute. We will address each count in turn.

¶ 24 I. Alleged Violation of the Illinois Controlled Substances Act (Count I)

¶ 25 In relevant part, section 505 of the Controlled Substances Act provides that all money and items of value that are used or intended to be used in violation of that Act are subject to

forfeiture. 720 ILCS 570/505(a)(4) (West 2014). The procedure for judicial *in rem* forfeiture proceedings involving an alleged violation of the Controlled Substances Act is found in the Drug Asset Forfeiture Procedure Act. See 720 ILCS 570/505(b) (West 2014).

¶ 26 When the State brings a forfeiture action, it has the initial burden of proving that probable cause exists for the forfeiture of the property. 725 ILCS 150/9(G) (West 2014). To meet this burden:

> "a complaint for forfeiture must allege facts providing reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion. [Citation.] Probable cause in this context requires only a probability or substantial chance of the nexus and not an actual showing." *People v. Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 505 (2005).

¶ 27 Regarding count I, the State contends that the facts it pleaded were sufficient to create a genuine issue of material fact regarding whether a belief that a nexus existed between the property (the currency and the bill-counting machine) and illegal drug activity. The State admits that the substance in fact found in the vials, AB-PINACA, was not illegal under Illinois law at the time of the controlled buys, but it emphasizes that the substance need not in fact be a controlled substance to constitute a violation of the look-alike substance provision of the Illinois Controlled Substances Act (720 ILCS 570/404 (West 2014)). Rather, the only requirement is that the seller knowingly represented the substance as a controlled substance. Thus, the State contends that the evidence was sufficient for a reasonable trier of fact to conclude that a common

understanding existed between the buyer and seller that the "special vials" were being sold as containing a controlled substance.

¶ 28 The State's argument raises the question of what substance the contents of the "special vials" was supposed to resemble, and the State provides no answer. Rather, the State claims that it can be inferred from the circumstances that the substance was being sold as a look-alike substance.

¶ 29 Our review of the record reveals that while some facts may be in dispute regarding count I of the complaint, no *material* facts are in dispute. While it could be argued that factual issues exist regarding the broken tamper-resistant seals on the vials, we disagree with the State that those issues would be material questions of fact. Even assuming, *arguendo*, that someone associated with the claimant broke the tamper-resistant seals on the vials that were eventually sold to the confidential informant, the State provided nothing to indicate that the term "special vials" was slang for a particular illegal substance or that the contents of the "special vials" were intended to represent anything other than what they were—*i.e.*, vials of lawful E-cigarette liquid. While the complaint alleged that the confidential informant purchased a substance known as "Vise" from the claimant, the State provided no factual support for the use of the term "Vise." There is no affidavit from the confidential informant, the affidavits presented by the claimant disavowed knowledge of the term "Vise," and the complaint stated that the confidential informant asked for "special vials"—not "Vise"—when he made the three purchases. Further, the term "special vials" is ambiguous at best, and the State provided nothing to indicate that the term was intended to refer to narcotics. See *e.g.*, *People v. Cochran*, 323 Ill. App. 3d 669, 679-80 (2001) (involving the sale of a look-alike substance in which the defendant used terminology that police officers testified was indicative of the sale of drugs and in which the substance being

sold resembled crack cocaine). Under these circumstances, we hold that the State's complaint failed to create a genuine issue of material fact regarding the belief-of-a-nexus requirement for forfeiture actions brought under the Controlled Substances Act. Accordingly, we hold that the circuit court did not err when it granted summary judgment in favor of the claimant on count I.

¶ 30 II. Alleged Violations of the Money Laundering Statute (Count II)

¶ 31 As previously noted, a forfeiture action can also be initiated under the money laundering statute of the Criminal Code of 2012. 720 ILCS 5/29B-1(h) (West 2014). The procedure for these judicial *in rem* forfeiture actions is written directly into the statute and is largely identical to the procedure written into the Drug Asset Forfeiture Procedure Act. Compare 720 ILCS 5/29B-1(h), (l) (West 2014) with 725 ILCS 150/9 (West 2014).

¶ 32 In relevant part, section 29B-1(h)(1)(A) of the money laundering statute provides that the following is subject to forfeiture: "any property, real or personal, constituting, derived from, or traceable to any proceeds the person obtained directly or indirectly, as a result of a violation of this Article" and "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this Article." 720 ILCS 5/29B-1(h)(1)(A), (B) (West 2014). In part, section 29B-1(a) provides that an individual commits the offense of money laundering:

> "(1) when, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, he or she conducts or attempts to conduct such a financial transaction which in fact involves criminally derived property: (A) with the intent to promote the carrying on of the unlawful activity from which the criminally derived property was obtained; or (B)

> where he or she knows or reasonably should know that the financial transaction is designed in whole or in part: (i) to conceal or disguise the nature, the location, the source, the ownership or the control of the criminally derived property; or (ii) to avoid a transaction reporting requirement under State law[.]" 720 ILCS 5/29B-1(a) (West 2014).

¶ 33 The statute defines "criminally derived property" as:

> "(A) any property, real or personal, constituting or derived from proceeds obtained, directly or indirectly, from activity that constitutes a felony under State, federal, or foreign law; or (B) any property represented to be property constituting or derived from proceeds obtained, directly or indirectly, from activity that constitutes a felony under State, federal, or foreign law." 720 ILCS 5/29B-1(b)(4) (West 2014).

Thus, unlike a forfeiture action proceeding under the Drug Asset Forfeiture Procedure Act, a forfeiture action proceeding under the money laundering statute is not limited to activity that is illegal only under Illinois law. Compare 720 ILCS 5/29B-1 (West 2014) with 725 ILCS 150/3 (West 2014). This is important here because at the time of the raid and seizure, AB-PINACA was illegal under federal law but not under Illinois law. Thus, while the State's allegation in count I could not be supported by a claim that AB-PINACA was illegal, its allegation in count II can in fact be supported by such a claim.

¶ 34 Like a forfeiture proceeding under the Drug Asset Forfeiture Procedure Act, after the complaint for forfeiture has been filed, the next step under the money laundering statute is for the

court to conduct a probable cause hearing. 720 ILCS 5/29-B-1(l)(1) to (12) (West 2014). At that hearing, the State is required to show that probable cause exists for forfeiture of the property. 720 ILCS 5/29B-1(l)(7) (West 2014). If the State successfully meets its burden, the burden shifts to the claimant to show "by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture." *Id.* We note this procedure because it is important to recognize in this case that a probable cause hearing has not yet been held. To survive summary judgment here, the State was not required to prove that it in fact had probable cause for forfeiture; rather, it only had to show that a genuine issue of material fact existed regarding probable cause for forfeiture. *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007) (holding that "[w]hile a plaintiff need not prove her case at the summary judgment stage, she must present enough evidence to create a genuine issue of fact").

¶ 35 Regarding count II, the State contends that two theories presented questions of material fact that should have precluded a grant of summary judgment. First, the State emphasized that AB-PINACA was illegal under federal law and that, accordingly, a question of material fact existed regarding whether the claimant or its distributor was responsible for the existence of AB-PINACA in the vials.

¶ 36 Our review of the record reveals that the affidavits are conflicting on who was responsible for the presence of AB-PINACA in the vials. In their affidavits, Aguilera, Hoyos, and Schultz denied tampering with the store's merchandise, but the State's affidavit from Moritz claimed that the only vials with broken safety seals were the ones containing AB-PINACA and that those vials were found in a wooden cigar box underneath the sales counter and in the office in the storage room. Because the forfeiture of property based on an alleged violation of the money laundering statute requires knowledge that the property was criminally derived, and

because "criminally derived property" can include proceeds obtained from activity constituting a felony under federal law, we agree with the State that a question of material fact exists regarding the vials under count II of the complaint.

¶ 37 The State's second theory under count II was that questions of material fact existed regarding whether the cigarettes constituted contraband, who manufactured the cigarettes, and who controlled the manufacture of the cigarettes. Further, the State claimed that there were questions of material fact related to SAC's alleged subleasing of space from the claimant and whether it was in fact wholly separate from Aguilera.

¶ 38 Our review of the record reveals that the affidavits are also in conflict regarding matters relevant to the State's contraband cigarette claims in count II. Moritz's affidavit stated that surveillance video showed: (1) the cigarette-rolling machine being moved between space allegedly being leased by SAC and space belonging to the claimant; (2) cigarettes being retrieved from the room with the hidden compartment and given to customers after being rung up for empty cigarette tubes and loose tobacco; and (3) Snider walking behind the sales counter several times even though Aguilera stated Snider was not employed by the claimant. Further, a large quantity of apparently handmade cigarettes in cartons without tax stamps were seized from that back room. Additionally, the State claimed it seized a document that conflicted with Aguilera's claim that he had sold the cigarette-rolling machine in 2012. We agree with the State that the affidavits presented questions of material fact regarding whether the claimant was conducting a contraband cigarette operation such that the currency and bill-counting machine were subject to forfeiture under the money laundering statute.

¶ 39 Under these circumstances, we hold that the circuit court's grant of summary judgment in favor of the claimant was proper on count I but was erroneous on count II. We emphasize that

our ruling in this appeal is not an adjudication that the State has in fact established probable cause for the forfeiture of the property under count II of the complaint. Rather, our ruling is simply that some questions of material fact exist such that the circuit court's grant of summary judgment in favor of the claimant on count II was improper. Accordingly, we affirm in part and reverse in part and remand the cause for further proceedings.

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court of Will County is affirmed in part and reversed in part and the cause is remanded for further proceedings.

¶ 42 Affirmed in part and reversed in part; cause remanded.