

DISCUSSION¹

Section 1355, which grants subject matter jurisdiction to district courts in civil forfeiture actions, provides in pertinent part:

In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

28 U.S.C. § 1355(c). Both the Government and Claimant agree that the word 'shall' in § 1355(c) does not necessarily mandate a stay of judgment in every case. See United States v. 1993 Bentley Coupe, et al., 1997 WL 803914 (D.N.J. 1997) (denying the government's application for a stay); United States v. Fourteen Various Firearms, 897 F.Supp. 271 (E.D. Va. 1995) (granting motion for stay where factors balanced in government's favor). However, the Government contends that 'shall' "does require the court, upon motion, to issue such order as is necessary to preserve the right of the appealing party to the full value of the defendant property." (Doc. 38, at 7). While the Court of Appeals for the Third Circuit has not yet addressed the scope of an appellant's

¹ The factual and procedural history of this case has been detailed at length in the January 2003 Order. As such, the information will not be repeated here.

rights in a civil forfeiture action, the Second and Tenth Circuits have examined this issue. See United States v. Various Tracts of Land in Muskogee and Cherokee Counties, 74 F.3d 197 (10th Cir. 1996); In re All Funds in Accounts in the Names Registry Pub., Inc., 58 F.3d 855 (2d Cir. 1995). In All Funds, the court rejected the government's argument that based on the language of § 1355 it was entitled to an automatic stay or an order requiring the posting of a bond pending appeal. The court explained: "[t]he government's 'right' to the funds depends upon the strength of the merits of its case, including its ability to demonstrate, inter alia, that all of the funds in question were the fruits of criminal activity." All Funds, 58 F.3d at 856; see also Various Tracts of Land, 74 F.3d at 198 ("Appellant's 'right . . . to the full value of the property at issue' under § 1355(c) is bound up with the strength of his argument on appeal."); 1993 Bentley, 1997 WL 803914, *1 (adopting the reasoning of the Second and Tenth Circuits).

In examining whether a stay or other order is appropriate under § 1355, a court must apply a four-part test. The test requires an appellant to show: (1) a substantial likelihood of success on the merits; (2) that he will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party; and (4) where the public interest lies. See 1993 Bentley, 1997 WL 803914, * 1 (citing Republic of Phillippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d

Cir. 1991)). The party seeking a stay has the burden to establish that these factors have been met. See United States v. Nicolet, 1988 WL 21965, *1 (E.D. Pa. 1988) (cites omitted) (denying defendant's motion for a stay pending appeal).

While these four "factors structure the inquiry . . . no one aspect will determine its outcome. Rather, proper judgment entails a delicate balancing of all elements." Harris v. Pernsley, 654 F.Supp. 1057, 1059 (E.D. Pa. 1987) (quoting Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978)). "[W]here the failure to enter a stay will result in a meaningless victory in the event of appellate success, the district court should enter a stay of its order." Fourteen Various Firearms, 897 F.Supp. at 273 (cites omitted). Upon a review of this matter, we have determined that the factors balance in Claimant's favor.

1. Likelihood Of Success On Appeal

The Government has appealed the question of whether there was no genuine issue of material fact, such that the moving party, Marckesano, was entitled to judgment as a matter of law. (Doc. 38, at 8). Without providing any argument that differs from those made in its opposition to Claimant's summary judgment motion, the

Government merely makes the conclusory statement that "there is a strong likelihood that the issue presented on appeal could be rationally resolved in favor of the United States." (Id., at 11).

The Government infers that it was denied the opportunity to conduct discovery and claims that further discovery, e.g., interrogatories and a deposition of Michael Mase ("Mase"), would have "support[ed] the government's side of the factual disputes the parties identified in the joint case management plan." (Id., at 12). At the December 19, 2002 conference, the parties agreed to have a hearing on the summary judgment motion. (Doc. 20). At no point prior to the December conference or the January 22, 2003 hearing did the Government object to having a hearing or request additional time to conduct further discovery. During the hearing, the Government spent several hours questioning Marckesano. In addition, while the Government declined to call Mase as a witness, the Government did in fact question him on cross-examination. In view of the fact that the Government had ample opportunity to present its case during the lengthy hearing, we find that its argument is without merit.

As stated in the January 2003 Order, testimony at the hearing demonstrated that Marceksano was more than a nominal owner of the Honda. Instead, uncontradicted testimony revealed that Marckesano retained full dominion and control over the car and only allowed Mase to use the car when he made a specific request for it.

The Government has failed to prove any complicity on Marckesano's part in Mase's illegal activities that would suggest she knew that the Honda was being used in drug transactions. Accordingly, this factor weighs in Marckesano's favor.

2. Irreparable Harm Absent A Stay

The Government argues that if the Honda is returned to Marckesano, it will depreciate in value during the time it takes the Third Circuit to decide the appeal, thereby harming the Government's interest in the Honda. This argument is devoid of merit, particularly when one considers the nature of the property. Indeed, the Government recognizes that the Honda has already depreciated in value while in the Government's custody. (Doc. 38, at 8). The Honda will thus depreciate in value, regardless of who has possession of it.

The Government further contends that there is a likelihood that Claimant will transfer or sell the Defendant vehicle and dissipate the proceeds of such sale, or that Claimant will fail to care for the Honda, or will drive it in an unsafe manner which would result in its being damaged or destroyed. (Doc. 31, at 2). We shall therefore assume, as the Government suggests, that if a stay is not granted, the Government will be unable to recover the Honda or the proceeds from its sale. This factor weighs in the

Government's favor and Claimant concedes this point.² (Doc. 41, at 8).

3. Harm To Claimant

The Government argues that there will be no harm to Marckesano if this Court grants the stay, but fails to recognize that she will, in fact, suffer harm because she has been and will be denied the use and enjoyment of the Honda pending the outcome of the appeal.

The Government asserts that it has not been dilatory in its prosecution of the case. In contrast, the Government contends that Marckesano has delayed in taking steps to prosecute her claim. In reviewing the procedural history of this case, it appears that a

²We are mindful of the distinction between this case and Fourteen Various Firearms, supra, a case on which the Government relies. In Fourteen Various Firearms, the court granted the government's motion for a stay pending an appeal. In so holding, the court highlighted that "the seizure of contraband firearms and their removal from circulation and from commerce, not the obtention [sic] of the monetary value of those firearms, are the principal objectives of the United States in pursuing forfeiture." 897 F.Supp. at 273-74. The court also determined that the claimants would not suffer substantial harm by being denied the use and enjoyment of weapons that were deemed contraband. Indeed, the public would benefit from such a determination.

In this case, Mase drove the Honda to a designated location for the illegal drug transaction. However, unlike the weapons in Fourteen Various Firearms, the Honda itself is not contraband property. The public would not benefit from its "removal from circulation and from commerce" in the same manner that it would benefit from a situation involving the removal of illegal weapons. While we have considered that court's reasoning in our analysis, we find that the facts are easily distinguished from the matter before the Court.

little over three months had passed between the time Claimant filed her answer to the complaint (on June 18, 2002), and the time she filed a motion for summary judgment (on September 26, 2002).³ (Doc. 38, at 13). We cannot say that that period of time has prejudiced Marckesano's case in a manner that would, in effect, nullify any harm that she has suffered as a result of being deprived of the use of the Honda. To suggest otherwise would ignore the fact that the Honda has been in the Government's possession for seventeen months.⁴ This factor favors Marckesano's position.

4. Public Interest

The Government argues that public interest favors the granting of a stay since the Honda was "flagrantly used in furtherance of the distribution of 'hard' drugs, and where there is a substantial issue as to whether claimant is an owner at all, much less an innocent owner." (Id. at 13). We agree with the Government that there is a strong public interest in eliminating the distribution of drugs, and we recognize that federal law

³It appears that Claimant was not dilatory in her attempt to recover the car. On December 5, 2001, the DEA notified Claimant of its intent to forfeit the Honda. On December 12, 2001, Claimant replied to the letter with a request to release the Honda. On March 12, 2002, the matter was referred to the United States Attorney's Office for the Middle District of Pennsylvania. (Doc. 42, at 1-2). The complaint was filed on May 16, 2002. (Doc. 1).

⁴The Honda was seized by DEA agents on October 19, 2001, the date of Mase's arrest in Stroudsburg, Pennsylvania.

permits the forfeiture of property used to commit or facilitate the commission of a crime. See 18 U.S.C. § 983 (2003). However, the criminal investigation involving Mase has been concluded; Mase pled guilty and is currently serving his sentence. The uncontradicted evidence supports Marckesano's contention that she is an innocent owner who was unaware of the fact that Mase was involved in selling Ecstasy. Moreover, there was no evidence of complicity on Marckesano's part in Mase's illegal activities that would support the Government's case. As stated in the January 2003 Order, the Government may find suspect the manner in which the Honda and the options were paid for, but there is no evidence to support any allegations of Marckesano's involvement in the illegal activity.

Finally, we find that there is also a strong public policy against the unnecessary forfeiture of a vehicle which evidence shows is the property of an innocent owner. In reviewing this factor with those discussed above, it appears to the Court that the equities balance in Marckesano's favor. For the reasons stated herein, the Government's Motion for a Stay of the January 2003 Order pending the appeal is **DENIED**. However, we have concluded that in the interests of justice, we shall impose on Claimant the following restriction: she may not to sell or dispose of the Honda pending the appeal. An appropriate Order follows.

Richard P. Conaboy
United States District Judge

DATE: March _____, 2003

