

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS)
Plaintiff)
Vs.)
RODNEY E. MILLER, SR.)
Defendant)

CASE NO. ST-08-CR-0000427

ACTION FOR: 14 V.I.C. 834

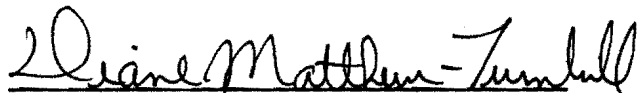
**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: WILLIAM J. GLORE, ESQUIRE
ORDER BOOK
LIBRARIAN
JUDGES & MAGISTRATES, SUPERIOR COURT
IT DIVISION
DENISE GEORGE-COUNTS, ESQ., ASSISTANT ATTORNEY GENERAL
CHARLES GRANT, ESQUIRE

Please take notice that on February 17, 2010 a(n) MEMORANDUM OPINION
AND ORDER dated February 10, 2010 was entered by the Clerk in the
above-entitled matter.

Dated: February 17, 2010

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT



DIANE MATTHEW-TURNBULL
COURT CLERK II

Islands (the “People”), sixty-eight (68) counts³ of which were brought against Miller individually or in combination with co-defendants Amos W. Carty, Jr. (“Carty”) and Peter R. Najawicz (“Najawicz”). On November 18, 2008, this Court issued an injunction pursuant to V.I. CODE ANN. tit. 14 § 606(f) of the Criminally Influenced and Corrupt Organizations Act (“CICO”) thereby freezing certain assets of Miller, Carty, and Najawicz. On March 4, 2009, the People filed an Amended Information, in which the People edited certain language in the original Information and included additional property subject to forfeiture. On June 15, 2009, this Court denied Miller’s January 7, 2009, Motion for Dissolution or Modification of the Preliminary Injunction. On July 21, 2009, the People filed a petition to extend the existing injunction to include certain real estate interests of Miller in Texas. On August 5, 2009, this Court issued a temporary restraining order (TRO) with respect to certain of those real estate interests. On August 7, 2009, Defendant Miller appealed this Court’s ruling to the Supreme Court of the Virgin Islands, which dismissed Miller’s appeal for want of jurisdiction on September 14, 2009.

ANALYSIS

a) Motion for Dissolution or Modification of the Preliminary Injunction

Pursuant to 14 V.I.C. § 606(f), when an information is filed, the Superior Court, “after a hearing with respect to which any person who will be affected ... may, based on the information ... enter a restraining order or injunction.” When determining whether an injunction should be issued, the following factors are considered:

³ Some of which were brought under the Criminally Influenced and Corrupt Organizations Act (“CICO”) as embodied by Title 14 VI Code Ann. § 600, et seq.

(1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest. *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 2009 WL 678791, at *2 (3d Cir. 2009).

Modification of an injunction is proper when “there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable.” *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993).

In the instant case, Miller has not alleged a change of circumstances that would justify modifying or dissolving the existing injunction. Miller simply reasserts that Investigator Peru’s November 17, 2008, testimony, which was part of the evidence this Court considered when issuing the injunction, was false and purposefully misleading—the same argument presented in Miller’s original motion to dissolve the injunction. In the present motion, Miller alleges that the People’s “mantra that [his] compensation ‘in excess’ of NOPA served as a predicate for racketeering and other criminal charges constitute[s] a fanciful and self-serving fabrication entirely without statutory or regulatory support.” (Miller motion, at 11). Instead, Miller argues that his compensation was limited only by the provisions for compensation set for him by the Hospital’s Board.

Under the 1998 and 2003 Hospital bylaws, the Hospital’s chief executive officer (CEO) “shall serve at the pleasure of the Board and receive such compensation as the Board shall determine.” Article VIII, Section 2(a); see also Article VII, Section 2(a) of the 2008 bylaws. Miller concludes that “[t]here is no question that under every one of

these bylaws, it is the [Hospital Board] ... not a 'NOPA,' that sets the compensation for the hospital CEO." (Miller motion, at 7).

In their Opposition, the People assert that the Hospital Board may determine the compensation of the Hospital's CEO within the confinements of the powers and duties of the Hospital as codified in 19 V.I.C. §§ 240, *et seq.* The People state that Miller's compensation was subject to the Government of the Virgin Islands Department of Finance payroll procedure. See 19 V.I.C. § 261(b).

Pursuant 19 V.I.C. § 245(e)(1):

[the Hospital] shall establish and maintain a system of personnel administration based on merit principles, equal opportunity and treatment and scientific methods governing the appointment, promotion, transfer, layoff, removal and discipline of hospital officers and employees.

Under 19 V.I.C. § 245(e)(3), the Hospital "shall adopt and have in place rules and regulations pertaining to the proper administration of the provisions of paragraph (1)."

The rules and regulations that the Hospital may adopt include "the establishment and administration of a pay plan." 19 V.I.C. § 245(e)(4)(C). In addition, the Hospital may make:

direct fiscal disbursements from an account created for that purpose to pay its costs and obligations subject to the following conditions: total disbursements in any fiscal year in either district may not exceed the lesser of \$5 million or the amount deposited from that district's collection in the Health Revolving Fund.

19 V.I.C. § 245(f)(1). Moreover, while the Hospital is "authorized to hire employees funded by the Health Revolving Fund," these positions are "subject to the provisions of the Personnel Merit System, any applicable Collective Bargaining Agreements and the constraints of the Virgin Islands Government Budget and allotment processes." 19 V.I.C.

§ 245(f)(2). In addition, under 19 V.I.C. § 261(a), the Hospital may establish and maintain separate bank accounts and may make disbursements from these accounts to “pay all necessary costs and obligations.” Notwithstanding the existence of any separate bank accounts that the Hospital may establish, however, the Department of Finance is “responsible for the payrolls of the [Hospital] subject to the appropriation and allotment process.” 19 V.I.C. § 261(b).

Even assuming, *arguendo*, that the Hospital could have compensated Miller completely outside the confines of the Department of Finance payroll procedures and/or the system of NOPAs, there was still probable cause to support the allegations in the Information that Miller committed embezzlement and other offenses based on the deposition testimony of Hospital Board members Francis E. Jackson (“Jackson”) and Samuel Topp (“Topp”).

In his August 13, 2008, deposition, Jackson testified that the Board agreed that a Rabbi Trust would be established for Miller in 2005. (Jackson Deposition, at 70). According to Jackson, the money that would supply the Trust was to come from Hospital funds. (*Id.*, at 64). In addition, the money that would fund the Trust was to be in addition to Miller’s base salary (*Id.*, at 65). The Board, however, was informed that the Rabbi Trust was never established. (*Id.*, at 67); see also (*Id.*, at 71).

Notwithstanding, Defendant Carty paid roughly 1.3 million dollars (\$1,300,000.00) to Defendant Miller after Defendant Miller resigned from the Hospital.

(*Id.*, at 72). Jackson testified that Schedule A,⁴ attached to Miller's contract, "was supposedly based upon what Mr. Carty paid Mr. Miller, all of this money that we never approved." (*Id.*, at 83). Jackson testified that Carty admitted double payments had been committed with respect to Schedule A of Miller's 2005 and 2007 contracts. (*Id.*, at 76). Upon the Board's review of the payments, Jackson testified that "it looked like there were double payments of this pension plan or this Rabbi Trust monies." (*Id.*, at 75).

In addition, Carty's payment to Miller was contrary to the Board's decision that funds would be contributed to the Trust. (*Id.*, at 72). When the Board questioned Carty about the payments he made to Miller, Carty said that "there are interpretation issues under the contract with respect to whether or not some of that money should have been paid or whether or not that is for the lawyers to decide whether this money should have been paid or not paid." (*Id.*, at 74). Moreover, although Schedule A was a determinative factor in the level of Miller's compensation, the Board never approved or ratified Schedule A. (*Id.*, at 79). The Board was only presented with the specifics of Schedule A after the Hospital began to be investigated. (*Id.*, at 82). "Generally speaking when we asked to see documents we kind of got a little run around there that we did not realize that we were getting at the time. It's at hindsight now that we can see that we were getting the run around." (*Id.*, at 79-80). When the Board finally saw Schedule A, Jackson stated that he was "surprised...to the extent that [they were] telling [the Board] that Schedule A is part of this Contract that [the Board] never saw to approve." (*Id.*, at 82).

⁴ Jackson stated that Schedule A appeared to be an addendum to the employment contract that concerned, among other things, Miller's pensions. (*Id.*, at 78).

Moreover, the testimony of Topp on August 11, 2008, indicates that Miller may have received additional unauthorized compensation. Topp testified that when Miller was originally hired as the Hospital's CEO, the Board was "less inclined initially to compensate [Miller] above what the NOPA salary for the proceeding CEO had been. And he accepted those terms initially." (Topp Deposition, at 12, 13). Some time in 2005, the Board decided it wanted to increase Miller's salary. Based on a report generated by Clark Consulting Group (the "Clark Report"), the Board learned that Miller was being paid in the 0 to 25 percentile group of CEOs across the United States who were managing hospitals similar in size and complexity to the Hospital. (*Id.*, at 18). The Board reached a general consensus that it wanted to pay Miller somewhere in the 50 to 75 percentile group as delineated in the Clark Report. (*Id.*, at 18); see also (Exhibit B-2 to Miller's January 7, 2009, Motion for Modification or Dissolution of the Preliminary Injunction, at 2). At that time, however, the Board had not agreed on a specific dollar amount. (*Id.*, at 17). According to Topp, Miller's base salary was to be \$265,000.00, and with performance enhancers, Miller could achieve a salary of over \$400,000.00. (*Id.*, at 23). Later in his deposition, Topp clarified that the maximum amount compensation that Miller could achieve under the 2005 contract was close to \$420,000.00. (*Id.*, at 50). Although he was not clear, Topp believed that the \$420,000.00 amount put Miller in the 50 to 75 percentile group, as the Board had agreed upon. (*Id.*, at 44, 45). In addition, Topp had the understanding that the Rabbi Trust consisted of deferred compensation that came out of Miller's salary. (*Id.*, at 25-27). "It was my understanding that [the Rabbi Trust] was exactly as the retirement plan of the Government requires a contribution from

the employee and the employer.” (*Id.*, at 33); see also (*Id.*, at 100). The hospital’s contribution to the Rabbi Trust was something “in addition to [Miller’s] base salary... but not in addition to the value of his total compensation package.” (*Id.*, at 33).

In his deposition, Topp appeared surprised to learn that, according to the Clark Report, the 75 to 100 percentile group started at \$289,000.00, which was well below Miller’s \$420,000.00 compensation package. (*Id.*, at 60). In addition, upon reading the Inspector General’s audit report, Topp got the impression that payments were made “above and beyond what had been authorized.” (*Id.*, at 111). Moreover, although Topp had signed an earlier statement declaring that he had reviewed Miller’s 2005 contract and that it reflected the Compensation Committee’s understanding of the terms of Miller’s employment, Topp testified under oath that he was not very familiar with the content of the 2005 contract and admitted to the falsity of his earlier statements. (*Id.*, at 90-91).

The testimonies of Topp and Jackson provided the People with the necessary probable cause to file an Information and seek an injunction in this case. Even assuming, *arguendo*, that the NOPA system has no bearing on this case as Miller submits, Miller allegedly acquired Hospital funds without the approval of, or ratification by, the Hospital Board, which would constitute embezzlement. As a result, Miller has not demonstrated that there has been a “change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable,” and his motion to modify or dissolve the injunction will be denied.

b) Motion for Immediate Release of Attorney’s Fees and Costs

Defendant Miller's Motion for Immediate Release of Attorney's Fees is an additional attempt to modify the injunction. Specifically, Miller asserts that the injunction impinges upon his ability to retain his counsel of choice. Nevertheless, it is well settled that "a defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 626 (1989). For example, the Government "does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense." *Id.* "[N]o lawyer, in any case, ... has the right to ... accept stolen property, or ... ransom money, in payment of a fee ... The privilege to practice law is not a license to steal." *Id.* quoting *Laska v. United States*, 82 F.2d 672, 677 (10th Cir.1936).

As an alternative, Defendant Miller asserts that, under the Hospital's bylaws, he has a right to be indemnified for any attorney fees and costs that he incurs in this matter. Pursuant to Article XV Section 1 of the 2003 Hospital bylaws the Board shall:

indemnify any person made a party to any action, suit or proceeding, whether civil or criminal, by reason of the fact that he/she is or was an officer or director authorized to act for or on behalf of the Board, against judgments, fines, reasonable amounts paid in settlements and the reasonable expenses, including attorney's fees, actually and necessarily incurred by him/her as a result of such action or proceeding, or any appeal therein: (a) [e]xcept in relation to matters which such person is adjudged to have breached his duty to the Board under Act 6012, and (b) [p]rovided such person acted in good faith for a purpose which he/she reasonable believed to be in the best interest of the Board, and in criminal actions or proceedings, in addition, had no reasonable cause to believe that his/her conduct was unlawful.

Here, Miller's argument is not properly before the Court in this proceeding because his indemnification request is a contractual claim against the Hospital, a non party in this matter. In addition, a review of the indemnification clause indicates that there would need to be a factual inquiry to determine whether Defendant Miller had "no reasonable cause to believe his...conduct was unlawful." Accordingly, Miller's motion will be denied.

An Order consistent with this Memorandum Opinion shall follow.

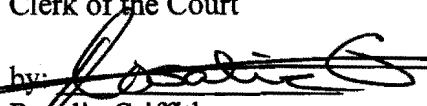
Dated: February 10, 2010



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

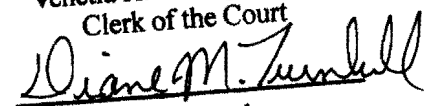
Attest:

Date: February _____, 2010
Venetia H. Velazquez, Esq.
Clerk of the Court

by:  2/17/10
Rosalie Griffith
Court Clerk Supervisor

CERTIFIED A TRUE COPY

Date: 2/17/10
Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk

