

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MEMORANDUM AND ORDER

REAL PROPERTY LOCATED AT
1804 ROLLING HILLS ROAD,
CUSTER, PORTAGE COUNTY, WISCONSIN,
WITH ALL APPURTENANCES AND
IMPROVEMENTS THEREON,

06-C-299-S

Defendant.

Plaintiff United States of America commenced this action pursuant to 21 U.S.C. § 881(a)(7) for the forfeiture of real property which was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. § 801 et seq., punishable by more than one year's imprisonment.

Claims against the property have been made by Carl M. Jocius and the International Bank of Amherst.

On October 20, 2006 claimant Carl M. Jocius filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law and a brief in support thereof. Plaintiff cross moved for summary judgment the same date. These motions have been fully briefed and are ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

The defendant real property is located at 8104 Rolling Hills Road, Custer, Portage County, Wisconsin. Its appraised value is between \$88,000.00 and \$100,000.00 subject to a second mortgage lien of \$14,000.00. Carl Jocius is the owner of the real property. The International Bank of Amherst has a Promissory Note and first mortgage on the defendant property.

On May 25, 2006 a search warrant was executed at the residence of Carl Jocius located at the above address. Items found in the search included a Safari Land bullet proof vest, a finger scale, numerous marijuana smoking pipes, packages of rolling papers, large bong, marijuana grinders and other drug paraphernalia. Inside a "shop vac" was a gift bag that contained approximately \$1,940.00 in U.S. currency, one \$1,500.00 money order, three 5mg tablets of hydrocone, two 80 mg tablets of oxycodone, Six 30 mg tablets of flurazepan HCL and a brown paper bag containing five plastic bags, each containing approximately a quarter ounce of marijuana. Additional marijuana was found in other locations in the house.

A white tray containing marijuana residue and plastic bags was located on top of the dresser in an upstairs bedroom. Next to the tray were two digital scales and a note pad containing names and phone numbers. The upstairs bedroom floor was covered with marijuana plant stems and pieces. On the living room table was a white paper plate containing marijuana residue. Next to the plate were numerous plastic bags and the area around the living room

table was covered with marijuana residue, plant stems and plant pieces.

Sixty-three firearms and ammunition were found through out the residence. Most of the firearms were loaded.

For three months in the late fall and early winter of 2005 David Ulman resided with Carl Jocius at his residence. From 1990 until November 2002 Fred Soderstrom, now deceased, was the housemate of Carl Jocius.

Based on the items seized from the residence during the May 25, 2006 search Carl Jocius is charged in state court with felony drug charges. State of Wisconsin v. Carl M. Jocius, Case Number 06-CF-125, Portage County Wisconsin Circuit Court.

DISPUTED FACTS

Claimant Carl Jocius by his affidavit has raised a genuine issue of material fact concerning the following:

Claimant Jocius sold marijuana from the residence on a daily basis.

Claimant Jocius obtained weekly supplies of marijuana.

Claimant Jocius sold a pound of marijuana every one or two weeks from his residence.

The currency found in his home was the proceeds of the sale of marijuana or other drugs.

The upstairs bedroom in the residence was a processing area to prepare marijuana for sale or distribution.

The living room in the residence was a processing area to prepare marijuana for sale or distribution.

The names and phone numbers found in the residence corresponded to persons involved in the use or purchase of marijuana.

MEMORANDUM

In a civil forfeiture case it is the government's burden to establish probable cause to believe that the property is subject to forfeiture. United States v. On Leong Chinese Merchants Association Building, 918 F. 2d 1289, 1292 (7th Cir. 1990) Probable cause is defined as "reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion." Id. This burden is the same as the government's burden in establishing the basis for a search warrant. United States v. Lot 9, Block 2 of Donnybrook Place, 919 F. 2d 994, 998 (5th Cir. 1990).

Once the government demonstrates probable cause in a forfeiture case, the ultimate burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. United States v. Edwards, 885 F. 2d 377 (7th Cir. 1989). The claimant must show that 1) no underlying crime occurred; 2) that the defendant property was not in fact derived

from or was not used to facilitate a criminal offense and 3) that he or she was an innocent owner of the defendant property. See United States v. \$215,300 United States Currency, 882 F. 2d 417, 419-420 (9th Cir. 1989), cert. denied, 497 U.S. 1005 (1990). The claimant must offer some admissible evidence that would be sufficient to establish his or her defense. If not the United States is entitled to summary judgment based on its showing of probable cause alone. United States v. Premises and Real Property at 4492 S. Livonia Road, 889 F.2d 1258, 1309 (2nd Cir. 1989).

Claimant has submitted an affidavit raising a genuine issue of material fact concerning whether an underlying crime was committed and whether his residence was used to facilitate the criminal offense. A genuine issue of material fact remains for trial on these issues. Plaintiff's motion for summary judgment will be denied.

Claimant Carl Jocius moved for summary judgment on the basis that forfeiture of the residence would violate the Eighth Amendment prohibition against excessive fines. This motion cannot be decided until it is determined that the property at issue is subject to forfeiture. United States v. Funds in the Amount of \$170,926.00, 985 F. Supp. 810, 814 (N.D. Ill. 1997). Factual issues also remain as to whether the loss of equity in the defendant real property is disproportionate to the value of the marijuana sold from and used

in the residence. The motion for summary judgment by claimant Carl M. Jocius will be denied.

ORDER

IT IS ORDERED that the motion of plaintiff for summary judgment is DENIED.

IT IS FURTHER ORDERED that the motion of claimant Carl M. Jocius for summary judgment is DENIED.

Entered this 28th day of November, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge