

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OFFICE OF THE ATTORNEY GENERAL,)
)
 Petitioner,)
)
 v.)
)
 \$61,000 CASH POSTED FOR)
 SEIZED GARMENTS,)
)
 Respondent Property,)
)
)
 AMERICAN LANGENTE CORPORATION,)
 MICHIGAN INC., JIN APPAREL, INC.,)
 and N.E.T. CORPORATION,)
)
 Real Parties in Interest.)
 _____)

Civil Action No. 98-745

**ORDER GRANTING
JIN APPAREL'S MOTION
FOR SUMMARY JUDGMENT**

I. PROCEDURAL BACKGROUND

This matter came before the Court on December 2, 1998, in Courtroom A on Real Party in Interest Jin Apparel, Inc.'s motion for summary judgment. R. Darrin Class, Esq. and David A. Wiseman, Esq. appeared on behalf of Real Party in Interest Jin Apparel, Inc. Robert Goldberg, Esq. appeared on behalf of Petitioner. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

FOR PUBLICATION

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II. FACTS

On June 25, 1998, agents from the Division of Immigration raided the offices of American Langente Corporation (hereinafter referred to as “ALC”). As a result of the raid, eight workers were found to be working illegally and arrested.

On June 30, 1998, ALC picked up approximately 1,900 garments from Real Party In Interest Jin Apparel, Inc. (“hereinafter referred to as “Jin Apparel”) to perform quality control work on the garments. Later the same day, officers from the Division of Immigration returned to ALC and seized the garments.¹

In July 1998, the Attorney General (hereinafter referred to as “the government”) filed a Petition for Forfeiture of Personal Property whereby it sought the forfeiture of the seized garments. In response to the Petition, four parties including Jin Apparel filed a Petition for a Temporary Restraining Order whereby the parties sought to substitute a cash bond for the garments. The Court granted the TRO and the parties posted a cash bond in the amount of \$61,000. Of this amount, Jin Apparel’s share is \$26,600.

In November 1998, Jin Apparel filed the instant motion whereby it seeks to have the monies it deposited with the Superior Court returned.

III. ISSUES

1. Whether the government has probable cause to believe that the property is subject to forfeiture?
2. Whether the motion should be denied based on Com.R.Civ.P. 56(f)?

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IV. ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil Procedure. Rule 56(a) provides:

A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party’s favor upon all or any part thereof.

¹ Along with garments owned by Jin Apparel, garments owned by Real Party In Interest Michigan, Inc. were also seized.

Com. R. Civ. P. 56(a). Rule 56(c) continues:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.

Com. R. Civ. P. 56(c). Once a movant for summary judgment has shown that no genuine issue of material fact exists, the burden shifts to the opponent to show that such an issue does exist. Riley v. Public School Sys., 4 N.M.I. 85, 89 (1994).

B. Forfeiture

In support of its motion for summary judgment, Jin Apparel contends that the government did not have probable cause to seize its garments at ALC. As such, the cash posted by Jin Apparel is not subject to forfeiture.

A forfeiture under 3 CMC § 4365 is governed by the terms of 6 CMC § 2150. Under this statute, the government may make a warrantless seizure of property if:

The Attorney General has *probable cause* to believe that the property has been used or is intended to be used in violation of this title.

6 CMC § 2150(b)(4).

In the Ninth Circuit, civil forfeiture actions require the government to provide the court with a showing of probable cause for belief that a *substantial connection* exists between the property to be forfeited and the criminal activity. United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1187 [p. 4](9th Cir.1995).² This determination of probable cause is based on the aggregate facts and may be established by circumstantial evidence. United States v. U.S. Currency, \$30,060.00, 39 F.3d 1039, 1041 (9th Cir.1994). The government's belief that the property is subject to forfeiture must be more than mere suspicion but can be less than prima facie proof. United States v. \$191,910.00 in U.S. Currency, 16 F.3d 1051,1071 (9th Cir.1994).³

² The government bases this forfeiture action on 3 CMC § 4365 which provides for personal property forfeitures resulting from immigration law violations. However, such forfeiture proceedings must be brought under the CNMI civil forfeiture statute (6 CMC § 2150, et seq). This statute tracks very closely with the language of the federal civil forfeiture statute (21 U.S.C. § 881) under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

³ In a similar fashion, civil forfeiture actions brought under the Immigration and Nationality Act (8 U.S.C. § 1324) also require that the government demonstrate probable cause for the institution of the suit.

In the instant case, it is undisputed that Jin Apparel's garments did not arrive at ALC's premises until June 30, 1998 - five days *after* the illegal workers were arrested and removed from ALC. Since the illegal workers were in Immigration detention on the date the garments were seized, it is improbable that the detained workers had the opportunity to work on these garments. Moreover, as Jin Apparel points out, a five-day interval between the arrest and seizure is too remote in time to support a finding of probable cause that the garments were somehow connected to ALC's immigration violations. *See Mulligan v. United States*, 358 F.2d 604, 607 (8th Cir.1966).

Based on the foregoing, the Court finds that the government has not demonstrated probable cause for its belief that a substantial connection existed between Jin Apparel's garments and ALC's immigration violations. As such, the Court holds that Jin Apparel's cash bond is not subject to forfeiture. [p. 5]

C. Com.R.Civ.P.Rule 56(f)

In its opposing brief, the government contends that pursuant to Rule 56(f) of the Commonwealth Rules of Civil Procedure, it should be allowed time for discovery in order to respond to the instant motion. As such, a ruling on the motion should be deferred.⁴

In requesting Rule 56(f) relief, the burden is on the party seeking to conduct discovery to put forth sufficient facts to show that the evidence sought exists. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir.1987). Moreover, the party seeking shelter under Rule 56(f) may not simply rely on vague assertions that discovery will produce needed, but unspecified, facts. *United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357,1363 (9th Cir.1986), *citing Securities & Exchange Commission v. Spence & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir.1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981). Finally, a party cannot forestall summary judgment by arguing that it has not had an opportunity to complete its discovery when it has not pursued its discovery rights with vigor. *Scosche Industries, Inc. v. Vision Gear Incorporated*, 121 F.3d 675, 682 (Fed.Cir.1997).

In its declaration supporting the Rule 56(f) request, the government states that:

⁴ At oral argument, counsel for the government refused to address the merits of Jin Apparel's motion. Its entire opposition was based on Rule 56(f).

The discovery propounded to date by petitioner is designed to (inter alia): (a) discover material facts within exclusive control of the garment companies; (b) strengthen petitioner's case; and (3) identify appropriate areas of further discovery.⁵

The government goes on to state:

Specifically, we believe this discovery will (at a minimum): (a) show that Jin Apparel violated CNMI law with respect to the seized garments; and (b) create genuine issues of material fact with respect to these issues thus requiring denial of Jin Apparels (sic) motion pursuant to Rule 56(c).⁶

Shortly after filing its forfeiture petition in July 1998, the government received notice that the Real Parties in Interest had agreed to shorten all discovery-related time limits so that the government [p. 6] could conduct the same prior to moving for summary judgment.⁷ Still, the government made no effort to conduct discovery until November 16, 1998 - five days after Jin Apparel filed the instant motion. Evidence of the government's lack of diligence alone is enough deny relief under Rule 56(f). *See Scosche Industries, Inc.*, supra. Yet, despite its newly professed lack of basis to establish probable cause without discovery, the government was ready to move the Court for forfeiture back in July 1998.

Finally, at oral argument, counsel for the government contended that ALC can be characterized as a continuing criminal enterprise whose immigration violations can be shown, via Rule 56(f) discovery, to be imputed to Jin Apparel. However, the government failed to raise this issue in its opposing brief and consequently has not cited any law supporting this new theory. As such, the Court has no choice but to find it unpersuasive. Moreover, the Court finds that a party who presents an argument in this fashion invites the rebuke of the Court. Counsel must always temper zealous representation with intellectual honesty, otherwise the Court may be compelled to impose more tangible sanctions.

Based on the foregoing, the Court finds that the government has not met its burden for Rule 56(f) relief as it has failed to set forth sufficient facts to show that the evidence it seeks actually

⁵ See Declaration of Robert Goldberg, dated November 18, 1998, at ¶ 6, attached to Opposition to Motion for Summary Judgment.

⁶ *Id.* at ¶ 8.

⁷ See letter from Robert J. O'Connor to Robert Goldberg, dated July 24, 1998, attached as Exhibit A to Motion for Summary Judgment.

exists, or that if it exists it would be legally sufficient for the Court to rule in the government's favor. Likewise, the government's declared statements consist mainly of vague assertions which, as noted above, are inadequate to satisfy Rule 56(f). As such, the government's request under Rule 56(f) to defer the motion to conduct discovery is denied.

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V. CONCLUSION

For all the reasons stated above, Jin Apparel's motion for summary judgment is **GRANTED**. The Petition for Forfeiture of Personal Property shall be dismissed with prejudice as to Jin Apparel and the Clerk of Court shall return Jin Apparel's share of the cash bond within 14 days of the date of this order.

So ORDERED this 15 day of December, 1998.

/s/ Timothy H. Bellas _____

TIMOTHY H. BELLAS, Associate Judge