

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 08-cv-2169 P
)
 TWENTY-FIVE THOUSAND FOUR)
 HUNDRED FORTY-SIX DOLLARS)
 (\$25,446.00) IN UNITED STATES)
 CURRENCY,)
)
 Defendant.)

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ORDER
OF FORFEITURE

Before the court is plaintiff United States of America's ("government") Motion for Summary Judgment and Order of Forfeiture. (D.E. 34.) For the reasons below, the government's motion is DENIED.¹

This is an *in rem* forfeiture action brought to enforce 21 U.S.C. § 881(a)(6), which provides for the forfeiture of property that constitutes proceeds traceable to, or intended to be used in, the exchange of a controlled substance in violation of Title II of

¹Pursuant to the joint agreed scheduling order signed and submitted by the parties and approved by the court, all parties consented to have a United States Magistrate Judge conduct all proceedings in this case, including presiding at the trial, ordering the entry of a final judgment, and conducting all post-judgment proceedings. (D.E. 23, 25.)

the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* The defendant property is \$25,446.00 in United States currency and the sole claimant is Dr. Kelvin Douglas.

In support of its motion, the government relies almost exclusively on a seventeen-page affidavit from Tennessee Bureau of Investigation ("TBI") Special Agent Nathan Bishop. (D.E. 34-2.) According to the government, the information contained in Agent Bishop's affidavit

was obtained throughout the course of the investigation of the claimant and is based upon his personal knowledge, upon information related to him by former and current employees of Locum Tenens Healthcare located in Dyersburg, Memphis, and Jackson, TN, upon information related to him by representatives of Blue Cross Blue Shield of Tennessee and upon information related to him by independent witnesses.

(Pl.'s Mot. for Summ. J. at 3.) However, the court has reviewed the affidavit and finds that Agent Bishop's averments are based almost entirely on hearsay statements (and sometimes hearsay-within-hearsay or even hearsay-within-hearsay-within-hearsay). It appears from the affidavit that Agent Bishop obtained the vast majority of his information from conversations he had with other TBI agents, an investigator with the Dyersburg Police Department, a pharmacist in Dyersburg, Drug Enforcement Administration agents, several unidentified confidential informants, and former employees of Dr. Douglas.

In response to the government's motion, Dr. Douglas argues (correctly) that the affidavit used in support of the motion is

based almost entirely on hearsay. Dr. Douglas also attaches his own affidavit, in which he states that he did not illegally sell or distribute narcotics or receive money from the illegal sale of narcotics. Dr. Douglas claims that he had prescription drugs delivered to his residence instead of his clinic due to rising concerns of theft at his clinic. He further asserts that he never gave out a prescription unless the patient was properly screened or triaged, and that in July of 2007 when his clinic closed, he renewed many of his patients' prescriptions for thirty days in order to give them time to find a new doctor.

Federal law renders subject to forfeiture to the United States

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

21 U.S.C. § 881(a)(6). The government may obtain title to such property by filing an *in rem* civil case naming as the defendant the property to be forfeited. United States v. One 1973 Chevrolet Impala, 640 F. Supp. 2d 993, 995 (W.D. Tenn. 2009). The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), which applies to forfeiture proceedings after August 23, 2000, sets forth the government's burden of proof in forfeiture actions. United States v. \$39,000.00 in U.S. Currency, No. 04-2902, 2005 WL 2600217, at *2 (W.D. Tenn. Oct. 11, 2005). Under CAFRA, the "burden of proof is

on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture." 18 U.S.C. § 983(c)(1). To meet this burden, the government is not required to show a direct connection between the property and the illegal activity. Id. "The burden of showing something by a preponderance of the evidence merely requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." \$39,000.00, 2005 WL 2600217, at *4 (quotations omitted). "The aggregation of facts, each one insufficient on its own, may suffice to meet the government's burden." United States v. \$118,170.00 in U.S. Currency, 69 F. App'x 714, 715 (6th Cir. 2003) (citing United States v. \$67,220.00 in U.S. Currency, 957 F.2d 280, 284 (6th Cir. 1992)). Where the government's theory "is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense." \$39,000.00, 2005 WL 2600217, at *2 (quoting 18 U.S.C. § 983(c)(3)). "The 'substantial connection' requirement does not require the government to provide direct evidence that the property is linked to a specific drug sale." Id. at *4. "Instead, reasonable inferences may be drawn from the evidence presented to establish a nexus between the property and drug activity." United States v. Veggacado, 37 F. App'x 189, 190 (6th Cir. 2002).

Federal Rule of Civil Procedure 56(c) provides that

[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c)(2); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Canderm Pharmacal, Ltd. v. Elder Pharms., Inc., 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on the pleadings, but must present some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Finally, the "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994).

As stated above, virtually all of the government's evidence is based upon Agent Bishop's affidavit, which in turn is based almost

entirely upon hearsay (and sometimes double or even triple hearsay). Since the enactment of CAFRA, courts have held that hearsay is no longer admissible in deciding the merits of a civil forfeiture proceeding brought under CAFRA. See United States v. \$92,203.00 in U.S. Currency, 537 F.3d 504, 510 (5th Cir. 2008) (stating that "[w]e therefore agree with the lower courts . . . and hold that courts may no longer rely on hearsay (absent an exception to the hearsay rule) when deciding the merits of a civil forfeiture proceeding brought under CAFRA"); One 1973 Chevrolet Impala, 640 F. Supp. 2d at 998 (declining to consider hearsay contained in agent's affidavit filed in support of summary judgment); United States v. 0.30 Acre Tract of Land, 425 F. Supp. 2d 704, 708 n.3 (M.D.N.C. 2006) ("Additionally, the United States is no longer permitted to rely on hearsay evidence to meet its burden."); United States v. One 1991 Chevrolet Corvette, 390 F. Supp. 2d 1059, 1065-66 (S.D. Ala. 2005) (noting that the government is no longer permitted to use hearsay evidence in post-CAFRA forfeiture action); United States v. Six Negotiable Checks in Various Denominations Totaling \$191,671.69, 207 F. Supp. 2d 677, 683 (E.D. Mich. 2002) ("As the Government recognizes in its reply brief, this elevated standard seemingly precludes any reliance on hearsay, as the Government could have done in a pre-CAFRA case."); United States v. One Parcel of Prop. Located at 2526 Faxon Ave., 145 F. Supp. 2d 942, 950 (W.D. Tenn. 2001) (stating that the government "cannot proceed on mere

hearsay" in a post-CAFRA civil forfeiture case).

In its summary judgment motion, the government does not address the post-CAFRA cases relating to the inadmissibility of hearsay, nor has it identified any hearsay exceptions applicable to Agent Bishop's affidavit. Because the court must disregard the hearsay portions of the affidavit in deciding the present motion, the court finds that there are genuine issues as to material facts and that the government is not entitled to judgment as a matter of law. Therefore, the motion is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

March 29, 2010
Date