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

OFFICE OF THE ATTORNEY GENERAL and DIVISION OF IMMIGRATION SERVICES Petitioners, v. CONSTRUCTION EQUIPMENT AND OTHER PERSONAL PROPERTY SEIZED AT TOWER CONSTRUCTION SITE IN SAN VICENTE, Respondent Property. TOWER CONSTRUCTION CORPORATION, Real Party in Interest.	)	Civil Action No. 98-731 **ORDER DENYING TOWER CONSTRUCTION CORPORATION'S MOTION TO DISMISS AND MOTION TO STRIKE**

I. PROCEDURAL BACKGROUND

This matter came before the Court on August 26, 1998, in Courtroom A on Real Party in Interest Tower Construction Corporation's motion to dismiss. Robert Goldberg, Esq., appeared on behalf of Petitioners. Pedro M. Atalig, Esq. appeared on behalf of Real Party in Interest Tower Construction Corporation. 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

[p. 2]

II. FACTS

On June 4, 1998, agents from the CNMI Department of Labor and Immigration (hereinafter referred to as "DOLI") conducted an immigration inspection at the construction site of Real Party in Interest Tower Construction Corporation (hereinafter referred to as "Tower") in San Vicente, Saipan. The inspection was based, in large part, on an anonymous call received by DOLI that illegal aliens were working at the site.[1] As a result of the inspection, sixteen individuals were found to be working for Tower illegally. In addition, DOLI officers seized numerous items of construction equipment from the site.[2]

On July 9, 1998, the Office of the Attorney General and Division of Immigration Services (hereinafter referred to as "Petitioners") filed a Petition for Forfeiture of Personal Property seeking forfeiture of the property seized at Tower's construction site.

On July 30, 1998, Tower filed the instant motion whereby it seeks to have the Petition dismissed pursuant to Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure.

III. ISSUES

1. Whether typographical errors in Public Law 9-5 void 3 CMC § 4361(c) and (e)?

2. Whether 3 CMC § 4365 is a criminal forfeiture statute requiring a criminal conviction prior to asset forfeiture?

3. Whether the search was lawful under the Fourth Amendment?

4. Whether the government has shown that, prior to seizing the construction equipment, it had probable cause to believe that the equipment was substantially connected to immigration violations?

5. Whether Tower has standing to challenge the forfeiture of the personal property of its president, Hyon Ok Lee, or its non-resident employees?

[p. 3]

IV. ANALYSIS

I. Motion to Dismiss

---

[1] *See* Memorandum from Immigration Investigator Nicolas T. Reyes to Captain Edward Sablan, dated June 4, 1998, attached as Exhibit 2 to Petition for Forfeiture of Personal Property.

[2] The seized goods included numerous construction tools and two pickup trucks. *See* Memorandum from Captain John Taitano to Captain Ed Sablan, dated June 23, 1998, attached as Exhibit 1 to Petition for Forfeiture of Personal Property.

A. 3 CMC §§ 4361(c) and (e)

In June 1994, Public Law 9-5 was signed into law to provide for the increased authority to the Immigration Office for, amongst other things, to apprehend and deport illegal aliens. In doing so, Public Law 9-5 repealed subsections (c), (d), (e), and (f) of 3 CMC § 4361 in their entirety, and then re-enacted the subsections to correct defects in the existing law. However, a typographical error was made in Public Law 9-5 whereby § 4362 was inadvertently substituted in place of § 4361. Based on this error, Tower contends that Public Law 9-5 voided § 4361 and the statute should be treated as though it never existed. However, as Petitioners correctly point out, not only was the typographical error corrected in House Bill 9-69 which supported Public Law 9-5, but the Commonwealth Code also corrected the error in the codified statute long before the instant property seizure. As such, the Court finds Tower's argument unpersuasive as to this issue.

B. Civil vs. criminal forfeiture

Tower contends that 3 CMC § 4365, the immigration forfeiture statute, is a criminal forfeiture statute. As such, a criminal conviction is required before Tower's property can be forfeited.

There are two types of forfeiture: criminal and civil. A criminal forfeiture is an *in personam* judgment against a person convicted of a crime, while a civil forfeiture is an *in rem* proceeding in which liability attaches to particular property and not to particular institutions or individuals. *See* Alexander v. United States, 509 U.S. 544, 557-559, 113 S.Ct. 2766, 2775-2776, 125 L.Ed.2d 441 (1993). Thus, the defendant in a criminal forfeiture proceeding is the *person*, and the defendant in a civil forfeiture proceeding is the particular *property*. *See* Austin v. United States, 509 U.S. 602, 614-617, 113 S.Ct. 2801, 2808-2809, 125 L.Ed.2d 488 (1993). However, unless a forfeiture statute specifically requires it, a criminal conviction is not a prerequisite to forfeiture. State v. Lincoln County, 605 So.2d 802, 804 (Miss.1992); State v. One 1978 Chevrolet Corvette, 667 P.2d 893, 896 (Kan.App. 1983); Marks v. State, 416 So.2d 872, 874 (Fla.App. 1982); City of Tallahassee v. One Yellow 1979 Fiat, 414 So.2d 1100, 1102 (Fla.App. 1982).

[p. 4] In construing 3 CMC § 4365 with the authorities cited above, the Court finds that forfeitures occurring through this statute are civil in nature and not criminal. Not only do the forfeitures proceed

against the seized property and not against the person, there is no mention in the statute of a criminal action or conviction being a prerequisite to forfeiture.

C. Search

Searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The government has the burden of proving by a preponderance of the evidence whether a search comes within an exception. Commonwealth v. Pangelinan, 3 CR 357, 359 (N.M.I. Trial Ct. 1988). One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973).

3 CMC § 4381(d) bestows upon immigration officers the same powers of search and entry granted to the Chief of Labor under 3 CMC § 4442 -- most notably, authority to conduct warrantless searches where non-resident workers are employed. However, even statutes that provide for warrantless searches and seizures are still limited by the restrictions of the Fourth Amendment. *See* Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F.Supp. 432, 439 (N.D.Cal. 1989); Zepeda v. United States I.N.S., 753 F.2d 719, 725-26 (9th Cir. 1983). As such, if the DOLI agents had consent to conduct the search, the search would be valid pursuant to Schneckloth, supra.

3 CMC § 4381(d) provides, in pertinent part, that:

> "As a condition of and in consideration of any approval to employ nonresident workers, any employer is deemed to agree to entry and search pursuant to this section."

3 CMC § 4381(d).

[p. 5] Based on a plain reading of the language above, employers in the CNMI who employ nonresident workers are deemed to have consented to warrantless immigration searches. As such, the Court finds that based on 3 CMC § 4381(d), the warrantless search was valid.

D. Seizure

As an additional contention supporting its motion, Tower argues that the seizures do not fit within any of the categories authorizing warrantless seizures under 6 CMC § 2150(b). As such, the seizures were unlawful.[3]

6 CMC § 2150(b), which provides for warrantless forfeiture seizures, states in pertinent part as follows:

> "(b) Any property subject to forfeiture to the Commonwealth under this title may be seized by the Attorney General upon process issued by any court of the Commonwealth having jurisdiction over the property, except that seizure *without that process* may be made when:
>
> (1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
>
> (2) The property subject to seizure has been the subject of a prior judgment in favor of the Commonwealth in a criminal injunction or forfeiture proceeding under this title;
>
> (3) The Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
>
> (4) The Attorney General has probable cause to believe that the property has been used or intended to be used in violation of this title.

6 CMC § 2150(b)(emphasis added).

The seizure occurred without a warrant, thus subsection (1) does not apply. Likewise, there is no indication that the property at issue was subject to a prior judgment in favor of the CNMI, nor is there anything to indicate that the property is dangerous to health or safety. Thus, subsections (2) and (3) would be inapplicable as well. That leaves subsection (4) as the remaining possibility to authorize a warrantless forfeiture seizure.

[p. 6] 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 forfeited and the criminal activity. United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1187 (9th Cir.1995). The 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

---

[3] The Court notes that the DOLI officers were authorized under 3 CMC § 4381 to conduct a warrantless search of Tower's work site. As such, the remaining issue is whether the warrantless seizure was justified.

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). However, the government must have probable cause prior to effectuating the seizure of property subject to forfeiture. United States v. All Funds Presently on Deposit, 813 F.Supp.180, 186 (E.D.N.Y. 1993).

In the case at bar, the Court finds that the seizure of the construction equipment at Tower's work site was valid. The facts show that the DOLI officers apprehended twenty-five construction workers at the site. Of this number, sixteen were found to be working illegally for Tower. Based on this information, the DOLI officers seized the construction equipment. As such, the government has made a showing that it had probable cause for its belief that the construction equipment was substantially connected with criminal activity, to wit, the employment of illegal alien construction workers.[4]

C. Standing

Tower contends that only its seized personal property can be subject to the instant forfeiture action and not that of its president or non-resident employees as it would deprive those individuals of property without due process. In opposition, the government contends that Tower lacks standing to challenge the seizure and forfeiture of personal property other than its own.

To have standing to challenge a forfeiture, a claimant must allege that he has an ownership or other interest in the forfeited property. United States v. $122,043.00 in United States Currency, 792 F.2d 1470, 1473 (9th Cir.1986).

[p. 7] In the instant case, Tower does not claim *any* interest in the seized personal property owned by its president, Hyon Ok Lee, or its non-resident employees. As such, the Court finds that Tower lacks standing to challenge the forfeiture of such property.

II. Motion to Strike

Pursuant to an agreement between the parties, the government was to file its opposition brief by August 14, 1998. However, on August 13, 1998, counsel for the government was called away to Tinian on emergency business. On August 14, 1998, counsel for the government asked Tower for a one-day extension in which to file its opposition, but Tower failed to respond. The government filed and hand

---

[4] The government cannot seize the products or fruits of the illegal labor, only those instrumentalities which facilitated the employment of the illegal aliens.

served its opposition on Monday, August 17, 1998. Tower subsequently moved to strike the opposition as untimely. Counsel for the government again contacted Tower and suggested that the parties extend the briefing and hearing schedule so as to accommodate Tower. However, Tower refused.

Based on the government's emergency situation and its good faith request to accommodate Tower, the Court denies Tower's motion to strike the government's opposition brief.

V. CONCLUSION

For all the reasons stated above, Tower Construction Corporation's motion to dismiss and motion to strike are **DENIED**.

So ORDERED this 25 day of January, 1999.

/s/ Timothy H. Bellas

TIMOTHY H. BELLAS, Associate Judge