

**Nallaseth v Ajam**

2008 NY Slip Op 32182(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0102328/2008

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 10

*Cyrus Nallaseth*

- v -

*Jadi Ajam*

INDEX NO.

102328/08

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (a) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

AUG 05 2008

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: 7/31/08

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
CYRUS NALLASETH and MOHAMMED NOORI,

Plaintiffs,

-against-

FADI AJAM and BBT INTERNATIONAL, INC.,

Defendants.  
-----X

**Decision/Order**

Index No.: 102328/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf's OSC w/CN affirm, MN affid, exhs	.....	1
CN affirm	.....	2
Def FA affid in opp, exhs	.....	3
GS affirm, exhs	.....	4
Pltf's JJ reply affid	.....	5

**FILED** Numbered  
 AUG 05 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

*Upon the foregoing papers, the decision and order of the court is as follows:*

This action arises from a series of business disputes between partners in a retail and wholesale automobile accessories business, wherein the principal issue is whether Fadi Ajam ("Ajam"), Cyrus Nallaseth ("Nallaseth") and Mohammed Noori ("Noori") (all three collectively herein referred to as "the partners") are equal owners of the property located at 1111 - 1117 South Broad Street, Philadelphia, Pennsylvania (the "Property").

Plaintiffs move for a preliminary injunction restraining and enjoining Ajam from transferring, encumbering or otherwise placing a lien on the Property. The court, after hearing argument, granted plaintiffs only a limited temporary restraining order which remains in place pending the court's decision on this motion. The court ordered that Ajam

must notify plaintiffs at least fifteen days before transferring or encumbering the Property. Ajam opposes the motion for a preliminary injunction in all respects.

### **Claims Made and Arguments presented**

The partners owned and operated Nikko International, Inc. d/b/a Big Boys Toys of Queens ("Nikko"), a retail and wholesale automobile accessories business which operates in Queens, New York. The partners, along with several other persons not made parties to this action, are also owners of defendant BBT International, Inc. d/b/a City Automotive d/b/a Xanatos Automotic ("Xanatos").

Sometime in 2004, the partners decided to expand their business by owning and operating a retail store in Philadelphia, Pennsylvania called Big Boy Toys of Philly, Inc ("Philly"). The partners are currently each one-third owners of Philly.<sup>1</sup>

Plaintiffs allege that, although Ajam purchased the Property in his name, the partners agreed to be equal owners of the Property. Ajam claims, however, that no such agreement was made and that he is the sole owner of the Property. Notwithstanding this dispute, record title to the Property is held solely in Ajam's name.

In support of their contention, plaintiffs claim that Ajam provided "little if any capital for the acquisition of the Property." Plaintiffs maintain that Ajam held record title to the Property for "convenience purposes only" and that they trusted Ajam who knew that he was merely holding record title to the Property, but, in fact, the partners were equal owners of the Property. Plaintiffs have provided a copy of an email from Ajam to Nallaseth dated

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<sup>1</sup> There are allegedly other investors, however, plaintiffs allege that their equity has been converted into debt and they are no longer relevant to the issues raised in this action.

[\* 4 ]  
November 1, 2004, wherein Ajam wrote:

**Philly:**

I am close to obtaining a mortgage (sic) under my personal name. We will do a shareholders agreement to reflect that the building is owned by all of us. This is easier then doing it under the company, since we are pressed for time.

Ajam claims that this email represents the partners' understanding that he was to purchase the Property, and plaintiffs were to purchase the New York property upon which Nikko operates. Ajam contends that he alone funded the purchase price of the Property. Ajam also claims that the partners "did not proceed with a shareholders agreement to reflect that the Property is owned by all of [the partners] - because, as a result of plaintiffs' failure to purchase the New York property, and make their contribution to our proposed venture, my Property is not owned by all [of the partners]."

Plaintiffs have provided a series of emails which they claim memorialize the understanding that the partners were joint owners of the Property. Several of the emails indicate that Ajam sought plaintiffs' approval to sell the Property. Plaintiffs maintain that these exchanges evidence their respective ownership interests in the Property. Ajam argues that he only sought plaintiff's consent to sell the Property because Philly had a lease at the Property, and Ajam "did not believe [he] could get a good price on the Property if it was sold subject to that lease."

Plaintiffs contend that Noori attended the refinancing closing of the Property because "he believed he was an owner of the property and had facilitated and arranged the placing of the refinancing loan on the property." Ajam maintains that Noori did not assist in refinancing, but merely introduced him to a banker at First American International

[\* 5 ]  
Bank ("FAIB").

Dennis George, Ajam's attorney, wrote a letter dated January 17, 2008 wherein Philly was advised that it is in default of its rental obligations at the Property to Ajam, the landlord. The letter demands payment of \$98,750 and requests that the payment be made to Ajam. There is no indication that Ajam has taken any further legal action with respect to Philly's alleged default.

There is no dispute that Philly was unsuccessful and has ceased operations. Plaintiffs claim that Philly did not generate any profit and significant cash flow was used to pay debt and taxes on the Property. Plaintiffs allege that the partners agreed to sell the Property sometime in 2006 and state that the Property has an equity value in excess of \$1 million. Ajam states that "while this motion was pending, [the partners] agreed to a recent purchase offer of \$2,000,000" but this sale fell through.

In the complaint, plaintiffs seek a preliminary and permanent injunction restraining and enjoining defendant Ajam from transferring, encumbering or otherwise placing a lien on the Property, or, in the alternative, imposing a constructive trust on the Property for plaintiffs' benefit (the first cause of action), a declaration that the Property is owned by Ajam, Nallaseth and Noori as tenants in common, each with a one third ownership interest (second cause of action), and for money damages arising from Ajam's alleged failure to repay a loan made by Nallaseth to Xanatos doing business as defendant BBT International, Inc. ("BBT") (third cause of action).

Plaintiffs claim that they are entitled to the preliminary injunction to "prevent a gross miscarriage of justice by prohibiting Ajam from depriving [plaintiffs] from [their] rightful ownership position in the Property." Plaintiffs claim they have numerous documentary

demonstrating that the partners are joint owners of the Property and that, "unless enjoined and restrained by this court, Ajam will be left to transfer or encumber the Property thereby... causing [plaintiffs] irreparable injury."

Ajam opposes the motion and maintains that he is the sole owner of the Property. Ajam has provided copies of the deed evidencing his ownership as well as the mortgage note he executed to secure funds for the purchase of the Property. He argues that he is suffering injury by not being allowed to rent or sell the Property. He maintains that he is paying all the bills for the Property, to wit: the initial down payment of \$40,000, \$180,000 towards the mortgage and insurance of the Property. Defendant provides proof of payments he has made towards the mortgage and insurance. Defendant also argues that if plaintiffs' motion is granted, "plaintiffs should be required to pay the carrying costs [Ajam is] compelled to incur as a result."

Ajam also argues that plaintiffs cannot demonstrate irreparable harm because they have agreed and continue to agree to try and sell the Property and therefore, the only issue is whether any of the proceeds from the sale of the Property should be distributed to Plaintiffs.

In reply, plaintiffs maintain that they are ready, willing and able to contribute their share of the costs of carrying the Property. George Stiefel, Esq., attorney for plaintiffs, states that he has been advised by his clients that the Property has been leased and that "the cash flow from the lease should be sufficient to pay all carrying charges on the Property."

### **Discussion**

On a motion for a preliminary injunction, the movants must prove the likelihood of

[\* 7 ]

ultimate success on the merits, that they will suffer irreparable harm unless the relief is granted, and a balance of the equities in their favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1<sup>st</sup> Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2<sup>nd</sup> dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Id. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b). For the following reasons, the court grants the preliminary injunction only to the limited extent that Ajam is directed to notify plaintiffs at least 15 days before he intends to transfer or encumber the property.

The likelihood of success on the merits is a disputed question of fact on the record presented. Despite Ajam's *prima facie* evidence of ownership of the Property, the deed, plaintiffs claim that an oral agreement was forged between the partners that they would each be equal and joint owners of the Property. The emails provided by plaintiffs do not unequivocally demonstrate the terms of the agreement as they allege or even whether such an agreement was ever made. None of these emails outright state that such an agreement existed, nor do these emails evidence their alleged ownership interests in the Property.

Moreover, there is a long history between the partners in the context of their business dealings and consequently, a large number of their transactions seem to have been executed orally. Ajam vehemently disputes plaintiffs' version of the oral agreement. In fact, Ajam claims that a different agreement was made between the partners, the terms of which were breached by plaintiffs. These disputes of fact largely turn on issues of

credibility and based on this record, the court cannot discern the terms of the oral agreement as alleged by plaintiffs, or whether such an agreement was ever entered into. At this stage of the action, Ajam's version of the agreement is as plausible as plaintiffs' (Metropolitan Steel Industries, Inc. v. Perini Corp., 50 AD3d 321 [2008]).

Furthermore, a balancing of the equities only requires that a limited injunction be granted to protect plaintiffs at this time. There is no imminent sale or encumbrance. Ajam is the record title owner of the Property and pays the mortgage and insurance on the Property. As Ajam correctly bears the burden of ownership of the Property, the court will not enjoin him from attempting to make it profitable. Plaintiffs admit that they have been aware of Ajam's attempts to sell the Property since 2006 and they are interested in sharing in the profits from a *bona fide* sale. Therefore any injunction which prevented Ajam's efforts at sale would not maintain the status quo.

Nonetheless, there is a disputed issue as to plaintiffs' alleged ownership interest in the Property which awaits trial. Accordingly, the court hereby grants plaintiffs' motion for a preliminary injunction only to the extent that the court hereby orders Ajam to notify plaintiffs at least fifteen days before he intends to transfer or encumber the Property. In this way, plaintiffs will be able to renew this motion should new facts arise which shift the equities of this application.

The court also orders that a nominal One Thousand Dollar (\$1,000) undertaking be made by plaintiffs in connection with the limited preliminary injunction that is granted. This is to secure any damages and costs that may be sustained by reason of the injunction.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiffs' motion for a preliminary injunction is granted only to the extent that the court hereby orders Ajam to notify plaintiffs at least fifteen days before if he intends to transfer or encumber the Property; and it is further


**ORDERED** that as a condition to the limited preliminary injunction, plaintiffs are to provide an undertaking in the amount of One Thousand Dollars (\$1,000).

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
July 31, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
AUG 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK