

**The Pawn Shop v Esterman**

2011 NY Slip Op 30012(U)

January 4, 2011

Sup Ct, NY County

Docket Number: 112563-10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Pawn Shop L.L.C., Et Al.

INDEX NO. 112563/10

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

Gary Esterman, Et Al.

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

**FILED**

JAN 06 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

*and PC scheduled for  
2/24/11 @ 9:30  
am*

Dated: 1/04/11

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X  
The Pawn Shop and Irina Krutoyarsky,

Plaintiff (s),

**-against-**

Gary Esterman and Modell Financial  
Inc., d/b/a Modell's,

Defendant (s).

-----X

**DECISION/ ORDER**

Index No.: 112563-10  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische

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

<b>Papers</b>	<b>Numbered</b>
Pltfs' OSC (prelim injunc) w/SBR affirm, IK affid, exhs .....	1
Modell opp w/GM affid, exhs .....	2
Pltfs' reply w/IK affid, exhs .....	3
Pltffs' reply w/SBR affirm .....	4

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

This is an action for replevin (CPLR § 7102). The Pawn Shop, LLC ("Pawn Shop" and Irina Krutoyarsky ("Krutoyarsky") (collectively "plaintiffs"), claim that defendant Gary Esterman ("Esterman"), among other things, stole jewelry and cash from the Pawn Shop which he then pawned with defendant Modell Financial, Inc. d/b/a Modell's ("Modell's"). Presently before the court is plaintiffs' motion for a preliminary injunction enjoining and restraining Modell's from pawning, selling, or otherwise disposing of the jewelry that Esterman pawned with that store. The court granted plaintiffs a temporary restraining order, which remains in effect pending its decision on this motion.

Modell's has appeared in the action and opposes the motion. Esterman has not appeared, answered the complaint nor opposed this motion.

**FILED**

JAN 06 2011

NEW YORK  
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## Arguments

Krutoyarksy is the owner of the Pawn Shop. She and Esterman had a personal relationship that soured. Krutoyarsky alleges that Esterman entered the Pawn Shop one day and physically attacked her. He also stole jewelry from her. Esterman has been arrested and charged with a crime based upon that attack. According to Krutoyarsky, Esterman has also used her charge card to make unauthorized purchases. The stolen jewelry and unauthorized charges amount to approximately \$500,000. Krutoyarksy has learned that the jewelry he stole from her was pawned at Models. This was discovered when he was arrested and a pawn shop ticket found in his pocket.

Plaintiffs contend that until there is a resolution of this replevin action, Modell's should be enjoined from selling or otherwise disposing of plaintiffs' jewelry because of its unique nature.

In opposition Modell's argue that it loaned \$55,000 to Esterman collateralized by the jewelry (ticket no. 238246). He represented, in writing, that he owned the jewelry and had the right to pawn it. This representation is found on the pawn ticket which also states that Esterman will indemnify Modell and hold it harmless against all loss, damages and expenses incurred in connection with any false statement by him in connection with the loan. Thus, Modell's contends that it had no reason to believe that the jewelry was stolen. Esterman now owes Modell's more than \$64,000 and Modell's argues that it is Modell's, not plaintiff, that will be prejudiced if it is not allowed to dispose of the collateral in accordance with the terms of the loan/pawn ticket. Modell's also claims that plaintiffs have not adequately identified the jewelry stolen from the Pawn Shop and it is impossible to make the connection between the pieces Modell's has and those allegedly stolen.

Plaintiffs reply that the loan agreement signed contains numerous false statements

[\* 4]

and that it is notarized by Modell's manager, significantly eroding the validity of the statements therein. In any event, plaintiffs argue that Modell's failed to make certain basic inquiries which would have flagged this transaction as involving stolen property. Plaintiff provides a copy of the Union Township investigation report into the theft and pictures of some of the jewelry allegedly stolen.

### **Discussion**

It is well settled that in order to be entitled to a temporary preliminary injunction, the movant must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (see CPLR § 6301; Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 [1990]; Preston v. Fabrication Enterprises, 68 N.Y.2d 397 [1986]; W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 [1981]). The decision to grant the motion is committed to the sound discretion of the trial court.

This is not an action for money damages, but for replevin. Plaintiffs have presented facts tending to show that Esterman stole jewelry from the Pawn Shop. Plaintiffs have shown that they will be irreparably injured if the stolen jewelry is sold because of its unique nature. Crediting plaintiffs' statements, that they own the jewelry, the balance of the equities strongly favor the plaintiffs, not Modell's.

Although Esterman may have signed a statement that he owns the jewelry pawned and Modell's may be an innocent victim of a crime, plaintiffs claim to also have been victimized. If, in fact, the jewelry belongs to the plaintiffs, then their rights to the jewelry are superior to Modell's. Until the issue of ownership is resolved, the jewelry must remain with Modell and cannot be disposed of because the jewelry is, by its very nature, unique (see, Morse v. Penzimer, 58 Misc.2d 156 [Sup Ct. Oneida 1968]).

In accordance with the foregoing, plaintiffs' motion for a preliminary injunction is

hereby granted. Defendant Modell Financial, Inc. d/b/a Modell's is hereby enjoined and restrained from taking any action to pawn, sell, or facilitate the sale of any sale of the jewelry that was pawned to them by defendant Gary Esterman on or about June 29, 2010 which is the subject of ticket number 238-246, until further order by the Court or final resolution of this action.

The issuance of this preliminary injunction is conditioned on plaintiffs' compliance with the requirements of CPLR 6312, by posting an undertaking to provide a remedy to the defendant if it is ultimately determined that plaintiffs were not entitled to a preliminary injunction (J.A. Preston Corp. v. Fabrication Enterprises, Inc., 68 N.Y.2d 397 [1986]). The undertaking, in the amount of \$55,000, shall be posted no later than fifteen (15) days after this decision and order is entered. Until the earlier of either the filing of the undertaking or 15 days after this decision and order is entered, the temporary restraining order shall remain in effect.

A Preliminary conference is scheduled for this case on **February 24, 2011 at 9:30 a.m.** A copy of this decision and order shall be served by plaintiffs on Esterman and proof of service shall be brought to the conference.

**Conclusion**

Plaintiffs' motion is granted as indicated and conditioned upon an undertaking.

Any relief requested but not specifically addressed is hereby denied.

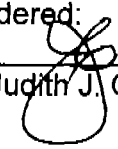
This constitutes the decision and order of the court.

Dated: New York, New York  
January 4, 2011

**FILED**

**JAN 06 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC