

Ali v BJ Org. of N.Y., Inc
2020 NY Slip Op 32625(U)
August 12, 2020
Supreme Court, Kings County
Docket Number: 507394/15
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

-----x

ALI MOHAMED ALI,
Plaintiff, Decision and order

- against - Index No. 507394/15

BJ ORGANIZATION OF NEW YORK, INC, YASIN M.
MOHAMED a/k/a YASIN MOHAMED ALI and AHMED
N. MOHAMED a/k/a AHMED MOHAMED ALI,
Defendants, August 12, 2020

-----x

ABDO MOHAMED ALI a/k/a KENNY ELI,
Third Party Plaintiff

- against -

ALI MOHAMED ALI, YASIN MOHAMED ALI and AHMED
NAGI MOHAMED,
Third Party Defendants,

-----x

PRESENT: HON. LEON RUCHELSMAN

On November 23, 2004 an agreement was entered into whereby the shares of ownership of the defendant BJ Organization of New York Inc., were purportedly transferred as follows: half to Ali Mohamad Ali, one sixth to Ahmed Mohamed, one sixth to Yasin Mohamed and one sixth retained by Abdo Mohamed Ali, a/k/a Kenny Ali. A dispute arose regarding the management of the property and a lawsuit was commenced. On February 5, 2013 the parties entered into a stipulation that required money to be paid to Kenny and Kenny agreed he would give his one sixth interest in the property to Ali, Ahmed and Yasin, all brothers, in equal shares. On December 15, 2012 Ali assigned 50 shares he owned to Ahmed. A foreclosure was commenced and Douglas Rossenberg was

appointed a receiver of the property. A further action was commenced by Ali seeking a determination regarding his ownership interest in the property. These actions have been consolidated. Further, Kenny commenced a third party action alleging the others failed to abide by the terms of the 2013 stipulation.

The prior receiver Douglas Rosenberg has moved pursuant to Judiciary Law §753(A)(1) seeking to hold third party plaintiff Abdo Mohamed Eli, a/k/a Kenny Eli in contempt for violating various court orders. The successor receiver has also made a motion seeking to hold Kenny in contempt. Further, Rosenberg has moved seeking that he be discharged and that his accounting be accepted and that he and his counsel are paid for their work performed. Ahmed has moved seeking a nunc pro tunc determination that he may file lawsuits against Rosenberg and Kenny. The current receiver has moved seeking to sell the property and another property owned by BJ. Lastly, a motion has been filed by Kenny seeking to refinance the mortgage. The motions have been opposed respectively and after reviewing all the motions this court now makes the following determination.

Conclusions of Law

It is well settled that to establish civil contempt it must be demonstrated there was a lawful order "expressing an unequivocal mandate", there is reasonable certainty the order was disobeyed and the party being held in contempt knew of the order

of the court (McCormick v. Axelrod, 59 NY2d 574, 466 NYS2d 279 [1983]). These requirements must be established by clear and convincing evidence (El-Dehedan v. El-Dehedan, 26 NY3d 19, 19 NYS3d 475 [2015]).

In this case there has been no evidence presented, and surely no clear and convincing evidence, that Kenny violated any court orders. The court orders in this case prohibited anyone other than the receiver from collecting rents and further prohibited anyone from engaging in any work at the property. The factual allegations presented by the prior receiver supporting any contempt against Kenny consists of a few sentences. First, that "throughout the course of my Receivership it has come to my attention that Third Party Plaintiff, ABDO MOHAMED ALI a/k/a KENNY ELI...has been collecting rents, use and occupancy and other forms of consideration in violation" of various court orders (see, Affidavit of Douglas Rosenberg, ¶12, August 2, 2018). Further,"in violation of the aforesaid Court Orders, the Third Party Plaintiff has done work in the Subject Building, leased apartments and commercial spaces and interfered with work performed by the Receiver's agents. The Third Party Plaintiff has leased the following apartments in the Subject Building in violation of the aforesaid Court Orders: 1A 1C 1D 1E 3C 4H 4K" (id at ¶14). However, these accusations which are serious in their nature and could support a contempt application if found

true, are accusatory and lacking any evidentiary support at all. The second contempt motion filed by the successor receiver, Margaret Streicker Porres stated that "in contravention of the Orders, Kenny has, and continues to interfere with the management of the Building and the discharge of my duties, by falsely advising tenants that the Receiver has been removed and that no rent should be paid to me, as Receiver. He also has, and continues to perform unlawful construction in the Building without permits" (see, Affidavit of Margaret Streicker Porres, ¶10, January 27, 2020). Again, while those accusations are serious there is no evidence supporting them. The receiver notes that pursuant to an order dated March 30, 2017 all parties were ordered to refrain "from interfering in any manner with the management of the Premises or the Receiver in the discharge of its duties hereunder" and that Kenny violated that provision by circulating a petition called a 'Tenant Affidavit' seeking to garner support for the removal of the receiver. That affidavit does not demonstrate Kenny sought to disobey any court order. Indeed, the receiver is appointed by the court and tenants expressing their displeasure with such receiver has no impact or bearing on the receiver's duties. Thus, while the affidavit does evince a dissatisfaction with the receiver it does not purport to inhibit the receiver in fulfilling her duties. Further, there is no evidence, other than conjecture, that the existence of the

Tenant Affidavit caused the tenants to pay rent to someone other than the receiver. Indeed, this is a matter that could have been verified by simply securing affidavits from the tenants themselves. Surely, even if the tenants refused to cooperate, subpoenas ordering them to produce rent checks and statements indicating which party they paid rent would have provided the necessary evidence that is sorely lacking. Likewise, there is insufficient proof that Kenny, as opposed to anyone else, was engaging in illegal work at the premises. Lastly, the mere fact that Kenny inquired about the price of a boiler, if true, without more, does not establish that Kenny disobeyed any court order. To be sure, the accusations against Kenny, as noted, are serious, and even if the high standard of clear and convincing evidence has been found lacking there is certainly circumstantial and other evidence that Kenny has interfered with the receiver's ability to perform her duties. Therefore, Kenny and all parties are reminded that they may not interfere with any of the receiver's duties and the court will vigorously support the receiver's efforts to fulfill all the duties incumbent upon her. At this juncture the motions seeking sanctions are denied. Likewise, the motion seeking a forensic accountant is denied as well. In addition, the court declines to sign Ahmed's order to show cause recently filed seeking contempt for the same reasons. Next, Ahmed seeks to withdraw the portion of the motion

(Motion #16) seeking leave nunc pro tunc to sue Kenny and the prior receiver. The parties oppose that request only because they accuse Ahmed of forum shopping by initiating another lawsuit that has been assigned to another judge. Thus, there is no substantive reason to object to the withdrawal of the motion. Therefore, the request to withdraw that portion of the motion is granted. Related matters should rightly be heard by the same judge so that consistent results are reached affecting the same parties. The fact a similar or identical motion has been filed in another proceeding is a matter that should be dealt with in the other proceeding. If an administrative determination erroneously assigned a similar case to another judge, this court would accept a transfer of that case to promote efficiency and consistency. In any event, the request to withdraw that portion of the motion is granted.

Concerning the prior receiver Douglas Rosenberg's motion to be discharged, the chief opposition to such motion is that Rosenberg acted in bad faith and breached his duties as receiver. However, it would be more accurate to conclude the parties are really accusing each other of improprieties and are utilizing Rosenberg as an accessory or an innocent bystander in the bad acts cross-fire asserted by the parties. Thus, Kenny accuses Rosenberg of failing to stop Ahmed and Yasin from embezzling over \$400,000 (see, Kenny's Opposition to Receiver's Discharge, page

3) while Ahmed accuses Rosenberg of permitting Kenny to reside in the premises and not pay any rent (see, Ahmed's Opposition to Receiver's Discharge, page 6). Of course, both Kenny and Ahmed accuse Rosenberg of improper acts that are unrelated to the parties accusations against each other, however, it is important to place the opposition in context. In any event, there are numerous factual issues which cannot be decided at this time and will in all likelihood require a hearing. Moreover, Rosenberg has not responded to the accusations and has not offered a Reply Affirmation. Further, the nature of the allegations are in large part connected to the actual dispute between the parties and as long as it lingers resolution on this matter cannot be resolved. Therefore, the motion is held in abeyance pending the resolution of more substantive issues in this case.

The motion seeking to substitute the receiver and to permit the new receiver to refinance the property is granted. The only basis to oppose the motion is the argument presented by Ahmed that Kenny would frustrate the fruits of any refinance benefits. That speculative reason does not outweigh the clear benefits such refinance would yield. Further, while it is true there are disputes, as noted, regarding the percentages of ownership of the property in question, refinance will benefit every party proportionally. In addition, at this juncture, since no determination of ownership has been made, Kenny surely has

standing to bring this motion. Moreover, the request to substitute the receiver is granted. The new receiver is Eric Nelson Esq. 54 Florence Street, Staten Island New York 10308, 718-356-056. Mr. Nelson's duties shall comprise all the duties already delineated in all the previous orders. Moreover, any decisions regarding any repairs will be solely the decision of the receiver."

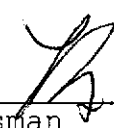
The motion seeking to sell the properties is denied at this time without prejudice. The new receiver will endeavor to refinance the property, try to restore the asset to a profitable enterprise and then the new receiver can determine the best course of action for the future of the property.

This lawsuit is a dispute concerning the percentages of ownership of certain real property. Resolution of those key issues is fundamental to resolving this lawsuit. Substantive motions to attempt to resolve these ownership interests are of paramount importance. There has been much time expended concerning secondary and tertiary issues that have not advanced the ultimate issues in any meaningful way. The parties may reach out to the court at any time in this vein.

So ordered.

ENTER:

DATED: August 12, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC