

Affatato v Rosales

2010 NY Slip Op 31968(U)

July 2, 2010

Sup Ct, Suffolk County

Docket Number: 30023/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 30023/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 STEPHEN AFFATATO,

Plaintiff,

-against-

MERCEDES ROSALES,

Defendant.

ORIG. RETURN DATE: SEPTEMBER 24, 2009
 FINAL SUBMISSION DATE: NOVEMBER 19, 2009
 MTN. SEQ. #: 001
 MOTION: MOT D

ORIG. RETURN DATE: OCTOBER 29, 2009
 FINAL SUBMISSION DATE: NOVEMBER 19, 2009
 MTN. SEQ. #: 002
 MOTION: MOT D

PLTF'S/PET'S ATTORNEYS:

COURTEN & VILLAR, PLLC
 33 KINGS HIGHWAY
 HAUPPAUGE, NEW YORK 11788
 631-851-8700

DEFT'S/RESP ATTORNEYS:

THE BARBARA LAW FIRM
 401 FRANKLIN AVENUE - SUITE 100
 GARDEN CITY, NEW YORK 11530
 516-222-2333

Upon the following papers numbered 1 to 12 read on these motions _____

FOR A PRELIMINARY INJUNCTION AND OTHER RELIEF

Order to Show Cause and supporting papers 1-3; Affidavit in Opposition 4; Order to Show Cause and supporting papers 5-7; Affirmation in Opposition 8; Replying Affirmation and supporting papers 9, 10; Affidavit in Reply and supporting papers 11, 12; it is,

ORDERED that this motion by plaintiff for an Order granting the following relief:

(1) a preliminary injunction and temporary restraining order to restrain defendant and all those assets that are currently identifiable as accounts and policies which contain funds that were removed from plaintiff's own personal and business accounts and all other funds, whether known or unknown at this time, deposited into bank and deferred compensation accounts, pending further Order of this Court;

(2) an immediate preliminary injunction and temporary restraining order preventing defendant and/or her agents - including the administrators and fund managers - from transferring, surrendering, selling, cashing in, hypothecating or otherwise altering or moving any and all assets of Wannabee Enterprises, Inc., Maggie Ventures, Inc., all bank accounts, credit accounts, deferred compensation plans, life insurance policies, annuities and other financial and personal assets until such time as due deliberation and partition can be had of these funds and assets;

(3) enjoining and restraining defendant and/or her agents from removing, transferring, selling, surrendering, hypothecating or otherwise altering any and all assets held in her name, on her behalf or in the name of third parties pending further Order of this Court;

(4) enjoining and prohibiting defendant and/or her agents from acting in any capacity which might affect the assets and/or operations of plaintiff and/or "S. Affatato," "Wannabee," "Maggie" and/or any other asset to which defendant might have access and where such access had already and might continue to interfere with the operations of each of those corporations, pending further Order of this Court;

(5) granting plaintiff leave to amend plaintiff's summons and verified complaint to include causes of action for imposition of a constructive trust on the Port Jefferson realty, and on the corporations known as Wannabee Enterprises, Inc. and Maggie Ventures, Inc., Shaina Leasing Corp., Affa Organics, Inc. and Hasbar Associates, Inc. and on certain bank accounts, deferred compensation accounts, life insurance policies and other accounts and assets as yet unknown to plaintiff, pending further Order of this Court.

(6) dismissing the counterclaim and affirmative defenses filed by defendant;

(7) directing that defendant deposit into plaintiff's attorney's escrow account the proceeds of any bank accounts, deferred compensation accounts, and life insurance policies as have already been liquidated by her, that such assets might be preserved for partition by this Court, pending further Order of this Court;

(8) an immediate temporary restraining order preventing the defendant and/or her agents from entering the premises situate 4 Pine Path, Port Jefferson, New York, and/or causing the removal of furnishings, personalty, fixtures, money, or other assets therefrom until further Order of this Court;

(9) an immediate temporary restraining order preventing defendant and/or her agents from entering any of the business premises or places of operation of the businesses including but not limited to those known as S. Affatato Asphalt, Inc., Wannabee Enterprises, Inc., Maggie Ventures, Inc., Shaina Leasing Corp., Affa Organics, Inc. and Hasbar Associates, Inc., nor from causing the removal or transfer of any assets therefrom pending further Order of the Court; and

(10) immediately appointing plaintiff, or such other person as this Court might deem appropriate, as the temporary receiver for Wannabee Enterprises, Inc. and Maggie Ventures, Inc., said receiver to serve without bond, pending further Order of this Court,

is hereby **GRANTED** solely to the extent provided hereinafter; and it is further

ORDERED that this motion by defendant for an Order seeking the following relief:

(1) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all shares of said corporations, whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(2) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all assets of said corporations which are

in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(3) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all bank accounts in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(4) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds held in any and all bank accounts in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(5) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all bank accounts in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually

or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending further Order of this Court;

(6) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(7) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds held in any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(8) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc.,

Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., and whether in the name of any third parties on the plaintiff's behalf whether known or unknown at this time, whether held individually or jointly or with anyone else, pending further Order of this Court; and

(9) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all investments, stocks, bonds, money markets, tax deferred annuities, term life insurance policies, and any and all other investments, in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(10) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds held in any and all investments, stocks, bonds, money markets, tax deferred annuities, term life insurance policies, and any and all other investments in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(11) a preliminary injunction and temporary restraining order, to restrain and enjoin plaintiff, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all investments, stocks, bonds, money markets, tax deferred annuities, term life

insurance policies, and any and all other investments in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on plaintiff's behalf, pending further Order of this Court;

(12) granting defendant leave to amend her verified answer to include causes of action for imposition of a constructive trust on Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc.;

(13) granting defendant leave to amend her verified answer to include causes of action for unjust enrichment on Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc.;

(14) granting defendant leave to amend her verified answer to include causes of action for partition of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc.;

(15) appointing a receiver, to serve without bond, for the immediate sale of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., and directing that said receiver deposit the net proceeds of said sales into his/her attorney escrow account, pending further Order of this Court;

(16) granting defendant leave to amend her verified answer to include a cause of action for partition of 4 Pine Path, Port Jefferson, New York; and

(17) appointing a receiver, to serve without bond, for the immediate sale of 4 Pine Path, Port Jefferson, New York, and directing that said receiver deposit the net proceeds of said sales into his/her attorney escrow account, pending further Order of this Court; and

(18) striking from plaintiff's affidavit, his attorney's affirmation, plaintiff's Order to Show Cause, and from these pleadings and proceedings heretofore had herein, any and all mention and/or discussion of "Angelina,"

“adoption,” defendant’s child, and any and all other matters not properly brought before this Court,

is hereby **GRANTED** solely to the extent provided hereinafter.

By Order dated September 10, 2009 (Sweeney, J.), the Court granted plaintiff a temporary restraining order as follows:

ORDERED that the defendant and/or her agents - including the administrators and fund managers - are enjoined and restrained from transferring, surrendering, selling, cashing in, hypothecating or otherwise altering or moving any and all assets of Wannabee Enterprises, Inc., Maggie Ventures, Inc., all bank accounts, credit accounts, deferred compensation plans, life insurance policies, annuities and other financial and personal assets until such time as due deliberation and partition can be had of these funds and assets, pending the return date of plaintiff’s application.

By Order of this Court dated October 15, 2009, the Court granted defendant a temporary restraining order, as follows:

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all shares of said corporations, whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff’s behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers,

administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all assets of said corporations which are in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all bank accounts in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating,

surrendering, and/or cashing in, any and all bank accounts in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all bank accounts in the name of plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of the plaintiff personally and/or in the names of Wannabee

Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds held in any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all pension plans, retirement plans, deferred compensation plans, SEPs, IRAs, 401(k)s 403(b)s, and any and all other pension and/or retirement plans, in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc.,

Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., and whether in the name of any third parties on the plaintiff's behalf, whether known or unknown at this time whether held individually or jointly or with anyone else, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all investments, stocks, bonds, money markets, tax deferred annuities, term life insurance policies, and any and all other investments in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds held in any and all investments, stocks, bonds, money markets, tax deferred annuities, term life insurance policies, and any and all other investments in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc.,

Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein; and it is further

ORDERED that the plaintiff, STEPHEN AFFATATO, and/or any and all agents, representatives, managers, administrators and/or employees of the corporations known as Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., are hereby restrained and enjoined from selling, transferring, moving, altering, hypothecating, surrendering, and/or cashing in, any and all funds removed from any and all investments, stocks, bonds, money markets, tax deferred annuities, term life insurance policies, and any and all other investments in the name of the plaintiff personally and/or in the names of Wannabee Enterprises, Inc., Maggie Ventures, Inc., Stonco Materials, Inc. and/or Affa Organics, Inc., whether known or unknown at this time, whether held individually or jointly or with anyone else, and whether in the name of any third parties on the plaintiff's behalf, pending the return date herein.

In addition, the Court, *sua sponte*, extended and continued the temporary restraining order granted on September 10, 2009 (Sweeney, J.) pending the return date of defendant's motion.

Plaintiff commenced this action on July 31, 2009, by summons and verified complaint, asserting a single cause of action for the imposition of a constructive trust on the real property commonly known as 4 Pine Path, Port Jefferson, New York ("real property"). However, by the instant motion, plaintiff seeks to amend his complaint to assert causes of action sounding in imposition of a constructive trust on the corporations known as Wannabee Enterprises, Inc. ("Wannabee"), Maggie Ventures, Inc. ("Maggie"), Shaina Leasing Corp. ("Shaina"), Affa Organic, Inc. ("Affa") and Hasbar Associates, Inc. ("Hasbar"), and on certain bank accounts, deferred compensation accounts, life insurance policies and other accounts and assets as yet unknown to plaintiff; partition of the

real property, accounts, assets and corporations; conversion; and for tortious interference.

Plaintiff alleges that S. Affatato Asphalt, Inc. ("S. Affatato") is a paving company owned and operated by plaintiff, and that Stonco, Inc. ("Stonco") is a corporation formed by and titled to plaintiff for the purpose of providing the raw materials to S. Affatato. Wannabee and Maggie are truck leasing companies formed by plaintiff for the express purpose of providing trucking services to S. Affatato. Plaintiff informs the Court that Wannabee and Maggie are titled to defendant, but are both equitably owned by plaintiff. Further, plaintiff contends that he is the equitable owner of the real property titled in defendant's name, along with all corporations, accounts, personalty and funds referenced in plaintiff's motion, as it was his earnings that were used to purchase and fund such assets. Plaintiff claims that the real property was titled in defendant's name merely to avoid having the real property subject to any business liabilities.

Plaintiff indicates that defendant was his life partner and intended future spouse. The parties met in 1997, and defendant began working for S. Affatato in 1998. Plaintiff alleges that defendant has abused the trust he placed in her by stealing "untold" amounts of money from him from the businesses she was entrusted to operate. In addition, Plaintiff alleges that defendant was the bookkeeper for S. Affatato, but that she "appears to have named herself as the nominal owner of Wannabee and Maggie." Plaintiff contends that defendant has converted plaintiff's assets; has increased her own salary by thousands of dollars per pay period without authorization; and has attempted to liquidate certain deferred compensation accounts and a whole life insurance policy. Plaintiff alleges that defendant has converted for her own use approximately \$1 million of plaintiff's funds.

With respect to Wannabee and Maggie, plaintiff contends that these corporations were originally titled to plaintiff, but that defendant converted title to her own name. In addition, plaintiff indicates that defendant has failed to make payments for the taxes, insurance, and the New York State permits for the vehicles owned by Wannabee and Maggie. Plaintiff alleges that such inaction has hindered his ability to operate S. Affatato. Therefore, plaintiff seeks to be appointed temporary receiver of Wannabee and Maggie so that he may have the authority to pay any expenses of those corporations and to keep them operational.

Further, plaintiff alleges that defendant resided in the real property until she voluntarily vacated on or about July 21, 2009, but that she has "plans to re-enter the house" to remove all of the furnishings and other personalty paid for by plaintiff. As such, plaintiff seeks to restrain defendant from re-entering the real property.

Finally, plaintiff seeks to dismiss defendant's affirmative defense alleging plaintiff fails to state a cause of action upon which relief may be granted and/or fails to adequately plead a cause of action for a constructive trust, as well as her counterclaim for imposition of a constructive trust on the real property and for unjust enrichment in connection with defendant's financial contributions to the real property.

Defendant has filed opposition to plaintiff's motion as well as her own motion, by Order to Show Cause, seeking the relief described herein above. Defendant contends that beginning in 2000, the parties began several business relationships, and started several trucking and manufacturing companies together. Defendant further contends that the parties decided that some of the companies would be in her name and some would be in plaintiff's name. Defendant alleges that she handled the day-to-day operations of the companies, and plaintiff provided the "start-up capital" from his other business ventures. Defendant informs the Court that she was paid a "reasonable" salary of between \$140,000 and \$190,000 per year for her duties as comptroller of the companies. Moreover, defendant alleges that the real property was purchased by her in or about 2002, and that the monthly carrying charges were by paid her from her salary.

Defendant alleges that at no time did she convert or embezzle monies from plaintiff or his various companies; rather, defendant alleges that the monies were spent on plaintiff and/or his businesses and/or his family members. As such, defendant seeks a preliminary injunction so that plaintiff will not be "free to dissipate these entities, assets and/or funds at his sole discretion, and I will be forever deprived of my legal and/or equitable share of said entities, assets and/or funds."

Defendant also seeks leave to amend her verified answer to include causes of action for imposition of a constructive trust on Wannabee, Maggie, Stonco and/or Affa; for unjust enrichment on Wannabee, Maggie, Stonco and/or Affa; for partition of Wannabee, Maggie, Stonco and/or Affa; to appoint a

receiver, to serve without bond, for the immediate sale of Wannabee, Maggie, Stonco and/or Affa, and directing that said receiver deposit the net proceeds of said sales into his/her attorney escrow account, pending further Order of this Court; for partition of the real property; and to appoint a receiver, to serve without bond, for the immediate sale of the real property, and directing that said receiver deposit the net proceeds of said sale into his/her attorney escrow account, pending further Order of this Court. Moreover, defendant seeks an Order striking from plaintiff's affidavit, his attorney's affirmation, plaintiff's Order to Show Cause, and from these pleadings and proceedings heretofore had herein, any and all mention and/or discussion of "Angelina," "adoption," defendant's child, and any and all other matters not properly brought before this Court.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N. Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction pursuant to CPLR 6301, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]).

The Court has weighed the elements necessary for the granting of injunctive relief, and finds that an injunction is warranted herein. The Court notes that both parties have sought preliminary injunctions herein, and a preliminary injunction would maintain the status quo of the parties' assets pending the disposition of this action.

Accordingly, those branches of the instant motions for a preliminary injunction are **GRANTED** to the extent that the temporary restraining orders heretofore granted on September 10, 2009 (Sweeney, J.) and October 15, 2009, shall remain in full force and effect pending the ultimate disposition of the instant

action. The aforementioned temporary restraining orders are modified solely to the extent that: (1) both parties shall be bound by the terms of both temporary restraining orders; and (2) the assets listed therein shall be restrained except as needed in the ordinary course of business of the parties' corporations.

Next, CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" absent surprise or prejudice resulting from the delay (CPLR 3025 [b]). Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (CPLR 3025 [b]; *Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Defendant has not opposed plaintiff's request to amend his complaint. As such, that branch of plaintiff's motion for leave to amend his complaint is **GRANTED** to the extent that plaintiff is granted leave to serve the proposed amended summons and amended verified complaint, annexed to plaintiff's moving papers as Exhibit "G," upon defendant. The proposed amended verified complaint shall be deemed served upon defendant as of the date of service of the instant Order with notice of entry.

However, the Court finds that branch of defendant's motion for leave to amend her answer to be procedurally defective, in that defendant failed to annex a copy of a proposed amended answer to her motion-in-chief (see *Chang v. First Am. Title Ins. Co.*, 20 AD3d 502 [2005]; *Ferdinand v Crecca & Blair*, 5 AD3d 538 [2004]; *Haller v Lopane*, 305 AD2d 370 [2003]). Although defendant has annexed a proposed amended answer to her reply papers, new material contained in a reply for the first time should not be considered by a court (see e.g. *Falcone v Karagiannis*, 25 Misc 3d 1225A [Sup Ct, Nassau County 2009]). Accordingly, that branch of defendant's motion seeking leave to amend her answer is **DENIED**. Notwithstanding the foregoing, defendant may serve a responsive pleading to plaintiff's amended verified complaint in accordance with CPLR 3025 (d).

With respect to the parties' applications for the appointment of a receiver, the appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits (*Vardaris Tech, Inc. v Paleros, Inc.*, 49 AD3d 631

[2008]; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d 403 [2006]; *Modern Collection Associates, Inc. v Capital Group, Inc.*, 140 AD2d 594 [1988]). It is to be granted only where the applicant makes “a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant” (*Vardaris Tech, Inc. v Paleros, Inc.*, 49 AD3d 631, *supra*). On this record, the Court finds that plaintiff has made such a showing to be appointed receiver of Wannabee and Maggie, but that defendant has failed to make such a showing to have a receiver appointed to sell Wannabee, Maggie, Stonco, Affa, and the parties’ real property.

Accordingly, that branch of plaintiff’s application to be appointed receiver of Wannabee and Maggie Ventures, to serve without bond, is **GRANTED** (see CPLR 6401 [a]), so that plaintiff may operate these corporations on a daily basis as going concerns. Plaintiff shall provide defendant and the Court with accountings in connection with these corporations on a monthly basis during his receivership.

Finally, plaintiff seeks to dismiss defendant’s affirmative defense alleging plaintiff fails to state a cause of action upon which relief may be granted and/or fails to adequately plead a cause of action for a constructive trust, as well as her counterclaim for imposition of a constructive trust on the real property and for unjust enrichment in connection with defendant’s financial contributions to the real property. Defendant has not opposed this branch of plaintiff’s motion.

With respect to defendant’s affirmative defense, plaintiff argues that the Second Department has held that a defense that a complaint does not state a cause of action cannot be interposed in any answer (see e.g. *Glensek v Guidance Realty Corp.*, 36 AD2d 852 [1971]). However, the Second Department has recently held that pleading the defense of failure to state a cause of action is unnecessary, constitutes “harmless surplusage,” and that a motion by the plaintiff to strike the same should be denied (*Butler v Catinella*, 58 AD3d 145 [2008], quoting *Citibank [S.D.] v Coughlin*, 274 AD2d 658, 659 [2000]). As such, the Second Department has now adopted this as its rule of law, and has expressly held that to the extent prior cases from that Court hold differently, they should no longer be followed (*Butler v Catinella*, 58 AD3d 145, 150). As such, that branch of plaintiff’s motion to dismiss defendant’s affirmative defense is **DENIED**.

However, the Court finds that defendant’s counterclaim for imposition of a constructive trust on the real property and for unjust enrichment in

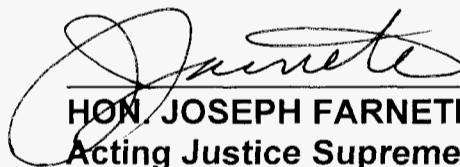
connection with defendant's financial contributions to the real property, must be dismissed. Imposition of a constructive trust requires proof of four elements, namely, a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119 [1976]). Generally, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, as when a plaintiff conveys property to a defendant on faith of the latter's promise to reconvey it (*Sharp v Kosmalski*, 40 NY2d 119, *supra*; *Bontecou v Goldman*, 103 AD2d 732 [1984]), or when a plaintiff invests funds, time or effort toward the purchase or improvement of property in reliance on a defendant's promise to share in some interest in the property (see *e.g. Lester v Zimmer*, 147 AD2d 340 [1989]).

Here, the elements of a constructive trust are lacking relative to the real property. Defendant seeks to impose a constructive trust upon the real property; however, she is not the equitable owner of the real property but rather the holder of legal title. As such, defendant's counterclaim is misplaced. In view of the foregoing, that branch of plaintiff's motion seeking dismissal of defendant's counterclaim for imposition of a constructive trust on the real property is **GRANTED**.

Finally, any relief requested by the parties but not specifically granted herein is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 2, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court