

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JAMES I. KIM, and JKYY, INC.,	:	JULY TERM, 2005
	:	
Plaintiffs,	:	NO. 03410
	:	
v.	:	COMMERCE PROGRAM
	:	
KIJIN JAY CHOI,	:	Control No. 080021
	:	
Defendant.	:	

OPINION

Plaintiffs, James I. Kim and JKYY, Inc. (“JKYY”) have moved this court for an emergency injunction. Mr. Kim claims that he was previously the sole owner of JKYY, which operated a delicatessen with a liquor license at 1933-35 Spruce Street, Philadelphia (the “Deli Business”). *See* Complaint, ¶¶ 10-12. Plaintiffs claim that defendant, Kijin Jay Choi, orally agreed to buy the Deli Business (including inventory, right to assume equipment leases, goodwill and liquor license) for \$380,000, payable as follows:

- a. \$5,000 upon signing a written sales agreement;
- b. \$115,000 by note;
- c. \$260,000 in cash at closing.

See id. at ¶ 13. However, plaintiffs also claim that Mr. Choi “conditioned his offer on [Mr.] Kim agreeing to memorialize the purchase as if for \$120,000 only.” *Id.* at ¶ 14. Indeed, the written contract between the parties provides for Mr. Choi to pay only \$120,000 to purchase the Deli Business.¹ *See* Complaint, Ex. A, p. 2. The written contract was allegedly drafted by an

¹ The written contract further provides that “this is the entire agreement between the parties and may not be changed or altered unless it is agreed upon between the parties in writing and executed by each of the parties hereto.” Complaint, Ex. A., p. 29. No explanation is given for why the transaction was structured so that the written

attorney, Barry Goldstein, who represented both buyer and seller and acted as escrow agent for the transaction. *See* Complaint, ¶ 14.

Prior to the closing, Mr. Choi apparently paid the \$5,000 downpayment and executed a note for \$115,000. *See id.* at ¶ 19. On the morning of the closing, July 7, 2005, Mr. Kim claims that he gave possession of the Deli Business to Mr. Choi. *See id.* at ¶ 21. Later that day, Mr. Choi allegedly showed up at the closing with a suitcase containing \$260,000 in cash, but plaintiffs claim that Mr. Choi refused to turn it over to Mr. Kim once the closing documents were signed, and Mr. Choi left the closing with the money. *See id.* at ¶¶ 22-30.

For the next three weeks or so, Mr. Choi apparently continued in possession of the Deli Business while refusing to tender the \$260,000 to Mr. Kim. As a result, plaintiffs brought suit against Mr. Choi and asserted claims against him for damages for breach of contract, rescission based on fraud in the inducement of the contract, and unjust enrichment. *See* Complaint, Counts I-IV. Plaintiffs also requested injunctive relief imposing “a constructive trust” on the \$260,000 in cash that was brought to the closing in the suitcase “to prevent its dissipation and waste.” *See id.* at ¶ 58. Plaintiffs further allege, “upon information and belief, in the absence of protecting that *res* from dissipation and waste, [Mr.] Choi will be unable to satisfy any judgment plaintiffs, or either of them, will obtain.” *Id.* at ¶ 59.

Plaintiffs also filed a Motion for Emergency Injunction directing Mr. Choi to deposit with the court “the \$260,000 cash exhibited to plaintiffs at the July 7, 2005 closing that is the subject of this case, which amount shall be held pending resolution hereof.” *See* Plaintiffs’ Proposed Order. After reviewing plaintiffs’ Motion papers and Complaint, it is clear to the court that, even

agreement clearly contradicts the parties’ alleged true, oral, agreement. The court is left to infer that the parties’ purpose was illegitimate, e.g. to escape payment of transfer or income taxes.

if everything plaintiffs claim is true, they are not entitled to the extraordinary relief that they have requested and their Motion must be denied.²

There are six essential prerequisites that a party must establish prior to obtaining preliminary injunctive relief:

- 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
- 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;
- 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
- 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, that it is likely to prevail on the merits;
- 5) that the injunction it seeks is reasonably suited to abate the offending activity; and,
- 6) that a preliminary injunction will not adversely affect the public interest.

Warehime v. Warehime, ___ Pa. ___, 860 A.2d 41, 46-47 (2004). In this case, plaintiffs cannot satisfy at least two of these “essential prerequisites,” namely the first and third.

With respect to the first element, it is clear from the relief requested by plaintiffs in their Motion that the harm of which they complain, *i.e.* breach of the oral contract between the parties, can be adequately compensated with money damages since the payment of money is the only relief that plaintiffs seek in their Motion. *See Mozenter v. Trigiani*, 2003 Phila. Ct. Com. Pl. LEXIS 59 (Apr. 2, 2003) (in dispute between former business associates, court denied plaintiff’s

² “In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.” Pa. R. Civ. P. 1531(a). The decision whether or not to grant a hearing on an emergency injunction is therefore left to the sound discretion of the court; the mere filing of a motion by the plaintiff does not automatically entitle him to a hearing.

motion to have disputed client fees put in escrow pending determination of whether such fees should be apportioned between the parties); Romy v. Am. Life Care, Inc., 2000 Phila. Ct. Com Pl. LEXIS 96 (Mar. 7, 2000) (court denied plaintiff's request for injunction restraining defendant from continuing to collect receivables allegedly due to plaintiff because the claimed harm was compensable in money damages that could be determined at a later date). The fact that plaintiffs apparently claim that they are entitled to be paid with certain monies that were allegedly contained in a suitcase over three weeks previously does not change the nature of the relief requested by plaintiffs from a request for payment of sums due into a request to impound a disputed and unique *res*.

In addition, the harm of which plaintiffs complain, *i.e.* nonpayment of amounts allegedly due under a contract, is not irreparable simply because defendant may prove to be judgment-proof if and when plaintiffs finally obtain a judgment against him. If the possible insolvency of the potential judgment-debtor was the standard to be applied by the court in granting injunctions, then in these volatile economic times, almost every plaintiff in a commercial nonpayment case would be entitled to demand that the defendant deposit into escrow monies equal to the amount that the plaintiff ultimately seeks in damages.³

Furthermore, if the court were to take possession of the money that defendant allegedly flaunted at the closing, it would not restore the parties to the positions that they held immediately prior to defendant's allegedly wrongful conduct, so plaintiffs cannot satisfy the third requirement for issuance of an injunction. According to plaintiffs, defendant's wrongful conduct consisted of

³ This is not a case where defendant improperly took plaintiffs' money, which facts may justify the imposition of an injunction against defendant's dissipation of such stolen funds. *See Citizens Bank v. Myers*, 872 A.2d 827 (Pa. Super. 2005) (court froze defendants' accounts that contained monies defendants embezzled from plaintiff); East Hills TV & Sporting v. Dibert, 366 Pa. Super. 455, 531 A.2d 507 (1987) (court froze defendant's account that contained monies paid to defendant by plaintiff for goods defendant never delivered). Instead, in this case, plaintiffs claim that defendant improperly took possession of plaintiffs' Deli Business. It is surprising that plaintiffs have not asked the court to enjoin defendant from dissipating that allegedly stolen asset.

taking possession of the Deli Business without paying all of the agreed upon purchase price. In order to restore the parties to the *status quo ante*, the court would have to return possession of the Deli Business to plaintiffs, and return to defendant, or put into escrow, the limited monies that defendant did pay to plaintiffs. Although plaintiffs requested rescission of the contract in their Complaint, they neglected to ask for such relief in their Motion for Emergency Injunction.⁴

Finally, the court questions whether the grant of the requested injunction would comport with the public interest, as it appears that the parties were attempting, by structuring their transaction as they did, to commit fraud. A party who invokes the court's equitable powers asks the court to enforce "the requirements of conscience and good faith." In re Estate of Pedrick, 505 Pa. 530, 544, 482 A.2d 215, 222 (1984). Plaintiffs must therefore come to the court with clean hands, and they cannot expect the court to enforce a transaction that offends the court's conscience. Plaintiffs admit that the transaction was structured so as to mislead its intended audience since they claim that the written contract was drafted to make the purchase appear "as if for \$120,000 only." Complaint, ¶ 14. It is certainly not the court's job, when sitting in equity, to act as an unwitting agent for the parties to assist them in misleading an innocent third party.

CONCLUSION

For all the foregoing reasons, plaintiffs' Motion for Emergency Injunctive Relief is denied.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

Dated: August 9, 2005

⁴ The court does not mean to imply that a preliminary request for rescission would automatically have been granted. However, such a request certainly would have been entitled to greater consideration by the court since it is a more appropriate temporary remedy in this case than the impoundment requested by plaintiffs.