No.
L.T. No. 13-CA-7175

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

ABDEL KARIM NABI, SOUZAN FARAH NABI, and NAIF NABI,

Petitioners,

v.

ABDELILAH ALAMI-BINANI,

Respondent.

On Petition for a Writ of Certiorari and a Writ of Prohibition

PETITION FOR WRIT OF CERTIORARI AND WRIT OF PROHIBITION

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BASIS FOR JURISDICTION

Petitioners, Abdel Karim Nabi, Souzan Farah Nabi, and Naif Nabi, petition this Court for a writ of certiorari to quash the writ of execution the trial court entered on September 2, 2016 and a writ of prohibition to prevent the trial court from continuing to exercise jurisdiction it does not have to permit any further execution upon a nonfinal "final judgment" that was entered on March 7, 2016.[1]

This Court has jurisdiction to issue a writ of certiorari pursuant to Article V, § 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2)(A). This petition is timely because the writ of execution was rendered on September 2, 2016. *See* Fla. R. App. P. 9.100(c) (petitions for certiorari "shall be filed within 30 days of rendition"). A petition for a writ of certiorari is the proper remedy to pursue when, as here, a trial court has already exceeded its jurisdiction by attempting to permit execution upon a nonfinal "judgment":

> [W]e continue to believe that certiorari is available to review the form of an order, if not its underlying merits, insofar as it permits execution prior to rendition of an appealable final judgment. This notion does

[1] Respondent, Hon. Steven Scott Stephens of the Thirteenth Judicial Circuit in and for Hillsborough County, is the presiding judge in the case from which this petition arises, *Alami-Binani* v. *Nabi*, No. 13-CA-7175 (Fla. 13th Cir. Ct.). Because the petition seeks a writ of prohibition, petitioners are required to serve Judge Stephens as a respondent. *See* Fla. R. App. P. 9.100(e)(2) (trial judge "is a formal party to the petition for . . . prohibition," "must be named as such in the body of the petition," and "must be served"). "Unless otherwise specifically ordered, the judge . . . has no obligation to file a response," but may "choose to do so." *Id.* 9.100(e)(3). "The absence of a separate response by the judge . . . shall not be deemed to admit the allegations of the petition." *Id.*

> not rest on a policy determination that a litigant should be permitted an immediate review of an order if the order exposes the litigant's assets to execution. Rather, it is premised on the question of whether an order properly may subject a litigant to execution at a time when the trial court litigation is incomplete and there is no available appellate remedy.

E. Ave., LLC v. *Insignia Bank*, 136 So. 3d 659, 664 (Fla. 2d DCA 2014); *see also Gibson* v. *Progress Bank of Fla.*, 54 So. 3d 1058 (Fla. 2d DCA 2011) (quashing judgment entered after nonfinal appeal was taken as null and void and related order denying protective order from discovery in aid of execution).

This Court's jurisdiction to enter a writ of prohibition derives from Article V, § 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(3). A petition for a writ of prohibition is the proper remedy to pursue when, as here, a trial court is acting beyond the scope of its jurisdiction. *E.g.*, *Gibson*, 54 So. 3d at 1060-61 (trial court lacked jurisdiction to permit discovery in aid of execution of void judgment); *Marsh* v. *Patchett*, 788 So. 2d 353, 355 (Fla. 3d DCA 2001) (granting writ of prohibition to prevent trial court from permitting execution upon or discovery about expired judgment); *see also English* v. *McCrary*, 348 So. 2d 293, 296 (Fla. 1977) ("Prohibition is an extraordinary writ, a prerogative writ, extremely narrow in scope and operation, by which a superior court, having appellate and supervisory jurisdiction over an inferior court or tribunal possessing judicial or quasi-judicial power, may prevent such inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its ju-

risdiction."); *Rosenbloom* v. *Schleider*, 876 So. 2d 1244, 1244 (Fla. 4th DCA 2004) (trial court lacked jurisdiction to rule on untimely motion for rehearing).

FACTS ON WHICH PETITIONER RELIES

This is a business dispute. In broad overview, Respondent, Abdelilah Alami-Binani, sued Petitioners for a variety of alleged contract breaches and business torts. After a torturous procedural odyssey in which this case ping-ponged between several trial judges and this Court, the case culminated in a four-day jury trial. The jury rendered an approximately $69,000 verdict in favor of Mr. Alami-Binani, but ruled he was entitled to only nominal damages (i.e., $1.00) on his purported $700,000 cause of action for breach of fiduciary duty. *See* Ex. A. Consistent with the verdict, the trial court entered a "final judgment" on March 7, 2016. *See* Ex. B.

The parties timely filed post-trial motions. *See* Ex. C at 5-6. Instead of denying the post-trial motions in their entirety, on July 6, 2016, the trial court entered an order granting a new trial as to Mr. Alami-Binani's purported $700,000 cause of action for an accounting. *See* Ex. C. Petitioners timely took a nonfinal appeal pursuant to Florida Rule of Appellate Procedure 9.130(a)(4) from that order, *see* Ex. D, and that appellate action is now proceeding in this Court as *Nabi* v. *Alami-Binani*, No. 2D16-3506 (Fla. 2d DCA) ("*Nabi I*").

On July 29, 2016, the trial court entered a temporary injunction that, among other things, restored Mr. Alami-Binani as president and general manager of the

disputed company. *See* Ex. E. Petitioners again timely took a nonfinal appeal pursuant to Florida Rule of Appellate Procedure 9.130(a)(1)(B) from that order, *see* Ex. F, and that appellate action is now proceeding in this Court as *Nabi* v. *Alami-Binani*, No. 2D16-3587 (Fla. 2d DCA) ("*Nabi II*").[2]

On August 31, 2016, apparently treating the March 7, 2016 judgment as final and executable—and notwithstanding the trial court's grant of a new trial that rendered it interlocutory, nonfinal, and unappealable—Mr. Alami-Binani filed a proposed writ of execution. *See* Ex. G. In response, Petitioners filed a motion asking the trial court to either refrain from issuing the writ of execution or to set the writ aside. *See* Ex. H. Without addressing that motion, the trial court issued the writ of execution on September 2, 2016. *See* Ex. I. Petitioners do not know whether Mr. Alami-Binani may also be preparing or pursuing other *ex parte* papers in aid of execution. This petition followed.

NATURE OF THE RELIEF SOUGHT

The Court should accept jurisdiction pursuant to Article V, § 4(b)(3) of the Constitution and Florida Rule of Appellate Procedure 9.030(b)(2) and (b)(3), enter an order to show cause to Respondents directing them to respond to this petition, and ultimately issue a writ of certiorari that quashes the September 2, 2016 writ of

[2] This Court has now consolidated *Nabi I* and *Nabi II*. *See* Order of September 19, 2016. The initial brief in those consolidated, nonfinal appeals is now due October 31, 2016.

execution and a writ of prohibition to prevent any further execution of the nonfinal "final judgment" of March 7, 2016.

ARGUMENT

This Court should issue a writ of certiorari. Because the trial court lacked jurisdiction to enter or enforce any nonfinal "judgment," especially as long as *Nabi I* and *Nabi II* remain pending in this Court, it lacked jurisdiction and departed from the essential requirements of law when it issued the writ of execution on September 2, 2016. For those reasons, the writ of execution is void and must be quashed.

This Court should also issue a writ of prohibition. When the trial court granted a new trial, it rendered the "final judgment" of March 7, 2016 nonfinal. It is black letter law in this Court that trial courts cannot permit execution on a nonfinal, unappealable "judgment" when the judgment debtor would have no right to appeal or right to obtain a supersedeas bond. Moreover, so long as nonfinal appeals are pending, trial courts lack jurisdiction to enter judgment or allow execution upon any nonfinal "judgment" already entered. Because *Nabi I* and *Nabi II* remain pending in this Court, the trial court lacks jurisdiction to enter or permit execution upon any judgment.

Standard Of Review

To obtain a writ of certiorari, a "petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the

remainder of the trial (3) that cannot be corrected on postjudgment appeal." *Parkway Bank*, 658 So. 2d at 648. Prongs (2) and (3) concern only this Court's jurisdiction; it is only prong (1) that goes to the merits. *See Parkway Bank* v. *Fort Myers Armature Works*, 658 So. 2d 646, 648-49 (Fla. 2d DCA 1995) (describing prongs (2) and (3) as "the two jurisdictional prongs" and prong (1) as the "standard of review on the merits").

"Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. It is preventive and not corrective in that it commands the one to whom it is directed not to do the thing which the supervisory court is informed the lower tribunal is about to do." *English* v. *McCrary*, 348 So. 2d 293, 296-97 (Fla. 1977).

Merits

I. PETITIONERS ARE ENTITLED TO A WRIT OF CERTIORARI QUASHING TO WRIT OF EXECUTION BECAUSE EXECUTION CANNOT PROCEED ON A NONFINAL "JUDGMENT"

"Permitting execution prior to completion of the litigation before the trial court has long been characterized as improper by the appellate courts." *E. Ave., LLC* v. *Insignia Bank*, 136 So. 3d 659, 665 (Fla. 2d DCA 2014). Here, it is beyond sispute that the litigation is not yet complete, because the trial court granted Mr. Alami-Binani a new trial as to one of his causes of action.

For that reason, notwithstanding the supposed finality of the March 7, 2016 judgment's language, it simply is not final and appealable. Rather, it is black letter law that an order or judgment is final and appealable only "when it adjudicates the merits of the cause and disposes of the action . . . leaving no judicial labor to be done except the execution of the judgment." *McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992).

Petitioners are therefore left "exposed to enforcement of the judgment at a time when [they] cannot obtain review of it and, importantly, [they] cannot shield [their] assets from execution by posting an appellate supersedeas bond." *Id.* at 661. In precisely this circumstance, this Court has issued a writ of certiorari to quash a nonfinal judgment that purported to permit execution before a litigation was complete. *Id.* at 666. Instead of permitting execution upon an oxymoronic nonfinal final judgment, this Court has instead explained that trial courts should enter "an interlocutory order specifying the amount of damages that are no longer in controversy and directing that further proceedings resolve the remaining issues." *Id.* "Only when the remaining issues are decided should a final order encompassing all of the damages, including those from the interlocutory order, be entered." *Id.* For the same reasons, the Court should likewise issue a writ of certiorari and quash the writ of execution here.

Additionally, it is also black letter law that the one thing a trial court cannot do while a nonfinal appeal is pending is to enter a final judgment. *E.g.*, Fla. R. App. P. 9.130(f) ("during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court"); *accord Gibson* v. *Progress Bank of Fla.*, 54 So. 3d 1058 (Fla. 2d DCA 2011). For that reason as well, it necessarily follows that a trial court cannot permit execution upon a nonfinal "judgment" when it lacks the jurisdiction to enter a final judgment in the first place.

The trial court departed from the essential requirements of law when it failed to follow this Court's decision in *East Avenue, LLC* and acted without jurisdiction in issuing the writ of execution. This Court should therefore issue a writ of certiorari quashing the writ of execution.

II. FOR THE SAME REASONS, PETITIONERS ARE ENTITLED TO A WRIT OF PROHIBITION TO ENSURE THAT THE TRIAL COURT DOES NOT PERMIT ANY FURTHER EXECUTION OR DISCOVERY IN AID OF EXECUTION

This Court should also issue a writ of prohibition. When the trial court granted a new trial, it rendered the "final judgment" of March 7, 2016 nonfinal. It is black letter law in this Court that trial courts cannot permit execution on a nonfinal, unappealable "judgment" when the judgment debtor would have no appellate remedy or right to obtain a supersedeas bond. *E. Ave., LLC*, 136 So. 3d at 666.

Moreover, so long as nonfinal appeals are pending, trial courts lack jurisdiction to enter judgment or allow execution or discovery in aid of execution upon any non-final "judgment" already entered. Fla. R. App. P. 9.130(f); *Gibson*, 54 So. 3d at 1060-61. Because *Nabi I* and *Nabi II* remain pending in this Court, the trial court shall continue to lack such jurisdiction to enter or permit execution upon any judgment. Moreover, based on the trial court's failure to address Petitioners' motion to dissolve or refrain from issuing the writ of execution (Ex. I), it appears that the trial court will continue to permit execution or discovery in aid of execution. Accordingly, Petitioners have "shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." *English*, 348 So. 2d at 296-97.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari that quashes the writ of execution of September 2, 2016 and a writ of prohibition that prevents the trial court from permitting any execution or discovery in aid of execution upon the "judgment" of March 7, 2016.

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2016, I electronically served the following via the Florida e-portal: Michael C. Addison (m@mcalaw.net) and Laura H. Howard (howard@mcalaw.net), Addison & Howard, P.A., 400 North Tampa Street, Suite 1100, Tampa, FL 33602; and David A. Townsend (davidtownsend@tampabay.rr.com), Townsend & Brannon, 608 West Horatio Street, Tampa, FL 33606-4104.

I FURTHER CERTIFY that on September 23, 2016, I served the following via U.S. Mail and e-mail: Hon. Steven Scott Stephens (divisionL@fljud13.org), George Edgecomb Courthouse, 800 East Twiggs Street, Suite #522, Tampa, FL 33602.

September 23, 2016

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

September 23, 2016

/s/ Thomas Burns
Thomas A. Burns