

Genger v The Arie Genger 1995 Life Ins. Trust
2009 NY Slip Op 30902(U)
April 16, 2009
Supreme Court, New York County
Docket Number: 108602-2008
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jane S. Solomon
Justice

PART 55

SAGI GENGER and ELANA GENGER

INDEX NO. 108602/2008

MOTION DATE _____

- v -

THE ARIE GENGER 1995 LIFE INSURANCE TRUST, ET AL.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for expunge a recorded instrument.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4

5-8

(and papers submitted in sequence no. 002)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED

APR 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/16/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

SAGI GENGER and ELANA GENGER,
Petitioners,

INDEX NO. 108602-2008

-against-

THE ARIE GENGER 1995 LIFE INSURANCE
TRUST and THE NEW YORK CITY
DEPARTMENT OF FINANCE, OFFICE OF
THE CITY REGISTER,

DECISION AND ORDER

FILED

APR 21 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

Respondents.

-----X

JANE S. SOLOMON, J.:

INTRODUCTION

Petitioners Sagi Genger and Elana Genger (the "Petitioners") bring this action to expunge a recorded instrument ("Instrument") and to quiet title to two condominium units in Manhattan. Respondent The Arie Genger 1995 Life Insurance Trust (the "Trust") opposes the petition on the merits and asserts four counterclaims. Separately, in motion sequence 002, the Trust seeks an order under CPLR § 408 for leave to conduct discovery. As set forth below, the motion to conduct discovery is granted because the petition cannot be determined summarily.

FACTUAL BACKGROUND

The parties here are family members who are fond of litigating (as evidenced by the several matters pending before me and my colleagues). The father is Arie Genger; he has a

daughter, Orly, and a son, Sagi, whose wife is Elana. In 1995, Arie established the respondent Trust for the equal benefit of Sagi and Orly. In responding to the petition, Arie explains how, prior to the transactions at issue here, with Orly's consent, he and the trustees permitted the Trust to assist Sagi with an obligation of his to Bank Hapoalim which presented regulatory compliance issues. Then, in 2003 and 2004, Petitioners acquired two residential condominium units in which they do not live (225 West 83rd Street, Unit 15-Z and 1965 Broadway, Unit 22G) (the "Units"). Notably, in connection with the purchase of the Units, Sagi represents that Bank Hapoalim gave mortgages for the entire purchase prices, while Arie says that the Trust funded the purchases once Sagi agreed that the Units would be held for the benefit of the Trust. Not until 2005 did Arie seek written confirmation of this understanding. The Instrument is that writing.

Petitioners contend both: (1) that they did not sign the Instrument at all, i.e. their signatures are forged; and (2) that infirmities in the notarial acknowledgment recorded with the Instrument invalidate the recordation. Accordingly, they seek to expunge the recorded Instrument and "quiet title" to the Units, removing the alleged status of the Trust as the beneficial owner. In its counterclaims, the Trust seeks a declaration that it is the beneficial owner of each unit and, if it is not,

judgments against Petitioners for the \$1.4 million expended by it for the purchase of the Units, and the imposition of a constructive trust.

The typed portion of the Instrument says that Petitioners signed it in March 2005; a copy of it was not recorded against each property until August 2007. The preliminary clauses recite that "funds constituting the Trust have heretofore been utilized for the acquisition of the [Units]" and that "despite the foregoing, ownership of the Units was taken as a matter of record in the names of [Petitioners]", so that "to eliminate any doubt or misunderstanding as to the beneficial ownership of the Units":

NOW, THEREFORE, the undersigned jointly and severally do hereby state, affirm, acknowledge and agree that, notwithstanding the fact that record ownership to the Units was taken in their names, all right, title and interest in and to the Units has been, is now and shall continue to be solely the property of the Trust and neither one of the undersigned has any beneficial ownership interest in and to the same. Furthermore, the undersigned hereby agree to take such acts, do such things and execute and deliver such instruments, certificates, letters, papers, agreements and other documents as may be necessary or advisable to confirm of evidence the Trust's beneficial ownership of the Units.

(Instrument, attached as Exh. C to Petition). The acknowledgment of a notary public is on a separate page and, in her oath, the notary, Linda Rosett, states that it is made in Queens County and

that Petitioners appeared before her on March 15, 2005. In an affidavit, she avers that any signature she took of Petitioners at that time had a proper stamp reflecting that her commission expired in April 2007. She explains that she used "Queens" as a venue because that is where she is qualified. When the Instrument was sent for filing, the lawyer who did so sent a similar document. However, the alleged originally recorded document, which was displayed at oral argument, has a correction strip showing that Ms. Rosett's commission expires in 2011 and has an altered identification number. In his affidavit, the transmitting lawyer, Lance G. Harris, states that the changes on the acknowledgment page which was returned to him were not there when he sent it.

DISCUSSION

Petitioners argue that the Instrument is invalid under Real Property Law § 291, which states that "[a] conveyance of real property, within the state, on being duly acknowledged by the person executing the same . . . may be recorded in the office of the clerk of the county where such real property is situated. Real Property Law § 292 states: "Such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the

conveyance as a witness." This language would not on its face invalidate the recorded Instrument.

The Trust admits that Petitioners were not before Ms. Rosett in Queens on March 15, 2005, and that her commission expired in 2007 and was subsequently renewed through 2011. In opposing the motion and substantiating the Trust's position, Arie attests to the underlying transactions and the authenticity of Sagi's signature. The Trust also submits admissions from Sagi that undercut the petition here, although Sagi challenges how they were obtained. (E-mails from Sagi Genger to Eric Bergazyn (Aug. 29, 2006), attached as Exh. A to Attorney's Statement of Yoav M. Griver.)

The Trust also moves under CPLR § 408 for an order permitting it to conduct discovery. The Trust contends that discovery is needed to resolve threshold issues of fact, namely whether Petitioners signed the Instrument and their intent in respect of the Trust's claim. The Trust seeks an order permitting it to engage in document discovery and depose Petitioners and others.

It is undisputed that Ms. Rosett was a licensed Notary Public in good standing on the date that she notarized the document, and that, in fact, as an employee of Arie's business, she had notarized other documents for family members. As noted, Petitioners expressly rely on a document notarized by her in 2006

to support their own argument.

The alterations to the notary stamp do not, in and of themselves, render the recorded Instrument a nullity. See N.Y. Exec. Law § 137; N.Y. Jur. 2d Acknowledgments § 17; Carmody-Wait 2d § 5:28. Moreover, under Real Property Law § 309-a, an acknowledgment is valid so long as it substantially complies with the form set forth therein; minor discrepancies are insufficient to invalidate an instrument. See Weinstein v. Weinstein, 36 A.D.3d 797, 797-98 (2nd Dept. 2007) (discrepancy in an acknowledgment concerning the date of execution). An error in the venue provision also is insufficient to void the Instrument in the event that it was properly witnessed by Ms. Rosett. See Matter of Klosinski, 192 Misc.2d 714, 725 (Surr. Ct. Kings Co. 2002).

Petitioners urge the Court to rigidly apply the technical requirements for a notary public's statement. However, their very own petition contains a conspicuous notary error: the Verification for the Petition states that it was sworn to in "York" County.

CONCLUSION

Accordingly, it hereby is

ORDERED that the Trust's motion under CPLR § 408 for discovery is granted to the extent that within 10 days of entry

hereof the Trust shall serve the document demand and deposition notices substantially in the form annexed to its papers on Petitioners, and Petitioners may within 10 days of receipt serve such notices as they deem appropriate. All discovery shall be sharply focused and conclude by July 31, 2009, for which purpose:

- (1) copies hereof are being sent by my staff to counsel; and
- (2) there will be a Compliance Conference on August 3, 2009 in Part 55 at 10:00 AM; and it further is

ORDERED that the Petition is held in abeyance pending the foregoing and the filing of a note of issue.

Dated: April 16, 2009
 New York, New York

ENTER:

 J.S.C. Index No. 108602/2008

FILED
 APR 21 2009
 COUNTY CLERKS OFFICE
 NEW YORK