

**Genger v Genger**

2011 NY Slip Op 33609(U)

May 8, 2011

Supreme Court, New York County

Docket Number: 104249/07

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
Justice

PART 55

Genger, Ame  
- v -  
Genger, Sagi

INDEX NO. 104249/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

FILED

MAY 14 2012

Dated: 5/8/11

NEW YORK COUNTY CLERK'S OFFICE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ARIE GENGER,

Plaintiff,

Index No. 104249/07

-against-

**DECISION/ORDER**

SAGI GENGER and DALIA GENGER,

**FILED**

Defendants.

MAY 14 2011

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>          </u>
Cross-Motion and Affidavits Annexed.....	<u>2</u>
Answering Affidavits to Cross-Motion.....	<u>          </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action against his son, defendant Sagi Genger ("Sagi"), to recover a money judgment on debt allegedly due to plaintiff on three promissory notes and a stock purchase agreement (collectively referred to as the "Notes"). Defendants now move pursuant to CPLR § 3211 to dismiss the action as premature or to stay this action and compel arbitration pursuant to CPLR § 7503. Plaintiff cross-moves for a preliminary injunction enjoining defendants from invoking the audit and arbitration provisions of the divorce stipulation agreement (the "Stipulation") signed by plaintiff and defendant Dalia Genger ("Dalia"). For the

reasons set forth below, defendants' motion to dismiss or to stay the action and compel arbitration is granted and plaintiff's cross-motion for a preliminary injunction is denied.

The relevant facts are as follows. Plaintiff was the defendant in a divorce action commenced by his former wife Dalia. In connection with that action, plaintiff and Dalia entered into a Stipulation, dated October 26, 2004, in which they agreed to equitably distribute their marital property as of January 31, 2002. The Stipulation required the parties to list all of their marital assets on certain schedules, which would then be evenly divided between the parties.

The Stipulation provides in Article XII that Dalia has a right to certain audits of the plaintiff's assets. It provides that upon the wife's request, the husband shall allow the wife to audit his assets and liabilities as of January 31, 2002 in order to test the correctness and completeness of the items included in the schedules of the parties' property. The Stipulation further provides that if the audits find that the husband owned any property on January 31, 2002 which was not listed on the schedules, the husband will pay to the wife one half of the value of the property. It further provides that if the audits find assets not listed on the schedules with a value greater than \$250,000, such error will be presumed willful on the husband's part and the husband will pay the wife one half of three times of that value. However, the husband will have an opportunity to rebut that presumption of willful error at an arbitration conducted in accordance with the terms of the Stipulation. The wife did in fact commence an audit pursuant to the terms of the Stipulation, which audit has now been completed by Ernst & Young. That audit concluded that the husband did not disclose marital assets on the schedules contained in the Stipulation including the Notes, as a result of which the wife is entitled to additional payments. Pursuant to the unambiguous terms of the Stipulation, the plaintiff in this action has now

commenced an arbitration to challenge the findings of the audit regarding the undisclosed assets, including the Notes.

The Stipulation also stated that the husband and wife's son, Sagi, was to be appointed attorney-in-fact under a power of attorney, with the power to allocate certain marital assets so as to effect an equal distribution of those assets. Relying on the power of attorney, Sagi instructed that ownership of certain instruments under which he was indebted to plaintiff - the Notes- be transferred to Dalia.

In 2007, plaintiff commenced the instant action against Sagi to recover the amount of the Notes. Prior to answering, Sagi moved to dismiss the complaint claiming that he had the authority, as attorney-in-fact, to assign the obligations under the notes and the stock purchase agreement to a third party, which he did, and thus he was no longer obligated to make payments to plaintiff. Justice Jane S. Solomon granted Sagi's motion to dismiss plaintiff's complaint. Plaintiff then appealed the decision. The Appellate Division, First Department, reversed the Supreme Court's decision granting Sagi's motion to dismiss the complaint, finding that a question of fact exists as to the ownership of the notes and the stock purchase agreement, which was not definitively resolved by the documentary evidence on which Sagi relied. *Genger v. Genger*, 87 A.D.3d 871, 873 (1<sup>st</sup> Dept 2011). The First Department then directed that Dalia be added as a defendant as "her rights, if any, in the subject instruments, might be inquitably affected by a judgment." *Id.* After receiving the First Department's decision, plaintiff prepared an amended complaint adding Dalia as a defendant and served her with the amended summons and complaint.

At the oral argument of this motion the wife and son entered into a stipulation, not signed

by the husbands's attorney, which provides as follows:

Defendants Sagi Genger and Dalia Genger, by and through their undersigned counsel, hereby agree that should the Court dismiss the action in favor of arbitration between plaintiff Arie Genger and defendant Dalia Genger to determine any claims concerning the debt instruments referenced in the Amended Complaint (collectively, the "Notes") pursuant to the audit and arbitration provisions of the Stipulation of Settlement, defendants will treat the 2006/2007 transfer of the Notes by Sagi Genger to Dalia Genger as a nullity.


The Court finds that the issue of whether the Notes are marital property which should be distributed pursuant to the Stipulation, which must be determined before the plaintiff can bring an action against his son to recover on the Notes, must be determined pursuant to the audit and arbitration provisions of the Stipulation. The Stipulation unambiguously provides that the defendant Dalia Genger has the right to commence an audit where a determination can be made as to whether the Notes are in fact assets which should have been listed on the schedules annexed to the Stipulation. Plaintiff's remedy, if he disagrees with the findings of the audit, is to commence an arbitration challenging the audit, which he has in fact done. Now that Sagi and Dalia Genger have stipulated that the transfer of assets by Sagi to Dalia is a nullity if the court dismisses the action in favor of arbitration, the appropriate remedy to resolve any dispute as between Arie and Dalia as to the ownership of these Notes is the audit and arbitration provisions of the Stipulation. The Stipulation clearly gives Dalia the right to claim in the audit that there are certain assets which should have been but were not included in the schedules as marital assets. It is the province of the auditor to make the initial determination as to that claim and it is then in the province of the arbitrator to make the final determination if Arie Genger chooses to challenge the determination of the auditor. Arie Genger cannot bypass the audit and arbitration provisions of the Stipulation by choosing to commence an action against his son to recover on the Notes

without adding his wife where the specific issue of whether these Notes are marital assets must be and has been determined by audit.

The court notes that it is not giving any res judicata or collateral estoppel effect to the prior determination of the arbitrator that it did not have jurisdiction to determine the issue of the ownership of the Notes as the arbitrator did not give any reasoning or analysis as to why he declined jurisdiction and the issue of the ownership of the Notes did not come before him pursuant to a challenge of an audit commenced by Dalia pursuant to the explicit audit provisions of the Stipulation.

Accordingly, defendants' motion to dismiss the complaint or stay the action and compel arbitration is granted and plaintiff's cross-motion enjoining defendants from invoking the audit and arbitration provisions of the Stipulation is denied. This action is hereby dismissed as the parties are required to arbitrate their dispute regarding the Notes. This constitutes the decision and order of the court.

Dated: 5/8/11

Enter: \_\_\_\_\_  
  
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