

**Genger v Genger**

2013 NY Slip Op 31499(U)

July 3, 2013

Supreme Court, New York County

Docket Number: 100697/08

Judge: Barbara Jaffe

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

**BARBARA JAFFE**

PRESENT: HON. [REDACTED]  
Justice

PART 12

Index Number : 100697/2008  
GENGER, ORLY  
vs.  
GENGER, SAGI  
SEQUENCE NUMBER : 016  
OTHER RELIEFS

INDEX NO. 100697/2008

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 816

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 7/3/13

[Signature], J.S.C.  
**BARBARA JAFFE**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
ORLY GENGER,

Plaintiff,

Index No. 100697/08

-against-

Argued: 1/30/13  
Mot. Seq. Nos. 016, 017, 021, 025

SAGI GENGER,

Defendant.

**DECISION AND ORDER**

-----X  
BARBARA JAFFE, JSC:

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This decision and order addresses motion sequence numbers 016, 017, 021 and 025. In sequence 016, defendant Sagi Genger (Sagi) seeks an order quashing the discovery demands of his younger sister, plaintiff Orly Genger (Orly), and compelling her deposition. Orly cross-moves for an order seeking discovery as well as an adverse inference against Sagi. In sequence 017, Orly seeks to supplement the record of Sagi's motion to quash and her own cross motion with new information concerning the criminal conviction of Sagi's tax accountant Jonas Gayer. In sequence 021, Sagi seeks an order summarily dismissing Orly's complaint. And in sequence 025, Orly moves for an order sealing exhibit 29 annexed to her counsel's statement, filed in connection with opposing Sagi's summary judgment motion.

The above referenced motions and the cross motion are consolidated for disposition.

**I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

The general background of this action has been discussed in various decisions of this court. Additional background is provided where relevant to the instant motions and cross

\* 3]  
motion.

Orly and Sagi are the daughter and son of non-parties Arie Genger and Dalia Genger. (Complaint, ¶ 5). In 2001, Arie formed the AG Companies and one of their affiliates, AG Holdings Company (AG Holdings). (Complaint, Exh. Q [Arie affidavit]). The AG Companies are composed of AG Real Estate Partners, LP (AG LP) and AG Real Estate GP, Inc. (AG GP) (collectively, AG Companies). Before March 2004, Orly and Sagi each owned a 45 percent interest in AG LP; the remaining interest was held by AG GP, together with AG LP. (*Id.*, ¶ 6). In March 2004, Orly and Sagi each purchased a 50 percent interest in AG GP for \$150,000 (*id.*, ¶ 8), each thereby obtaining a 50 percent interest in the AG Companies, which, through a series of corporate ownership interests, owned two Canadian real estate properties. (*Id.*, ¶ 7).

In late 2004 or early 2005, Orly agreed to Sagi's request that she transfer her interest in the AG Companies to him for \$100,000. (Complaint, ¶ 9). Sagi alleges, and Orly denies, that the transaction constituted his attempt to convey to Orly, as a wedding gift, \$100,000 and that it was Orly who had approached him with a complex tax issue and the idea of selling him her interest. (Orly opposition brief, at 2). Orly signed a bill of sale and Sagi signed a \$100,000 promissory note which was back-dated to January 1, 2004. (Complaint, ¶ 9).

Orly alleges that in signing the bill of sale, she relied on Sagi's assurance that she would later be able to retrieve her interest in the AG Companies for one dollar (the oral option), and that her interest would remain unchanged. (*Id.*, ¶ 10). The Canadian properties were later sold in for approximately \$24.8 million, in Canadian dollars (CAD). (*Id.*, ¶ 13).

Orly also alleges that when she transferred her interest to Sagi, the value of her shares in the AG Companies was at least \$4 million, and that Sagi withheld that information from her. (*Id.*,

¶¶ 14, 15). In March 2007, after Orly learned the true value of the interest in the AG Companies that she had transferred, she asked Sagi to return to her its equivalent value. Sagi refused. (*Id.*, ¶¶ 18, 19). According to Orly, through a series of complex transactions, Sagi drained the AG Companies of value and shifted or otherwise transferred the value into two new and “extremely valuable” companies he controlled, Riverside General Partner LP and Riverside Properties LP (collectively, the Riverside Companies). (*Id.*, ¶ 21).

Orly sets forth three causes of action: 1) a declaratory judgment and injunction; 2) rescission; and 3) fraudulent inducement. In particular, she seeks a declaration that the sale of her interest in the AG Companies to Sagi is null and void, and a direction that Sagi transfer the equivalent share interest in the Riverside Companies to Orly.

In April 2008, Sagi moved pursuant to CPLR 3211 (a) (1) for an order dismissing the complaint based on documentary evidence, consisting primarily of a written agreement pursuant to which Sagi granted Orly the option of repurchasing, no earlier than January 1, 2006, her interest in the AG Companies for \$10,000 (the written option). Sagi argued that, having failed to exercise the written option, Orly had no claim against him. In a decision and order dated November 12, 2008 and denying the motion, another justice of this court held that the written option did not “completely dispose” of Orly’s claims because it is “undated [and] does not contain a merger clause or a no-oral modification clause and thus does not necessarily refute [Orly’s] allegation that [Sagi orally] represented to her that she could repurchase her interests for \$1 at some point.” (*Genger v Genger*, 21 Misc 3d 1132 [A],\* 6, 2008 NY Slip Op 52325 [U] [Sup Ct, NY County 2008] [Nov. 2008 decision]). The parties then engaged in lengthy and contentious discovery.

According to Sagi, in or about 2001, in order to buy the two Canadian properties, Arie funded the purchase with millions of dollars of bank debt, inter-company loans from TPR Investment Associates (TPR), a affiliate of the AG Companies, as well as a \$3.85 million loan from Arie's friend Vladimir Gusinsky which was secured by a pledge of AG Holding's shares in the AG Companies. (Def. moving brief, at 5). In February 2008, three months after Sagi told Orly that the AG Companies were "valueless," Gusinsky sued AG Holdings to collect on the loan due to nonpayment. In December 2009, a judgment was entered in Gusinsky's favor for CAD \$4.36 million. (*Id.*)

Unable to collect on the judgment, Gusinsky foreclosed on the collateral and thereafter sued Sagi in his personal capacity via piercing the corporate veil. (*Id.*). In May 2011, Gusinsky sold the AG Holdings judgment and collateral for a "substantial sum" to a Sagi-affiliated and controlled entity named EGNG Asset Ltd. (*Id.* at 5-6). Because Orly "did not contribute to the bailout" of the AG Companies, and instead "seeks a windfall" by claiming "millions of dollars in damages" in former companies with no assets, and a 50 percent interest "in the former assets of the partnership without the burden of the Gusinsky judgment," Sagi contends that her complaint should be dismissed. (*Id.* at 6).

## II. SAGI'S MOTION FOR SUMMARY JUDGMENT (sequence 021)

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence,

demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]).

Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); “unsubstantiated allegations and assertions are insufficient” (*Zuckerman*, 49 NY2d 557, 562).

Sagi argues that Orly’s cause of action for fraudulent inducement cannot survive as the unambiguous terms of the written option rebut and trump any allegation of fraud premised on the oral option which contains different terms (*i.e.*, \$10,000 per written option versus \$1 per oral option. (Sagi moving brief, at 8-9). Sagi also maintains that the fraud claim is barred by Orly’s testimony that she and Sagi agreed to the oral option when the bill of sale was signed and that the parties reference the written option in the bill of sale as a past event. Consequently, Sagi argues, the parol evidence rule precludes a fraud claim based on the oral option as the subsequent written agreement subsumes the prior oral agreement even absent an integration clause. (*Id.* at 9-10). Sagi also asserts that Orly should be foreclosed from asserting the fraud claim because her contractual remedy is to exercise the right set forth in the written option, which she has not done. (*Id.*).

As Orly argues, however, the written option is not dated and Sagi indicated at his

deposition that the written option may have been signed the same day as the bill of sale. (Opposition brief at 9-10). Thus, there is an issue of fact as to the applicability of the parol evidence rule. Moreover, in the Nov. 2008 decision, the court observed that the written option permits Orly to exercise the \$10,000 option only after January 1, 2006, and Orly asserts that as Sagi rendered the AG Companies valueless before then, the written option “actually supports the notion that Defendant defrauded Plaintiff by inducing her to transfer her interests in the AG Companies based on an illusory option.” (Nov. 2008 decision, at 5).

The two Canadian properties owned by the AG Companies were sold between 2004 and 2005, and the sale proceeds were transferred to the Sagi-controlled Riverside Companies to facilitate the purchase of a new property, *Domaine La Renaissance*. Thus, even if the oral option is unenforceable, the written option does not definitively refute Orly’s allegation that Sagi fraudulently induced her into signing the written option. Rather, as Orly contends, the written option is “more evidence of Sagi’s fraud.” (Opposition brief, at 10). That Orly never exercised either option does not defeat the fraud claim, and exercising the written option is not Orly’s sole remedy, as her claim of fraudulent inducement is not premised upon a written instrument.

Nonetheless, Sagi argues that even after discovery, Orly still fails to set forth all four elements of a fraudulent inducement claim: misrepresentation or omission of fact, intent, reliance and injury. He maintains that the only alleged misrepresentation is his assuring Orly that she would be able to buy back her shares for one dollar and that her interest in the AG Companies would remain unchanged. As Orly never sought to exercise the option, Sagi asserts she cannot establish a misrepresentation.

Orly contends, however, that she is suing Sagi for using “his position of trust as her older

brother to deceive her into selling her 50 percent interest in the [AG] Companies for a fraction of that interest's true value." (Opposition brief, at 22). In other words, Orly contends that having failed to disclose to her the true value of her interest in the AG Companies and by telling her that her shares in the AG Companies were worthless, Sagi defrauded her and thereby caused her to sell her interest to him for a fraction of its true value, CAD \$24 million. She also asserts that the recent valuation of Domain La Renaissance was approximately CAD \$12 million. (*Id.* at 5-6).

According to Sagi, however, his representation of the value of the AG Companies as worthless was correct because when the proceeds of the sales were reduced by the mortgages on the Canadian properties, the value of the partnership's interest in Domaine La Renaissance was approximately \$4 million, which was further reduced when the Gusinsky loan became a judgment in 2009. (Sagi reply brief, at 6).

However, Sagi also admits that "Gusinsky sold the judgment and collateral to ENNG Assets Ltd., an entity affiliated with Sagi, for a substantial sum" (Sagi opening brief, at 5-6), and if the collateral, namely, the AG Companies' interest, was worthless, an issue arises as to why it was purchased for such a substantial sum. Orly asserts that she learned through discovery that Sagi has used a web of interconnected corporate affiliates, including ENNG, TPR, and others, to siphon millions of dollars from the Riverside Companies into his own pockets, in the form of management and consulting fees, thereby reducing her interest in the Riverside Companies, into which the AG Companies' interest was transferred. (Opposition brief, at 11-12).

Based on the foregoing, there exists a material issue of fact as to whether the true value of Orly's interest in the AG Companies was worthless.

A defendant's intent to commit fraud is "generally inferred from surrounding

circumstances, since people do not ordinarily acknowledge that they are lying.” (*Braddock v Braddock*, 60 AD3d 84, 89 [1<sup>st</sup> Dept 2009]). Here, an inference that Sagi intended to defraud Orly may be drawn from the following alleged facts: (1) Sagi’s misrepresentation and omission as to the value of the AG Companies, *supra*; (2) Sagi’s completion of the sale of the AG Companies’ properties and the transfer of the sale proceeds to the Riverside Companies before the January 1, 2006 option date, as noted in the Nov. 2008 decision; and (3) Sagi’s withdrawal of money in the form of management and consulting fees. Sagi’s assertion that he has acted in good faith and has complied with discovery only raises a credibility issue.

Sagi also argues that Orly’s testimony that the transferred shares were worth several million dollars defeats her claim that she relied on Sagi’s misrepresentation of value, and that because Orly has access to the books and records, but did not avail herself of them, she is barred from asserting reliance. In the Nov. 2008 decision, the court held that Sagi’s argument based on Orly’s failure to avail herself of the books and records argument was unpersuasive, and thus remains the law of the case and may not be relied on here. Moreover, Orly testified that she reasonably relied on her brother, a seasoned businessman in a family co-owned business who owes her a fiduciary duty. (*Braddock*, 60 AD3d at 88, citing *Venizelos v Oceania Mar. Agency*, 268 AD2d 291 [1<sup>st</sup> Dept 2000] [family members stand in fiduciary relationship with one another in a co-owned business venture]). Orly’s willingness to transfer her interest in the AG Companies to Sagi for \$100,000, the amount of Sagi’s promissory note, tends to support her claim that she relied upon his representation that the transfer was temporary and that the value of her interest would remain the same. “In any event, resolution of a reasonable reliance claim is generally left to a finder of fact” (*Talansky v Schulman*, 2 AD3d 355, 361 [1<sup>st</sup> Dept 2003]), and

thus, whether Orly's reliance was reasonable is an issue of fact. (*Country World v Imperial Frozen Foods Co.*, 186 AD2d 781, 782 [2d Dept 1992] ["In a fraud action, whether a party could have ascertained the facts with reasonable diligence so as to negate justifiable reliance is a factual question."])).

Relying on an expert report by Samuel Gunther, CPA, Sagi contends that Orly sustained no damages or injury because the management and consulting fees were properly paid to TPR and other affiliates and Sagi made a substantial investment in the business, whereas Orly withdrew a significant "allowance" without contributing to its management. The expert report was provided to Orly for the first time in support of Sagi's motion for summary judgment and Gunther has not been questioned with respect to his qualification and opinion. On the other hand and in connection with her cross motion to compel the production of information, *infra*, III, Orly offers the amended affidavit of Christopher Hunt, seeking business information that Sagi and his agents have allegedly failed to produce to support her claim that she sustained damages as a result of Sagi's fraud. Thus, whether Orly has sustained damages constitutes a disputed issue of fact as to which discovery remains outstanding. (CPLR 3212 [f]).

Sagi also argues that if Orly fails to sustain her substantive fraudulent inducement claim, the other two causes of action necessarily fail because they constitute remedies for the alleged fraud. Orly contends that the two causes of action are not wholly dependent upon the fraud claim, and that Sagi has failed to establish a *prima facie* case for summary dismissal of the fraud claim.

Absent a ground for awarding summary judgment to Sagi as to the fraudulent inducement claim, both the declaratory judgment and rescission causes of action likewise survive.

III. SAGI'S MOTION FOR DISCOVERY AND ORLY'S CROSS MOTION TO COMPEL  
(sequence 016)

Sagi seeks an order quashing Orly's additional discovery demands on nonparties Rochelle Fang, his mother-in-law and another shareholder in the Riverside Companies, and Jonas Gayer of Gayer & Associates, his personal tax accountant, and an order compelling Orly's deposition. Orly opposes and cross-moves for an order compelling discovery. Additionally, in the event Sagi fails to produce the requested financial information, Orly asks for an adverse inference to be drawn against Sagi, so as to preclude him from presenting evidence in opposition to her proof of damages at trial. Sagi opposes Orly's cross motion and reiterates his motion to quash the nonparty subpoenas and other discovery.

At oral argument on January 31, 2013, Sagi's counsel agreed to provide Orly within two weeks backup documentation for the 2008 tax returns for the Riverside Companies. (*See* Transcript, Jan. 31, 2013, at 42). At a status conference held on June 16, 2013, the parties stipulated that Sagi would endeavor to locate and produce for inspection all remaining agreed upon documents by July 18, 2013, and that he would sit for a continued day of deposition by August 16, 2013. The parties also stipulated, and it was so-ordered by the court, that in the event Sagi's motion for summary judgment motion is denied, they would agree to set a schedule for the remaining nonparty discovery at the next conference.

Accordingly, the instant discovery motions have been resolved to the extent provided in the so-ordered stipulation dated June 19, 2013 (ECFD 202). Other discovery motions, *eg*, sequences 019, 020, 023, and 024 relating to the discovery of other nonparties such as law firms, companies and specific individuals, have been resolved by separate court orders.

IV. ORLY'S MOTION TO SUPPLEMENT RECORD AND FOR SEALING ORDER  
(sequences 017, 025)

In sequence 017, Orly seeks an order permitting her to supplement the record relating to sequence 016 and her cross motion with purportedly newly acquired information concerning the criminal conviction of Sagi's tax accountant, Jonas Gayer, for submitting fraudulent tax returns in an unrelated matter, but using a scheme that allegedly resembles that employed here. In response, Sagi submits an affidavit in which he states that he does not believe that Gayer's alleged criminal misconduct impacted Riverside, and that he has taken steps to retain a new accounting firm for Riverside. As this motion is unopposed, the relief sought is granted and the record is deemed supplemented, as requested.

Via sequence 025, Orly seeks an order sealing exhibit 29, consisting of pages from the transcript of Sagi's July 27, 2012 deposition which are annexed to her attorney's statement in opposition to Sagi's summary judgment motion. The portion of the transcript sought to be sealed contains confidential information pertaining to Sagi, and the parties agree that the portion should be filed under seal pursuant to a confidentiality agreement. At oral argument, this court orally granted the motion, such that the relevant exhibit can be neither accessed nor viewed electronically. (*See* Transcript, Jan. 31, 2013, at 43). The Clerk of the Court was duly notified of the relief granted, and thus the relevant exhibit cannot be accessed or viewed electronically.

V. CONCLUSION

Based on all of the foregoing, it is hereby

ORDERED, that with respect to motion sequence number 016 and the related cross motion, the relief sought by the parties is granted to the extent set forth in the so-ordered

stipulation dated June 19, 2013 (ECFD 202); it is further

ORDERED, that with respect to motion sequence number 017, the relief sought by plaintiff is granted and the record is supplemented as requested; it is further

ORDERED, that with respect to motion sequence number 021, defendant's motion seeking summary judgment dismissing the complaint as against him is denied; and it is further

ORDERED, that with respect to motion sequence number 025, plaintiff's motion seeking a sealing order is granted, and exhibit 29 to the plaintiff counsel's statement, dated October 26, 2012, in support of plaintiff's opposition to the defendant's summary judgment motion is permitted to be filed under seal.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

Dated: July 3, 2013  
New York, New York