

Genger v Genger

2013 NY Slip Op 32458(U)

October 10, 2013

Sup Ct, New York County

Docket Number: 104249/07

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 104249/2007
GENGER, ARIE
vs
GENGER, SAGI
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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). _____

FILED

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

OCT 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

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

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OCT 11 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: 10/10/13

CR, 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: Part 55

-----X
ARIE GENGER,

Plaintiff,

Index No. 104249/07

-against-

DECISION/ORDER

SAGI GENGER and DALIA GENGER,

Defendants.

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

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

Papers	FILED	Numbered
Notice of Motion and Affidavits Annexed.....		<u>1</u>
Answering Affidavits.....	OCT 15 2013	<u>2</u>
Cross-Motion and Affidavits Annexed.....		<u>2</u>
Answering Affidavits to Cross-Motion.....	NEW YORK	<u>3</u>
Replying Affidavits.....	COUNTY CLERK'S OFFICE	<u>3</u>
Exhibits.....		<u>4</u>

Plaintiff Arie Genger 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"). Plaintiff now moves pursuant to CPLR § 3212 for summary judgment on the Notes. Plaintiff also moves for an Order (1) pursuant to CPLR § 3211(a)(1) and (7) dismissing the counterclaims asserted by Sagi in his amended answer; and (2) pursuant to 22 NYCRR § 130-1.1.g granting him sanctions against Sagi. Both motions are consolidated for disposition. For the reasons set forth below, plaintiff's motion for summary judgment is denied, plaintiff's motion to dismiss

Sagi's counterclaims is granted and plaintiff's motion for sanctions is denied.

The relevant facts are as follows. Plaintiff was the defendant in a divorce action commenced by his former wife, defendant Dalia Genger ("Dalia"), on January 31, 2002. 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.

Article XII of the Stipulation provides that Dalia has a right to certain audits of the plaintiff's assets. Specifically, upon Dalia's request, plaintiff shall allow Dalia 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 plaintiff owned any property on January 31, 2002 which was not listed on the schedules, plaintiff will pay to Dalia 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 plaintiff's part and plaintiff will pay Dalia one half of three times of that value. However, plaintiff will have an opportunity to rebut that presumption of willful error at an arbitration conducted in accordance with the terms of the Stipulation. The Stipulation also stated that the parties' son, Sagi, was to be appointed attorney-in-fact pursuant to a power of attorney, with the power to allocate non-liquid marital assets contained in the schedules so as to effectuate an equal distribution of those assets. Relying on the power of attorney, Sagi instructed that ownership of the Notes under which he was indebted to plaintiff, be transferred to Dalia. Specifically, Sagi attempted to transfer (1) Note 1, which was executed on July 30, 2001 in the

amount of \$11,700; (2) Note 2, which was executed on March 12, 2002 in the amount of \$100,000; (3) Note 3, which was executed on January 16, 2004 in the amount of \$50,000; and (4) Note 4, the stock purchase agreement, which was executed on March 1, 2006 and related to the sale of certain Canadian real estate interests.

Dalia commenced an audit pursuant to the terms of the Stipulation, which concluded that plaintiff did not disclose certain marital assets on the schedules contained in the Stipulation, including the Notes, as a result of which Dalia was entitled to additional payments. Pursuant to the unambiguous terms of the Stipulation, plaintiff commenced an arbitration to challenge the findings of the audit regarding the undisclosed assets, including the Notes. In the arbitration proceeding, plaintiff argued that because some of the Notes did not exist on January 31, 2002, they could not constitute marital property which needed to be disclosed or valued. In an award dated May 2008, the arbitrator awarded Dalia \$3.85 million in damages but declined to address the issue of the Notes on the ground that he lacked jurisdiction to do so.

On or about January 30, 2007, plaintiff filed a motion for summary judgment in lieu of complaint seeking summary judgment against Sagi on Note 1, Note 2 and Note 3. On March 29, 2007, plaintiff filed a second motion for summary judgment in lieu of complaint seeking summary judgment against Sagi on Note 4, the stock purchase agreement. In April 2008, both cases were consolidated before Justice Milton Tingling. The parties then agreed that the two motions would be withdrawn and a new complaint encompassing the entire dispute would be filed. On or about December 6, 2008, plaintiff filed a complaint to recover on all four Notes. Immediately thereafter, in January 2009, Sagi moved to dismiss the case on the grounds that the matter belonged in arbitration as Dalia claimed ownership rights in and to the Notes after they

were assigned to her pursuant to his authority as attorney-in-fact under the Stipulation and that the Notes were marital property. Additionally, in light of the fact that other matters relating to the Gengers had been assigned to Justice Jane S. Solomon, plaintiff moved to have the case before Justice Tingling assigned to her as well. Justice Solomon accepted the case.

On August 14, 2009, Justice Solomon granted Sagi's motion to dismiss on the grounds that (1) plaintiff did not own the Notes because they were all properly transferred to Dalia by Sagi, acting pursuant to his authority as attorney-in-fact; and (2) plaintiff had already challenged the transfer of the instruments in the post-judgment arbitration with Dalia arising out of their divorce and the fact that the arbitrator did not rule in his favor was binding. Plaintiff then appealed Justice Solomon's dismissal of the case. The First Department reversed Justice Solomon's decision finding that the attorney-in-fact agreement did not appear to grant Sagi the right to make the assignments in question and that there was no evidence that the alleged transfer of the Notes actually occurred. *See Genger v. Genger*, 87 A.D.3d 871, 873 (1st Dept 2011). Further, the First Department found that Sagi was removed as attorney-in-fact in the divorce proceeding precisely because he attempted to make the transfer. *See id.* The First Department also found that the arbitrator disavowed jurisdiction over issues regarding the Notes and specifically declined to render any award regarding those issues and thus, plaintiff's action against Sagi was not barred. *See id.* Finally, the First Department directed that Dalia be added as a defendant as "her rights, if any, in the subject instruments, might be inequitably affected by a judgment." *Id.*

On or about December 16, 2011, plaintiff filed an amended complaint, adding Dalia as a defendant in accordance with the First Department's decision. In January 2012, Dalia moved to

dismiss the amended complaint on the grounds that she owned the Notes in question and that they were marital property subject only to arbitration pursuant to the Stipulation. At the oral argument on the motion before this court, Dalia and Sagi entered into a stipulation which provides that

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.

In a decision entered on May 14, 2012, this court dismissed the action and compelled arbitration, finding that “the appropriate remedy to resolve any dispute between Arie and Dalia as to the ownership of these Notes is the audit and arbitration provisions of the Stipulation.” Plaintiff appealed this court’s decision, which was reversed by the First Department. Specifically, the First Department stated:

We disagree with the Supreme Court’s finding that it was the province of the auditor to make the initial determination as to whether the notes at issue were marital assets, and that it was then the province of the arbitrator to make the final determination if plaintiff Arie Genger chose to challenge the auditor’s determination. Arie and Dalia’s divorce settlement stipulation entitled Dalia to audit Arie’s assets and liabilities “as of the date of commencement of the parties’ matrimonial action, i.e., January 31, 2002.” The \$100,000 and \$50,000 notes that are being disputed were not issued until March 12, 2002 and November 17, 2003. As we noted on the prior appeal, neither the notes nor the purchase agreement contain arbitration clauses.

Plaintiff now moves for an Order (1) pursuant to CPLR § 3212 for summary judgment on the Notes; (2) pursuant to CPLR § 3211(a)(1) and (7) dismissing Sagi’s counterclaims asserted in his

amended answer; and (3) pursuant to 2 NYCRR § 130-1.1.g granting him sanctions against Sagi.

The court first turns to plaintiff's motion for summary judgment. "To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms." *American Realty Corp. of NY v. Sukhu*, 90 A.D.3d 792, 793 (2d Dept 2011), citing *Lugli v. Johnston*, 78 A.D.3d 1133, 1135 (2d Dept 2010). "Once the plaintiff submits evidence establishing these elements, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bone fide defense." *Id.* at 793.

In the instant action, plaintiff has established his prima facie right to summary judgment to collect on Note 2, Note 3 and Note 4 as he has demonstrated the existence of the Notes, which were signed by Sagi, which contain Sagi's unequivocal and unconditional obligation to repay and Sagi's failure to pay in accordance with the Notes' terms. However, plaintiff has failed to establish his prima facie right to summary judgment to collect on Note 1 as he has not demonstrated Sagi's "unequivocal and unconditional obligation to repay" pursuant to the Note. Note 1, executed on July 30, 2001, states

FOR VALUE RECEIVED, the undersigned, Orly Genger (the "Maker"), hereby unconditionally promises to pay to the order of Arie Genger ("Payee"), on July 31, 2009...the principal amount of ELEVEN THOUSAND SEVEN HUNDRED DOLLARS (\$11,700).

Although the note is signed by Sagi, it does not establish that Sagi has the obligation to repay as it is Orly Genger, Sagi's sister, who maintains that obligation pursuant to the Note. This court

need not address plaintiff's entitlement to summary judgment on the Note pursuant to the doctrine of mutual mistake as Sagi has raised an issue of fact sufficient to defeat plaintiff's motion for summary judgment on all four of the Notes.

Sagi's initial assertion that summary judgment should be denied because there exists an issue of fact as to the ownership of the Notes is without merit. Sagi bases this argument on the assertion that he validly transferred the Notes to Dalia pursuant to his authority under his power-of-attorney. However, Sagi has not demonstrated that he had the authority pursuant to the power-of-attorney to transfer the Notes in question. As the First Department has already held,

The power of attorney, read in conjunction with the stipulation pursuant to which the power of attorney was executed, gave Sagi the power to dispose of those assets that were listed on the schedule attached to the power of attorney; however, neither the notes nor the stock purchase agreement was listed on the schedule. Further, while the stipulation states that Sagi had the power to sell assets and distribute the proceeds from the sale, it nowhere states that he had the power to transfer or assign assets from one party to the other.

Genger, 87 A.D.3d at 873. Additionally, Sagi could not have had the authority to transfer Note 2 and Note 3 to Dalia based upon the First Department's finding that they were not marital assets as they were not in existence at the time the parties' divorce proceeding was commenced.

Specifically, the First Department found that

Arie and Dalia's divorce settlement stipulation entitled Dalia to audit Arie's assets and liabilities "as of the date of commencement of the parties' matrimonial action, i.e., January 31, 2002." The \$100,000 [Note 2] and \$50,000 [Note 3] notes that are being disputed were not issued until March 12, 2002 and November 17, 2003.

Genger v. Genger, 107 A.D.3d 576 (1st Dept 2013). Sagi's reliance on a chain of e-mails between himself and plaintiff in which plaintiff allegedly consented to the assignment of the

Notes to Dalia is also unavailing as the e-mails do not demonstrate that plaintiff consented to any such assignment.

However, Sagi has raised an issue of fact sufficient to defeat plaintiff's motion for summary judgment on all four Notes based on his assertion that the parties never intended for the Notes to be enforceable. Sagi claims that the Notes were executed between him and plaintiff "as tax planning mechanisms" and "were never intended to be enforced." Courts have found, specifically in regard to promissory notes, that when a party to a note contests the enforceability of the note, an issue of fact is created sufficient to defeat summary judgment. *See Greenleaf v. Lachman*, 216 A.D.2d 65 (1st Dept 1995), lv. denied, 88 N.Y.2d 802 (1996). In *Greenleaf*, plaintiff and defendant executed a promissory note in the amount of \$500,000. When the relationship between the parties soured, plaintiff commenced an action pursuant to CPLR § 3213 to collect on the note. Defendant opposed the motion on the ground that the parties never intended for the note to be enforced and the Supreme Court denied the motion. On appeal, the First Department affirmed and held:

The issue before this Court is whether parol evidence is admissible to prove that the loan agreement, though facially unambiguous, was nonetheless unenforceable because the parties never considered it a binding debt. The general rule is that parol evidence is inadmissible to contradict, vary, add to, or subtract from the terms of an integrated agreement such as the instant note (citations omitted). There are some exceptions to this rule, however, and [defendant] argues that one, which allows the admission of parol evidence not to vary the terms of the writing, but to show that a "writing, although purporting to be a contract, is, in fact, no contract at all" ...is applicable.

Id. At 65-66. In holding that such exception applied to the case, the First Department explained:

Courts have declined to apply the exception in somewhat similar situations, on public policy grounds (citations omitted), where

allowing the debtor to escape the terms of the illusory bargain after the tax evading lender had disappeared from the equation would have the detrimental effect of allowing the scheme to succeed. Here, however, the facts present subtly different concerns which militate in favor of applying the exception to nullify the contract. In this case the parties to the initial transaction are identical to the litigants before the court, the beneficiary of the tax scheme has not disappeared from the calculus, and there is no third party estate whose interest is involved. In this situation, enforcement of the note in favor of the plaintiff would, in essence, allow the instigator and sole beneficiary of the initial tax evasion scheme also to reap the financial benefit of the illusory debt.

Here, as in *Greenleaf*, the parties to the Notes are identical to the litigants, plaintiff, the purported beneficiary of the alleged tax scheme has not disappeared from the calculus and there is no third party estate whose interest is involved. Therefore, plaintiff's motion for summary judgment to collect on the Notes is denied.

The court next turns to plaintiff's motion to dismiss Sagi's counterclaims. As an initial matter, plaintiff's motion to dismiss Sagi's counterclaims on the ground that his amended answer containing the counterclaims was untimely pursuant to CPLR § 3025(a) is denied. Pursuant to CPLR § 3025(a), "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." CPLR § 3025(a). Sagi served his original answer to the complaint on July 1, 2013. Sagi then served an amended answer on July 22, 2013 without leave of court. Although Sagi's time to serve an amended answer as of right expired on July 21, 2013, Sagi was allowed an extra day for service as July 21, 2013 was a Sunday. *See Jones v. Coughlin*, 125 A.D.2d 883 (3d Dept 1986) ("Since February 16 was a Sunday, and the following day was a national holiday, respondents' service of answering papers

on February 18 was timely.”) Thus, Sagi’s amended answer was timely.

However, plaintiff’s motion to dismiss Sagi’s counterclaims on the ground that they fail to state a cause of action is granted. On a motion addressed to the sufficiency of the pleadings, the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a [claim] should not be dismissed on a pleading motion so long as, when [defendant’s] allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

In the instant action, plaintiff’s motion to dismiss Sagi’s first counterclaim for contribution and indemnification on the ground that it fails to state a cause of action is granted. A claim for “indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer.” *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by common law. *Id.* Implied indemnity allows one who “is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer.” *Id.* Additionally, “in the absence of a direct tort claim against it by a third party, the alleged tortfeasor may not properly seek contribution or common law indemnification from the claimant whether by means of a

counterclaim or otherwise, since the relief sought by the tortfeasor does not constitute an independent cause of action.” *Capstone Enterprises of Port Chester, Inc. v. Board of Education Irvington Union Free School District*, 106 A.D.3d 856, 859 (2d Dept 2013).

As an initial matter, the first counterclaim fails to state a cause of action for contractual indemnification. The first counterclaim alleges that “Sagi has already incurred, and continues to incur, injury as a result of his service as attorney-in-fact under the Stipulation. As a matter of fairness and equity, Arie should indemnify Sagi for, and/or contribute to, the reimbursement of that injury.” The first counterclaim fails to allege any provision of a contract which would sustain a claim for contractual indemnification against plaintiff. To the extent Sagi requests leave to replead his first counterclaim based on the allegation that he is entitled to contractual indemnification from plaintiff pursuant to the Stipulation signed by plaintiff and Dalia in their divorce action, such request is denied. Pursuant to Article V, Section 3(a) of the Stipulation,

The Husband shall indemnify, defend, and hold harmless the Wife, from and against 100% of any and all liabilities, damages, claims, actions, losses, settlements, penalties, judgments or obligations...including her reasonable counsel and other professional fees, expenses and costs, including but not limited to or arising from, existing, threatened and/or future actions, or proceedings naming the Wife...as a party, arising out of, or due to, events that occurred on or before the date of this Agreement. In addition, the Husband shall indemnify, defend and hold harmless the Wife from and against 100% of any and all Claims which arise by reason of any transaction made hereunder between the Wife or any affiliate of the Wife and any third party without sufficient consideration.

While plaintiff agreed to indemnify Dalia pursuant to the Stipulation, Sagi was not a signatory to the Stipulation and therefore cannot take advantage of said indemnification clause. Sagi’s assertion that he is “the successor to the rights...of Dalia under the Stipulation of Settlement” as

was alleged in a separate action filed by plaintiff (the “TPR case”) is without merit. The TPR case involved a continued fight among the parties relating to TPR Investment Associates, a family investment company that Dalia took control of after the divorce. Pursuant to that complaint, “Sagi, individually and as an officer of TPR...was the successor to the rights and liabilities of Dalia under the Stipulation of Settlement.” However, that allegation relates to Sagi’s responsibility as an officer and shareholder of TPR to protect the rights of family members after Dalia appointed Sagi as CEO of that company and has no relation to Sagi’s ability to take advantage of the indemnification clause in the Stipulation.

Additionally, the first counterclaim fails to state a cause of action for common-law indemnification and contribution. As an initial matter, the first counterclaim fails to allege that any third party has asserted a direct tort claim against Sagi that would give rise to common-law indemnification or contribution from plaintiff. To the extent Sagi seeks leave to replead his counterclaim based on the allegation that he is entitled to common-law indemnification and contribution from plaintiff on the ground that plaintiff allegedly coerced Sagi into his position as attorney-in-fact and thereafter, he suffered damages as a result, including being sued by Orly Genger is also without merit. To the extent that Sagi is a defendant in a lawsuit brought by Orly Genger on the basis of his conduct as attorney-in-fact, Sagi may only seek indemnification and contribution from plaintiff in that action. This action was brought against Sagi based solely on his execution of the four Notes. As Sagi has not shown that plaintiff alleges any claim against him based on his conduct as attorney-in-fact, Sagi may not assert a claim for common-law indemnification or contribution in this action.

Plaintiff’s motion to dismiss Sagi’s second counterclaim for breach of fiduciary duty is

also granted. To sufficiently plead a cause of action for breach of fiduciary duty, a party must allege “(1) the existence of a fiduciary relationship, (2) misconduct by the [other party], and (3) damages directly caused by the [other party’s] misconduct.” *Smallwood v. Lupoli*, 107 A.D.3d 782, 784 (2d Dept 2013). The second counterclaim alleges that “Arie, as Sagi’s father, and knowledgeable of Sagi’s then-incapacitation, owed Sagi a duty to not knowingly take advantage of Sagi during a period of incapacitation.” It further states that “Arie breached that duty when he convinced Sagi to enter into the Stock Purchase Agreement referenced in the [complaint]” and that “Sagi was injured as a result of that breach.” However, Sagi’s second counterclaim fails to state a cause of action for breach of fiduciary duty as it fails to allege the existence of a fiduciary relationship between plaintiff and Sagi. To the extent Sagi seeks leave to replead his second counterclaim to allege a fiduciary relationship based on the allegation made in the TPR case that “[a]s a fiduciary Sagi, individually, and as an officer of TPR, owed a duty of fidelity and undivided loyalty to Arie, Orly, and the Orly Trust regarding the TRI shares,” such request is denied. That statement involved Sagi’s duties in his role as CEO of TPR and his control over certain shares of stock and does not relate to any duties that existed between plaintiff and Sagi upon executing Note 4. Thus, as Sagi has failed to demonstrate legal merit for any of these allegations in the context of this lawsuit, his counterclaims must be dismissed and his request for leave to replead his counterclaims is denied.

Finally, that portion of plaintiff’s motion which seeks an Order granting him sanctions against Sagi is denied as plaintiff has failed to provide a sufficient basis for such relief.

Accordingly, plaintiff’s motion for an Order pursuant to CPLR § 3212 for summary judgment on the Notes is denied; plaintiff’s motion for an Order pursuant to CPLR § 3211

