| **Genger v Genger** |
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| 2014 NY Slip Op 30950(U) |
| April 10, 2014 |
| Sup Ct, New York County |
| Docket Number: 651089/10 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 12

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ARIE GENGER and ORLY GENGER, in her individual capacity and on behalf of THE ORLY GENGER 1993 TRUST,

Plaintiffs,

-against-

SAGI GENGER, TPR INVESTMENT ASSOCIATES, INC., DALIA GENGER, THE SAGI GENGER 1993 TRUST, ROCHELLE FANG, individually and as trustee of THE SAGI GENGER 1993 TRUST, GLENCLOVA INVESTMENT COMPANY, TR INVESTORS, LLC, NEW TR EQUITY I, LLC, NEW TR EQUITY II, LLC, JULES TRUMP, EDDIE TRUMP AND MARK HIRSCH,

Defendants.

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SAGI GENGER, individually and as assignee of THE SAGI GENGER 1993 TRUST, and TPR INVESTMENT ASSOCIATES, INC.,

Cross-Claimants, Counterclaimants and Third-Party Claimants,

-against-

ARIE GENGER, ORLY GENGER, GLENCLOVA INVESTMENT COMPANY, TR INVESTORS, LLC, NEW TR EQUITY I, LLC, NEW TR EQUITY II, LLC, JULES TRUMP, EDDIE TRUMP, MARK HIRSCH, TRANS-RESOURCES, INC., and WILLIAM DOWD,

Cross-Claim Defendants, Counterclaim Defendants, and/or Third-Party Claim Defendants.

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Index No. 651089/10

Motion Seq. No. 27

**DECISION AND ORDER**

BARBARA JAFFE, JSC:

This decision and order addresses motion sequence 27 (NYSCEF 553), in which plaintiff

Arie Genger moves pursuant to CPLR 6201(3) for an order attaching approximately $7.4 million, representing the proceeds of TPR Investment Associates, Inc.'s (TPR) sale of Arie's equity shares in Trans-Resources, Inc. (TRI), a TPR subsidiary, to the so-called Trump Group. TPR opposes the motion. (NYSCEF 627).

## I. PERTINENT BACKGROUND

In motion sequence 024, Arie sought a preliminary injunction and temporary restraining order enjoining and restraining TPR and its president Sagi Genger, Arie's estranged son, from using or spending $7.4 million in proceeds from the sale of Arie's shares in TRI. I declined to sign the proposed order and set forth my reasoning in an opinion. (NYSCEF 517). Arie appealed and moved for a preliminary appellate injunction. In a decision dated August 20, 2013, the Appellate Division, First Department, dismissed the appeal. (NYSCEF 712).

Immediately thereafter, Arie moved for the same relief based on a different legal theory (motion sequence 026), seeking an order of attachment pursuant to CPLR 6201. On or about August 30, 2013, I declined to sign the proposed order. (NYSCEF 592). Arie then sought an interim stay of my order (NYSCEF 597), which was denied by the Appellate Division.

## II. DISCUSSION

Pursuant to CPLR 6201, "[a]n order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled . . . to a money judgment against one or more defendants," when "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . . ." (CPLR 6201[3]).

In support of the instant motion, Arie asserts, among other things, that: 1) TPR/Sagi has attempted to transfer $4 million of $10.3 million yielded from the sale by TPR to the Trump Group of shares of the Orly Genger Trust in TRI to an off-shore entity, and that this court entered an order in a related action under Index No. 109749/2009 disapproving the transfer and imposing sanctions on TPR for violating prior court injunctions (NYSCEF 418); 2) $26.7 million in sales proceeds payable to TPR on account of the Sagi Trust shares in TRI sold to the Trump Group were dissipated; 3) Sagi used TPR assets for his personal use, *eg,* construction expenses for renovating his residence, legal and professional fees, and for his mother-in-law; 4) expert reports produced in connection with an investigation into AG holdings, a TPR affiliate, reflect a pattern of secreting and manipulating assets and violating tax laws; 5) a consent judgment against Sagi was entered with the Securities Exchange Commission due to his fraudulent conduct while he served as the chief executive officer of a company named Lumenis; 6) Sagi, by himself and through his relatives and friends, controls TPR's finances and assets; and 7) Sagi has testified that TPR had little or no assets in 2008. (NYSCEF 562, at 14-24).

Arie also maintains that the $7.4 million he seeks to attach, which represents the minimum amount of his unjust enrichment claim, "exceeds all of TPR's counterclaims known to me, which I maintain are meritless and are not conceded" (NYSCEF 554), and that there is "no doubt that the $7.4 million, which is or already has been released to TPR by the Trump Group, will be dissipated or placed in one of Sagi's and/or TPR's off-shore accounts beyond the reach of any judgment creditor, leaving [him] without any means to enforce a judgment against TPR." (NYSCEF 562, at 12). Thus, at oral argument of this motion, Arie's counsel expressed a desire to "reopen the attachment motion . . . to see where the [$7.4 million] went, to see if we can

establish that they have been moved out the jurisdiction . . . misused or dissipated" and to take "discovery as to where – they have now moved their principal place of business out of New York." (NYSCEF 651, at 33-34). Counsel also accused TPR of "stonewalling" Arie's requests for discovery, and argued that the discovery would enable Arie to prove that TPR has been dissipating assets. (*Id.* at 35).

In opposition to plaintiff's motion, TPR contends that an order of attachment should not be entered because, among other things: 1) there has been no dissipation of assets by TPR; 2) the unjust enrichment claim asserted against TPR is not likely to succeed on the merits; and 3) TPR's counterclaim against Arie is worth far more than his affirmative claim against TPR. (NYSCEF 627 at 13-20). TPR also alleges that because "the Sagi Trust and TPR were forced to sell the TRI shares to the Trump Group for far below fair market value," the value of its counterclaim is "at least $100 million." (NYSCEF 627 at 20).

TPR disputes all of the assertions set forth by Arie in support of this motion. While it concedes having violated court orders enjoining it from taking any action that might encumber the Orly Trust, thereby rendering the settlements void or voidable and subjecting it to sanctions, TPR asserts that a fraudulent intent has not be established sufficient to warrant an attachment. TPR also denies plaintiff's allegations of fraud (NYSCEF 627, at 13-18), alleging rather, that it was Arie who committed fraud and misconduct in this case (*id.* at 3-9).

In *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, the First Department set forth the standard for obtaining an order of attachment. "The plaintiff must show a viable cause of action and the probability that it will succeed on the merits, that one or more grounds exist for attachment . . . and that the amount demanded from the defendant exceeds all

counterclaims known to the plaintiff." (109 AD3d 49, at 59; CPLR 6212 [a]). And, as an order of attachment is a harsh remedy, the prayer for relief must be "construed narrowly in favor of the party against whom the remedy is invoked." (*Id.*). A likelihood of success on the merits may be established even if the facts are in dispute and the evidence is inconclusive. (*Bell & Co., PC v Rosen*, 114 AD3d 411 [1st Dept 2014]; *Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4, 5 [1st Dept 2003]).

The requirement that the amount demanded by the plaintiff exceed all counterclaims known to the plaintiff applies only to those counterclaims "the validity of which the plaintiff is willing to concede." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C6212:2; *see also Freedman v Wilson Sec. Corp.*, 31 AD2d 627, 628 [1st Dept 1968] ["the burden imposed upon the plaintiffs is satisfied by a statement that the sum claimed from defendants is due over and above all counterclaims which plaintiffs are willing to concede as just"); *accord Mishcon de Reya New York LLP v Grail Semiconductor, Inc.*, 2011 WL 6957595 at *10, 2011 US Dist LEXIS 150998 at *38 [SD NY]).

Here, as I have already found that Arie has demonstrated, *prima facie*, his claim of unjust enrichment (NYSCEF 285), and in light of the Delaware Chancery Court's intimation that allowing TPR/Sagi to take the family wealth would be inequitable under the circumstances (NYSCEF 554, Exh. E at 72-74), Arie's claim may well succeed. That the Delaware court spoke in the context of Orly's claims against TPR/Sagi is immaterial, as TPR sold the Arie shares and the Orly Trust shares to the Trump Group in the same side letter agreement and within the same transaction. Moreover, there has been no judicial determination that the unjust enrichment claim depends on Arie's beneficial ownership of the Arie shares. Thus, plaintiff has demonstrated that

he has a viable claim and that there is a probability of success on the merits, thereby satisfying the first prong of the standard set forth in *VisionChina* and CPLR 6212 (a).

And, as Arie does not concede that the value of the counterclaim exceeds his claim, and given the absence of any substantiation for TPR's assertion that it and Sagi were forced to sell the TRI shares to the Trump Group for well below market value, plaintiff has also satisfied the third prong.

However, while the transactions may evince a scheme by TPR to dissipate the Orly Trust assets, a fraudulent intent has not been conclusively established, at least for purposes of issuing an attachment order. (*Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12, 13 [1st Dept 2004] ["[h]owever, removal, assignment or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits.").

Accordingly, based on the foregoing, it is hereby

ORDERED, that plaintiff's motion seeking an order of attachment (motion sequence number 27) is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

Dated: April 10, 2014
New York, New York