

**Genger v Genger**

2014 NY Slip Op 31322(U)

May 19, 2014

Supreme Court, 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  
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	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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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"). Defendant Dalia Genger ("Dalia") now moves for an Order pursuant to CPLR § 3103(a) vacating and quashing plaintiff's notice to take her deposition on the grounds that she no longer has any interest in this proceeding and she has no relevant testimony to provide and thus, the deposition will unreasonably annoy her and cost her unnecessary expense and prejudice. For the reasons set forth below, Dalia's motion is denied.

The relevant facts are as follows. Plaintiff was the defendant in a divorce action

commenced by his former wife 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.

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 December 6, 2008, plaintiff commenced the instant action to recover on all four Notes.

The parties then engaged in significant motion practice, the result of which was, *inter alia*, that Dalia was added as a party to the action. Plaintiff then moved 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. In October 2013, this court issued a decision denying plaintiff's motion for summary judgment to collect on the Notes on the ground that an issue of fact exists as to whether the parties intended for the Notes to be enforceable based on Sagi's assertion that the Notes were executed between him and plaintiff "as tax planning mechanisms" and "were never intended to be enforced." Additionally, this court granted plaintiff's motion to dismiss Sagi's counterclaims asserted in his amended answer and denied that portion of plaintiff's motion for sanctions against Sagi. Dalia now moves for a protective order pursuant to CPLR 3103(a) vacating and quashing plaintiff's notice to take her deposition.

CPLR § 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution and defense of an action...by: (1) a party...[and] (2) a person who possessed a cause of action or defense asserted in the action." Pursuant to CPLR § 3103(a), the

court, upon motion or on its own initiative, may issue a protective order “regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” “The proponent of such a motion must make an appropriate factual showing to be entitled to such relief.” *Willis v. Cassia*, 255 A.D.2d 800, 801 (3d Dept 1998). Indeed, “[t]he scope and supervision of discovery is generally within the sound discretion of the court where the action is pending.” *Carella v. King*, 198 A.D.2d 567, 568 (3d Dept 1993). Further, “[i]f the disclosure sought is of relevant material and does not come under any of the immunities...of CPLR 3101..., it will be a rare case in which CPLR 3103 is applied to deny disclosure altogether.” McKinney’s Consol. Laws of N.Y., Practice Commentaries, CPLR C3103:1.

In the instant action, Dalia’s motion for a protective order pursuant to CPLR § 3103(a) vacating and quashing plaintiff’s notice to take her deposition is denied. As an initial matter, Dalia has failed to make the appropriate factual showing of unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice as she merely alleges that she will be inconvenienced by a deposition. Additionally, Dalia has failed to show that her deposition is not relevant to the instant action. Dalia’s conclusory assertion that she “no longer has any interest in this proceeding” and that she does not have “any relevant testimony to give” is without merit. Sagi’s remaining defense in this action is that he does not have to pay the amount due and owing on the Notes as they were never intended to be enforced because they were given to him by Arie as gifts for tax planning purposes. However, at some point after Sagi obtained the Notes from Arie, he purported to transfer the Notes to Dalia, who then extended the due dates of the Notes, allegedly so that Sagi would not have to pay them. Thus, Dalia’s testimony is relevant as to

