

Genger v Genger

2014 NY Slip Op 31484(U)

June 9, 2014

Sup Ct, New York County

Docket Number: 109749/09

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
ORLY GENGER, in her individual capacity and
on behalf of the Orly Genger 1993 Trust
(both in its individual capacity and on
behalf of D & K Limited Partnership),

Index No. 109749/09

Motion seq. no. 030

Plaintiff,

INTERIM DECISION

-against-

DALIA GENGER, SAGI GENGER, LEAH FANG,
D & K GP LLC, and TPR INVESTMENT ASSOCIATES,
INC.,

Defendants.

-----X
BARBARA JAFFE, JSC:

Plaintiff seeks an order directing entry of a money judgment against defendants. Her motion arises from my decision and order dated May 29, 2013 in which, among other things, I imposed sanctions on defendants for violating earlier court injunctions. (NYSCEF 418). The May 29 decision and order resolved motion sequence numbers 013, 014, 015 and 016, familiarity with which is assumed.

I. BACKGROUND

In my May 29 decision and order, I ordered Dalia Genger, Sagi Genger, Leah Fang, D&K GP LLC (D&K GP), and TPR Investment Associates, Inc. (TPR) to pay for “plaintiff’s costs in preparing and filing the cross motions and opposing defendants’ motions” (*id.* at 18), which plaintiff alleged totaled \$139,541.83 in legal fees and costs. (NYSCEF 452, 453). Defendants appealed the May 29 order to the Appellate Division, which, by decision dated March 4, 2014, modified the order. (*Genger v Genger*, 115 AD3d 421 [1st Dept 2014]).

Although the Appellate Division affirmed that portion of the order with respect to TPR and D&K GP, and found that they had disobeyed a lawful mandate of this court and must pay plaintiff's fees and costs (*id.* at 422), it reversed the order as to co-defendants Dalia and Sagi on the ground that "plaintiff's cross motion for sanctions was improper as against Dalia and Sagi, who were not movants." (*Id.*). The Court also observed, however, that "Dalia - as trustee of Orly's Trust - had a conflict of interest in releasing herself as part of the October 2011 and March 2012 settlement agreements," and held that because Fang had retired as trustee of Orly's Trust in 2008, and "had nothing to do with the 2011 and 2012 settlements, there was no basis for sanctioning [her]." (*Id.* at 422-423).

After entry of the appellate decision, plaintiff submitted a supplemental affirmation seeking an order directing the entry of judgment against TPR and D&K GP in the sum of \$212,124.85, including an additional \$72,583.02 in fees and costs incurred in defending the appeal. (NYSCEF 618). TPR and D&K GP jointly opposed. (NYSCEF 620). Thereafter, plaintiff filed a second supplemental affirmation requesting an additional \$13,780.30, which purportedly reflects fees and costs incurred through April 30, 2014, for a revised total of \$222,905.15. (NYSCEF 641).

II. DISCUSSION

A. Contentions

In their supplemental opposition, which incorporates some of the arguments set forth in their brief opposing plaintiff's original application (NYSCEF 465), TPR and DK GP argue, in pertinent part, that: (1) the additional \$72,583.02 should be disregarded absent an award of fees and costs for the appeal; and (2) the original \$139,541.38 amount should be reduced by the

matters attributable to (a) plaintiff's motion for a so-called "Pre-Judgment Order of Attachment" which I had denied; (b) plaintiff's motion for sanctions against Sagi, Dalia, and Fang; (c) plaintiff's opposition to Fang's motion for summary judgment; and (d) "other unrelated matters" filed under NYSCEF 464-466. They assert that they "cannot lawfully be assessed costs for sanction motions which were reversed, and for unrelated and unsuccessful litigation efforts involving other parties." (NYSCEF 620, at 2-3).

B. Analysis

It is undisputed that the appeal was pursued by TPR and D&K GP and co-defendants in connection with my May 29 order and constituted litigation of the issues addressed therein. As the Appellate Division affirmed my holdings that TPR and D&K GP were properly ordered to pay plaintiff's fees and costs, and that the releases under the settlements were voidable at plaintiff's option (*Genger*, 115 A3d at 422), the fees and costs related to the appeal are properly awarded to plaintiff, to the extent that they are reasonable.

It is also undisputed that under the settlement agreements, Dalia, as trustee of the Orly Trust, and Sagi, the president/CEO of TPR, were beneficiaries of the settlement agreements together with TPR and D&K GP, as they were purportedly released from all liabilities for their conduct with respect to the settlements. Also, TPR and D&K GP had sought a court order, for themselves and on behalf Sagi and Dalia, to amend their answers to add the defense of release, in response and in opposition to plaintiff's complaint against them. Moreover, the Appellate Division noted that plaintiff had petitioned the Surrogate's Court to remove and surcharge Dalia, and that Dalia had a "conflict of interest in releasing herself" as part of the settlement agreements. (*Genger*, 115 AD3d at 423). Additionally, Sagi, on behalf of D&K GP, signed an

agreement entitled “Meeting of Partners of D&K LP,” pursuant to which the D&K LP partners’ assets were pledged in connection with the 1993 Note, and that D&K GP was, at all relevant times, owned by Dalia, who held in it a 99 percent interest. Thus, even though the Appellate Division reversed the May 29 order as against Sagi and Orly on procedural grounds, corporate defendants TPR and D&K GP, which are and were controlled and/or owned by Sagi and Dalia, may be held liable for payment of all fees and costs properly incurred by plaintiff in connection with the order and appeal. (*Genger*, 115 AD3d at 423).

Plaintiff requested various forms of relief in her motion which sought, as a secondary matter, a prejudgment order of attachment. The primary relief was for a temporary restraining order and a preliminary injunction to enjoin defendants from encumbering the Orly Trust with debt or selling its assets in connection with the proposed settlements and the so-called “Manhattan Safety transactions.” Because plaintiff also asked that I order defendants to post, as security, \$4.44 million in assets in connection with the foregoing, which was similar to a request for a prejudgment order of attachment, I denied it. The secondary relief was a small part of the entire motion. (*See* NYSCEF 418, at 17). As many of plaintiff’s other requests were granted, there is no basis for disallowing the costs and fees relating to the entire motion. Consequently, only that portion of the fees and costs related to the attachment request should be subtracted.

As NYSCEF 464 through 466 are directly related to the instant motion, the costs and fees associated with them may be awarded, despite defendants’ contention that they concern unrelated matters.

The Appellate Division’s finding that defendants had disobeyed a “lawful mandate of the court” and were “properly ordered” to pay for such fees and costs persuades me that the fees and

costs sought are not disproportionate to their liability, notwithstanding defendants' argument that the settlement agreements were attempts to settle litigation claims. (*Genger*, 115 AD3d 422).

III. CONCLUSION

Plaintiff's request for fees and costs incurred in connection with this motion is granted to the extent set forth above, and plaintiff is directed to submit revised billing and other documentation consistent with the relief granted. Such documentation shall exclude the legal services performed by plaintiff's counsel on unrelated matters, if any, as well as privileged communications. Mindful that the parties are highly litigious and that they have been unable to settle this motion and others, I hereby appoint a Special Referee to hear and report with recommendations with respect to any fee and cost dispute that may arise in connection with this motion.

Accordingly, based on all of the foregoing, it is hereby

ORDERED that plaintiff's application seeking an order directing the clerk of the court to enter a money judgment against defendants D&K GP LLC and TPR Investment Associates, Inc. is granted to the extent set forth hereinabove; and it is further

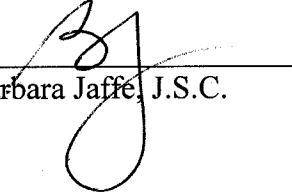
ORDERED that, pursuant to CPLR 4311, the issue regarding the amount of attorney's fees and costs (imposed as sanctions against defendants) is referred to a Special Referee, to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation by the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall hear and determine all issues arising from such application; and it is further

ORDERED that plaintiff's application is held in abeyance, pending receipt of the report

and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that, within 30 days from the date of this decision and order, a copy of this decision and order with notice of entry, together with a completed Information Sheet, shall be served by plaintiffs' counsel upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar on the Special Referee's Part (Part 50R) for the earliest convenience date.

ENTER:


Barbara Jaffe, J.S.C.

Dated: June 9, 2014
New York, New York