Genger v Genger
2015 NY Slip Op 30008(U)
January 7, 2015
Supreme Court, New York County
Docket Number: 651089/2010
Judge: Barbara Jaffe

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS 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, MARK HIRSCH, and TRANS-RESOURCES, INC.,

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, Counterclaim and/or Third-Party Claim Defendants.

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Index No. 651089/2010

Motion sequence no. 032

DECISION AND ORDER

BARBARA JAFFE, JSC:

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Cross claim defendants Glenclova Investment Co., TR Investors, LLC, New TR Equity I, LLC, New TR Equity II, LLC, Jules Trump, Eddie Trump, Mark Hirsh (collectively, the Trump Group) and Trans-Resources, Inc. (TRI) seek an order of this court pursuant to CPLR 213, 214, 3016(b), and 3211(a) (1), (3), (5), and (7) dismissing the first, second, third, sixth, seventh, and tenth cross claims against the Trump Group and TRI in TPR/Sagi's first amended answer, counterclaims, cross claims, and third-party complaint. (NYSCEF 432). The Trump Group and TRI seek to dismiss all six cross claims, namely: fraud and aiding and abetting fraud; aiding and abetting a breach of fiduciary duty; breach of a stockholders agreement; tortious interference with a transfer agreement; tortious interference with prospective economic relations; as well as contribution and indemnification.

By notice dated August 23, 2014, TPR/Sagi voluntarily dismissed the cross claims against the Trump Group, but not against TRI. (NYSCEF 1085). For the reasons stated herein, the instant motion to dismiss is granted in its entirety.

I. BACKGROUND

The facts of this case have been set forth in great detail in prior decisions of this court, the Delaware courts, the United States District Court for the Southern District of New York (SDNY court), and the Appellate Division, First Department, each of which has fully described the facts relating to the protracted litigation among the Trump Group and the members of the Genger family for control of TRI, a company that makes and sells chemicals for agricultural use. For purposes of the instant motion, only the relevant facts are summarized below.

Arie Genger and Dalia Genger are the father and mother of their son Sagi Genger and daughter Orly Genger. Before 2001, TRI was a wholly-owned subsidiary of TPR, a company

owned by the Genger family. Arie owned 51 percent of TPR and the remainder interest was held by a limited partnership composed of Dalia, the Sagi Trust and the Orly Trust.

In 2001, when TRI was almost insolvent, Arie sought aid from the Trump Group of investors, which agreed to invest in, and become a minority stockholder of, TRI with an interest of 47.15 percent. They entered into a stockholders agreement, pursuant to which if any party sought to transfer or sell its TRI shares to anyone other than Arie, that party was required to give written notice to the other TRI shareholders, each of which would have a right of first refusal. It was also agreed that the failure to comply with the transfer restriction would render the transfer void, thereby entitling the non-transferring stockholders to purchase the transferred shares at the fair market value as of the time of the transfer. Based on the Trump Group/TRI's unrebutted assertions, Sagi participated with Arie in the negotiation of the TRI stockholders agreement. (NYSCEF 733, at 5, 6 and 14; NYSCEF 888, at 1, 4, 6 and 7). These unrebutted assertions have significant legal consequences and ramifications, as discussed below.

In October 2004, after a contentious divorce proceeding, Arie and Dalia entered into a settlement stipulation that provided for a division of their marital property. It is uncontroverted that Sagi assisted in negotiating that settlement as well (NYSCEF 1085, at 4), pursuant to which Arie and Dalia agreed to instruct TPR to transfer its TRI shares, or 52.85 percent of TRI, to the Genger family members, namely, to Arie himself, who was a permitted transferee under the stockholder agreement, and to the Sagi Trust and the Orly Trust, non-permitted transferees. Arie falsely represented in the settlement agreement that, except for TPR, no consent was required for the transfer of the TRI shares. (*See TR Invs., LLC v Genger*, 2010 WL 3279385, *10 [Del Ch Aug. 9, 2010], *affd* 26 A3d 180 [Del 2011]).

On October 26, 2004, Arie resigned from TPR. Soon thereafter, on October 29, 2004, as agreed, Arie transferred his TPR shares to Dalia, TPR transferred its TRI shares to Arie and the Sagi and Orly trusts (collectively, the 2004 transfers), and Sagi became TPR's president and CEO. That same day, Sagi, on behalf of TPR, executed the transfer agreement, thereby effectuating the 2004 transfers. (NYSCEF 741).

In the spring of 2008, TRI again faced financial difficulty and was threatened with foreclosure by a lender. Arie, who was then TRI's chairman, asked the Trump Group for a capital infusion in exchange for additional shares of TRI, such that the Trump Group would gain majority control of TRI. The Trump Group agreed and, at a meeting held in mid-June 2008, provided Arie with a draft funding agreement. As TPR was listed in the draft agreement as a TRI stockholder, and given the 2004 transfer of TPR's shares in TRI, Arie was obliged to disclose to the Trump Group that TPR was no longer a TRI stockholder, having transferred its stock in TRI to Arie and to the Sagi and Orly trusts four years earlier pursuant to the divorce settlement. Notwithstanding the violation of the stockholders agreement, the Trump Group and Arie continued to negotiate the draft funding agreement. (*TR Invs.*, 2010 WL 3279385 at *9).

In August 2008, upon anticipating that Sagi would resist a transfer of control of TRI to the Trump Group, and as an alternative source of funding had become available, TRI, through Arie, terminated the negotiation of the funding agreement with the Trump Group. As a result, by letter dated August 8, 2008, the Trump Group invoked its contractual right under the 2001 stockholders agreement to purchase all of the TRI shares that were transferred in 2004 in violation thereof. When TRI and Arie disputed the Trump Group's right to purchase the shares, the Trump Group commenced an action in the SDNY court on August 11, 2008. (*Id.* at 10).

In enforcing its contractual purchase rights by buying all of the TRI shares, the Trump Group entered into two agreements with TPR/Sagi: (1) a main agreement whereby TPR and the Sagi Trust would sell the Sagi Trust shares, comprising a 19.5 percent equity interest in TRI, to the Trump Group, whether or not the 2004 transfers were judicially determined to be void, thereby giving the Trump Group majority control of TRI; and (2) a side letter agreement whereby the Trump Group was given the option of buying the TRI shares that were transferred to Arie and the Orly Trust, thereby giving the Trump Group total control of TRI, if and when such shares were combined with the Sagi Trust shares, although that option would be triggered only if the 2004 transfers were judicially determined to be void.

On August 22, 2008, pursuant to the main agreement, TPR/Sagi sold the Sagi Trust shares to the Trump Group for $26.7 million. By letter agreement dated August 28, 2008, TPR/Sagi agreed that the purchase price for the Sagi Trust shares, as well as all of the terms and conditions of the stock purchase agreement, "were and are fair, reasonable and acceptable." (NYSCEF 736). In February 2011, pursuant to the side letter agreement, the Trump Group exercised its option and purchased the Arie shares and the Orly Trust shares in TRI.

The sale and purchase of the invalidly transferred TRI shares, the quest for a judicial determination of the record and beneficial ownership of such shares, and the ensuing fight for control of TRI, have spawned protracted and multifarious litigation in various jurisdictions. The complex history and outcome of that litigation has also been set forth in many judicial opinions. (*See e.g., Genger v Genger*, 121 AD3d 270 [1st Dept 2014]; *Glenclova Inv. Co. v Trans-Resources, Inc.*, 874 F Supp 2d 292 [SD NY 2012]; *Genger v TR Invs., LLC*, 26 A2d 180 [Del 2011]). The instant opinion is addressed solely to whether Arie's misrepresentation about the

transferability of the TRI shares in 2004, and Arie/TRI's alleged failure to disclose the funding agreement to TPR/Sagi in 2008, warrant the damages sought by TPR/Sagi against the Trump Group and TRI, as alleged in the cross claims. The Arie and Orly Trust shares in TRI, and the purchase prices paid by the Trump Group for those shares, are not relevant and will not be addressed.

II. ALLEGATIONS

As summarized by TPR/Sagi in their opposition to the Trump Group/TRI's motion to dismiss those claims (NYSCEF 844), the cross claims consist of two components. First, it is alleged that in 2004, TRI's management misrepresented to TPR/Sagi that TPR's 52.85 percent ownership in TRI could be conveyed to the Sagi Trust without the consent of any shareholder other than TPR, and that the Sagi Trust would receive clear title to the TRI shares. Second, it is alleged that in 2008, TRI's management failed to disclose to TPR/Sagi the draft funding agreement and other opportunities to ratify the 2004 transfers so as to enable the Sagi Trust to retain its TRI shares. Due to the alleged misconduct of TRI and its management, TPR/Sagi contend that the Sagi Trust was unable to retain its TRI shares and was compelled to sell them to the Trump Group "simply to salvage a small fraction of their market value," thereby sustaining enormous monetary damages. (*Id.* at 1-2). TPR/Sagi also assert that, pursuant to the main agreement, they sold the Sagi Trust shares to the Trump Group for $26.7 million, at an 86 percent discount of their 2008 market value of $195 million. (*Id.* at 11-12).

III. ANALYSIS OF OVERARCHING CONSIDERATIONS

Although TPR/Sagi allege that the TRI shares were purchased by the Trump Group at a large discount, they do not dispute that they had agreed that the purchase price, terms and

conditions of the 2008 stock purchase agreement were fair, reasonable, and acceptable, and they also acknowledge that, in the post-divorce arbitration, the arbitrator adopted an appraisal for all of the TRI shares and valued the Sagi Trust shares at approximately $10.3 million as of 2004. (NYSCEF 844, at 11). And, according to the Delaware court, "the Trump Group was giving up its right to purchase the shares from TPR at 2004 prices, which likely would have allowed the Trump Group to obtain the Shares for much less than the approximately $26 million it paid to purchase the Sagi Shares" (*TR Invs. v Genger*, 2010 WL 291704, at *17 [Del Ch July 23, 2010]). TPR/Sagi also concede that, under the 2001 stockholders agreement, the Trump Group had the right to purchase the invalidly transferred TRI shares at 2004 values, that the 2004 transfers were judicially voided because they were effectuated in violation of the stockholders agreement (NYSCEF 844, at 2-3), and that pursuant to the 2008 stock purchase agreement, TPR/Sagi "settle[d] with the Trump Group for the maximum that [they] could hope to recover in litigation" (*Id.* at 11).

Given TPR/Sagi's concessions, the judicial findings and documentary evidence, the Trump Group has established that the price it paid for the Sagi Trust's TRI shares was fair, reasonable and acceptable. (CPLR 3211[a][1]).

However, TPR/Sagi ask that all of this evidence be disregarded, arguing that, even if the price paid by the Trump Group for the Sagi Trust shares was fair and reasonable as between them and the Trump Group, TRI wrongfully encumbered the Sagi Trust shares, and that the price paid for the shares by the Trump Group reflects that encumbrance, thereby entitling TPR/Sagi to be recompensed in their cross claims. (NYSCEF 844, at 3). They analogize the circumstances at issue here with those of a hypothetical homeowner who sells his house to a scrap dealer after it

was burned down by an arsonist. Although the scrap dealer purchases the demolished house for a "fair" price, and the property owner sells it for a price that, given the arson, is fair, the arsonist remains liable notwithstanding the scrap dealer's purchase. Similarly, TPR/Sagi claim that the sale of TRI to the Trump Group does not absolve TRI of its original wrong, and as the Trump Group purchased TRI with its assets and liabilities, TPR/Sagi's cross claims constitute some of those liabilities. (*Id.*)

TPR/Sagi's voluntary dismissal of the cross claims against the Trump Group, however, remains significant in addressing their case against TRI. As the Delaware court observed, "if violation of the Stockholders Agreement has deepened the Genger Family's internecine feud, that is unfortunate. But it is not the Trump Group's problem, *nor is it a basis for an appeal to this court's sense of equity*." (*TR Invs.*, 2010 WL 2901704, at *18) (emphasis supplied). It is equity that poses the obstacle to permitting the cross claims to proceed here against TRI. To permit it is to accomplish indirectly what cannot be accomplished directly, namely, to revisit the bargain that TPR/Sagi knowingly and willingly struck many years ago with the Trump Group. Moreover, because the Trump Group wholly owns TRI now, permitting the cross claims to proceed against TRI would in effect countenance a suit against the Trump Group, notwithstanding TPR/Sagi's voluntary discontinuance of the cross claims against it. In light of the discontinuance, TPR/Sagi's complaint that the Trump Group "obtained a billion-dollar company for pennies on the dollar" (NYSCEF 844, at 2) rings hollow.

Significantly, as it is undisputed by TPR/Sagi that Sagi participated in negotiating the TRI stockholders agreement, the issue is conceded. (*Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010] [plaintiff abandoned her claim by failing to oppose or rebut that branch of

defendant's motion which was to dismiss it); *Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] ["plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]). Thus, Sagi was aware, or should have been aware, of the transfer restriction on the TRI shares, such that TPR/Sagi should have obtained from Arie the requisite consents or notices before executing the 2004 transfers. Nonetheless, Sagi signed the transfer agreement on TPR's behalf and effectuated the transfers in violation of the stockholders agreement. (NYSCEF 733, at 6). As noted above, Sagi's participation in the events underlying the transfers is asserted in the Trump Group/TRI's pleadings, and was repeated by counsel at the July 2, 2014 oral argument without rebuttal. (NYSCEF 1085, at 4).

Given Sagi's role in the events preceding and underlying the 2004 transfers, TPR/Sagi are more accurately characterized pursuant to their own analogy as members of the team of arsonists who, in concert with Arie and his alleged cohorts, burned down the house (the Sagi Trust shares and other TRI shares), because the Trump Group (the scrap dealer) was not notified of the invalid transfers (the arson) by the Genger family and their family-owned corporations until June 2008, when the funding agreement was being negotiated. Therefore, the alleged encumbrance on the TRI shares did not proximately result from Arie's misrepresentation, but from the Trump Group's valid exercise of its purchase rights under the stockholders agreement, which was breached by TPR, a signatory thereto and a company then controlled by members of the Genger family. Thus, TPR/Sagi's alleged injury was essentially self-inflicted, and the Trump Group's alleged windfall, if any, is immaterial.

Additionally, the contention that TPR/Sagi had no reason to question that Arie had obtained the consent of his close friend Jules Trump (NYSCEF 844, at 5) is of no significance,

absent an affirmative representation or evidentiary showing by Arie that the consent had in fact been obtained. (*See* 60A NY Jur 2d, Fraud and Deceit § 91 ["Concealment becomes a fraud where there is an act that affirmatively tends to a suppression or disguise of the truth or to a withdrawal or distraction from the real facts."]). Given Sagi's uncontroverted participation in negotiating the TRI stockholders agreement, and thus his knowledge of the shares transfer limitations therein, it was unreasonable for TPR/Sagi to rely on Arie's misrepresentation, without receiving verifiable evidence that the required consents were in fact procured.

TPR/Sagi's claim that they and the Sagi Trust are distinct entities that sustained different damages (NYSCEF 844, at 5) is also not legally significant, as they share common, if not identically aligned interests: Sagi is CEO of TPR and the the beneficiary and purported assignee of the Sagi Trust, and they are all represented by the same counsel pursuing identical strategies in these lengthy and arduous proceedings. Moreover, in their own submissions, they blur the lines among them and concede that the harms Arie inflicted on Sagi are those inflicted on the Sagi Trust. In describing the June 20, 2008 memorandum written to Arie by TRI's attorney David Lentz, in which he described the so-called "nuclear option" (NYSCEF 844. at 8-9), TPR/Sagi state in their opposition brief that "[t]he memo laid out various ways to take away the Sagi Trust's shares, concluding that TRI should 'keep Sagi in the dark, unable to get to the value of his TRI holdings for any time in the foreseeable future.'" They also maintain that "TRI's management willfully concealed all this from Cross-Claimants out of malice to Sagi . . . [and] Sagi was to be given 'no information' and left to 'go into a mushroom.'" (*Id.* at 9). Given the concession that Sagi was the target of the nuclear option, which is claimed to have been designed to deprive Sagi of the TRI shares, and as he has no right to those shares except to the extent that

he was a beneficiary of the Sagi Trust, TPR/Sagi (the cross-claimants) are estopped from arguing that Sagi's interest in pursuing the cross claims is separate and apart from that of the Sagi Trust.

TPR/Sagi also argue that, had TRI's management consummated the funding agreement in 2008, the negotiation of which was not disclosed to TPR/Sagi, the Trump Group's purchase rights under the 2001 stockholders agreement would have been extinguished, the 2004 transfers would have been ratified, and the Sagi Trust would have been able to retain the Sagi Trust's TRI shares. (NYSCEF 844, at 7). They rely on certain communications exchanged during the summer of 2008, including the June 20, 2008 memorandum, among TRI's management and counsel, namely, Arie, William Dowd, and David Lentz, which they contend evidence a scheme by which TRI proposed various strategies to deprive the Sagi Trust of the TRI shares and to keep Sagi in the dark. (*Id.* at 8).

The assertion that the consummation of the funding agreement would have enabled the Sagi Trust to "retain" its TRI shares is relevant to whether the Sagi Trust is entitled to pursue relief under the TRI stockholders agreement and thus, its capacity under CPLR 3211 (a) (3) to be a plaintiff in this action. According to TPR/Sagi, the Delaware court's ruling that the 2004 transfers were void and that the Sagi Trust shares "reverted" to TPR signifies that those shares were once owned by the Sagi Trust, which also means that it was a TRI shareholder from 2004 to 2008. (NYSCEF 844, at 4-5). On the other hand, the Trump Group/TRI contend that, because noncompliant transfers are void, as opposed to voidable, under the stockholders agreement. the Sagi Trust never owned the TRI shares and was never a shareholder.

Assuming that the Sagi Trust was a shareholder and was entitled under section 1.5 of the TRI stockholders agreement to financial statements or other material reports regarding TRI's

performance, the draft funding agreement constitutes neither a financial statement nor a report regarding TRI's performance. Assuming also that even if the draft agreement was required to be disclosed or turned over to TPR/Sagi for whatever reason, the claim that the disclosure would have had an impact on the Trump Group's purchase rights is speculative, given its contractual right to void the 2004 transfers. As the Trump Group observes, "in not one single draft of the Funding Agreement is there even a mention of the so-called Sagi Trust Shares or of the Trump Entities' Purchase Rights emanating from TPR's breach of the Stockholders Agreement." (NYSCEF 733, at 16). Thus, the argument that the draft funding agreement would have effected a ratification of the 2004 transfers, including the Sagi Trust shares, is too conjectural to warrant the relief sought by TPR/Sagi.

Moreover, that the funding agreement could have been consummated or finalized is of no legal significance, absent a fully agreed-upon formal agreement. (NYSCEF 734, at 11-13). Indeed, TPR/Sagi concede that "a transfer that failed to comply with those restrictions and the prior notice requirement would *automatically* be deemed invalid and void, and would trigger the non-selling stockholders' right to purchase the invalidly transferred shares." (NYSCEF 432, ¶ 13 [emphasis added]).

Based on the foregoing overarching considerations, absent sufficient factual or legal support for the allegations underlying TPR/Sagi's cross claims, they should be dismissed. To the extent any elaboration is required, the cross claims are discussed in greater detail below.

A. Cross claims

1. Fraud and aiding and abetting fraud

TPR/Sagi allege that TRI and its agents made false representations to them that TPR's

ownership of the TRI shares could be conveyed without further consent, that TRI was authorized to issue stock certificates for the new shares, that the Sagi Trust would have clear title to its shares, and that TPR/Sagi reasonably relied on the misrepresentations to their detriment.

Given Trump Group/TRI's unrebutted assertion that Sagi participated in the negotiation of the stockholders agreement and the divorce settlement, and was thus, if not aware of the transfer restrictions on the TRI shares, should have been aware of them, and as he nonetheless signed the transfer agreement on behalf of TPR, thereby effectuating the 2004 transfers in violation of the stockholders agreement of which TPR itself was a party, TPR/Sagi's allegation that they reasonably relied on Arie's misrepresentation is unjustifiable (*Rotanelli v Madden*, 172 AD2d 815, 816 [2d Dept 1991], *lv denied* 79 NY2d 754 [1992] [plaintiff's claim of reliance on alleged misrepresentation was rejected, as he was a party to contract containing terms that contradicted misrepresentation, and plaintiff was presumed to have read contract]), and Sagi's knowledge may be imputed to TPR and the Sagi Trust. Similarly, just as TPR/Sagi seek to impute Arie's misdeeds to TRI, Arie's misdeeds are equally imputed to TPR, because he was a TPR director and used his authority in passing a board resolution authorizing TPR's transfer of the TRI shares. Thus, TPR/Sagi are precluded from recovery against the Trump Group and TRI. (*See Buechner v Avery,* 38 AD3d 1, 2 [1st Dept 2007] [bankruptcy trustee could not bring tort claims because bankrupt company's management cooperated with third parties in committing alleged wrongs]).

In addition to claiming a misrepresentation in 2004, TPR/Sagi also allege that TRI and its agents fraudulently concealed or failed to disclose the funding agreement and the opportunity in 2008 to ratify the 2004 transfers, and that as a result, TPR/Sagi were forced to sell the Sagi Trust

shares at a fraction of their market value to the Trump Group, thus sustaining injury. Again, even assuming the existence of a requirement that the funding agreement be disclosed, the disclosure would have had no impact on the Trump Group's right to purchase the TRI shares at 2004 prices, including the Sagi Trust shares, because those rights are expressly set forth in the stockholders agreement, and TPR/Sagi repeatedly acknowledge it. And again, it is only conjecture that the consummation of the funding agreement could have resulted in the ratification of the 2004 transfers. (*See e.g. Friedman v Anderson*, 23 AD3d 163, 167 [1st Dept 2005] [court dismissed fraudulent misrepresentation and nondisclosure claims because plaintiff failed to establish that alleged act and omission constituted direct cause of any loss]).

2. Aiding and abetting a breach of fiduciary duty

According to TPR/Sagi, as alleged in their second cross claim against TRI, Arie and William Dowd owed them a fiduciary duty, they breached that fiduciary duty in connection with the 2004 transfers and the 2008 funding agreement, and TRI aided and abetted them in doing so. (NYSCEF 432, ¶¶ 45-48). Again, allowing cross claims against TRI to proceed is tantamount to allowing TPR/Sagi to resurrect, indirectly, the claims it voluntarily dismissed against the Trump Group, which now wholly-owns TRI as a result of TPR/Sagi's sale of all of TRI shares to the Trump Group in 2008.

In any event, a corporation does not assume the fiduciary duties owed by its directors and officers to its purported shareholders. (*See Gates v Bea Assoc., Inc.*, 1990 WL 180137*6 [SD NY 1990]; *see also Peacock v Herald Square Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). Yet, TPR/Sagi maintain that TRI aided and abetted breaches of the fiduciary duty that Arie owed them, not just as an officer of TRI, "but on other bases as well" (NYSCEF 844, at 22), namely,

Arie's "familial fiduciary relationship" to Sagi. That relationship, however, is irrelevant here, as TRI cannot be held liable for a family dispute, and TPR/Sagi cite no law for that proposition. That Sagi may have a personal claim against Arie, does not translate into a claim against TRI, particularly when it is alleged that Arie has a "personal vendetta" against Sagi, and that "Arie acted in certain respects beyond the scope of his agency" (*Id.* at 22-23). Such a claim has no legal significance here, as a corporation cannot be held liable for acts of its executive that were performed outside the scope of the executive's employment. (*McArthur v J.M. Main Street, Inc.*, 46 AD3d 639 [2d Dept 2007]).

TPR/Sagi also assert that in a "close corporation" like TRI, "Arie owed the Sagi Trust a fiduciary duty as a co-shareholder in TRI." (NYSCEF 844, at 22). Even if Arie and the Sagi Trust were co-shareholders, a fact disputed by the Trump Group as it asserts that the transfers to Arie and the Sagi Trusts in 2004 were void, any fiduciary duty allegedly owed by Arie as a shareholder may not be imputed to TRI, and TPR/Sagi provide no authority to the contrary. In any event, TRI is not close corporation, absent any evidence that it is a statutorily created entity with specific attributes or any mention of it in its corporate charter, the formation of which is governed by specific provisions of Delaware's corporation laws, 8 Del C. § 342. (NYSCEF 888, at 15).

TPR/Sagi also cite no authority for the proposition that Arie, as the Sagi Trust's proxy holder, owes a duty to disclose by virtue of his "superior knowledge of essential facts." (NYSCEF 844, at 22). In the only case cited by TPR/Sagi, the court dismissed the plaintiff's claim, holding that the defendant accountants had no duty to disclose. (*Barrett v Freifeld*, 77 AD3d 600, 602 [2d Dept 2010]). There, the issue was for accountant malpractice, whereas here,

it is agreed that the issues arise from an adversarial familial relationship. Even if Arie were required to disclose as proxy holder, it would not have made a difference, as a consummation of the funding agreement and ratification of the 2004 transfers are merely conjectural, since the Trump Group held the rights to purchase all invalidly transferred TRI shares. TPR/Sagi's speculations form too slender a thread upon which to hold TRI liable.

3. Breach of stockholders agreement

In this cross claim, TPR/Sagi allege that TPR performed under the stockholders agreement while it "innocently [relied] upon the TRI Group's misrepresentation that no additional approvals were required" for the 2004 transfers, and as a result of TRI's continuing breach of the agreement through 2008, TPR was forced to sell the Sagi Trust shares for a fraction of their market value. (NYSCEF 432, ¶¶ 52-54).

As CEO of TPR, and given the Genger family strife and Sagi's participation in negotiating the stockholders agreement, TPR/Sagi had a duty to ensure that the requisite notices and consents were obtained before executing the 2004 transfers. Thus, from the Trump Group/TRI's perspective, TPR by Sagi breached the stockholders agreement. (*See TR Investors, LLC v Genger,* 2013 WL 603164, at *1 [Del Ch Feb 18, 2013] ["[t]he transfer of the stock out of TPR violated the terms of the Stockholders Agreement that TPR had signed with the Trump Group"). And, as Arie was a TPR director when he made the misrepresentation in the divorce settlement, TPR's claim is barred from recovery where it too was at fault. (NYSCEF 733, at 14; *see Buechner v Avery*, 38 AD3d at 444 [corporation's bankruptcy trustee precluded from bringing claim because corporation's management allegedly cooperated with third parties in committing alleged wrongs]).

In any event, TPR/Sagi were not injured by selling the Sagi Trust shares to the Trump Group, because the sale was required by the stockholders agreement under the circumstances of an undisputed violation thereof. Thus, any damage arising from the breach of the stockholders agreement was also a proximate result of TPR/Sagi's own action.

4. Tortious interference with the 2004 transfer agreement

TPR/Sagi assert that while TPR and the Sagi Trust were parties to the 2004 transfer agreement, TRI and its agents intentionally and unjustifiably caused TPR to fail to perform thereunder, thereby tortiously interfering with the transfer agreement, which resulted in the forced sale of Sagi Trust's TRI shares in 2008 to the Trump Group for a fraction of their market value. (NYSCEF 432, ¶¶ 69-72).

To sustain a viable cause of action for the tortious interference of contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Here, the Delaware court held that the 2004 transfers were void because they violated the stockholders agreement. Thus, the transfer agreement effectuating the invalid 2004 transfers was also void or deemed void, and void contracts are legal nullities that can neither be breached nor enforced. (*420 East Assocs. v Kerner*, 81 AD2d 545, 546 [1st Dept 1981]).

Nonetheless, TPR/Sagi argue that even if the 2004 transfers were voided, the 2004 transfer agreement was never before the Delaware court and, thus, the agreement was never voided. (NYSCEF 844, at 25). However, the agreement is not independent of the transfers, which were voided. Yet, TPR/Sagi maintain, even if the agreement was deemed void and TPR

"unwittingly violated" it, it was due to TRI's misconduct because its chairman, Arie, caused the TRI shares to be transferred out of TPR in violation of the stockholders agreement. (*Id.* at 25-26). Again, as the transfer agreement is void and invalid, it cannot support a tortious interference of contract claim. (*Jaffe v Gordon*, 240 AD2d 232 [1st Dept 1997] [failure to establish valid contract precluded claimant from pursuing tortious interference claim]).

5. Tortious interference with prospective business relations

But for TRI's misconduct in causing TPR's failure to perform the transfer agreement, TPR/Sagi argue, they would have established economic relations with the Trump Group as TRI co-shareholders. (NYSCEF 432, ¶¶ 75-79).

To sustain a cause of action for tortious interference with a prospective economic advantage claim, a plaintiff must allege: (1) a business relation between itself and a third party; (2) the defendant's interference with that relation; (3) that the defendant acted with the sole purpose of harming the plaintiff or used improper or illegal means that amounted to a crime or independent tort; and (4) that such acts injured plaintiff's relation with the third party. (*Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 323 [1st Dept 2007]; *Jacobs v Continuum Health Partners*, 7 AD3d 312, 313 [1st Dept 2004]).

TPR/Sagi argue that, but for TRI's wrongful conduct, the 2004 transfers would have been effectuated, and the Trump Group and the Sagi Trust would have remained co-owners of TRI. (NYSCEF 844, at 26). They rely on *Harger v Price* for the proposition that, as a shareholder of a closely-held corporation, the plaintiff shareholder has a prospective business relationship with the acquiring entity, and that the cancellation of the plaintiff's shares before the acquisition, due to the misconduct of the corporation's management, precluded that relationship, thereby forming

the basis of a tortious interference claim. (204 F Supp 2d 699, 709 [SD NY 2002]).

Regardless of whether TPR/Sagi would have remained co-owners of TRI with the Trump Group, which is a speculative proposition, the Trump Group held the contractual right under the stockholders agreement to purchase all of the TRI shares, including the Sagi Trust shares, due to the violation of that agreement, thereby terminating whatever prospective business relationship TPR/Sagi might have anticipated. In *Harger*, the plaintiff was a minority shareholder who claimed that his former co-shareholders wrongfully "did him out" of his equity interest in their closely-held corporation so as to gain for themselves the benefits of a merger/acquisition with a prospective acquiror by cancelling his shares before the acquisition. (*Harger*, 204 F Supp 2d at 701-704). Here, it was TPR/Sagi, not TRI, that entered into the 2008 stock purchase agreement with the Trump Group, and it was TPR/Sagi that pocketed the proceeds of the sale of all TRI shares, including those that Arie and the Orly Trust claim belong to them. TPR/Sagi do not and cannot claim that their sale of all TRI shares to the Trump Group "did them out" of the shares, having sold them for a fair and reasonable price. TPR/Sagi's loss, if any, was the economic consequence of the bitter feud among the members of the Genger family, which should not be borne by TRI or the Trump Group, having purchased the shares from TPR/Sagi at an admittedly "fair, reasonable and acceptable" price. Equity neither condones nor permits a party to seek an economic advantage or other equitable relief in these circumstances. (*Amarant v D'Antonio*, 197 AD2d 432, 434 [1st Dept 1993] ["Plaintiff will not be heard to complain that defendants are to be restrained from an asserted violation of one agreement under circumstances in which their resort to its provisions was induced by plaintiff's violation of a subsequent agreement."]).

6. Contribution and indemnification

TPR/Sagi assert that to the extent they incurred liability on Arie's, Orly's, and/or the Orly Trust's surviving claims, the Trump Group and TRI should indemnify them and/or contribute to same. (NYSCEF 432, ¶ 95). As those "surviving" claims have been dismissed (*Genger v Genger*, 112 AD3d 270 [1st Dept 2014], *reargument and leave to appeal denied*, 2014 NY Slip Op 87342 [U] [1st Dept, Oct. 23, 2014], the indemnification/contribution claim is moot.

7. Statute of limitations

In their moving brief, the Trump Group and TRI argue that the sixth and seventh cross claims for, respectively, tortious interference with the transfer agreement and tortious interference with prospective business relations, should be dismissed as time-barred given the three-year statute of limitations. Both claims are alleged to have arisen in 2008, but were not brought until 2013. (NYSCEF 733, at 23 and 25). In their opposition brief, TPR/Sagi do not address or contest the argument, and thus are deemed to have conceded it.

Even if it had been addressed, I would find as follows: The misrepresentation was made by Arie in 2004. Consequently, these cross claim are time-barred, having accrued more than six years before the filing of the cross claim complaint in April 2013, or when it was purportedly discovered in August 2008 when TPR/Sagi sold the Sagi Trust shares to the Trump Group, which is more than two years before April 2013. (CPLR 213 [8]).

Even if the cross claims relate back to the time when Arie filed his second amended and supplement complaint in September 2010, which is espoused by TPR/Sagi but opposed by the Trump Group and TRI, this claim nonetheless should be dismissed on the merits, for the reasons set forth above. And, pursuant to CPLR 213(8), the discovery of the fraud is subject to a

"reasonably diligence" standard, in that the time to sue accrues from the time "the plaintiff claims discovered or fraud, or could with reasonable diligence have discovered it." Here, it is uncontroverted that Sagi participated in the negotiation of the stockholders agreement and the marital settlement agreement and, as such, could have, using reasonable diligence, discovered the misrepresentation, before the transfer agreement was finalized and executed.

It is also undisputed that the alleged breach of the stockholders agreement occurred in 2004, more than six years before the filing of the cross claim complaint. Thus this cross claim is also time-barred. Even assuming that the claim relates back to the filing of Arie's second amended and supplemental complaint, this claim should be dismissed on the merits, based on the reasons set forth above.

Alternatively, TPR/Sagi ask that if their cross claims are dismissed, they should be allowed to replead them pursuant to CPLR 3211(e). While such a request may be granted under certain circumstances, here, TPR/Sagi's attempt to replead will needlessly prolong this litigation, especially where the Trump Group and its now wholly-owned company, and TRI, is essentially an outside bystander caught up in the contentious family feud.

III. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that the relief sought in the instant motion to dismiss is granted in all respects, and all cross claims asserted therein, namely, the first, second, third, sixth, seventh and tenth cross claims, by cross claim plaintiffs TPR Investment Associates Inc. and Sagi Genger, individually and as assignee of the Sagi Genger 1993 Trust, against cross claim defendants Glenclova Investment Co., TR Investors, LLC, New TR Equity I, New TR Equity II, LLC, Jules

Trump, Eddie Trump, Mark Hirsh and Trans-Resources, Inc., are dismissed with prejudice.

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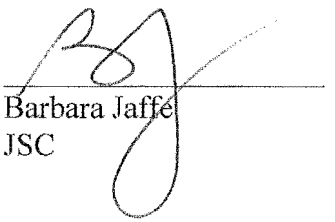

Barbara Jaffe
JSC

Dated: January 7, 2015
New York, New York