Genger v Genger
2015 NY Slip Op 30481(U)
April 3, 2015
Sup Ct, New York County
Docket Number: 109749/09
Judge: Barbara Jaffe

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

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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),

Plaintiff,

-against-

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

Defendants.

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Index No. 109749/09

Motion seq. nos. 036, 037 and 038

DECISION AND ORDER

BARBARA JAFFE, JSC:

Defendants Dalia Genger, Leah Fang, and D&K GP LLC (D&K GP) seek an order granting leave to amend their answers to add the affirmative defenses of failure to join a necessary party, violation of public policy, and champerty. (Mot. seq. 036 [NYSCEF 578]). As it is undisputed that claims against Fang arising from transactions implicated in this action were dismissed by the Appellate Division (*Genger v Genger*, 120 AD3d 1101 [1st Dept 2014] [NYSCEF 653 at 33-34]), her motion seeking leave to amend her answer to add affirmative defenses is moot and need not be addressed.

Plaintiff seeks an order (1) granting her leave to renew and/or reargue certain issues resolved in my December 23, 2013 decision (NYSCEF 561), which, among other things, permitted defendant Sagi Genger to amend his answer to add the same three affirmative defenses; and (2) upon granting same, to modify the December 2013 decision by denying Sagi's motion to amend his answer. (Mot. seq. 037 [NYSCEF 585]).

Defendant TPR Investment Associates, Inc. (TPR) seeks an order granting leave to amend

its answer to add the same three affirmative defenses. (Mot. seq. 038 [NYSCEF 598]). TPR and Sagi (TPR/Sagi) oppose plaintiff's motion (mot. seq. 037) and cross-move for leave to renew and/or reargue certain portions of the December 2013 decision. (NYSCEF 607).

These motions, as well as TPR/Sagi's cross motion, are disposed of in this decision.

I. BACKGROUND

The background for these motions has been described in great detail in several opinions, including, an opinion dated July 28, 2010, rendered by the justice previously presiding in this part (NYSCEF 80), the December 2013 decision (NYSCEF 561), and the opinion of the Appellate Division, dated September 23, 2014 (*Genger v Genger.* 120 AD3d 1101 [1st Dept 2014]). Thus, familiarity with the background is presumed, and only the relevant facts are highlighted here for the purpose of addressing the instant motions.

The central issue of these motions is the enforceability of a promissory note executed in 1993 by D&K Limited LP (D&K LP) in favor of TPR in connection with an estate planning scheme whereby plaintiff's parents, Arie Genger and Dalia Genger, provided for plaintiff and her brother, Sagi. Plaintiff alleges that Sagi, Dalia, and others engaged in wrongful acts, including a "sham UCC sale" of the 1993 note and other colluding and self-dealing transactions, designed to deprive her of her interests in the 1993 Orly Genger Trust and the family-owned companies.

II. DISCUSSION

A motion for leave to amend pleadings pursuant to CPLR 3025 (b) is left to the sound discretion of the trial court, and should be freely granted at any time, absent prejudice or surprise. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). A party is prejudiced when it is "hindered in the preparation of [its] case or . . . prevented from taking some measure in

support of its position" (*Kimso Apts., LLC v Gandhi,* 24 NY3d 403 [2014]), or upon losing a special right that could have been avoided (*Barbour v Hosp. for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991]). The party opposing the amendment bears the burden of demonstrating prejudice. (*Kimso Apts.,* 24 NY3d at 411).

Delay in moving to amend pleadings coupled with significant prejudice to an opponent justifies denial of the motion; delay alone does not. (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Tri-Tec Design, Inc. v Zatek* Corp., 123 AD3d 420 [1st Dept 2014]; *Abdelnabi v New York City Tr. Auth.*, 273 AD2d 114, 115 [1st Dept 2000]).

A court should deny leave to amend when the proposed amendment cannot withstand a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York,* 98 NY2d 314 [2002]), or if the amendment is patently without merit or palpably insufficient (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]; *Zaid Theatre Corp v. Sona Realty Co.*, 18 AD3d 352, 354-55 [1st Dept 2005]).

A. Champerty

Champerty is "an equitable defense that was developed 'to prevent or curtail the commercialization of or trading in litigation,'" and to prohibit "the purchase of claims with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs" *(Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. v Love Funding Corp.*, 13 NY3d 190, 199 [2009]).

The defense of champerty is narrowly construed. In *Love Funding*, the Court of Appeals

held that the champerty statute is violated "only if the primary purpose of the purchase or taking by assignment of the thing in action is . . . to commence a suit thereon," and "if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation." (*Love Funding*, 13 NY3d at 200). The Court added that "the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim" (*id.* at 201), and that if a party takes an assignment of a claim where it had a pre-existing interest, the party would not violate the statute when commencing an action to collect damages thereon (*id.* at 202).

In the December 2013 decision, I permitted Sagi to assert this defense based on his allegation that newly discovered evidence would show that plaintiff "may be funding her claims in this case in concert with Arnold Broser and David Broser, who have been holding themselves out as Arie Genger's attorneys." (NYSCEF 561 at 7). I conditioned the defense on Sagi producing the newly discovered evidence to me within 45 days of the date of that decision, or no later than February 6, 2014. (*Id.* at 9).

In her opposition to defendants' motion to amend their answer to include champerty, and in support of her motion for leave to renew, plaintiff asserts that Sagi produced no evidence in support of his champerty defense by February 6, 2014. (NYSCEF 593, at 3). In opposing Orly's motion, which was noticed before February 6, 2014, and in support of their cross motion to renew, which was noticed on March 14, 2014, TPR/Sagi relies on an affidavit filed in a parallel action (*Arie Genger, et al. v Sagi Genger, et al.*, index No. 651089/2010) wherein a principal of the so-called Trump Group, a party in the 2010 action but not in the instant action, states that Arie and Orly had made an arrangement with the Brosers, whereby they agreed to provide $20

million to finance Arie's and Orly's litigation expenses. (NYSCEF 607 at 7). According to TPR/Sagi, if the affidavit is credited, "Orly has sold her shares [in Trans Resources Inc., a TPR subsidiary] in a manner potentially violative of New York Judiciary Law § 489." (*Id.*).

TPR/Sagi, however, fails to explain or show how the alleged financing of Orly's action constitutes champerty and they cite no case law in support. Thus, the newly discovered evidence has not been shown to support the defense. The other defendants do not address the issue with respect to their own positions.

B. Failure to join Arie as a necessary party

Plaintiff argues that I overlooked and/or misapprehended both fact and law in permitting Sagi to amend his answer to include the defense that Arie is a necessary party. (NYSCEF 592).

TPR/Sagi and the other defendants claim that Arie is a necessary party to this action. (NYSCEF 607, 653).

Pursuant to CPLR 1001, necessary parties are "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action."

It is undisputed that in 1993, Arie and Dalia caused D&K LP to issue the 1993 note in exchange for a 49 percent interest in TPR, which transaction formed part of the family's estate plan whereby Sagi and Orly each received a 48 percent direct interest in D&K LP, and an indirect interest in TPR. Repayments on the note were made by D&K LP until 1999, after which no attempt was made to collect on it until 2008, when Sagi caused TPR to send a notice of default to D&K LP, and thereafter foreclosed on it via what plaintiff alleges was a "sham UCC sale." According to Orly's complaint, TPR/Sagi thereby obtained the note at a deep discount which, while it reduced D&K LP's payment obligation, left a $8.8 million deficiency guaranteed by the

Orly Genger Trust and the 1993 Sagi Genger Trust.

The parties dispute whether all Genger family members and the family-controlled companies understood and agreed that the note was created to facilitate estate planning and never intended to be enforced or collected. This dispute is well-founded, given the pleadings and other records produced, including deposition transcripts, which reflect that the members of the Genger family seem to adjust their positions on the enforceability of the note according to their litigation strategy of the moment. (*See eg* NYSCEF 607 at 3: "This supposed secret family agreement [as to whether the note was to be enforced] was never reduced to writing, and has been denied under oath, at one time or another, by each and every member of the Genger family - including, most notably, Orly"; *see also id.*, at 3 n 2; "Orly falsely claims that Sagi testified to the contrary. He did not. He did testify in the marital arbitration that he believed that the note was worthless, because it was uncollectible, based on Arie's claim that the sole collateral - the TPR shares - were worthless.").

Against this backdrop, Dalia and D&K GP, the general partner of D&K LP that has been controlled by Sagi since his parents' bitter divorce in 2004, argue that Arie is a necessary party to this action because the note constitutes a tax fraud perpetrated by him to avoid paying gift taxes. The same argument is advanced by TPR in its motion for leave to amend, as well as in TPR/Sagi's opposition to plaintiff's motion to renew. In support of their motion (NYSCEF 579), and in reaction to plaintiff's refusal to consent to the proposed amendment given assertions made by Dalia during the post-divorce arbitration that the note was enforceable, Dalia and D&K GP argue that Dalia is not estopped from taking a contrary position. They rely on the June 2010 opinion wherein the previously presiding justice held that, while admissible, Dalia's prior

testimony about the enforceability of the note should not estop her from taking a contrary position, as the arbitration addressed whether the enforceability of the note "*as between the former husband and wife*," and not "*as between the children of Arie and Dalia Genger, or the family owned companies*" (NYSCEF 80 at 16; emphasis in original). (NYSCEF 579, ¶ 8).

Even absent an estoppel, however, it is undisputed that Arie did not sign the note in his individual capacity. Rather, D&K LP, the Orly Trust, the Sagi Trust, and TPR signed it. Moreover, plaintiff asserts no claims against Arie in this action; neither are any counterclaims asserted against him. By contrast, in the 2010 action, defendants assert counterclaims against both Arie and plaintiff. Thus, Arie need not be added as a party-defendant in order to obtain complete relief in this action, and defendants neither address the statutory definition of a necessary party nor cite case law for a contrary proposition. Also, it is unnecessary and inappropriate to consolidate this action with the 2010 action, as the two actions implicate different factual issues and legal analyses.

Defendants do not argue that Arie is a necessary party with respect to plaintiff's claims against them here, nor do they allege that plaintiff participated with Arie in the alleged tax fraud. Instead, they contend that Arie is necessary because he constructed the alleged tax fraud, and that his conduct constitutes an affirmative defense to plaintiff's claims against them. For instance, they assert that "[t]hose gift taxes would have been owed by Arie . . . [Plaintiff] now comes to this Court seeking to enforce a secret family agreement which, if true (and it is false), would constitute a fraudulent scheme to avoid millions of dollars in gift taxes . . . [but] it is against public policy for the Court to enforce illegal contracts . . . ." (NYSCEF 607 at 4-5). That Arie's conduct may be relevant to the inquiry, however, does not mean that he is a necessary party

within the meaning of the statute. Also, Arie was deposed in this action and in the parallel 2010 action, as well as in the related actions pending before me. To the extent that additional discovery in this action may be required of Arie by defendants, he is nonetheless, a fact witness only, not a necessary party, as defined in CPLR 1001.

C. Violation of public policy defense

Defendants argue that any attempt to enforce a fraudulent scheme to avoid the payment of taxes is against public policy. The defense is advanced in connection with their argument that Arie is a necessary party to the alleged tax fraud, and that any attempt to enforce the fraudulent scheme to avoid the payment of taxes is against public policy.

In the December 2013 decision, I relied on *Greenleaf v Lachman*, 216 AD2d 65 (1st Dept 1995), in ruling in Sagi's favor. In *Greenleaf*, the issue was whether the defendant stepson could rely on an exception to the rule against admitting parol evidence to vary the terms of a writing, the promissory note that the plaintiff stepfather had induced him to sign with the explanation that it was only to avoid having to pay gift taxes on it. Given the stepfather's intent to avoid paying gift taxes, which was against public policy, the *Greenleaf* Court ruled for the stepson. I thus held that the failure to name all of the parties to the note, along with a cause of action for violating public policy, constituted valid defenses. (*Id.* at 7).

Here, however, as Arie neither signed the note nor is a necessary party to this action, the public policy defense is inapplicable.

In TPR/Sagi's cross motion, they also seek leave to reargue the December 2013 decision to the extent that I denied them leave to add to their answer certain other defenses. They argue that, pursuant to CPLR 2221(e), reargument should be granted because the requested affirmative

defenses are based on new facts, which were unavailable to them in February 2013 when the original motion was filed and at the August 2013 oral argument on the motion, such that I did not have an opportunity to consider them in reaching my 2013 decision. (NYSCEF 607 at 8).

TPR/Sagi allege that the interest expense on repaying the 1993 note taken by Orly and D&K LP in their 1994 to 1999 tax returns shows that Orly treated the note as enforceable, and that her current position that the note is unenforceable "would transform the Orly Trust and D&K into tax cheats" (NYSCEF at 10), thereby placing them *in pari delicto* with them. The repayment of the note by D&K LP, however, does not constitute a new fact, as it is alleged in the complaint that Sagi and Dalia controlled D&K LP since 2004 when they created D&K GP, which is also undisputed. That William Fischer was the accountant for TPR, Sagi, Orly, D&K LP, and both Trusts during the tax years at issue is also not a new fact, and it is undisputed that he prepared the tax returns at issue. Thus, TPR/Sagi's contention that they only discovered, in November 2013, that tax deductions for interest expenses on the note had been taken in the subject tax returns, when the returns were allegedly produced by Fischer at the time, is unpersuasive at best.

TPR/Sagi also argue, based on the affirmative defense *allegans contraria non est audiendus*, or "He is not to be heard who alleges things contrary to each other" (*Apex Binding Corp. v Relkin*, 198 Misc 381, 384 [Sup Ct, New York County 1950]), that Orly's conflicting positions in other lawsuits precludes her from taking a divergent position in this and other proceedings. (NYSCEF 607 at 11). For example, TPR/Sagi argue that, in this action Orly takes the position that proceeds from the sale of the Sagi Trust shares belong to TPR, but in the parallel 2010 action she took the position that proceeds from the sale of the Orly Trust shares belong to her. (*Id.* at 10).

Even assuming that Orly has taken conflicting positions in various proceedings, this defense is also not based on new facts. According to Orly, her third amended complaint in the 2010 action was filed in September 2011, but Sagi's motion to amend his answer to add defenses was filed in February 2013. Because TPR/Sagi knew or should have known of the contents of Orly's third amended complaint by September 2011, the alleged new facts have been known to them for more than a year.

As to the eight remaining affirmative defenses, TPR/Sagi argue that they are viable because Arie was the agent of Orly and the Orly Trust, the law makes a principal liable for the agent's acts, and Arie has testified that he represented all Genger interests with respect to the TRI shares. (NYSCEF at 11-12). Arie's testimony, however, does not establish that he is Orly's agent in connection with the instant claims. Rather, his testimony only shows that, in connection with the Orly Trust and Sagi Trust voting proxies that he allegedly acquired pursuant to the 2004 transactions, Arie could vote the family-owned TRI shares. Those proxies, however, have been invalidated by the courts, and in any event, they do not constitute new facts, as TPR/Sagi knew of their existence since 2004, and Arie's testimony does not alter their prior existence. TPR/Sagi also fail to explain why the voting proxies render Orly liable for Arie's acts. Indeed, in the December 2013 decision I noted that Sagi did not explain why Arie's alleged bad acts are attributable to Orly: "While these defenses . . . may apply to claims asserted by Arie in the 2010 action, or may warrant an offset to damages awarded in the 2010 action, they do not apply to Orly in this action." (NYSCEF 561, at 5).

III. CONCLUSION

Based on all of the foregoing reasons, it is hereby

ORDERED, that the relief requested in motion sequence number 036 by defendants Dalia Genger and D&K GP LLC is denied, and that the relief requested by defendant Leah Fang is denied as moot; it is further

ORDERED, that the relief requested in motion sequence number 037 by plaintiff Orly Genger is granted in its entirety, and that the decision of this court dated December 23, 2013 (NYSCEF 561) is deemed modified to the extent that the branch of that decision which granted the motion of defendant Sagi Genger (Sagi) to amend his answer to add the three affirmative defenses that are addressed herein is now denied; it is further

ORDERED, that the relief requested in motion sequence number 038 by defendant TPR Investment Associates, Inc. (TPR) is denied; and it is further

ORDERED, that the relief requested by TPR/Sagi in their cross motion to plaintiff's motion sequence number 037 is denied in the entirety, including their request to reargue their motion to amend their answer with certain affirmative defenses which was denied in this court's December 23, 2013 decision.

ENTER:

Barbara Jaffe, JSC

Dated: April 3, 2015
New York, New York