

**Genger v Genger**

2015 NY Slip Op 32583(U)

February 26, 2015

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

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ARIE GENGER,

Plaintiff,

Index No. 104249/07

-against-

**DECISION/ORDER**

SAGI GENGER and DALIA GENGER,

Defendants.

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**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  
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Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>          </u>
Cross-Motion and Affidavits Annexed.....	<u>2</u>
Answering Affidavits to Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff Aric 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”). Plaintiff now moves for an Order granting judgment in favor of plaintiff and against Sagi on Note 2, Note 3 and the stock purchase agreement plus interest as of the time of the final judgment. Defendant Dalia Genger (“Dalia”) cross-moves for an Order (1) pursuant to CPLR § 3212 for summary judgment declaring her to be the owner of the stock purchase agreement; or, in the alternative (2) pursuant to CPLR § 2701 directing that any payment on the stock purchase agreement made by Sagi be paid into court

until the rightful ownership of the stock purchase agreement has been resolved. The motions are resolved as set forth below.

The relevant facts and procedural history of this case are as follows. Plaintiff was the defendant in a divorce action commenced by Dalia, his former wife, on January 31, 2002. In connection with that action, plaintiff and Dalia entered into a stipulation (the "Stipulation"), dated October 26, 2004, in which they agreed to distribute their marital property as of January 31, 2002 (the "marital assets"). The Stipulation required the parties to list all of their marital assets on certain schedules, which would then be divided between the parties. The Stipulation provides for the equitable division of liquid marital assets, such as, *inter alia*, cash, insurance policies and retirement accounts. However, the Stipulation provides an alternative procedure for dealing with non-liquid marital assets such as, *inter alia*, "personal and real property" and securities and investment accounts that cannot be divided in kind and which were required to be "sold as promptly as possible." Pursuant to Article II, Paragraph 6, Section (b) of the Stipulation, if any of these non-liquid marital assets have not been sold by the second anniversary of the Stipulation, they shall be valued and distributed as the parties mutually agree. The Stipulation further provides that if, by the 45<sup>th</sup> day after the second anniversary of the Stipulation, no agreement as to these non-liquid marital assets has been reached, a coin toss will be conducted to determine the value and ownership of the asset. The coin toss procedure is set forth in the Stipulation.

Pursuant to the Stipulation, Sagi, plaintiff and Dalia's son, 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. Specifically, Sagi attempted to transfer (1) Note 1 in the amount of \$11,700; (2) Note 2 in the amount of \$100,000; (3) Note 3 in the amount of \$50,000; and (4) Note 4, the stock purchase agreement, which relates to the sale of certain real estate interest holdings.

After significant motion practice in the instant action, in July 2013, plaintiff moved for an Order, *inter alia*, pursuant to CPLR § 3212 granting him summary judgment against Sagi on the Notes. In a decision dated October 10, 2013, this court, *inter alia*, denied plaintiff's motion for summary judgment finding that although plaintiff established his *prima facie* right to judgment as the owner of the Notes, Sagi raised an issue of fact as to whether the Notes were ever intended to be enforced. Thereafter, Sagi moved for an Order, *inter alia*, pursuant to CPLR § 2221(d) granting him leave to reargue this court's finding that no factual issues exist as to the ownership of the Notes. This court denied Sagi's motion in its entirety. Sagi then appealed this court's decision.

In a decision dated December 4, 2014, the Appellate Division, First Department, granted plaintiff summary judgment against Sagi on Note 2, Note 3 and the stock purchase agreement and remanded the calculation of damages and interest thereon to this court finding that no factual issues exist as to whether those notes were ever intended to be enforced. The First Department also held that Arie owns the Notes and that this "court properly found that no issue of fact exists as to the notes' ownership...." *Genger v. Genger*, 123 A.D.3d 445 (1<sup>st</sup> Dept 2014). The First Department was not persuaded by Sagi's claim that he validly transferred the Notes to Dalia pursuant to his authority as attorney-in-fact since "the stipulation of settlement did not state that Sagi had 'the power to transfer or assign assets from one party to the other,' and Sagi has failed on this motion for summary judgment to provide evidence to the contrary." *Id.*

The court first turns to plaintiff's motion for an Order granting him judgment on Note 2,

Note 3 and the stock purchase agreement. As an initial matter, plaintiff's motion for judgment against Sagi on Note 3 is granted without opposition pursuant to the First Department's decision in *Genger*, 123 A.D.3d 445. Accordingly, plaintiff is entitled to a judgment against Sagi on Note 3 in the amount of \$94,122.

Plaintiff's motion for judgment against Sagi on Note 2 is also granted pursuant to the First Department's decision in *Genger*, 123 A.D.3d 445. However, this court finds that the post-default rate of interest that applies to Note 2 is 3.24% and not the statutory rate of 9%. "When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract...If the parties failed to include a provision in the contract addressing the interest rate that governs after principal is due or in the event of a breach, New York's statutory rate will be applied as the default rate." *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011). Pursuant to CPLR § 5004, the statutory interest rate is 9%. However, "New York courts have long held that when an agreement involving an indebtedness 'provides that the interest shall be at a specified rate *until the principal shall be paid*, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment.'" *NML Capital*, 17 N.Y.3d at 258 (citing *O'Brien v. Young*, 95 N.Y. 428, 430 (1884)). "Said another way, when the principal on a loan is due on a date certain and the debtor fails to make payment, the interest rate in the contract will be used to calculate interest on unpaid principal from the date of maturity of the loan to the entry of judgment." *NML Capital*, 17 N.Y.3d at 258. "Thus, inclusion of a clause directing that interest accrues at a particular rate 'until the principal is paid' (or words to that effect) alters the general rule that interest on principal is calculated pursuant to New York's statutory interest rate after the loan matures or the debtor defaults." *NML Capital*, 17 N.Y.3d at 258-59.

In the instant action, the court finds that the post-default interest rate to be applied to the amount due under Note 2 is 3.24% and not the statutory rate of 9% on the ground that Note 2 includes a clause directing that interest accrue on the unpaid principal at the rate of 3.24% until the “[r]etirement of the promissory note,” or, in other words, until the principal is paid. Note 2 specifically states as follows:

FOR VALUE RECEIVED, the undersigned, SAGI GENGER,...hereby unconditionally promises to pay to the order of Arie Genger,...on March 12, 2007,...the principal amount of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

The Borrower further agrees to pay interest in like money...the unpaid principal amount hereof at a rate of 3.24% per annum compounded semi-annually. *Interest shall be payable at retirement of the PROMISSORY NOTE.*

(Emphasis added). Therefore, pursuant to the directive of the Court of Appeals in *NML Capital*, 17 N.Y.3d 250, this court must alter the general rule and instead apply the 3.24% rate of interest provided for in Note 2. Accordingly, plaintiff is entitled to a judgment against Sagi on Note 3 in the amount of \$146,946.05.

However, that portion of plaintiff’s motion for judgment against Sagi on the stock purchase agreement is denied. It is undisputed that plaintiff has established his right to judgment against Sagi as the owner of the stock purchase agreement pursuant to the First Department’s decision in *Genger*, 123 A.D.3d 445 in which it held that “[t]o the extent the notes and stock purchase agreement were considered ‘non-liquid assets,’ subject to a ‘coin toss’ procedure set forth in the divorce settlement, Arie owns the instruments and the debts are owed to him.” However, Dalia has raised an issue of fact as to the ownership of the stock purchase agreement. Specifically, Dalia has cross-moved for summary judgment on the stock purchase agreement based on her assertion that since the First

Department issued its decision in December 2014, she has conducted the coin toss pursuant to the Stipulation and that based on said coin toss, she is now the rightful owner of the stock purchase agreement and must be granted judgment thereon. Thus, judgment on the stock purchase agreement for either plaintiff or Dalia may not be granted until the validity of the coin toss is determined. However, this court finds that the determination of whether the coin toss was valid should be made by the Honorable Matthew Cooper in the matrimonial part. Indeed, plaintiff has affirmed, and the parties do not dispute, that plaintiff has already moved before Justice Cooper in January 2015 to set aside the coin toss as invalid. Thus, plaintiff's motion for judgment against Sagi on the stock purchase agreement and Dalia's cross-motion for summary judgment on the stock purchase agreement are denied without prejudice with leave to renew at such time when Justice Cooper issues a decision on the motion pending before him determining the validity of the coin toss conducted by Dalia in January 2015.

Additionally, that portion of Dalia's cross-motion for an Order directing that any payment on the stock purchase agreement made by Sagi be paid into court until the rightful ownership of the stock purchase agreement has been resolved is denied as this court has not yet directed Sagi to make any payment on the stock purchase agreement at this time.

Finally, to the extent plaintiff asserts in his moving papers that he is no longer seeking judgment against Sagi on Note 1, he must move or stipulate to discontinue that claim against Sagi as it is still a claim in this action.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an Order granting him judgment against Sagi on Note 2 and Note 3 is granted; and it is further

