

| |
|--|
| Matter of Genger v Pedowitz & Meister LLP |
| 2015 NY Slip Op 32635(U) |
| April 14, 2015 |
| Supreme Court, New York County |
| Docket Number: 161812/2013 |
| Judge: Barbara Jaffe |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 12

Orly Genger
-v-
Pedowitz & Meister LLP

INDEX NO. 161812/2013

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for other reliefs

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

APR 14 2015

Dated: _____



BARBARA JAFFE, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
In The Matter Of An Article 77 Proceeding

Index No. 161812/2013

ORLY GENGER, as beneficiary of the
Orly Genger 1993 Trust,

Motion seq. nos. 001, 002 and 004

Petitioner,

-against-

DECISION AND ORDER

PEDOWITZ & MEISTER LLP, as escrow agent,
DALIA GENGER, as trustee of the Orly Genger
1993 Trust, and TPR INVESTMENT
ASSOCIATES, INC.,

Respondents.

-----X
BARBARA JAFFE, JSC:

By motion sequence 001 (NYSCEF 2), petitioner commenced a proceedings under CPLR Article 77 against respondent Pedowitz & Meister (Pedowitz), as escrow agent of an escrow agreement pursuant to which sale proceeds of certain shares in the Orly Genger Trust were held, asserting two causes of action: specific performance by Pedowitz of the escrow agreement, and breach of fiduciary duty against Pedowitz for not disbursing funds to Orly pursuant to the agreement. The motion was opposed by Pedowitz, for itself, as escrow agent, by Dalia Genger, petitioner's mother and trustee of the Orly Trust, and by TPR Investment Associates, Inc. (TPR), the former corporate parent of Trans Resources Inc. (TRI). Pursuant to an order of this court dated January 16, 2015 (NYSCEF 112), TPR's motion to dismiss the petition (sequence 003) was denied as moot, based upon a filed stipulation of discontinuance (NYSCEF 107).

In motion sequence 002 (NYSCEF 18) and motion sequence 004 (NYSCEF 42), Dalia and Pedowitz, respectively, seek orders dismissing the proceeding and granting sanctions against

petitioner and her counsel. Petitioner opposes both motions and cross moves (NYSCEF 59) to amend the petition and to consolidate this proceeding with a related action titled *Arie Genger et al. v Sagi Genger et al.*, Index No. 651089/2010 (the 2010 action). In the 2010 action, petitioner and her father, Arie Genger, asserted, among other claims, breach of fiduciary duty and unjust enrichment against, among others, TPR, Dalia, and petitioner's brother, Sagi Genger, relating to certain shares of TRI stock in which Arie and petitioner each claimed a beneficial interest, and which were sold by TPR and Sagi (TPR/Sagi) to the so-called Trump Group. The three motions (sequence numbers 001, 002 and 004) and the cross motion are disposed of in this decision.

I. BACKGROUND

The background for these motions has been described in detail in various opinions. (*See TPR Inv. Assocs. v Pedowitz & Meister et al.*, 2014 WL 1979932 [SD NY 2014]; *Genger v Genger*, 121 AD3d 270 [1st Dept 2014]). Thus, familiarity with the background is presumed, and only the relevant facts are summarized herein for purposes of addressing the instant motions.

The central issue is whether Pedowitz breached its fiduciary duty, as escrow agent under the escrow agreement, dated September 1, 2010, and executed by the Trump Group, TPR, the Orly Trust, Pedowitz, and petitioner, as beneficiary of the Orly Trust. Pursuant to the agreement, \$10.3 million in sale proceeds was placed in an escrow account maintained by Pedowitz, as the disposition of the proceeds was pending resolution of the litigation with respect to the Orly Trust's TRI shares that were sold to the Trump Group by TPR/Sagi.

On November 18, 2013, TPR's counsel purportedly sent correspondence to the other parties to the escrow agreement, including Pedowitz, requesting that the funds be released to TPR. On the same day, petitioner's counsel wrote to other parties of the agreement, objecting to

TPR's request and demanding that the escrow funds be released to petitioner instead. On November 19, 2013, TPR commenced an action in the federal district court of New York seeking, among other things, disbursement of the escrow funds to TPR (TPR's federal action). On November 22, 2013, TPR's counsel wrote to Pedowitz, objecting to petitioner's request for the disbursement of the escrow funds to her. On December 23, 2013, petitioner filed the instant petition with this court commencing this proceeding, alleging that Pedowitz breached its fiduciary duty by not releasing the funds to her. On January 31, 2014, Pedowitz filed an interpleader in the federal court to protect itself from liability for damages that might arise in connection with the release of funds. In her cross motion, petitioner argues, among other things, that Pedowitz further breached its fiduciary duty by prosecuting the interpleader, instead of commencing an arbitration, as required by the escrow agreement. The foregoing issues, and others, will be discussed below.

II. DISCUSSION

In the TPR federal action, and in the petition that petitioner filed more than one month thereafter, the relief sought is identical in that both parties demand that Pedowitz disburse escrow funds; however, here, petitioner also seeks to hold Pedowitz liable for its alleged breach of its fiduciary duty to her.

Pursuant to CPLR 3211(a)(4), a court may dismiss an action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." The purpose of this statute is "to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues." (*White Lights Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 96 [1st Dept 1997]). Because the federal court decided

the relief sought on its merits, namely, whether Pedowitz should disburse the escrow funds to TPR (*TPR Inv.*, 2014 WL 1779932 at *4), before petitioner sought relief, the instant action may be dismissed.

Petitioner nonetheless argues that she is not foreclosed from seeking relief in this court because the TPR federal action is “meritless on its face.” (NYSCEF 78 at 3). In the opinion of the federal court, based on the fact that all parties have agreed that the Trump Group is now the record and beneficial holder of all TRI shares, including the Arie and Orly Trust shares, “[i]t follows that TPR is entitled to the Proceeds, with Orly’s remaining claims for money damages against TPR and Sagi to be resolved in the New York Supreme Court.” (*TPR Inv.*, 2014 WL 1979932 at *7). Accordingly, the federal court granted TPR’s motion for summary judgment, denied petitioner’s motion to dismiss TPR’s complaint, and directed Pedowitz to release to escrow funds to TPR. (*Id.* at *8). In compliance with that directive, Pedowitz disbursed the escrow funds to TPR. In light of the federal court decision, and for the reasons stated therein, the specific performance claim in the petition which requests that the escrow funds be disbursed to petitioner must be denied as moot.

Even though the federal court decision stated that nothing therein “should be construed as resolving any question other than whether TPR is the next (but not necessarily last) beneficiary of the sale of the Orly Trust shares” and left that question for “the state courts to sort things out,” (*id.* at *6), the Appellate Division dismissed, in connection with the 2010 action which petitioner seeks in her cross motion to consolidate with this proceeding, that Arie’s and petitioner’s claims against TPR/Sagi and Dalia, including breach of fiduciary duty and unjust enrichment, should be dismissed. (*Genger*, 121 AD3d at 278-282). Thereafter, the Court of Appeals declined to hear

Arie's and petitioner's appeal. (*Genger*, 2015 NY Slip Op 64593 [Feb 24, 2015]). Accordingly, with respect to the Orly Trust shares that were sold by TPR/Sagi to the Trump Group, the courts have ultimately and judicially determined that TPR is entitled to the proceeds, which has been held in escrow by Pedowitz.

In a separate federal action in which Sagi sued Orly for breaching a contract to which Sagi, petitioner, and Dalia were parties, petitioner argued that she never actually received the Orly Trust shares and that the contract was not supported by consideration. (*Genger v Genger*, ___ F Supp 3d ___, 2015 WL 64743 [SD NY 2015]). The presiding federal court judge, however, observed that petitioner had "monetized" her interest in those shares under the June 2013 settlement agreement whereby, in exchange for an amount of money paid to her by the Trump Group, she agreed that the Trump Group would own all rights to those shares and that she would waive all of her claims, both as a trust beneficiary and individually. (*Id.*). Thus, according to the pertinent court decisions, all disputes related to petitioner's right or entitlement to the escrow funds, which represents sale proceeds of the Orly Trust shares in TRI, have been adjudicated against her.

In the TPR federal action, the court stated that Pedowitz's interpleader was unnecessary because Pedowitz would not incur liability for damages to petitioner in complying with that court's direction in disbursing the escrow funds to TPR. (*TPR Inv.*, 2014 WL 1979932 at *8). It also noted in dicta that there was no record of whether Pedowitz might be liable to Orly "on any other basis." (*Id.*). Notwithstanding the federal court's substantive ruling that Pedowitz should disburse the funds to TPR, petitioner's breach of fiduciary claim against Pedowitz appears to be based on procedural issues arising from the escrow agreement.

For instance, according to petitioner, under the escrow agreement, Pedowitz may only interplead when there are multiple valid requests for the funds, and, as she lodged the only valid written request and TPR provided no written objection, as required by the agreement, “TPR’s purported objection is a legal nullity, and [petitioner] remains entitled to the Proceeds.” (NYSCEF 78 at 2). Petitioner also advances arguments and facts relating thereto as to why TPR’s requests, notices and/or objections were procedurally improper. (*Id.* at 5-8). The federal court, however, stated that “today’s decision in TPR’s favor is not based upon the mechanics of the Escrow Agreement, but upon this Court’s prior rulings. Thus, the question of whether it was TPR or [petitioner] who first validly requested the Proceeds is of no moment.” (*TPR Inv.*, 2014 WL 179932 at *7, n 1). In any event, because the TPR federal action was filed one day after petitioner’s request for escrow funds, it may be deemed a timely objection to her request and, they were competing claims.

Petitioner also argues that Pedowitz should have proceeded with an arbitration proceeding, as required by the escrow agreement. (NYSCEF 78, at 11-13). Section 2 (c) of the agreement provides, in relevant part, that “Escrow Agent may file an interpleader action in a court . . . and obtain an order from such court requiring the other parties hereto to commence an arbitration proceeding . . . to resolve all issues arising pursuant to the Escrow Agreement.” Thus, petitioner maintains that Pedowitz should not have filed an interpleader to seek declaratory relief, as it would be limited only to seeking a court order to compel arbitration.

The same section of the agreement, entitled “Conflicting Requests,” also provides that “[t]he commencement of such an interpleader action . . . shall release Escrow Agent . . . from any and all further obligations and duties arising pursuant to this Escrow Agreement.” Thus, because

Pedowitz was faced with competing claims and conflicting requests from TPR and petitioner, and because it had no personal stake in the funds, it filed the interpleader seeking judicial guidance and declaratory relief, which should not be characterized as constituting a breach of fiduciary duty. Petitioner's allegation that the interpleader was filed by Pedowitz "to aid TPR's effort to obtain the Proceeds in TPR's chosen forum" (NYSCEF 102, at 6-7) is irrelevant, as the federal court has ruled in TPR's favor and directed Pedowitz to disburse the proceeds to TPR.

Petitioner also argues that Pedowitz labors under an impermissible conflict of interest, and alleges that it is using its position as escrow agent to benefit Dalia, its client and trustee of the Orly Trust, to engage in forum shopping to the advantage of Dalia and TPR. (NYSCEF 78 at 1). The record, however, reflects no evidence that Pedowitz's dual role violated any fiduciary duty or that its refusal to disburse the funds to TPR or petitioner was to benefit Dalia. Indeed, an attorney may properly serve in the dual role, as an escrow agent and attorney for the trustee, and it is undisputed that petitioner never objected to Pedowitz's dual role when the escrow agreement was duly executed by the signatory parties, including, among others, Pedowitz, petitioner, and Dalia, as trustee of the Orly Trust.

Thus, the second cause of action alleging that Pedowitz breached its fiduciary duty as an escrow agent is without a factual or legal basis.

As noted above, in her cross motion, petitioner seeks consolidation of this proceeding with the 2010 action. Consolidation is unwarranted as Pedowitz is not a necessary party to the 2010 action. Indeed, the Appellate Division has ruled that petitioner's claims against TPR/Sagi and Dalia should be dismissed, a ruling that adversely affects her position in the 2010 action, as her claims therein involved the Orly Trust shares and the proceeds of such shares.

In their motions and objections to petitioner's cross motion, Pedowitz and Dalia request the imposition of costs and sanctions against petitioner and her counsel for commencing this proceeding. New York's Codes, Rules and Regulations authorizes a court to award sanctions against a party who engaged in "frivolous conduct" that is "completely without merit in law and cannot be supported by a reasonable argument" for an extension or modification of the law. (22 NYCRR 130-1.1 [c][1]). At the time this proceeding was commenced, the claims asserted in the petition appeared colorable and plausible, and it could not be said with certainty that the conduct was frivolous or that the proceeding was undertaken primarily to harass or maliciously injure another. Subsequently, and as a result of the rulings by the federal court and the Appellate Division, the claims were discredited. Therefore, the imposition of sanctions is not warranted under the circumstances.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the relief requested in the petition (motion sequence number 001) by petitioner is denied, and the claims asserted therein are dismissed; it is further

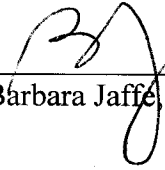
ORDERED, that the relief requested in motion sequence number 002 by defendant Dalia Genger seeking dismissal of the petition is granted, but the request for sanctions and/or costs against petitioner and her counsel is denied; it is further

ORDERED, that the relief requested in motion sequence number 004 by defendant Pedowitz & Meister LLP seeking dismissal of the petition is granted, but the request for sanctions and/or costs against petitioner and her counsel is denied; and it is further

ORDERED, that the relief requested in petitioner's cross motion is denied, and the Clerk

of the Court is directed to close this case.

ENTER:



Barbara Jaffe, JSC

Dated: April 14, 2015
New York, New York