Genger v Genger
2016 NY Slip Op 30602(U)
April 8, 2016
Supreme Court, 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

Mot. seq. no. 043

DECISION AND ORDER

BARBARA JAFFE, JSC:

In this motion, plaintiff Orly Genger, in her individual capacity and on behalf of the Orly Genger 1993 Trust (Orly Trust), both in its individual capacity and on behalf of D&K Limited Partnership (the LP), seeks an order of this court granting summary judgment as to defendants' liability, and severing the issue of damages for subsequent trial, with respect to three causes of action asserted in the second amended complaint, dated August 4, 2010. Specifically, she seeks summary judgment as to (1) the first cause of action, finding that defendants Sagi Genger and D&K GP LLC (the GP) breached their fiduciary duties to the LP and to the Orly Trust; (2) the seventh cause of action, declaring void the February 2009 UCC sale of a promissory note conducted by defendant TPR Investment Associates, Inc. (TPR); and (3) the eighth cause of action, directing that the shares sold and transferred to TPR via the UCC auction be returned to the LP. (NYSCEF 726).

Sagi, TPR, and the GP oppose and cross-move for an order granting them summary

judgment. (NYSCEF 786). The motions are consolidated for decision.

I. BACKGROUND

The background for this action has been described in detail in many opinions, including my opinions dated May 29, 2013 (NYSCEF 418), December 23, 2013 (NYSCEF 561), and April 3, 2015 (NYSCEF 878), all addressing defendants' motions seeking leave to amend their answers to add affirmative defenses, and the decision of the Appellate Division, First Department, dated September 23, 2014 (*Genger v Genger,* 120 AD3d 1102 [1st Dept 2014]), addressing the voidability of certain settlements and transactions entered into by defendants that violated prior court injunctions and adversely affected the Orly Trust, and sanctions sought by plaintiff against defendants arising therefrom, as well as my opinion dated May 4, 2015 (NYSCEF 904), by which I denied defendants' motion seeking dissolution of a 2013 preliminary injunction issued in favor of plaintiff. Familiarity with these decisions is presumed, and only the relevant facts are summarized here for purposes of addressing this motion and the cross motion.

Arie Genger, the father of Orly and Sagi and the former husband of Dalia Genger before their 2004 divorce, founded TPR and its former subsidiary Trans Resources Inc. (TRI). In 1993, he established the Orly Trust and the Sagi Genger Trust (the trusts) as part of a family estate plan for his children's benefit. Each trust was assigned a 48 percent interest in the LP, an entity created for Dalia and the children; Dalia held the remaining four percent interest and served as general partner. Thus, the trusts were made limited partners of the LP.

After Arie established the trusts, the LP purchased 240 shares of TPR stock, or 49 percent of TPR, funded in part by a note executed in favor of TPR for $8,950,000 (D&K note). The D&K note required repayment of principal and interest in annual installments over 10 years; the

trusts guaranteed the repayment. The remaining 51 percent interest in TPR was held by Arie.

It is undisputed that pursuant to the family's estate plan, the Orly Trust and the Sagi Trust were to have equal interests in TPR and other family-owned companies (NYSCEF 774 at 9), and defendants concede that, under the plan, TRI's income was to "flow upwards to TPR, which paid dividends to D&K [LP], which in turn used those dividends to pay interest back to TPR on the D&K Note." Through this "close-loop" dividend structure, the D&K note facilitated Arie's transfer to his children of his ownership interest in TPR, and the related family-owned companies, to his children, by ensuring that the note would be repaid and that the stock would ultimately be owned free and clear by the LP and the children's trusts, but with the payments being made from TRI's earnings rather than from the children or the LP directly. Approximately $4.5 million in principal and interest were paid on the note until 1999. (NYSCEF 864 at 1). Thereafter, no attempt was made to collect on it for almost 10 years.

Soon after Arie's and Dalia's 2004 divorce settlement, whereby Dalia obtained Arie's 51 percent interest in TPR, Dalia ceded control of TPR and the LP to Sagi by naming him CEO of TPR and forming the GP to replace herself as the LP's general partner; Sagi was appointed as the GP's manager. In 2008, TRI was sold to the Trump Group, which had held a minority interest in TRI since 2004.

As of August 8, 2008, Dalia assigned to Sagi her full interest in TPR. Two weeks later, on August 22, 2008, Sagi sold all of the Genger family's TRI shares to the Trump Group for $44 million. Nine days later, on August 31, 2008, Sagi caused TPR to send a notice of default on the D&K note to the LP, and foreclosed on it in February 2009 at a UCC auction sale at which the TPR shares pledged by the LP as security for the D&K note were purchased by TPR for $2.2

million, thereby reducing the LP's debt obligation, but leaving a $8.8 million deficiency guaranteed by the trusts. Thus, the Orly Trust's interest in the LP's sole asset, its stock interest in TPR, was transferred and sold to TPR.

In July 2009, Orly demanded from TPR the return to the LP of those shares that had been transferred and sold to TPR in the auction; TPR did not respond. Plaintiff thus commenced this action in August 2009, asserting 16 causes of action.

II. ANALYSIS

"'The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the proponent's *prima facie* burden is satisfied, the opposing party bears the burden of presenting evidentiary facts sufficient to raise triable issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

Thus, summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), or "where there is any doubt as to the existence of a triable issue" of fact (*Am. Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]), and the court must examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). This scrutiny is warranted because the entry of summary judgment "deprives the litigant of his day in court." (*Andre v Pomeroy,* 35 NY2d 361, 364 [1974]). Bare allegations or conclusory assertions are not sufficient to create genuine issues of fact necessary to defeat a

summary judgment motion. (*Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 [1978]).

A. First cause of action (breach of fiduciary duty)

1. Res judicata and partnership agreement

A cause of action is barred if it was part of a transaction or series of transactions at issue and decided in a prior action. The determination of whether a cause of action was part of a transaction or series of transactions requires a determination of what "factual grouping" constitutes "a transaction or series of transactions" on which asserted claims are based, which in turn requires an examination of "how the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations . . . ." (*Marinelli Assocs. v Helmsley-Noyes Co.*, 265 AD2d 1, 5 [1st Dept 2000][internal quotation marks and citations omitted]).

Defendants argue that this cause of action must be dismissed given the Appellate Division's decision in another Genger family action (*[Arie]Genger v [Sagi]Genger*, 121 AD3d 270 [1st Dept 2014) (the 2010 action), wherein it was held that, "as an officer of TPR, Sagi's fiduciary duty was to the corporation and its stockholders," not to the Orly Trust. (*Id.* at 278-279).

While the focus of the 2010 action is the 2008 sale of the Orly Trust's TRI shares to the Trump Group, the focus here is on the 2009 UCC sale of the LP's TPR shares, and in denying a motion to consolidate this action with the 2010 action, I found that "the two actions implicate different factual issues and legal analyses." (NYSCEF 878 at 7). The Appellate Division also recognized that the two actions involve different factual transactions and require different legal analyses, as evidenced by its dismissal of Orly's breach of fiduciary duty claim in the 2010 action

(*Genger*, 121 AD3d 270), while upholding my decision (NYSCEF 418) that Orly has a viable breach of fiduciary duty claim in this action (*Genger*, 120 AD3d 1102). The Court also addressed the allegation that Sagi had breached his fiduciary duty to the Orly Trust "by causing TPR to sell . . . the Orly Trust's . . . TRI shares to the Trump Group." (*Genger*, 121 AD3d at 278). Here, by contrast, it is alleged that Sagi/D&K GP breached their fiduciary duties to D&K LP/the Orly Trust because Sagi used his control over D&K GP and TPR by entering into self-dealing transactions to strip D&K LP of its TPR shares, thereby injuring D&K LP/the Orly Trust. Those claims are not addressed in the Appellate Division decision, nor were the LP or the GP parties to that action. Consequently, plaintiff's cause of action for a breach of fiduciary duty is not barred by the earlier decision in the 2010 case.

Defendants also argue that the D&K partnership agreement bars the claim as it provides that the partnership will indemnify and hold harmless each partner for any acts performed in connection with the partnership's assets or business, and also permits limited self-dealing by the partners. (NYSCEF 864). Given my holding that the applicable provision of the agreement does not preclude claims against partners for "fraud, bad faith or willful misconduct" (NYSCEF 71 at 23-24), the D&K partnership agreement also poses no bar to plaintiff's cause of action for a breach of fiduciary duty. Moreover, it is against public policy to allow a waiver to shield a party from its own deliberate misconduct and malfeasance. (*Pike v New York Life Ins.*, 72 AD3d 1043, 1051 [2d Dept 2010]). Indeed, the subject provision on which defendants rely only addresses a party's potential right to indemnification, but does not shield the party from liability for violation of fiduciary duties.

2. Breach of fiduciary duty

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). In a partnership, a partner owes a "sensitive and inflexible" fiduciary duty to the other partners and to the partnership (*Anderson v Weinroth*, 48 AD3d 121, 136 [1st Dept 2007]), which bars "not only self-dealing, but also requir[es] avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interests of those owed a fiduciary duty" (*Pokoik*, 115 AD3d at 429).

When an individual acts simultaneously as a director or manager of two corporations, he owes "the same duty of good management to both corporations," and must demonstrate "utmost good faith and the most scrupulous inherent fairness of the bargain." (*Weinberger v UOP, Inc.*, 457 A2d 701, 710-711 [Del 1983]). And when the individual operates from both sides of the challenged transaction, he must show that the transaction was "entirely fair," a test applied by the Delaware courts that has been adopted in New York when reviewing breach of fiduciary duty claims arising from self-interested transactions. (*R2 Invs., LDC, v Icahn*, 117 AD3d 632, 633 [1st Dept 2014]). The "entire fairness" test has two components: fair dealing and fair price. (*Weinberger*, 457 A2d at 711; *see also Cambridge Cap. Real Estate Investments, LLC v Archstone Enter. LP*, __ AD3d __, 2016 WL 1098149 [1st Dept 2016] [same]). While the former focuses generally on the timing of the transaction, its structure, negotiation, disclosure, and approval by the parties in interest, the latter focuses on the financial consideration for the transaction. (*Id.*).

Plaintiff alleges that before the auction, Sagi owned 50 percent of TPR, and that after the

auction, he acquired, through the LP's stock interest, an additional 48 percent interest in TPR. She asserts that Sagi and the GP breached fiduciary duties they owed to the LP and the Orly Trust by using Sagi's positions as TPR's CEO and as the GP's manager to engage in self-dealing and cause TPR to foreclose upon the D&K note via the UCC sale. In doing so, she maintains, Sagi caused the LP to lose its sole asset, its shares of TPR stock, thereby injuring the LP and its limited partners, including the Orly Trust, and enriching himself by almost doubling his interest in TPR.

Defendants argue, among other things, that the GP's duty, as the managing member of the LP, was to "treat all shareholders [Orly Trust and Sagi Trust] fairly and evenly," that it had no duty to favor the Orly Trust over the Sagi Trust, that Sagi's sole duty was to the GP, and that their actions were meant to benefit the LP as a whole by reducing or erasing its debt under the promissory note. They also allege that the GP paid its full share of the note in 2004, and that the Sagi Trust attempted to deal with the debt, whereas the Orly Trust did not. (NYSCEF 864 at 20). They offer in support TPR's board resolution, dated November 1, 2011, pursuant to which TPR released the Sagi Trust from obligations under the D&K note, based on certain settlements and transactions (NYSCEF 851), and an agreement, dated September 23, 2008, by which Sagi, as TPR's CEO, released the Sagi Trust from liabilities arising from TPR's 2008 sale of its TRI shares to the Trump Group, in exchange for and in settlement of its purported payment of approximately $7 million of the $27 million proceeds to TPR, with the remaining $20 million paid to the Sagi Trust for Sagi's sole benefit. (NYSCEF 853).

The November 2011 board resolution, however, was adjudged void by me (NYSCEF 418), and by the Appellate Division (*Genger*, 120 AD3d 1102]), and thus may not be used to

support defendants' argument here, and the agreement reflects that Sagi was apparently on both sides of the 2008 exchange and settlement, thereby raising a question about its legitimacy as well. (NYSCEF 853).

It is also undisputed that until Sagi took control of TPR from Dalia, there had been no attempt to collect on or enforce the note, despite the LP's failure to make payments on it for the previous five years. Thus, what defendants accomplished in selling the note at auction resulted in what Arie had sought to avoid, namely, an unequal disposition of Genger family assets. While defendants contend that once the default occurred, they had to auction the shares, it is undisputed that Sagi could have, through the Sagi Trust, continued to repay the note, perhaps through proceeds from the sale of his TRI shares. Instead, Sagi, on behalf of TPR, issued the default notice.

Defendants fail to address the testimony and evidence proffered by Sagi and Dalia in the post-divorce arbitration and on which the arbitrator relied in finding for Dalia, namely, that the D&K note "was part of the estate planning scheme to transfer wealth to the children [and that t]he parties never intended for this note to be collected and to do so would re-transfer wealth back to the parents and defeat their estate plan." (NYSCEF 757 at 15). Also not addressed is Sagi's memorandum to his counsel, David Parnes, dated August 2, 2006, in which he acknowledged that "D&K LP and its partners have a variety of claims against TPR, and deny the enforceability of the [D&K] Note" and agreed that the LP would refrain from making claims against TRP as long as the note was not enforced by TPR (NYSCEF 759), and the August 2007 divorce arbitration at which Parnes characterized the note as "problematic" and testified that everybody wanted to "bury [it] in the woods" to make it go away and that Sagi made efforts to try

to get rid of the note but was unable to do so (NYSCEF 756).

Thus, here, as Sagi was both the CEO of TPR/manager of the GP and the general partner of the LP, which was stripped of its TPR shares in the UCC sale notwithstanding his denial of the enforceability of the note and in contravention of the family's estate plan, thereby wiping out the LP's direct interest and the Orly Trust's indirect interest in TPR in favor of Sagi, Sagi fails to show the "utmost good faith" and the "entire fairness" of the transaction. (*See eg, R2 Investments, LDC v Icahn*, 117 AD3d 632 [1st Dept 2014] [applying Delaware "entire fairness" standard of review, plaintiffs stated breach of fiduciary duty claim against defendant based on allegations that defendant's recapitalization of company resulted in dilution of their voting rights while also giving defendant "super voting rights"]; *Ahlers v Evocation, Inc.*, 74 AD3d 1889 [4th Dept 2010] [plaintiffs alleged that defendants breached fiduciary duty by entering into merger agreement that was knowingly designed to enrich two of defendants' controlling shareholders at expense of common shareholders]; *compare Cambridge Cap. Real Estate Investments, LLC v Archstone Enter. LP*, __ AD3d __, 2016 WL 1098149 [1st Dept 2016[[plaintiff failed to allege facts demonstrating absence of fairness or that it did not receive the substantial equivalent in value of what it had before]; *see also Carey v Carey*, 101 AD3d 787 [2d Dept 2012] [in partnership involving family members, plaintiffs limited partners established entitlement to judgment on claim for breach of fiduciary duty against general partner based on partner's distribution of partnership assets to herself and others without making distributions to plaintiffs for their proportional share, thus breaching fiduciary duty of loyalty to limited partners]).

Defendants' alleged beneficial intent is belied by the consequences of their conduct, and there were avoidable adverse consequences to the Orly Trust to whom defendants owed a

fiduciary duty.

For these reasons and for those more fully set forth, *infra*, addressing plaintiff's cause of action to void the UCC transaction for lack of commercial reasonableness, I conclude that plaintiff demonstrates, *prima facie*, her right to summary judgment on the first cause of action, and that defendants fail to meet their burden of proving that the challenged transaction was "entirely fair."

B. Seventh cause of action (commercial reasonableness of UCC transaction)

Pursuant to article 9 of the New York Uniform Commercial Code (UCC), a secured creditor may, upon a valid default, foreclose upon the pledged collateral in a "commercially reasonable" manner. (UCC 9-610). "Every aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable." (UCC 9-610 [b]). The "procedures employed," i.e., the method used to invite bids to optimize auction price, may be used as a "barometer for measuring commercial reasonableness." (*Dougherty v 425 Dev. Assocs.*, 93 AD2d 438, 447 [1st Dept 1983]).

Plaintiff contends that the UCC auction was not held in a commercially reasonable manner. She first observes that while the LP's 240 shares of TPR stock were auctioned off for $2.2 million, in August 2008, Sagi purchased from Dalia 200 shares of TPR stock for $5 million, or more than twice the foreclosure price, and also purchased 10 shares of TPR stock on behalf of his mother-in-law Rochelle Fang for $800,000 to $1,000,000 in January 2007, thus "giving TPR a valuation of $50,000,000." (NYSCEF 774 at 24).

According to Sagi, however, "insufficiency of sale price alone will not overturn an auction unless the amount obtained 'shocks the court's conscience'" (NYSCEF 864 at 27), and

he maintains that, based on TPR's 2008 tax return showing net assets of $7.6 million, the $2.2 million bid was "hardly shocking," as an investor would bid the "after-tax price," which would reduce that $7.6 million by at least one-third, leaving a value of $5 million for TPR or $2.4 million for the auction shares (*id.* at 28).

Assuming that TPR's tax return constitutes objective evidence and that the bid price does not shock the conscience, the auction's alleged "procedural proprieties" must be examined to ascertain whether the auction sale was conducted in a commercially reasonable manner.

Plaintiff asserts that the auction was held for an improper purpose because Sagi violated his fiduciary duties to the LP by entering into a self-interested transaction to benefit himself, and that he intentionally failed to seek bids from potential investors, including the Trump Group, which also rendered the auction commercially unreasonable. (NYSCEF 980 at 20, 22).

Defendants allege, referencing Sagi's February 28, 2013 deposition during which he testified that he had "asked the Trumps if they would be willing to bid on it," that "TPR expressly invited the Trump Group (the parties who were the most logical candidates, given TPR's claim to record ownership of the TRI shares) to bid on the TPR shares." (NYSCEF 864 at 8 [referencing exh. ZZ, NYSCEF 839, at 173]).

Plaintiff offers affidavits dated March 9, 2015, in which the Trump Group principals deny having been aware of the sale when it was held, or having any recollection of having been informed by anyone of the sale or of having been invited to participate in it. (NYSCEF 954).

In his reply (NYSCEF 992), Sagi relies on the October 2013 deposition testimony of Trump Group's counsel, who was unable to recall whether the Trump Group had expressed any interest in acquiring shares of TPR, and denied that his client "ever expressed any interest in

acquiring shares or membership interest in any of these D&K entities," presumably maintaining that an inference arises from counsel's denial that the Trump Group had in fact been asked to acquire TPR shares or an interest in any D&K entity.

That an individual did not express an interest in something does not constitute evidence that the individual had been asked whether he had an interest, especially where, as here, the question is whether the individual expressed an interest to a disinterested third party. Thus, not only does counsel's testimony permit no inference that the Trump Group had been asked by anyone to bid, but counsel affirmatively testified that the Trump Group had not been invited to the auction (NYSCEF 984 at 375), a fact omitted by defendants. As defendants fail to demonstrate that the Trump Group principals, the "most logical candidates" to bid on the TPR shares, were notified of the auction or offered an opportunity to buy the shares, they raise no factual issue as to the commercial reasonableness of the auction.

Furthermore, as Sagi himself denied the enforceability of the note (NYSCEF 759), it is questionable whether there was a valid default, an issue that also affects the propriety of the auction and the reasonableness of its procedure.

For all of these reasons, and even if the price does not shock the conscience, there is no issue of fact as to the commercial reasonableness of the sale.

C. Eighth cause of action (replevin of the LP's TPR shares)

A cause of action for replevin requires that the plaintiff demonstrate a possessory right in the chattel superior to the defendant's. (*Pivar v Graduate School of Figurative Art*, 290 AD2d 212, 212 [1st Dept 2002][citations omitted]). Plaintiff asserts that because the UCC sale was not held in a commercially reasonable manner, TPR has no legitimate possessory right to the LP's

TPR shares and, thus, the shares should be returned to the LP. (NYSCEF 774 at 25).

The objective of replevin is recovery of the property, and the alternative relief or remedy is "fixation of its value." (*Sharfman v May-Claire Costume Co.*, 133 Misc 482, 484 [New York City Ct, NY County 1928]; *see* CPLR 7108[a] [damages for wrongful taking or detention or for injury to or depreciation of a chattel may be awarded to party]).

Notwithstanding plaintiff's demonstration of her right to replevin of the TPR shares to the LP, the return of the shares will effectively resume an acrimonious relationship, likely engendering more litigation. Consequently, the damages arising from defendants' breach of fiduciary duties or an evaluation of the subject shares will be determined or fixed in lieu of returning such shares to plaintiff.

D. Other issues

Defendants' additional arguments that plaintiff's claims are barred by Orly's fraud on the court, her failure to satisfy the so-called "*Greenleaf* exception," (*Greenleaf v Lachman*, 216 AD2d 65 [1st Dept 1995], *lv denied* 88 NY2d 802 [1996]) and on public policy grounds were addressed and rejected in my opinions dated April 23, 2013 and April 3, 2015 (NYSCEF 561 and 878), for the reasons stated therein. Therefore, defendants are precluded from raising them again.

Defendants support their argument that these claims must be dismissed with the affidavit of a Sagi Trust trustee, who disagrees that the D&K note was never to be collected or enforced. (NYSCEF 815 at 2). Rather, he claims that this action "would disrupt our affairs and impugn to the [Sagi] Trust's estate improper tax reporting." (*Id.*). In essence, defendants seek to re-assert their affirmative defense of "necessary party" as a basis for dismissal based on plaintiff's failure to name the Sagi Trust as a defendant here, alleging that the action negatively impacts the Sagi

Trust by alleging that it is a party to a tax fraud but it cannot defend its interests here as it was not named as a defendant. (NYSCEF 864).

Notwithstanding the trustee's position, the arbitrator presiding over Arie's and Dalia's divorce observed, based on the parties' positions in that case, that the D&K note was not intended to be collected or enforced (NYSCEF 757 and 759; *and see supra*, III.A.2.), and I too observed in an opinion dated January 7, 2015, in considering TPR/Sagi's argument that they and the Sagi Trust are distinct entities that have sustained different damages that:

> [g]iven 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 . . . are estopped from arguing that Sagi's interest in pursuing the cross claims is separate and apart from that of the Sagi Trust.

(*[Arie] Genger v [Sagi] Genger*, 2015 WL 112831 at *6, 2015 NY Slip Op 30008[U] [Sup Ct, NY County 2015], *affd* 135 AD3d 454 [1st Dept 2016]). Thus, as Sagi has been involved in this action for at least six years, he is precluded from raising this belated "necessary party" affirmative defense at the eleventh hour. Defendants have been given many opportunities to amend their answers to add defenses.

III. CONCLUSION

As defendants concede, this is not a complicated case. After obtaining control of TPR, Sagi enforced the note, despite having previously denied its enforceability, and did so in a manner calculated to inure to his benefit. By declaring a default and selling the LP's 240 shares in TPR back to TPR, he not only doubled his interest in TPR but also obtained complete control over it. Sagi then attempted, albeit unsuccessfully after court intervention, to rid himself of the remaining approximately $8 million due on the note by agreeing with himself, via TPR and the

Sagi Trust, to forgive his own debt. His actions resulted in plaintiff losing her shares in TPR secured by the note and the Orly Trust losing its only collateral in the LP, while still being held liable for the remaining amount due on the note. In short, defendants took the Sagi Trust's 120 shares in TPR and millions due on the note, and used it to gain control of TPR, including the 240 shares sold back to it, and erased the trust's obligation to pay the rest of the note. Moreover and unfortunately, defendants' actions not only harmed plaintiff, but also undermined and nullified the intent of their parents to convey their wealth to Sagi and Orly equally.

Based on all of the foregoing reasons, it is hereby

ORDERED, that the relief requested in this motion is granted to the extent of awarding partial summary judgment, on the issue of liability only, in favor of plaintiff with respect to the first, seventh, and eighth causes of action asserted in plaintiff's complaint; it is further

ORDERED, that the relief requested in defendants' cross motion for summary judgment is denied in all respects; it is further

ORDERED, that within ten days from the date of entry of this order, plaintiff shall serve a copy of this order upon defendants, as well as upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who shall assign this matter to a Special Referee, to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the issues regarding the damages arising from defendants' breach of their fiduciary duties to plaintiff and the value of the subject shares that were transferred in the February 2009 auction; and it is further

ORDERED, that the portion of plaintiff's motion seeking an award of damages is held in

abeyance pending receipt of the report and recommendations of the Special Referee.

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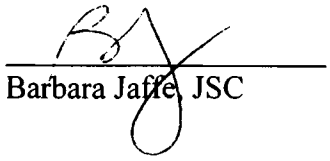

Barbara Jaffe, JSC

Dated: April 8, 2016
New York, New York