

Genger v Genger

2016 NY Slip Op 30726(U)

April 15, 2016

Supreme Court, New York County

Docket Number: 651089/2010

Judge: Barbara Jaffe

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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-

Index No. 651089/2010

Motion seq. no. 043

DECISION AND ORDER

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 Defendants.

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BARBARA JAFFE, JSC:

In this motion (NYSCEF 1169), Sagi Genger, individually and as assignee of the Sagi
Trust, and TPR Investment Associates, Inc. (TPR) (together, counterclaimants) seek an order

pursuant to CPLR 3212 for partial summary judgment on their (1) second counterclaim against Arie Genger and Orly Genger and second third-party claim against William Dowd for breach of fiduciary duty and aiding and abetting such breach; (2) fifth counterclaim against Arie and Orly for breach of the 2004 transfer agreement; and (3) eighth counterclaim against Arie and Orly for indemnification. Arie, Orly, and Dowd oppose and each cross-moves for summary judgment dismissing all counterclaims and/or third-party claims.

I. BACKGROUND

The facts of this case have been detailed in many opinions including the Appellate Division of the First Department, and the Delaware courts. The following decisions are the most relevant to the issues raised in this motion and the cross motions, as they are based on similar core facts. (*Genger v Genger*, 38 Misc 3d 1213 [A], 2013 NY Slip Op 50091 [U] [Sup Ct, NY County 2013], *affd as modified* 121 AD3d 270 [1st Dept 2014]; and *Genger v Genger*, 2015 WL 112831 [Sup Ct, NY County 2015], *affd* 135 AD3d 454 [1st Dept 2016]). The germane facts are summarized below.

Arie and Dalia Genger are the parents of Sagi and Orly. Before 2001, Trans Resources Inc. (TRI) was a wholly-owned subsidiary of TPR, a Genger family-owned company. Arie owned 51 percent of TPR, with the remaining 49 percent interest held by a limited partnership, D&K LP, composed of Dalia, the Sagi Trust and the Orly Trust. In 2001, when TRI faced financial difficulties, Arie sought aid from the Trump Group, which agreed to invest in TRI, and became a minority stockholder with a 47.15 percent interest. They entered into a stockholders agreement which provided, in relevant part, that 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, along

with a right of first refusal, and that the failure to comply with the transfer restriction would render the transfer void, entitling the non-transferring party to purchase the transferred shares at the fair market value at the time of transfer.

In October 2004, Arie and Dalia settled their divorce by stipulation, with Sagi assisting in negotiating the division of the marital property. Arie and Dalia agreed to instruct TPR to transfer its TRI shares to Arie, as well as to the Sagi Trust and Orly Trust (the trusts). Arie misrepresented in the stipulation that, except for TPR, no consent was required for the transfer of the TRI shares. On October 26, 2004, Arie resigned from TPR, and on October 29, 2004, as agreed, Arie transferred his TPR shares to Dalia, TPR transferred its TRI shares to Arie and to the trusts (collectively, the 2004 transfers), and Sagi became TPR's president and CEO. Sagi, on TPR's behalf, signed the transfer agreement to effectuate the 2004 transfers.

In early 2008, TRI again faced financial distress. Arie, then TRI's chairperson, asked the Trump Group to invest capital in exchange for additional TRI shares, such that the Trump Group would gain majority control. 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, but 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 TRI stock to Arie and the trusts pursuant to the divorce settlement. Despite the violation of the stockholders agreement, the Trump Group and Arie continued to negotiate the draft funding agreement.

In August 2008, in anticipation that Sagi would resist a transfer of control over TRI to the Trump Group, and as an alternative source of funds became available, TRI, through Arie, terminated the negotiation of the funding agreement. As a result, on August 8, 2008, the Trump

Group invoked its contractual right under the TRI stockholders agreement to purchase all of the TRI shares that had been transferred in 2004. When TRI/Arie disputed the Trump Group's rights, the latter commenced an action on August 11, 2008 in a New York federal court seeking a judicial declaration that the 2004 transfers were void under the TRI stockholders agreement.

Soon thereafter, the Trump Group entered into two agreements with TPR/Sagi to buy all TRI shares: (1) a main agreement whereby TPR and the Sagi Trust would sell the Sagi Trust TRI shares to the Trump Group, whether or not the 2004 transfers were judicially determined to be void, thus giving the Trump Group majority control of TRI; and (2) a side agreement whereby the Trump Group was given the option to buy the Arie and the Orly Trust's TRI shares, thus giving the Trump Group total control of TRI, when such shares were added to the Sagi Trust shares, but 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, the Sagi Trust shares were sold to the Trump Group for \$26.7 million. When the Trump Group, as majority shareholder, decided to remove Arie as TRI's director, Arie refused to recognize its authority. Therefore, the Trump Group commenced an action in the Delaware Chancery Court, pursuant to section 225 of the Delaware Code, for a judicial determination of TRI's corporate governance.

The Delaware court ruled that, contrary to Arie's assertion, the Trump Group never ratified the 2004 transfers, and had acquired the Sagi Trust's shares, thereby obtaining majority voting control of TRI and its governance. It also invalidated the 2004 transfers of TRI's shares to Arie and the Orly Trust and held that the stock had reverted to TPR and that the Trump Group could exercise its option to buy such shares pursuant to the 2008 side agreement with TPR. On

appeal, the Delaware Supreme Court, in 2011, affirmed that TPR was the record holder of Arie's and the Orly Trust's TRI shares, but held that the Delaware Chancery Court lacked the jurisdictional authority to determine who beneficially owned those shares. (*Genger v TR Invs., LLC*, 26 A3d 180 [Del 2011]). In or about February 2011, pursuant to the 2008 side agreement, the Trump Group exercised its option and purchased the Arie and the Orly Trust's TRI shares.

In 2010, before the Delaware Supreme Court rendered its decision, Arie and Orly commenced suit in this court, seeking, among other things, a judicial determination that Arie and the Orly Trust held beneficial interests in the disputed shares. In a decision rendered in January 2013, I dismissed most of their claims, except for a claim against Sagi for the breach of fiduciary duty claim and the unjust enrichment claims against Sagi and TPR. (*Genger*, 38 Misc 3d 1213 [A]). I also declined to dismiss certain claims against the Trump Group; those claims were subsequently settled in June 2013 by the relevant parties, including Arie, Orly, and the Trump Group, having reached a comprehensive settlement agreement which, among other things, recognized that the Trump Group had become the record and beneficial owner of the Arie and the Orly Trust's TRI shares, in exchange for Trump Group's settlement payments to Arie and Orly.

In a decision issued in July 2014, the Appellate Division affirmed and modified only those adverse rulings with respect to Sagi and TPR. (*Genger*, 121 AD3d 270). As a result, counterclaimants now seek a judicial determination of their counterclaims and/or third-party claims against Arie, Orly, and Michael Dowd, TRI's chief executive officer.

Counterclaimants also asserted cross claims against the Trump Group and TRI. In a decision issued in January 2015, I granted the Trump Group/TRI's motion to dismiss the cross claims (*Genger*, 2015 WL 112831), which the Appellate Division affirmed (*Genger*, 135 AD3d

454 [1st Dept 2014]).

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]).

Most, if not all, of the counterclaims and/or third-party claims are based on two main allegations: that counterclaimants suffered damages because in 2004, Arie misrepresented that no further consents were necessary for TPR to effectuate the 2004 transfers, and that in 2008, Arie in concert with Dowd and others, failed to disclose the negotiation of the funding

agreement, and that if disclosed, the Trump Group would have ratified the 2004 transfers and entered into the funding agreement with TRI, which would have averted the financial loss suffered by counterclaimants' "forced sale" to the Trump Group of the Sagi Trust TRI shares at a price that was far below the market price.

A. Counterclaimants' motion

1. Breach of fiduciary duty (second counterclaim and second third-party claim)

a. Claims against Arie

Counterclaimants allege that Arie, as TRI's chairman, owed a fiduciary duty to the Sagi Trust and TPR, as TRI's shareholders, until at least August 2008, and that Arie's 2004 misrepresentation that there were no transfer restrictions caused them injury. They also argue that because Arie, on behalf of TRI, reneged on the funding agreement with the Trump Group in 2008, TPR/Sagi was forced to sell the Sagi Trust's TRI shares to the Trump Group at a small fraction of its market value, thus sustaining financial injury.

It cannot be disputed that, as a matter of law, Arie did not owe Sagi a fiduciary duty based on their familial relationship, given their estrangement since at least 2007, a circumstance noted by the Appellate Division in holding that no fiduciary duty existed once the parties became adversaries.

Moreover, in my 2015 decision, I provided a detailed analysis of the cross claims filed against the Trump Group/TRI and of the role played by TPR/Sagi in connection therewith. Those cross claims are based on the same core facts underlying the counterclaims advanced here, including Arie's alleged breach of fiduciary duty. Thus, my findings bind counterclaimants, as they had a full and fair opportunity to litigate the issues in this action. (*Robinson v 1528 White*

Plains Rd. Realty, Inc., __ AD3d __, 2016 NY Slip Op 01441 [1st Dept 2016] [issues raised were fully litigated and decided in prior proceeding and plaintiff had full and fair opportunity to litigate them, and to extent not already decided, plaintiff's claims barred as they arose out of same transactions as those in prior proceeding]).

Those findings include, and the Delaware decision does not contradict, that the funding agreement was never executed and had no legal significance, that TPR/Sagi conceded that a transfer in violation of restrictions in the stockholders agreement would automatically be deemed void, that Sagi's claim that a disclosure of the negotiation of the funding agreement would have had an impact on the Trump Group's purchase right is speculative, given its contractual right to void the 2004 transfers, and that the assertion that the draft funding agreement could have effected a ratification of the 2004 transfers was conjectural. (*Genger*, 2015 WL 112831 at * 7). As the 2015 decision was affirmed on appeal, counterclaimants remain estopped from re-litigating these issues. (*Raghavendra v Brill*, 128 AD3d 414 [1st Dept 2015] [claims barred as federal court had made decision as to merit of claims and decision was affirmed on appeal]).

Additionally, the Appellate Division upheld my denial of TPR/Sagi's request to replead "in light of the flaws at the heart of appellant's claims, and its failure to submit any arguments indicating that it would be able to state any viable causes of action upon repleading." (*Genger*, 135 AD3d at 455). Moreover, counterclaimants' attempt to characterize my observation that "Sagi may have a personal claim against Arie" (*Genger*, 2015 WL 112831 at *9) as a finding that Arie had breached a fiduciary duty owed to Sagi is misplaced.

The ground for my 2015 decision is the, *inter alia*, undisputed or un rebutted factual assertion by the Trump Group/TRI that Sagi assisted in the negotiation of the 2001 TRI

stockholder agreement and the 2004 marital divorce settlement. (*Genger*, 2015 WL 112831 at *1, 2, 5, 8 and 10). Such participation by Sagi constitutes a defense to the counterclaim against Arie. Inasmuch as the claims arose in connection with the transfer restriction in the TRI stockholders agreement, and because Sagi knew or should have known of the restriction when he, on behalf of TPR, executed documents effectuating the 2004 transfers, such knowledge is imputed to the Sagi Trust and TPR. (*Id.* at 8).

Counterclaimants nonetheless argue, despite the Appellate Division's affirmance of my decision, that the "previously unrebutted, and false, allegation about Sagi supposedly negotiating the TRI Stockholders Agreement has now been debunked," and "[they] did not believe [they] needed to rebut [it] at oral argument because counsel are not fact witnesses." (NYSCEF 1366 at 3). They rely on Sagi's affidavit, dated January 22, 2015, filed after the issuance of my January 7, 2015 decision and apparently in connection with their appeal, in which Sagi asserts, for the first time, that he "attended an initial meeting with the Trumps" regarding the "economics" of the stockholders agreement, but never discussed issues "concerning the restrictions therein on share transfer." (NYSCEF 1388, exhibit AA).

Counterclaimants' contention that the assertions of Sagi's participation were advanced only at oral argument is erroneous given my affirmed decision. In any event, per my decision, the assertions were repeatedly advanced in the Trump Group/TRI's pleadings and were repeated by counsel at oral argument, without rebuttal. (*Genger*, 2015 WL 112831 at *1 and 5; NYSCEF 733 at 5, 6 and 14; NYSCEF 888 at 1, 4, 6 and 7). Counterclaimants also do not dispute that Sagi and his counsel, David Parnes, were provided with a copy of the stockholders agreement in connection with the negotiation of the divorce settlement and the 2004 transfers.

Even if Sagi's belated and self-serving affidavit was considered, it cannot be disputed that, as a matter of law, Arie did not owe Sagi a fiduciary duty based on their familial relationship, given their estrangement since at least 2007, a circumstance noted by the Appellate Division in holding that no fiduciary duty existed once the parties became adversaries. (*Genger*, 121 AD3d at 278). Because counterclaimants knew or should have known of the transfer restrictions in the stockholders agreement when the 2004 transfers were made, Arie's alleged breach of fiduciary duty, as it related to the 2004 misrepresentation, could not be reasonably relied on, nor could it be the proximate cause of the damages, if any, allegedly sustained.

Counterclaimants also argue that (1) because the Delaware court found that "Arie could have cured his prior misconduct by implementing the Funding Agreement," but instead caused TRI to renege on the deal "thereby instigating the Trump Group" to force the Sagi Trust to sell its TRI shares at a great loss, and (2) because the June 2008 memo written by attorney David Lentz to Arie and Dowd, which, according to counterclaimants, "describe[d] various ways for Arie to exploit for his own wrongdoing to steal the Sagi Trust's shares" in order for Arie to "harm his son, a beneficial shareholder in TRI, for which Arie served as Executive Chairman," that "Arie is liable for the direct consequences of this clear-cut fiduciary breach." (NYSCEF 1207 at 14-16).

The Delaware proceedings were primarily addressed to a dispute over TRI's governance, which was raised by the Trump Group when Arie refused to recognize its authority. Undisputedly, Sagi did not participate in the proceedings, and the Delaware decision neither focused on nor discussed Sagi's role in the 2004 transfers and 2008 funding agreement. Thus, the Delaware excerpts are inapposite.

In contrast, in my 2015 decision, I provided a detailed analysis of the cross claims filed

against the Trump Group/TRI and of the role played by TPR/Sagi in connection therewith. Those cross claims are based on the same core facts underlying the counterclaims advanced here, including Arie's alleged breach of fiduciary duty. Thus, my findings bind counterclaimants, as they had a full and fair opportunity to litigate the issues in this action. (*Robinson*, __ AD3d __, 2016 NY Slip Op 01441 [issues raised were fully litigated and decided in prior proceeding and plaintiff had full and fair opportunity to litigate them, and to extent not already decided, plaintiff's claims barred as they arose from same transactions as those in prior proceeding]).

Those findings include, and the Delaware decision does not contradict, that the funding agreement was never executed and had no legal significance, that TPR/Sagi conceded that a transfer in violation of restrictions in the stockholders agreement would automatically be deemed void, that Sagi's claim that a disclosure of the negotiation of the funding agreement would have had an impact on the Trump Group's purchase right is speculative, given its contractual right to void the 2004 transfers, and that the assertion that the draft funding agreement could have effected a ratification of the 2004 transfers was conjectural. (*Genger*, 2015 WL 112831 at * 7). As the 2015 decision was affirmed on appeal, counterclaimants remain estopped from re-litigating these issues. (*Raghavendra v Brill*, 128 AD3d 414 [1st Dept 2015] [claims barred as federal court had made decision as to merit of claims and decision was affirmed on appeal]).

b. Against Orly

Orly did not breach any fiduciary duty owed by her to counterclaimants, as the facts and legal theories for the claims against her are substantially the same, if not virtually identical, to those advanced against Arie. And, because Arie is not liable, Orly cannot be liable for aiding and abetting him. (*Cambridge Cap. Real Estate Investments, LLC v Archstone Enter.*

LP, __ AD3d __, 2016 WL 1098149, 2016 NY Slip Op 02017 [1st Dept] [as claim for breach of fiduciary duty dismissed, claim for aiding and abetting breach must also be dismissed]).

Counterclaimants maintain that because “Arie has always acted for Orly in all things relating to TRI,” that “Orly has admitted she stood to benefit if her father prevailed,” and that “because Arie caused TRI to renege on the Funding Agreement,” Orly is “liable for the damage Arie wrought as her representative.” (NYSCEF 1207 at 19-20). According to the allegations, the claim against Orly is based on Arie’s having reneged on the funding agreement, which allegedly destroyed the value of the Sagi Trust’s shares. On the other hand, even though the Orly Trust is a named co-defendant, there is no allegation that it breached its fiduciary duty or aided/abetted a breach.

“An agency relationship may be established by conduct,” which is apparent authority, “or by written or oral contract,” which is express authority. (*Pyramid Champlain Co. v R.P. Brosseau & Co.*, 267 AD2d 539, 544 [3d Dept 1999]). A third party may rely on the apparent authority of another only when the “words and conduct of the principal, communicated to the third party, have caused the third party to believe that an agent has the authority to contract on the principal’s behalf.” (*Legal Aid Soc. of Northeastern N.Y., Inc. v Economic Opportunity Commn. of Nassau County*, 132 AD2d 113, 115 [3d Dept 1987]). An agent is subject to the principal’s control. (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1993]).

Here, counterclaimants fail to identify any written or oral contract that authorized Arie to act on Orly’s behalf as to the funding agreement. Nor does it identify any word or conduct communicated to Sagi by Orly that would have lead him to believe that Arie was authorized to act on her behalf as to the funding agreement, nor do they tender any credible evidence to support

their allegation that Arie was Orly's agent. Thus, the allegation of agency fails.

Counterclaimants nonetheless argue that this court and the Delaware court have found that "Arie has always acted as Orly's agent with respect to the TRI shares," relying on inapposite statement fragments. In any event, they must show that Orly appointed Arie as her agent for purpose of the funding agreement, and not generally "with respect to the TRI shares." (*Ford v Unity Hosp.*, 32 NY2d 464, 472 [1973] [agency for one purpose does not invest agent with unlimited authority to bind principal]). (NYSCEF 1366 at 21). Additionally, their reliance on a narrow court statement and their transformation of it into a proposition of law that Orly's adoption of Arie's arguments in her pleadings creates an agency relationship, is misplaced and ill-conceived. (NYSCEF 1366 at 21-22). The adoption of a legal argument for litigation purposes does not an agency create, and counterclaimants cite no authority for it.

Moreover, my statement that Arie testified that "he represented all Genger interests with respect to the TRI shares" may not be isolated from its context and its connection with the Orly Trust and the Sagi Trust voting proxies which Arie acquired pursuant to the 2004 transfers, and that his testimony only showed that he could vote the family-owned TRI shares, but "does not establish that he is Orly's agent in connection with the instant claims." (NYSCEF 1386 at 7; citing Apr. 3, 2015 decision at 10, index no. 109749/2009, NYSCEF 878). Counterclaimants' reliance on the Delaware court's decision, in which it was recognized that Arie "adequately represented" Orly's interests for purposes of determining ownership of the TRI shares, and transformation of it into a proposition that renders Orly liable for Arie's "misconduct in the scope of his agency" (NYSCEF 1366 at 22), is also misguided, as that court "narrowly held" that "the Orly Trust's and TPR's interests in the board election were adequately represented by Genger

and the Trump Group,” and “repeatedly rejected the contention that Arie could represent or bind the Orly Trust in any other way.” (NYSCEF 1386 at 7-8; citing Delaware court’s decision that Arie could not consent to the court’s jurisdiction on behalf the Orly Trust and that only an authorized representative was legally empowered to do so). Thus, counterclaimants’ reliance on and citation to those decisions is misplaced and erroneous.

c. Against Dowd

For the reasons stated above, and with respect to the funding agreement in particular, and for reasons on which I relied in finding that Arie did not breach his fiduciary duty to counterclaimants, Dowd also did not breach his fiduciary duty, as the facts and legal theories for the claims against Arie and Dowd are substantially the same, if not identical. Because Arie is not liable, Dowd cannot be liable for aiding and abetting him. (*Cambridge Cap. Real Estate Investments, LLC v Archstone Enter. LP*, __ AD3d __, 2016 WL 1098149, 2016 NY Slip Op 02017 [as claim for breach of fiduciary duty dismissed, claim for aiding and abetting breach must also be dismissed]).

2. Breach of transfer agreement (fifth counterclaim)

In my January 2015 decision, I observed that “the Delaware court held that the 2004 transfers were void because they violated the stockholders agreement” [and that [t]hus, 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.” (*Genger*, 2015 WL 112831 at *11, 2015 NY Slip Op 30008[U]). As the decision was affirmed on appeal, it constitutes the law of the case.

Moreover, even though Orly is a named defendant with respect to this claim, she was not

a party to the transfer agreement, and counterclaimants failed to plead any facts alleging or identifying a breach by her. Rather, counterclaimants' briefs and other pleadings do not mention or address Orly with respect to this claim.

3. Indemnification (eighth counterclaim)

In plaintiffs' third amended and supplemental complaint, it is alleged that "Sagi owed a duty of trust and confidence to Arie under the 2004 Voting Trust Agreement" and that as "successor to the rights and liabilities of Dalia under the [Divorce] Settlement and the manager of TPR," Sagi owed a fiduciary duty to protect the assets of the Orly Trust for the benefit of his sister Orly and his father . . ." (NYSCEF 1190, ¶ 209). Counterclaimants thus argue that Sagi, as Dalia's successor, is entitled to be indemnified by Arie, pursuant to the terms of article V, section 3 of the divorce settlement, for all professional fees and expenses arising out of the events that occurred prior thereto. (NYSCEF 1207 at 12-13).

Counterclaimants' attempt to transform an allegation in a complaint into a judicial admission by Arie fails given the additional allegation that "Sagi owed a duty of trust and confidence to Arie." When analyzed in the context of the entire divorce settlement, the surrounding facts and circumstances, as well as the applicable law, the allegation does not constitute a judicial admission, particularly as it is undisputed that Sagi was not a party to the divorce settlement, and article V, section 3 therein specifically provides that "the Husband shall indemnify, defend, and hold harmless the Wife."

Contractual indemnity clauses "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" and no promise should be found "unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts

and circumstances.” (*Rodrigues v N&S Bldg. Contrs.*, 5 NY3d 427, 433 [2005][citation omitted]). Moreover, TPR/Sagi did not dispute the holding in another Genger-related action that “Sagi’s successor rights were limited to Dalia’s rights and responsibilities as they relate to TPR.” (NYSCEF 1355 at 30, NYSCEF 1387 at 26; citing to that decision, index no. 104249/07 at 12-13, dated Oct. 10, 2013). Therefore, as a non-party to the divorce settlement, the terms of which must be narrowly construed for the intended parties only, Sagi is not entitled to invoke the indemnity provision therein, as a matter of law.

Also, although Orly is named as a defendant with respect to this claim, counterclaimants fail to allege any facts against her.

B. Defendants’ cross motions

In the cross motions, plaintiffs/counterclaim defendants Orly and the Orly Trust and third-party defendant Dowd seek summary judgment dismissing all counterclaims and/or third party claims, including the following: fraud and aiding and abetting fraud, tortious interference with the stockholders agreement, tortious interference with the transfer agreement, tortious interference with prospective economic relations, breach of fiduciary duty based on familial relationship, as well as common-law contribution and indemnification.

1. Fraud and aiding and abetting fraud (first counterclaim and first third-party claim)

As my dismissal of counterclaimant’s claims for fraud and aiding and abetting fraud against TRI (*Genger*, 2015 WL 112831 at *8-9), was affirmed by the Appellate Division (135 AD3d at 454), and as the claims against Arie, Orly and/or the Orly Trust, and Dowd are identical to those that were alleged against TRI, they are meritless for the same reasons.

2. Tortious interference with stockholders agreement claim

In the 2015 decision, I dismissed counterclaimants' cross claim for a breach of the stockholders agreement against TRI for the reasons stated therein. (*Genger*, 2015 WL 112831 at *10, *affd* 135 AD3d at 455). Accordingly, this counterclaim and third-party claim for tortious interference of the stockholders agreement has no merit as a matter of law because it has already been judicially determined that TRI did not breach the stockholders agreement.

3. Tortious interference with transfer agreement

The Appellate Division affirmed my decision that “[t]he 2004 [transfer] agreement cannot be the basis for a tortious interference with contract claim.” (135 AD3d at 455). This claim thus has no merit.

4. Tortious interference with prospective economic relations

In the 2015 decision, I dismissed counterclaimants' cross claim for tortious interference with prospective economic relations as against TRI. (*Genger*, 2015 WL 112831 at *11-12). On appeal, the Appellate Division affirmed, stating that the claim was “inadequately pleaded and based on conjecture.” (*Genger*, 135 AD3d at 455). Therefore, this claim is also meritless.

5. Breach of fiduciary duty based on familial relationship

Arie's and Orly's cause of action for a breach of fiduciary duty based on the familial relationship against Sagi was dismissed by the Appellate Division. (*Genger*, 121 AD3d at 278). As counterclaimants allege that as Arie and Orly alleged in their complaint that Sagi owed them a fiduciary duty based on their “familial relationship,” and that “in the event such a duty is held to exist, then such duty necessarily is mutual,” and thus Arie and Orly owed Sagi “a comparable duty” (NYSCEF 1178, ¶ 88), and as all of Arie's and Orly's claims in the complaint were dismissed by the Appellate Division, so too must the cross claims against Arie and Orly arising

from the 2004 transfers and 2008 funding agreement, as discussed above.

6. Common law indemnification and contribution

The tenth counterclaim is dismissed as moot. (NYSCEF at 19).

IV. CONCLUSION

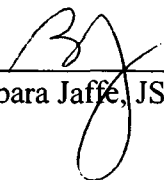
For all of the foregoing reasons, it is hereby

ORDERED, that the motion of Sagi Genger, individually and as assignee of the Sagi Trust, and TPR Investment Associates, Inc. for an order seeking partial summary judgment is denied in its entirety; it is further

ORDERED, that the relief sought in cross motions by the counterclaim defendants and third-party defendants Arie Genger, Orly Genger, and William Dowd seeking summary judgment dismissing all counterclaims and third-party claims against them, as applicable, is granted in all respects, and the counterclaims and third-party claims against Arie Genger, Orly Genger, and William Dowd are dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the parties are directed to settle order on notice within 30 days of the date of this decision.

ENTER:



Barbara Jaffe, JSC

Dated: April 15, 2016
New York, New York