

Genger v Genger

2016 NY Slip Op 31665(U)

September 1, 2016

Supreme Court, New York County

Docket Number: 109749/09

Judge: Barbara Jaffe

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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 : 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),

Index No. 109749/09

DECISION AND ORDER

Plaintiff,

-against-

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

Defendants.

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BARBARA JAFFE, JSC:

By decision and order dated April 8, 2016 (NYSCEF 1050; *Genger v Genger*, 2016 NY Slip Op 30602[U] [Sup Ct, New York County Apr. 8, 2016]), I granted plaintiff summary judgment on three causes of action, including breach of fiduciary duty, and referred the matter for a damages trial “to 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.” (2016 NY Slip Op 30602, *16). In denying defendants’ cross-motion to dismiss plaintiff’s cause of action for breach of fiduciary duty, I found that: (1) the dismissal on appeal of a claim for a breach of fiduciary duty in *Genger v Genger*, index No. 651089/2010 (*Genger v Genger*, 121 AD3d 270 [1st Dept 2014]) did not require dismissal of the instant fiduciary duty claim, because the focus of plaintiff’s claim here is the 2009 sham UCC sale of the LP’s TPR shares, whereas the focus of the claim in the 2010 action was the sale of the Orly Trust’s TRI shares to the Trump Group; (2) the two actions addressed different fiduciary duties;

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and (3) my denial of defendants' motion to consolidate this action with the 2010 action, as "the two actions implicate different factual issues and legal analyses" (NYSCEF 878 at 7; *Genger v Genger*, 2015 NY Slip Op 30481[U], *7 [Sup Ct, New York County Apr. 3, 2015]). (*Genger*, 2016 NY Slip Op 30602[U], *5-6). Having affirmed my denial of defendants' motion to dismiss plaintiff's claim for breach of fiduciary duty asserted in this action (NYSCEF 418; *Genger v Genger*, 120 AD3d 1102 [1st Dept 2014]), and having dismissed the claim for a breach of fiduciary duty in the 2010 action (*Genger*, 121 AD3d 270), the appellate division apparently agreed that the two fiduciary duty claims significantly differed.

Plaintiff now seeks an order clarifying the order of reference, conforming the pleadings to the evidence adduced thus far at the damages trial, and awarding her attorney fees. In seeking a clarification, she alleges, in essence, that it was demonstrated at the damages trial that, contrary to my finding that Dalia assigned to Sagi on August 8, 2008 the 51 percent interest in TPR that she had received from Arie pursuant to their 2004 divorce, the shares were never assigned and transferred but remained with TPR, thereby increasing the Orly Trust's interest in TPR. (NYSCEF 1349-1367).

In support of her motion for an order conforming the pleadings to the evidence, plaintiff essentially maintains that as a result of the evidence subpoenaed for the damages trial and the testimony given therein, she discovered that the August 22, 2008 stock purchase agreement and side letter agreement whereby TPR sold the family interest in TRI to the Trump Group, were "part and parcel of" the foreclosure and UCC sale of the D&K note. She thus argues that the value of her TRI shares sold to the Trump Group must be included as an element of her damages. (*Id.*).

Defendants oppose and cross-move pursuant to CPLR 2221(e) and 3212 for leave to renew their motion for summary judgment. They first allege that in seeking “clarification,” plaintiff improperly seeks modification of a factual matter which is more properly achieved by a motion pursuant to CPLR 2221, and that plaintiff’s desire for “clarification” ought not be deemed a CPLR 2221 motion absent procedural barriers thereto. They also deny that plaintiff’s motion is based on new or recently discovered facts, and contend that the argument based thereon is specious. (NYCSEF 1391).

In opposing the motion to amend, defendants argue that the facts on which plaintiff bases her motion are those set forth in support of her cause of action for a breach of fiduciary duty in the 2010 action which, as noted *supra*, was dismissed on appeal. They thus argue that plaintiff is barred both by res judicata from seeking damages based on those facts, and as an instance of improper “claim-splitting,” because she seeks compensation for the same injury in two separate actions. They also contend that plaintiff is estopped from seeking the value of the TRI shares here by virtue of the contrary position she took in opposing defendants’ cross motion for summary judgment in the 2010 action, and in opposing defendants’ application in this action to consolidate the two actions, whereby she denied in each instance that the two transactions were connected. Moreover, they observe that she seeks to hold Sagi liable here in his capacity as managing member of D&K GP, whereas in the 2010 action, in his capacity as president of TPR. And, based on plaintiff’s new assertions, defendants seek leave to renew their motion for summary judgment. (*Id.*).

In claiming that they would be prejudiced by plaintiff’s proposed amendment, defendants contend that had they known of this new claim for damages, they would have “undertaken other

defenses in this case,” “sought to gather and preserve third-party records relating to the challenged transactions” dating back to 2007 and earlier, pleaded several additional affirmative defenses, including a set-off and acquiescence, taken additional depositions, and prepared their expert on the new claims, which in any event gives rise to a mandatory accounting. (*Id.*). They also assert that having “monetized” her interest in the TRI shares for \$32.3 million (*Genger v Genger*, 76 F Supp 3d 488, 501 [SD NY 2015]), the requested amendment of her pleadings to include the value of the TRI shares would result in an inequitable double recovery (*id.*).

In seeking attorney fees, defendants argue that plaintiff relies on inapposite authority addressing claims against executors and trustees. Consequently, they maintain that the American Rule applies. They also strongly object to plaintiff’s claim that certain of TPR’s transactions constitute “money laundering.” (*Id.*).

Pleadings may be amended to conform them to the evidence before or after judgment, “upon such terms as may be just including the granting of costs and continuances.” (CPLR 3025[c]). The court may permit the amendment even if it “substantially alters the theory of recovery.” (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v City of New York*, 43 NY2d 400, 405-406 [1977]). That the judgment is summarily awarded does not preclude such an amendment. (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981]). The sole consideration guiding the court’s considerable discretion is whether the opposing party would be hindered in preparing its case. (*Id.*, at 23). However, the liberality in granting a motion to conform does not alter the rule that “a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.” (*Cobenas v Ginsburg Dev. Cos., LLC*, 133 AD3d 812, 813 [2d Dept 2015]; *Nestor v Britt*, 270

AD2d 192, 193 [1st Dept 2000]). Nor does it alter the law that a party is barred by res judicata from relitigating an issue that was fully litigated.

Here, numerous considerations, including the prejudice alleged by defendants, warrant the denial of plaintiff's application, not the least of which is her potential double recovery: Should the motion be granted and plaintiff prevail on the amended claim, she would receive the value of the TRI shares, that she had already been found to have "monetized" in her settlement with the Trump Group. Plaintiff's failure to address these significant obstacles to her application precludes a reply, which in any event, was never sought, and given the extensive litigation of these cases, plaintiff should have anticipated that defendants would advance this argument, as well as the other arguments that the dismissal of the claim for breach of fiduciary duty in the 2010 action bars the proposed amendment, and that her contrary positions estop her from advancing her new position.

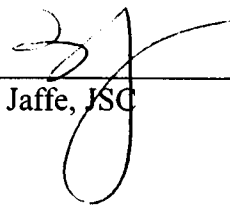
Given this result, defendants' cross-motion for leave to reargue the April 8, 2016 decision is denied.

Accordingly, for all of the above reasons, it is hereby

ORDERED, that plaintiff's motion to clarify the April 8, 2016 decision and amend the pleadings to conform to the evidence is denied; and it is further

ORDERED, that defendants' cross motion for leave to reargue the April 8, 2016 decision is denied.

ENTER:



Barbara Jaffe, JSC

DATED: September 1, 2016
New York, New York