

Genger v Genger

2019 NY Slip Op 31592(U)

June 6, 2019

Supreme Court, New York County

Docket Number: 109749/2009

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
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

ORLY GENGER, ORLY GENGER 1993 TRUST,

Plaintiffs,

- v -

INDEX NO. 109749/2009

MOTION DATE _____

MOTION SEQ. NO. 064

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

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 064) 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629

were read on this motion for reargument/reconsideration.

Plaintiffs seek leave to reargue my decision dated March 25, 2019 (NYSCEF 1594), by which I granted defendants' motion to confirm the report of a JHO/special referee and denied plaintiffs' motion to disapprove that report, and to renew her motion for an order disapproving the report. Defendants oppose.

I. MOTION TO REARGUE

Plaintiffs alleges that at the damages hearing held before the JHO, they offered "extensive evidence concerning TPR's cash, net operating loss carryforwards, and other assets, including defendant's own testimony and TPR's tax returns from 2007," which they contend "provides a sound basis for extrapolating the value of the TPR shares that [defendant Sagi] schemed to steal for himself." (NYSCEF 1611).

To the extent that defendants' alleged admission in TPR's 2007 tax return that the company had \$14,599,744 in assets and \$16,687,882 in net operating losses, was overlooked, reargument is granted.

On reargument, I find as follows:

While the 2007 tax return is sufficient to prove the value of TPR's assets and net operating losses before the sham auction was conceived is more reliable than TPR's 2008 return which was likely prepared after the auction, it and "other assets, including defendant's own testimony" fall short of proof of the value of plaintiffs' portion of the 240 shares. Plaintiffs' evidence does not prove a loss sufficient to result in an award that is not merely speculative.

In any event, defendants rebutted plaintiffs' case by offering expert evidence that the global recession, incessant Genger family litigation, TPR's corporate status, potential tax liability on future distributions, and the lack of any guarantee of dividends rendered the shares worthless along with Sagi's undisputed testimony that no one, including the Trump Group, was interested in buying the shares.

Apart from evidence of Sagi's lack of credibility and past manipulation of corporate documents, plaintiffs offer no independent evidence that the documents relied on by the expert are false or contain fabricated information. That the JHO was of one mind during the trial as to Sagi's credibility did not preclude him from changing his mind by the end of the trial, and his ultimate reliance on the expert's opinion constitutes an implicit finding that the basis for it is reliable, a determination that is within the JHO's discretion as factfinder. And plaintiffs offer no evidence to rebut the expert's opinion. That the expert did not analyze TPR's receipts and disbursements (trial transcript at 1179) is of little probative value absent plaintiffs' offer of evidence on which a determination of value could be made without speculation. Throwing shade

on Sagi and defendants' evidence does not serve to satisfy plaintiffs' ultimate burden of proving, with competent evidence beyond the 2007 tax return and Sagi's testimony, which they otherwise disparage, the value of the shares.

Nor was the Second Circuit's decision overlooked, as plaintiffs fail to acknowledge the Court's observation that Orly had "benefitted from the [TRI] shares regardless of whether the settlement money went to [her], as a gift to Arie, or to pay debts owed to her litigation partners" (*Genger v Genger*, 663 Fed Appx 44, 49 [2d Cir 2016]).

Plaintiffs also offer no basis for assessing the value of the breach of fiduciary duty separate and apart from the value of their portion of the shares that were ultimately sold at the auction or for valuing the shares based on their value to Orly personally as opposed to their market value.

For all of these reasons, plaintiffs do not demonstrate any matter of fact or law that was overlooked or misapprehended in determining the prior motion. (CPLR 2221 [d] [2]).

II. MOTION TO RENEW

Plaintiffs offer recent testimony elicited in a new *Genger* matter as evidence that Orly received nothing from the 2013 settlement with the Trump Group. They claim as justification for not having offered it earlier their inability to anticipate that the Second Circuit's determination that she had received only a "peppercorn" from the settlement would be overlooked. As plaintiffs overlook the portion of the Second Circuit's decision, *supra*, at I., indicating that Orly had benefitted from the TRI shares regardless of whether the settlement money went to her, as a gift to her father Arie, or to pay debts owed to her litigation partners, they offer no reasonable justification for failing to present facts on the prior motion. (CPLR 2221 [e] [3]). In any event, the evidence purports only to corroborate Orly's assertion that she had received nothing from the

settlement, a fact that would not change the prior determination. (CPLR 2221 [e] [2]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to reargue is granted, and that upon reargument, the court adheres to its earlier decision; and it is further

ORDERED, that plaintiff's motion for leave to renew is denied.

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BARBARA JAFFE, J.S.C.

6/6/2019
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED