SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Index Number : 109749/2009
GENGER, ORLY
vs
GENGER, DALIA
Sequence Number : 018
AMEND SUPPLMT PLEADINGS

INDEX NO. 109749/09
MOTION DATE
MOTION SEQ. NO. 018

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

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):

Dated: DEC 23 2013

_____, J.S.C.
BARBARA JAFFE
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: 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. nos. 018, 019, 028

DECISION AND ORDER

BARBARA JAFFE, JSC:

This decision and order addresses motion sequence numbers 018, 019 and 028 in the above-captioned action. In sequence 018, defendant Sagi Genger seeks leave pursuant to CPLR 3025 (b) to amend his answer to add affirmative defenses. In sequence 019, defendants TPR Investment Associates Inc. (TPR) and Sagi move pursuant to CPLR 3103(a) for a protective order. In sequence 028, nonparty David Broser seeks an order pursuant to CPLR 2304 quashing a subpoena served on him by defendants TPR and Sagi. The motions are consolidated for disposition.

I. BACKGROUND

The background of this action is set forth in many opinions of this court and others, including my opinion dated May 29, 2013 (NYSCEF 418) addressing sequence numbers 013 to 016, herein incorporated. Additional background pertains to the instant motions.

Arie Genger is the father of Orly Genger and Sagi. He founded TPR and its subsidiary Trans Resources Inc. (TRI). In 1993, he established the Orly Trust and the Sagi Trust as part of a

family estate plan for Orly's and Sagi's benefit. Each of their Trusts was assigned a 48 percent interest in D&K Limited Partnership (D&K LP); D&K GP LLC is the general partner and holds the remaining four percent interest in D&K LP. After the Trusts were funded by Arie, D&K LP purchased 240 shares of TPR stock, a 49 percent interest, and the purchase price was funded, in part, as follows: the trusts each paid $600,000, and D&K LP executed a note in TPR's favor for $8,950,000 (1993 note). The 1993 note required D&K LP to repay principal and interest in annual installments over 10 years, and each of the Trusts guaranteed the repayments. In her complaint, Orly alleges that all of the Genger family members, including the family-controlled TPR, understood that the 1993 note was created only for tax purposes to facilitate estate planning, and that the 1993 note was not intended to be enforced or collected.

In 2004, Arie and his wife, Dalia, were engaged in a bitter divorce that split the family and its assets, including TPR and TRI. According to Orly's complaint, Dalia and Sagi allegedly colluded to destroy Arie financially and their actions also threatened to destroy Orly. After the divorce, Dalia ceded control of TPR and D&K LP to Sagi. Once Sagi obtained control of TPR and its interest as payee on the 1993 note, he allegedly used his positions as TPR's CEO and D&K LP's manager to engage in self-dealing with respect to the 1993 note, so as to financially damage Orly and the Orly Trust.

Repayments on the 1993 note were made by D&K LP until 1999, and no attempt was made to collect on it for almost 10 years thereafter. In August 2008, Sagi caused TPR to send a notice of default to D&K LP. Then, the 1993 note was foreclosed upon via an auction held in 2009 (UCC sale), where the 240 shares of TPR stock pledged by D&K LP were purchased by TPR for $2.2 million, which reduced D&K LP's obligation, but left a $8.8 million deficiency

guaranteed by the Trusts. Thus, the Orly Trust's interest in D&K LP's only asset, its stock interest in TPR, was transferred to TPR, which Orly asserts has injured her financially.

In March 2012, the Orly Trust, acting through Dalia as its trustee, D&K LP acting through D&K GP, and TPR acting through Sagi, entered into a settlement agreement which restated an earlier agreement among the same parties. The settlement provided, among other things, that the Orly Trust would transfer to TPR its interest in D&K LP and disclaim such interest (the D&K interest) as well as any shares of TPR directly or indirectly (the TPR interest), the Orly Trust would be released from its obligation under the 1993 note, and the 1993 note would be cancelled and replaced with a new note in the amount of $4 million; the parties to the settlement would release each other, including directors, agents, trustees, etc., in connection with the 1993 note, the Orly Trust's TRI shares, the D&K interest, and the TPR interest. Pursuant to the settlement, and in contrast to the Orly Trust, the Sagi Trust was not required to repay the new note.

In July 2012, TPR filed a motion (sequence number 013) seeking leave to amend its answer to add release as an affirmative defense, as well as summary judgment dismissing the complaint, on the ground that the settlement released it and other defendants from all liabilities. In May 2013, I denied the motion and held that the settlement violated prior orders enjoining TPR and co-defendants from entering into transactions that would impact the Orly Trust's interests in TPR and/or TRI. Because of that violation, I held that the settlement was void and unenforceable.

II. DISCUSSION

A. Sagi's motion to amend (sequence 018)

In support of his motion for leave to amend his answer to add 18 affirmative defenses, Sagi argues that leave should be freely granted, absent prejudice or surprise. Plaintiff opposes, claiming that Sagi provides no credible excuse for his lengthy delay in seeking relief, that the proposed amendments prejudice her, as discovery is almost complete, that if leave is granted, discovery would begin anew and cause further delay, and that the proposed amendments are nonsensical and/or palpably insufficient.

"Leave to amend a pleading should be freely given, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." (*Sheila Props., Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 426 [2d Dept 2009]; *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365 [1st Dept 2007]). Morever, "[a] determination of whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed." (*Gitlin v Chirinkin*, 60 AD3d 901, 902 [2d Dept 2009]).

Here, the parties signed a stipulation in December 2010 whereby they agreed to stay the action pending a final decision of the Delaware Supreme Court in a related action. (NYSCEF 112). Thus, Sagi is not the sole cause of delay. And, the parties were not so near the conclusion of discovery. Rather, they continue to engage in contentious discovery. Thus, there is an insufficient basis for finding that Orly would sustain undue prejudice by virtue of additional discovery.

I now address the merits of each affirmative defense. Affirmative defenses one (release),

and eight (mootness), are apparently based on the settlement, previously held void or voidable. Thus, the two defenses have no merit.

In an opinion rendered on July 28, 2010 by the justice previously presiding in this part, (NYSCEF 80) and in my May 2013 opinion, Orly was held to have standing to assert claims on behalf of the Orly Trust and D&K LP. Thus, affirmative defense two (standing) based on Orly's alleged lack of standing is barred by the law of the case. As affirmative defenses three (collateral estoppel and res judicata), four (Sagi is not Orly's fiduciary), and five (Orly has unclean hands) are advanced in Sagi's original answer, there is no reason to add them.

Affirmative defenses six (*in pari delicto*), nine (spoliation/perjury), 10 (laches, estoppel, accord, acceptance, and waiver), 12 (failure to mitigate damages), 13 (statute of frauds and parol evidence rule), 14 (*allegans contrarira non est audiendus*), 15 (Sagi acted with clean hands and justification), and 17 (Orly's claims are subject to setoff for damages) are based on counterclaims asserted by Sagi in a related action pending before me (*Arie Genger et al. v Sagi Genger et al.*, 651089/2010) (2010 action). Indeed, in reply to Orly's opposition, Sagi argues that these defenses provide no basis for any claim to prejudice or surprise, because they are "further manifestations" of his already-pleaded defense of unclean hands, *e.g.*, Arie's spoliation of evidence as found by the Delaware courts. (NYSCEF 365, Reply Affirmation, ¶ 12). And, according to Sagi, these defenses derive from findings made in the Delaware proceedings, *e.g.*, Arie's refusal as agent of the OG Trust to mitigate damages from his wrongdoing. (*Id.*).

Sagi, however, fails to explain why Arie's alleged bad acts should be attributed to Orly. While these defenses or counterclaims may apply to claims asserted by Arie in the 2010 action, or may warrant an offset to damages awarded in the 2010 action, they do not apply to Orly in this

action.

Sagi explains that affirmative defense 11 (statue of limitation) arises from payments made under the allegedly unenforceable 1993 note. (NYSCEF 365, Reply Affirmation, ¶ 15). However, at oral argument on this motion, Orly's counsel explained, without dispute, that Orly's claims with respect to the 1993 note pertain to the 2009 UCC sale of the 1993 note. (NYSCEF 547, docketed in the 2010 action, transcript at 46). As these claims are timely raised by Orly in the 2009 complaint, the statute of limitations is inapplicable.

Sagi asserts that affirmative defenses seven (failure to name a necessary party) and 18 (against public policy) address Orly's failure to name Arie as a necessary party in the tax fraud arising from the 1993 note. (NYSCEF 365, Reply Affirmation, ¶ 15). He relies on *Greenleaf v Lachman*, 216 AD2d 65 (1st Dept 1995), *lv denied* 88 NY2d 802 (1996), in claiming that a court may enforce a tax fraud if all of the parties to the purported fraud are named in the suit. At oral argument, Sagi reiterated that, having failed to name Arie as a necessary party, Orly may not assert a tax fraud claim against TPR/Sagi. (NYSCEF 547, transcript at 50).

In *Greenleaf*, the plaintiff gave the defendant, his stepson, a monetary gift. Two years later, he induced him to sign a promissory note to avoid paying a gift tax. The issue before the court was whether the defendant, in proving that the promissory note was an unenforceable fraudulent attempt to avoid paying a gift tax, could rely on an exception to the rule against admitting parol evidence to vary the terms of a writing where he sought only to prove that the writing did not constitute a contract. The court held that where the parties to the initial transaction are the very litigants before the court, the beneficiary of the tax scheme "has not disappeared from the calculus," and there was no third party interest involved in the case,

enforcement of the note "would, in essence, allow the instigator and sole beneficiary of the initial tax evasion scheme also to reap the financial benefit of the illusory debt," and would contravene public policy. (216 AD2d at 66).

Here, Sagi's allegations are analogous to those advanced by the stepson in *Greenleaf*, only the initial transaction here is far more complex than that entered into by the parties in *Greenleaf*. Consequently, the failure to name all of the parties to the 1993 note constitutes a valid defense, as does the defense of Orly's cause of action being against public policy.

Champerty is alleged in affirmative defense 16 (New York Judiciary Law § 489). The champerty statute prohibits the purchase of claims with the intent to bring an action. Orly argues that this defense should be dismissed absent any evidence that she purchased any claims. Sagi argues that this defense arises from newly-discovered evidence as to "the potentially unlawful manner in which Orly may be funding her claims in this case in concert with Arnold Broser and David Broser, who have been holding themselves out as Arie Genger's attorneys." (NYSCEF 365, Reply Affirmation, ¶ 15). The parties neither addressed this defense at oral argument nor does Orly refute Sagi's assertion.

B. Motion for protective order (sequence number 019)

In motion sequence 019, Sagi alleges that while he was being deposed by plaintiff's counsel, he was asked questions about his religious faith and observance. Thus, he seeks a protective order prohibiting Orly's counsel from questioning him about his religious faith and other personal matters. In opposition, Orly states, without dispute, that the motion was denied by me when it was filed, and that it thus should have been withdrawn. Thus, the relief sought is moot and the motion is deemed withdrawn.

C. David Broser's motion to quash (sequence number 028)

David Broser, a nonparty in this action but a third-party defendant in the 2010 action, seeks an order quashing the subpoena served on him by TPR and Sagi. In opposition, defendants argue that newly discovered evidence reflects "the potentially unlawful manner in which Orly may have been funding her claims in this case in concert with Arnold and David Broser," and that the subpoena seeks documents and information that are "necessary and material" to defendants' proposed affirmative defenses five (unclean hands) and 16 (Judiciary Law § 489). (NYSCEF 416, Schretzman affidavit, ¶¶ 2-4). In the subpoena, defendants set forth information they seek from Broser, such as that relating to his alleged involvement in Arie's and Orly's litigation, "including financing and otherwise supporting the above captioned matter." (Subpoena at 1).

In reply, Broser contends that the subpoena constitutes an improper attempt by defendants to avoid the stay in the 2010 action, and that there is no evidence that he has any information or documents supporting defendants' defenses. (NYSCEF 423, Reply affirmation, ¶¶ 3-5).

Absent any denial of defendants' allegation that, based on newly discovered evidence, Orly may have funded her claims in this action in concert with Broser, and given the viability of affirmative defense 16 (Judiciary Law § 489) (*supra*, II.A.), a decision on this motion is held in abeyance, pending defendants' production of the purportedly newly discovered evidence that supports the assertion that Orly may have funded her claims in concert with Broser.

III. CONCLUSION

Based on all of the foregoing, it is hereby

ORDERED, that with respect to motion sequence number 018, leave to amend

defendants' answer is granted only to the extent of granting leave as to affirmative defenses 7, 16, and 18 raised in the proposed amended answer; it is further

ORDERED, that with respect to motion sequence number 019, the relief sought is moot and the motion is deemed withdrawn; and it is further

ORDERED, that with respect to motion sequence number 028, a ruling is held in abeyance pending defendants' production, within 45 days of the date of this order, of newly discovered evidence which tends to support their allegation that plaintiff Orly Genger may have funded her claims in this action in concert with nonparty David Broser, the movant.

ENTER:

Barbara Jaffe, JSC

Dated: December 23, 2013
New York, New York