

**Genger v Genger**

2015 NY Slip Op 30856(U)

May 19, 2015

Supreme Court, New York County

Docket Number: 651089/10

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

-----X  
ARIE GENGER and ORLY GENGER, in her individual  
capacity and on behalf of THE ORLY GENGER 1993 TRUST,

Plaintiffs,

-against-

Index No. 651089/10

Mot. seq. no. 041

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.

**INTERIM  
DECISION AND ORDER**

-----X  
BARBARA JAFFE, JSC:

Defendants TPR Investment Associates, Inc. (TPR) and Sagi Genger (Sagi, together with  
TPR, TPR/Sagi) move pursuant to CPLR 4311 and 6315 for an order of reference to ascertain  
damages it allegedly sustained resulting from the temporary restraining order and preliminary  
injunction granted plaintiffs, which damages to be paid out of the \$500,000 undertaking posted  
by Arie. (NYSCEF 1092). Arie and Orly oppose. (NYSCEF 1113 and 1128).

I. BACKGROUND

The facts of this case have been set forth in detail in prior decisions of this court, the  
Delaware courts, the United States District Court for the Southern District of New York, and the  
Appellate Division, First Department, each of which described the protracted litigation among  
the so-called "Trump Group" and the members of the Genger family for the control of TRI, a  
former subsidiary of TPR that was sold by TPR/Sagi to the Trump Group in or about 2008. For

purposes of this motion, only the salient facts are now described.

On October 5, 2010, another justice of this court issued an order temporarily restraining TPR/Sagi from using the proceeds of certain TRI shares, some \$7.24 million, in which Arie claimed an interest, and required the Trump Group to hold \$1.5 million of the proceeds in escrow or pay it into court. (NYSCEF 30). It was initially agreed that the Trump Group would pay the \$1.5 million to TPR directly, but due to the restraining order, that amount was added to the escrow account that was being maintained pursuant to a September 2010 escrow agreement between the Trump Group and TPR/Sagi. Similarly, proceeds of the Orly Trust's claimed shares in TRI, approximately \$10.3 million, were held pursuant to a separate escrow agreement, which conditioned the distribution of those proceeds on specified future events. The escrow agreements restricted TPR/Sagi from using or disposing of these proceeds pending a judicial determination of the beneficial ownership of the Arie and Orly Trust shares in TRI.

Pursuant to an interim order dated November 10, 2010, another justice of this court continued the restraining order pending the determination of Arie's application for a preliminary injunction on the condition that he post an undertaking of \$500,000; this action was stayed pending the resolution of Arie's appeal to the Delaware Supreme Court in a related action. (NYSCEF 39).

Pursuant to a decision dated February 17, 2011, another justice of this court converted the temporary restraining order into a preliminary injunction in favor of Arie, and held that the \$500,000 undertaking he posted was premised on the condition that he be required to pay TPR/Sagi for damages sustained by reason of the injunction, "if it is finally determined that [Arie] was not entitled to an injunction." (NYSCEF 64 at 14).

Pursuant to a loan agreement dated October 3, 2011, the Trump Group agreed to lend TPR \$1.5 million, plus an additional \$500,000, for an aggregate commitment of \$2 million. (NYSCEF 1122, Loan Agreement, § 2.01[a]).

Subsequently, by decision dated December 20, 2011, the justice granted Arie and Orly a preliminary injunction enjoining TPR/Sagi from using the proceeds from the sale of the TRI shares in which Arie and Orly claimed separate interests “pending the determination by a court of competent jurisdiction the beneficial ownership of such shares,” and required the Trump Group and TPR/Sagi to give Arie and Orly ten business days notice of “future transactions that may impact the subject shares.” (NYSCEF 210 at 14-15).

In a decision dated January 2, 2013, I dismissed the claims asserted in plaintiffs’ third amended and supplemental complaint against various defendants, except with respect to the unjust enrichment and breach of fiduciary duty claims against TPR/Sagi. (*Genger v Genger*, 38 Misc 3d 1213 [A], 2013 NY Slip Op 50091 [U] [Sup Ct, NY County 2013]). Thereafter, in a decision dated July 14, 2014, the Appellate Division affirmed and modified my ruling, to the extent of dismissing the remaining unjust enrichment and breach of fiduciary duty claims against TPR/Sagi. (*Genger v Genger*, 121 AD3d 270 [1<sup>st</sup> Dept 2014]). On or about February 24, 2015, Arie and Orly were denied leave to appeal that decision to the Court of Appeals. (*Genger v Genger*, 24 NY3d 917 [2015]).

By the instant motion, filed on July 28, 2014, TPR/Sagi seeks an order of reference and asks that I appoint a referee to determine, via an evidentiary hearing, the alleged damages sustained by TPR/Sagi arising from the temporary restraining order and preliminary injunctions. In support, Sagi submits an affidavit by which he states that the damages “substantially exceed

\$500,000, the amount of the undertaking posted by plaintiff Arie Genger to secure those restraints.” (NYSCEF 1093 at 1).

In opposition, plaintiffs argue that TPR/Sagi fails to show damages arising from the restraining order and preliminary injunctions and thus, does not demonstrate entitlement to an order of reference. They also contend that pursuant to CPLR 4317, an order referring a matter to a referee may be granted only where the trial or hearing requires an examination of a “long account” or “complicated issues of fact,” and that TPR/Sagi has not identified the elements or categories of damages requiring a referee’s hearing or determination.

According to TPR/Sagi, the damages sustained consist of interest expenses incurred for the \$2 million loan, and legal fees incurred in opposing the preliminary injunctions and prosecuting the appeal that resulted in the lifting of the injunction. (NYSCEF 1131). Based on TPR/Sagi’s assertion, the interest expense is \$200,572, and the legal fees “far exceed the \$299,428 remaining on the \$500,000 bond.” (*Id.*, ¶ 4 and ¶ 6).

## II. ANALYSIS

“Lost interest on the funds that were restrained is a proper element of damages covered by an undertaking in connection with a preliminary injunction.” (*Shu Yiu Louie v David & Chiu Place Rest.*, 261 AD2d 150, 152 [1<sup>st</sup> Dept 1999]; *Metropolitan Lofts of NY, LLC v Metroeb Realty I, LLC*, 46 Misc 3d 1222 [A] at \* 7, 2015 NY Slip Op 50251 [U] [Sup Ct, Kings County 2015]). Thus, the interest that would have been otherwise earned on the restrained funds, at the then prevailing interest rate and for the relevant period, may be recovered as damages arising from the injunction.

To recover the interest expense paid for borrowed funds, however, TPR must show that

the funds were necessary for its business operations. Moreover, \$1.5 million of Arie's claimed proceeds were restrained, not \$2 million TPR borrowed from the Trump Group. Therefore, only a prorated portion of the alleged \$200,572 interest expense incurred by TPR may be recovered, and only to the extent that the \$1.5 million loan was used by TPR for "legitimate corporate purposes." (NYSCEF 64 at 13).

A defendant may also seek to recoup attorney fees due to an improperly procured preliminary injunction. (*Louie*, 261 AD 2d at 152). And, where an injunction is vacated on appeal, reasonable and necessary legal fees incurred for the appeal may also be recovered. (*Matter of Sweets v Behrens*, 118 Misc 2d 1062, 1066 [Sup Ct, Schenectady County 1983]).

In light of the foregoing, TPR is entitled to recover reasonable and necessary fees and expenses incurred in opposing the preliminary injunction and prosecuting the appeal. As the enjoined funds constitute a portion of Arie's total escrowed funds, or \$1.5 million of \$7.24 million, the legal fees and expenses incurred should be prorated to the extent of \$1.5 million, as \$5.74 million was voluntarily escrowed by TPR and not pursuant to the preliminary injunction.

Similarly, as Orly's and/or the Orly Trust's claimed proceeds were voluntarily escrowed by TPR pursuant to a separate escrow agreement, TPR is not entitled to any fees and expenses incurred therefrom. And, even though the December 28, 2011 injunction (NYSCEF 210) also issued in favor of Orly and enjoined TPR from using Orly's claimed proceeds, no undertaking was required to be posted by Orly for the injunction because "the escrowed funds have now been deposited with the Clerk [of the federal court] of the SDNY in connection with the interpleader actions." (*Id.* at 6). As such, and per the parties, the December 28, 2011 injunction was "academic." (NYSCEF 1131, ¶ 11; NYSCEF 780 [transcript of oral argument], index

109749/2009, at 6-7).

As the Court of Appeals denied leave to hear plaintiffs' appeal, their contention that the instant motion is premature has no merit.

### III. CONCLUSION

Accordingly, TPR/Sagi is hereby directed to submit documentation of the actual damages incurred as a result of the relevant temporary restraining order and preliminary injunction discussed above to Arie's counsel, with copies to this court. Based on all of the foregoing, it is hereby

ORDERED, that defendants TPR/Sagi's motion seeking an order of reference is granted to the extent set forth hereinabove; it is further

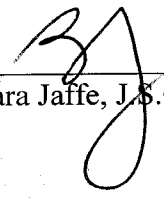
ORDERED, that, pursuant to CPLR 4311 and 6315, the amount of legal fees and interest incurred, as damages allegedly sustained by TPR in connection with the temporary restraining order and preliminary injunction granted in plaintiffs' favor, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation by the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall hear and determine all issues arising from such application; it is further

ORDERED, that this motion is held in abeyance, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED, that, within 30 days from the date of this interim decision and order, a copy of this interim decision and order with notice of entry, together with a completed Information

Sheet, shall be served by plaintiffs' counsel upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar on the Special Referee's Part (Part 50R) for the earliest convenience date.

ENTER:

  
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Barbara Jaffe, J.S.C.

Dated: May 19, 2015  
New York, New York