Genger v Genger
2016 NY Slip Op 30219(U)
February 10, 2016
Supreme Court, New York County
Docket Number: 100697/2008
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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Index No. 100697/2008

ORLY GENGER,

Plaintiff,

-against-

SAGI GENGER,

Defendant.
---x

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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On 27 days between January 29, 2015 and May 15, 2015, a bench trial in this matter was held before me on plaintiff's claim that defendant defrauded her into selling him her interest in a family Canadian real estate venture. (Ct. Exh. VII). The trial was bifurcated. This decision addresses liability only.

The parties are siblings; their family has been mired in litigation in several jurisdictions for many years, all inspired by the contentious divorce of the parties' parents. This action reflects the parents' enmity which has malignantly spread to their children.

Unsuccessful attempts over the years by judges and a special master to settle this and other Genger family matters evidence the inability of the family members to place family welfare

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over self-interest. Third parties too have been dragged into the litigations.

In her complaint, plaintiff seeks a judgment: (1) declaring that her transfer to defendant of her interest in the Genger family's so-called Canadian venture is null and void, and a mandatory injunction; (2) rescission of the transfer based on defendant's fraud in the inducement, misrepresentations and omissions; and (3) for fraud in the inducement. Plaintiff seeks punitive damages as well.

In his answer, defendant interposes three affirmative defenses: (1) failure to state a cause of action; (2) failure to allege fraud or mistake with sufficient particularity; and (3) availability of adequate remedies at law as the complaint sounds in breach of contract, not fraud.

Plaintiff called as witnesses defendant, Genger family accountant William Fischer, and her accountant Joel Isaacson. She also testified on her own behalf and presented videotaped testimony of defendant as he was being deposed in the course of another action (Ct. Exh. II), and of defendant's close friend and attorney David Parnes as he was being deposed during the course of this trial.

Called by defendant were Canadian properties accountant Brian Glasberg and Canadian property manager Vincent Dionne. Defendant testified on his own behalf and presented videotaped testimony of the parties' father Arie Genger, recorded in the course of another trial.

Objections to evidence, if not ruled on at trial, are resolved here as follows: An objection is deemed overruled if the evidence is expressly relied on. Evidence not expressly relied on here is deemed irrelevant or duplicative solely to the extent of its probative value as to liability only. Legal arguments advanced and not resolved during the course of the trial are resolved only if addressed by the party in his or her post-trial submission, and are otherwise deemed waived.

Decisions on the parties' post-trial applications (NYSCEF 632, 651) are reserved for the

damages portion of the trial.

I. RELEVANT FINDINGS

A. The Genger family

Plaintiff is a professional artist. Defendant is a 1997 graduate of the Wharton Business School and a former executive of Lumenis, a publicly traded company, a position he obtained with his father's help. Arie took an active interest in the parties' welfare and intended that the parties share equally the multimillion dollar portfolio of holdings that he had created and acquired. One of the jewels in the Genger family crown was its interest in the international company Trans-Resources, Inc. (TRI), held by TPR Investment Associates, Inc. (TPR), a Genger family entity. Pursuant to an estate and tax plan created by Arie in 1993, The Orly Genger 1993 Trust and The Sagi Genger 1993 Trust were formed, each funded with a 48 percent interest in a Genger family entity called D&K LP, which purchased a 49 percent interest in TPR in exchange for an $8.9 million promissory note (D&K note). At that time, the parties then held equal, indirect interests in TPR. Arie held the remaining 51 percent interest in TPR.

Given the breadth of the Genger family businesses and plaintiff's relative lack of knowledge about corporate finance and real estate, she relied on both Arie and defendant, her elder by seven years, for advice and assistance with her financial affairs.

B. The Genger family Canadian venture

On June 18, 2001, Arie formed AG Real Estate GP, Inc. (AG GP) to invest in Canadian real estate. Soon thereafter, he formed AG Land No. 1 Company (AG Land No. 1) (P's Exh. 281), and purchased 99 shares of it on behalf of AG GP in anticipation of his formation of AG Real Estate Partners, LP (AG LP). (P's Exh. 283).

Arie created AG LP in July 2001. He gave each party a 45 percent limited partnership

interest in it. AG GP, wholly owned by Arie, was the LP's managing partner and given a 10 percent interest. As a pass-through entity, any gains obtained by the LP passed through to the partners. (P's Exh. 202). Pursuant to paragraph six of subdivision a of the partnership agreement, the limited partners are prohibited from transferring all or any portion of the partnership interest to anyone without the GP's prior written consent. (*Id.*).

The LP indirectly owned 50 percent of AG Properties Co. (AG Properties), another Genger family entity that was mostly responsible for the Canadian properties. (P's Exh. 285). The remaining 50 percent of AG Properties went to Gilad Sharon, the son of Arie's close family friend. He intended the parties and Sharon, as members of the second generation, to share in the continuation of the Genger Canadian venture.

On October 1, 2001, AG Land No. 1 was renamed AG Holdings Co. (AG Holdings) (D's Exh. R9).

On October 17, 2001, TPR loaned AG Properties $1.3 million at 6-1/2 percent interest for the impending purchase of a residential apartment building (Durocher) in Canada. (D's Exh. X6). In April 2002, partly financed with a $2.5 million loan from Arie's friend Vladimir Gusinski, AG Properties purchased Durocher for $7,415,000. (P's 494-0002). A promissory note dated July 24, 2001, and executed by AG Properties in favor of Gusinski was secured by a pledge of all of the shares of AG Holdings (P's Exh. 403). Per the loan, quarterly interest payments were to commence in July 2003; payments of principal were to commence in 2008; an acceleration clause was included in the event of a default. AG Properties contributed $2,181,022 toward the purchase of Durocher. (P's 494-0002).

By September 2002, AG Properties purchased, for $11,275,000, another residential apartment building in Canada (Lincoln). Defendant played the primary role in the financing and

acquisition of both Durocher and Lincoln; Sharon assumed managerial responsibility; Parnes assisted with the legal aspects and served as the repository of all of the documentation. Arie retained authority to sign original corporate formation documents.

In October 2002, at Fischer's suggestion, Durocher was sold to a trust for the purpose of shielding the parties from a Canadian tax. (P's Exh. 465-0003).

In early 2003, Arie and Dalia commenced lengthy and difficult divorce proceedings, involving defendant and Parnes in the negotiations. At approximately the same time, defendant lost his executive position with Lumenis and was being investigated by the SEC. In May 2003, defendant was taken by ambulance to a hospital, accompanied by plaintiff, who testified that defendant was terrified by the investigation and the possibility of going to jail, and that he had been diagnosed as bipolar. Soon thereafter, defendant entered into a consent judgment whereby he was barred for five years from serving as a director or officer of any publicly traded company. For the next year, defendant was periodically hospitalized.

During the same approximate period, plaintiff agreed to defendant's and her parents' request that she pledge her multi-million dollar interest in a life insurance trust for defendant to borrow against it to repay a personal loan. At or around the same time, defendant formed an offshore entity, E&G Advisory Services Limited (E&G), which contracted with Lumenis, by agreement dated June 30, 2003, to hire him as a consultant. Parnes signed on behalf of E&G at defendant's request, even though he held no position in E&G. (P's Exh. 562).

In November 2003, at defendant's instance, Lincoln and Durocher were refinanced.

On March 8, 2004, each party purchased from Arie an equal portion of his 10 percent interest in the GP for $100,000, and agreed to pay an additional $50,000 each, contingent on the profits generated from the future sale of properties. (P's Exh. 214). The parties each thereby

became the sole and equal owners of the GP. On the same day, Arie resigned as director and officer of the GP and was replaced by the parties on its board of directors. Defendant was then elected president and treasurer, and plaintiff, vice-president and secretary. (P's Exh. 425).

Defendant agrees that the value of the LP at this time was $6 million.

On March 12, 2004, pursuant to a plan he conceived in mid-2003 to create his own Canadian real estate investment venture (P's Exh. 209-0002, 210, 211-0002, 414), defendant formed Riverside GP LP, with himself as general partner, and with limited partners TPR and AG Properties. It was funded with $500,000 from AG Properties, $500,000 from TPR, and $30,000 from Riverside Advisory. (P's Exh. 489). Riverside Advisory, also partly funded by TPR, was the entity through which defendant provided his services to the Riverside entities through TPR. Defendant was the sole employee of Riverside GP LP, although his wife and mother-in-law were listed as employees in order to provide them with health insurance coverage.

Additionally, pursuant to an amendment to the Riverside limited partnership agreement, backdated from its execution in 2005 to be effective as of April 1, 2004, Parnes was given a 3.57 percent interest in the carried interest distributions of the Riverside partnership, resulting in a payment to him of $100,000. (P's Exh. 203). Although not reflected in the amendment, defendant gave Parnes the interest in exchange for his legal services. Prior thereto, Parnes was paid for his services pursuant to oral "understandings" with defendant. AG Properties's capital contribution to the Riverside entities was increased to $2.171 million. (*Id.*). According to Fischer, the increase was intended to fund Riverside's investment in another Canadian property, Domaine La Renaissance (Domaine). Fischer took all instructions on these properties from defendant.

By April 2004, the proceeds of the Gusinski loan were depleted, and on April 1, 2004,

defendant replaced Arie as president and secretary of AG Properties.

In or around July 2004, the Riverside entities purchased Domaine for approximately $3.5 million. It was held by a trust and partly funded by TPR, E&G, and Dalia.

On July 27, 2004, AG Properties paid Dalia $100,000, and on July 30, 2004, $215,219 in interest on the Gusinski loan. (P's Exh. 261).

On September 2, 2004, AG Properties sold Durocher, generating $1.8 million Canadian.

On September 14, 2004, TPR paid $150,000 to White Box LLC, an entity Arie formed for plaintiff's art business. (P's Exh. 389). In October 2004, defendant and his wife purchased, for more than $4 million, a Park Avenue townhouse which they renovated. Given family tensions arising from the divorce, defendant moved his office from the Genger office on 57th Street to the townhouse. Defendant took charge of the divorce mediation, and soon thereafter settled his parents' differences as to the division of their marital assets. According to plaintiff, he accomplished the impossible.

Pursuant to the divorce settlement, executed on October 30, 2004 by Arie and Dalia, Arie transferred his 51 percent interest in TPR to Dalia. TPR was then held by Dalia and by D&K LP. Dalia paid defendant $400,000 and transferred to him 99 percent of her share of TPR in exchange for his $5 million promissory note. Defendant became a director of TPR and then TPR's president and chief executive officer, with Parnes as vice-president. (P's Exh. 312). Defendant authorized TPR's payment of monthly stipends to himself, his wife, and Dalia. Although defendant agreed to continue plaintiff's monthly TPR stipends and keep her on TPR's payroll for health insurance coverage, he and Arie agreed that the $150,000 paid to White Box warranted suspending plaintiff's stipends until 2006. TPR obtained a majority interest in White Box.

Soon thereafter, also pursuant to the divorce stipulation, TPR's shares in TRI were

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transferred to the parties' respective trusts, and defendant appointed Parnes and another close friend to replace the trustees of the Orly Genger Trust. Dalia and defendant formed D&K GP, LLC (D&K GP), and gained control over D&K LP, with defendant as managing member of D&K GP. (P's Exh. 268).

C. Plaintiff's transfer to defendant of her interest in AG LP

On November 29, 2004, at Parnes's request, Fischer emailed him a template for a bill of sale that he had used "in connection with the sale of a partnership interest." Fischer also indicates in the email that he was unable to locate an option agreement. The subject line of the email reads, "Documents." (P's Exh. 459).

Using the template as a guide, Parnes drafted a bill of sale for the transfer of plaintiff's interest in AG LP to defendant. He changed the initial wording from "This Bill of Sale is made on" to "This Bill of Sale is made as of" and inserted the date January 1, 2004. He also added a representation that plaintiff received "simultaneously" with the execution of the bill of sale $100,000 in cash as consideration for the transfer, along with a provision that the $100,000 was payable "by January 1, 2006" pursuant to a promissory note. (P's Exh. 218). Parnes appended to the bill of sale as exhibit A a promissory note that he too had drafted. Headed "Payable on January 1, 2006," the note contains a provision that the principal, together with all accrued interest "shall be due and payable in full by January 1, 2006." (P's Exh. 219). In contrast to promissory notes Parnes had prepared in other matters, the promissory note contains no provision for plaintiff to receive attorney fees in the event of a default.

Parnes also drafted a letter from plaintiff to defendant whereby defendant "memorialized" the parties' understanding concerning the ownership of the LP, reiterated his purchase of plaintiff's interest in it as of January 1, 2004, and granted her an option to purchase it back for

$10,000, at a time that was left blank. (P's Exh. 402).

In December 2004 or the beginning of 2005, defendant brought the documents to plaintiff at her apartment, and told her that in order to avoid having to pay a significant tax on her gain from the sale of Durocher and the prospective sale of Lincoln, she should temporarily transfer to him her interest in the LP as he had losses against which to offset the gain. Plaintiff did not understand, and when she asked him what he wanted her to do, he told her to sign the documents, assuring her that the transaction was a formality, that it would not affect her interest in the LP, that it would constitute a tax benefit to both of them, and that he would eventually transfer her interest back to her. Plaintiff also testified that defendant told her that she could exercise the option for a dollar.

Defendant and plaintiff then signed the bill of sale, which was undated, and the option letter; defendant signed the promissory note. (P's Exh. 218, 219). Plaintiff trusted defendant and believed his assurances. She also agreed to his request that she not mention the transaction to Arie which she believed reflected defendant's concern that Arie not be burdened.

Defendant gave the executed documents to Parnes who filled in the parties' social security numbers and the option date of "not earlier than January 1, 2006." Plaintiff was not given a copy of these documents.

Parnes never advised plaintiff of the consequences of the transaction. He moved to Israel on December 9 or 10, 2004, bringing with him documents pertaining to the Canadian properties. He preserved no documentation concerning the transaction.

In the fall of 2005, in anticipation of filing the pertinent 2004 tax returns, Fischer received from defendant or Parnes the bill of sale and promissory note. Fischer testified that he was not given nor had he seen the option letter, never had it in his files, and did not previously discuss it

with defendant, nor did he believe that plaintiff needed money at the time of the transaction. In preparing plaintiff's 2004, 2005, and 2006 federal tax returns, Fischer failed to state on Form 6252 for Installment Sale Income that she had sold her interest to a related party, thereby shielding the transaction from the scrutiny of the Internal Revenue Service. (D's Exh. F10, G10, H10).

By checks dated May 23, 2006 and August 30, 2006, defendant paid plaintiff, respectively, $33,000 and $10,000 toward the promissory note. (P's Exhs. 232, 388). Nine days later, at defendant's request, plaintiff signed a memorandum that he had drafted, whereby she stated that in addition to her interest in the LP "the consideration [she] received was for [her] entire interest in the [LP] including, [her] interest in [the GP]." (P's Exh. 220).

Arie disclaimed any knowledge of the transaction and testified that had he known of it, he would not have allowed it.

D. Post-transaction events

On December 30, 2004, AG Properties paid E&G $33,197.40, and on the same day, it paid TPR $701,860. (P's Exh. 261). On January 20, 2005, TPR paid AG Properties $122,708, paid Sharon a consulting fee of $122,720 (*id.*), and a few days later defendant entered into a consulting agreement with him (D's Exh. M9).

At the same approximate time, defendant, on behalf of AG Land Number 1 (AG Holdings), and Parnes, on behalf of TPR, executed a consulting agreement, backdated to November 2002, whereby TPR would continue providing consulting services for AG Holdings in return for an annual fee of $300,000, commencing several months before the September 2002 purchase of Lincoln (P's Exh. 249), thereby allowing for the payment of fees to TPR for services previously rendered in connection with Durocher and Lincoln. Additionally, on January 26,

2005, defendant, on behalf of AG Properties, and Parnes, on behalf of TPR, entered into an agreement whereby TPR was paid $475,000 by AG Properties, representing fees earned from November 1, 2001 through December 31, 2004, plus $100,000 in expenses. (P's Exh. 247). Defendant and Parnes conceded that in November 2001 or 2002, neither of them held a position of authority within AG Properties.

Some time in 2005, defendant and Arie executed a written agreement in the form of a letter addressed by defendant to Arie, dated "____ 2005," by which defendant assured Arie that "all funds received by AG Prop[erties] or Riverside General Partners LP (the general partners of Riverside), whether from or in connection with Riverside, will be set aside for the full repayment of the [Gusinski promissory note]," in exchange for Arie's agreement to sign resolutions and other documents pertaining to the sale of the properties. (P's Exh. 422). The assurance also reflects an understanding that AG Properties used the proceeds of the sales of Lincoln and Durocher to invest in Riverside for its purchase of Domaine. (*Id.*).[1]

The closing statement for the sale of Lincoln dated August 31, 2005, reflects instructions to Parnes to disburse $3.475 million to repay AG Properties. (P's Exh. 304). Parnes received a fee of $100,000 on the sale of Lincoln.

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[1] During the course of the trial, I granted a motion to quash a subpoena by which defendant sought testimony from a representative of the law firm that drafted another, unexecuted, assurance dated "_____ 2006." (NYCSEF 650). That document differs from the executed assurance and it contains a blank space, whereas the executed assurance is complete. As defendant and Arie executed the assurance dated "_____ 2005," and given their proclivity to execute undated and backdated documents, I hold defendant to the 2005 date. (*See also infra*, II.A.1.). Moreover, a company resolution dated August 2005 reflects Arie's contemporaneous resignation from AG Holdings and defendant's appointment as director (D's Exh. Q4), and an email from a Canadian law firm reports that pertinent corporate documentation reflects Arie's resignation by August 2005 (P's Exh. 499). A facsimile transmission of Arie's letters of resignation and the accompanying corporate resolutions, dated March 8, 2006, does not prove that Arie resigned on March 8, 2006.

On September 15, 2005, AG Properties paid TPR a $373,488 consulting fee.

On September 21, 2005, defendant purchased Sharon's 50 percent interest in AG Properties for $1 million Canadian, or $800,000 US (D's Exh. Y8), although he had approached Sharon with the idea of buying him out before August 16, 2004 (P's Exh. 217). Arie was disappointed by the breakup of the partnership and reluctantly assisted in mediating the terms. The same day, AG Properties paid $100,080 to a property held by the Riverside entities, followed by another $100,080 on September 27, 2005. (P's Exh. 261). And on October 5, 2005, AG Properties paid $527,540 Canadian to E&G as payment of a loan in US dollars. (*Id.*). On November 10, 2005, AG Properties paid TPR a fee of $842,464, and on November 14, another $255,080. (*Id.*).

Pursuant to a subpoena issued by the Office of the Manhattan District Attorney, Fischer turned over to his attorney originals and copies of his files for TPR, the Riverside entities, and the AG entities. His attorney forwarded the copies to the District Attorney. According to Fischer, his attorney said that the originals were lost in transit. Although Fischer always retains originals, he did not retain copies of the documents he turned over to his attorney,

TPR loaned AG Properties funds to pay the interest on the Gusinski note. Defendant loaned more than $1 million for same. Defendant also made monthly payments of $10,000 to $30,000 from the venture to E&G.

At the end of 2006, defendant fired Fischer and hired another accounting firm for the Genger family entities. Fischer sent the new firm all of his records relating to the AG entities and TPR and, over defendant's objection, retained copies.

On January 16, 2007, at defendant's instance, Parnes formed a limited liability company,

AG Real Estate LLC (P's Exh. 413) to protect defendant from personal liability for the anticipated default on the Gusinski note. Defendant gave Parnes the D&K note to ensure against Dalia or anyone else collecting on it, in exchange for which TPR was relieved of its obligation to pay $12,000 for the balance of Parnes's tuition for his MBA. (P's Exh. 313).

Plaintiff began to ask defendant about her financial affairs in May 2007. Because defendant distrusted Fischer for his association with Arie, and would not discuss finances with plaintiff unless she hired a new accountant with no connection to Arie or Fischer, she hired Isaacson & Co. to replace Fischer.

Arie learned of the transaction between the parties in September 2007, when an arbitration was held in the divorce matter. Had he known of the transaction earlier, he would have advised plaintiff to decline, given the far greater amount paid to purchase Sharon's share in AG Properties.

At a meeting held at Isaacson's office on November 8, 2007, attended by plaintiff, defendant, and Dalia, defendant became upset at being questioned about the finances of the Canadian venture, and when plaintiff asked if he would return her interest in the LP and GP to her, he said they had no value.

Plaintiff commenced this action against defendant on or about January 16, 2008.

In July 2008, the Gusinski note went into default. Gusinski obtained a judgment against AG Properties and defendant for approximately $4.4 million. For more than $3.3 million, defendant purchased the judgment, then worth more than $5 million with prejudgment interest.

Parnes returned the D&K note to defendant and in 2009, defendant foreclosed on it, extinguishing the indirect interest in TPR held by the Orly Genger Trust through D&K LP.

II. ANALYSIS

"In an action to recover for fraud [including fraudulent inducement], the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (NY Pattern Jury Instr. [PJI] 3:20 [parenthetical supplied]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 167 [1st Dept 2015]). Each element must be proved by clear and convincing evidence. (*Gaidon v Guardian Life Ins. Co. of Amer.*, 94 NY2d 330 [1999]; NY PJI 3:20). Loose, equivocal or contradictory evidence does not suffice. (*Abrahami v UPC Constr. Co.*, 224 AD2d 231 [1st Dept 1996]).

A. Credibility

In order to determine whether plaintiff sustained her burden of proof, I first address the credibility of the witnesses.

1. Defendant

As defendant was plaintiff's first witness, I address his credibility first.

Given the long and close personal and business relationship between defendant and Parnes, defendant's claim that he did not recognize Parnes's handwriting on the documents underlying the transaction is incredible, a conclusion buttressed by defendant's too-careful testimony that plaintiff may have filled in the figures on the bill of sale. This prevarication, as well as defendant's evasiveness and equivocation about the transaction, warrant doubt as to

defendant's general credibility. Plaintiff counsel's aggressiveness in questioning defendant, while occasionally inappropriate, cannot be blamed for defendant's evasiveness.

Defendant's evasiveness as to whether he owed plaintiff a fiduciary duty warrants additional doubt as to his credibility, for even absent such a duty, what he owed to plaintiff in terms of familial concern should have been sufficient motivation for him to find another, legal, way for plaintiff to handle the tax issue.

Moreover, as defendant knew that the suspension of plaintiff's TPR stipends was due to plaintiff's September 2004 receipt of the $150,000 check for White Box, and given his intent that the promissory note not be paid until after January 1, 2006, his testimony that the transaction was a mechanism for satisfying plaintiff's need for funds has no basis. I also reject his contention that plaintiff declined payment of the $57,000 balance on the promissory note.

2. Fischer

That Fischer provided Parnes with a template of a bill of sale does not prove that Fischer conceived the transaction absent any indication in the transmittal email that the template related to any matter, much less the one in issue. If the email contained anything tending to reflect Fischer's knowledge of the transaction, defendant would have offered it.

Having furnished Parnes with a blank template devoid of any reference to the transaction, and there being no other indicia of Fischer's involvement in the transaction beyond preparing the pertinent tax returns almost a year later, there is no reason for him to have recalled sending the template. Thus, Fischer's failure to produce the template in discovery is unremarkable.

Fischer's failure for three successive years to report on plaintiff's tax returns that she had sold her interest to a related party does not warrant attributing to him the backdating of the bill of

sale based on defendant's speculation that it may have ameliorated his failure to report the transaction as between related parties, absent any other evidence that Fischer knew of the option letter before receiving it in the fall of 2005.

It also bears observing that there is no reason for Fischer not to have completed the bill of sale himself if it had been his idea all along. In any event, defendant had the greater motivation to effect the transaction, and his frequent backdating or non-dating of documents for his or Parnes's benefit shows that he had no trouble creating false documents. Fischer's failure to retain a copy of files sent to the District Attorney's office or ensure their return does not adversely affect his credibility, and spoliation sanctions are not available against a nonparty.

For all of these reasons, I credit Fischer's denial of having conceived the transaction and of having been the source of any of its terms, and credit the rest of his testimony to the extent I rely on it.

3. Plaintiff

Plaintiff's inability to recall what defendant had told her about the tax issue when he asked her to sign the documents underlying the transaction is of no moment given his own testimony that he had explained to her that the transfer would take care of the tax issue. Any inconsistencies between her trial testimony and her deposition or other pleadings are insignificant given her apparent inability to understand aspects of the business, and her denial that defendant told her about Riverside remains unimpeached, as she was neither involved nor interested in it.

I thus find plaintiff credible to the extent I rely on her testimony, notwithstanding the tax returns. Although plaintiff is as interested as defendant in the outcome of this case, as are Arie and Fischer to lesser degrees, given defendant's prevarications (*supra*, II.A.1.), he is the least

credible.

4. Parnes

While Parnes's preparation of the documents underlying the transaction does not alone prove that he conceived it or dictated its terms, as an attorney, his unquestioning participation in much of defendant's financial maneuvering reflects poorly on his credibility, thereby warranting the rejection of his testimony that Fischer conceived the transaction.

5. Arie

Arie's denial that he knew about the transaction when it was executed or soon thereafter is supported by plaintiff and Fischer, and given Arie's intent that the parties share equally in the family business, defendant was motivated to ensure that he did not learn of it. I thus credit Arie's testimony to the extent I rely on it.

B. Misrepresentation or a material omission of fact which was false and known to be false

Defendant's prevarication about Parnes's handwriting (*supra*, II.A.1.) warrants rejecting his testimony denying that he conceived the transaction, and the absence of evidence that he instructed Parnes to prepare the transaction does not prove otherwise given their close personal and business relationship. Defendant's periodic hospitalization between May 2003 and May 2004 neither proves that he did not conceive the transaction nor connotes a lack of fraudulent intent, absent competent medical evidence and in light of his ability during that time to manage TPR, mediate the division of his parents' marital assets, and engage in numerous and complex transactions. Plaintiff's statement that defendant was diagnosed as bipolar, and her sympathy for him, do not constitute medical evidence or otherwise prove that defendant was unable to tell right from wrong or make rational decisions. Rather, defendant's experience and knowledge show

that he was capable of conceiving a false tax-based rationale for the transaction, and the evidence as a whole clearly and convincingly proves that he did so. His claim that he was "accommodat[ing]" plaintiff by buying her interest is unsupported, as is his argument that the sole reason for backdating the bill of sale was to enable a related party transaction to escape the scrutiny of the IRS (*see also supra*, II.A.2.).

Arie's approval or knowledge of any of defendant's other transactions does not relieve defendant of liability because it does not prove that Arie was aware of the transaction in issue. Arie, like plaintiff, trusted defendant to the degree that he reposed in him significant, and eventually complete, authority over the Canadian venture. Having given defendant this benefit and having helped him with the formation of the Riverside entities, Arie would not have permitted defendant to divest plaintiff of her interest in the venture. Notably, defendant did not effect the transfer of the LP until after Arie had resigned from the GP, thus eliminating the need for his consent.

Additionally, defendant's claim that the transaction was solely for plaintiff's benefit does not square with his desire that plaintiff not inform Arie of the transaction. Had defendant believed that the transaction benefitted plaintiff, there would have been no need for secrecy. Plaintiff's inference that defendant intended to protect Arie from a burden by keeping the transaction a secret is inconsistent with defendant's position that Arie was still actively involved in the Canadian entities. In any event, it is an inference I decline to draw, opting instead to infer a motive more sinister than that drawn by plaintiff at a time when she trusted him.

Defendant's representation to plaintiff that she needed then and there to sell him her interest in the LP for $100,000 is also fraudulent, a conclusion supported by his testimony that he

did not know "[w]hether [plaintiff] specifically wanted that transaction to include the sale of the interest as opposed to some other way of achieving the same objective." His acknowledgments that plaintiff could have funded the payment of a prospective capital gains tax other than by selling him her interest in the venture and that plaintiff's payment of the tax gain could have been put off to October of 2005 buttress that conclusion.

The peremptory manner in which defendant obtained plaintiff's signature on the bill of sale and option letter, does not evidence his asserted lack of interest in the transaction. Rather, it reflects a fraudulent attempt to persuade plaintiff that the transaction was nothing other than a formality. (*Infra*, II.D.).

Defendant's argument that plaintiff cannot prove his liability absent an attempt to exercise the option is disingenuous, as he sent her two checks toward the consideration for the transaction without a formal demand. In any event, given the fraud, plaintiff was not obliged to exercise the option before being entitled to relief. Consequently, *135 East 57th St. LLC v Daffy's Inc.*, 91 AD3d 1, 5 (1st Dept 2011), addressing an option to renew a lease, is inapposite. To the extent that plaintiff, in her complaint, seeks the benefit of the bargain, defendant is not thereby relieved of liability for fraud (*see Delcor Laboratories, Inc. v Cosmair, Inc.*, 169 AD2d 639, 640 [1st Dept 1991]), and she does not thereby convert her claim to a breach of contract.

Based on this evidence, I find that when defendant recommended that plaintiff transfer her interest in the venture to him in order to relieve her of a tax liability, he knew, and did not tell her, that there were other ways of accomplishing the alleged goal and that there was no need to do so at the time. Thus, plaintiff has established, by clear and convincing evidence, that defendant made a misrepresentation to plaintiff that he knew was false.

C. That the misrepresentation was made for the purpose of inducing the other party to rely on it

As there were other ways of handling plaintiff's potential tax liability, and in light of defendant's lack of credibility, plaintiff clearly and convincingly proved that the tax rationale constituted a misrepresentation used by defendant to induce her to transfer her interest to him.

D. Justifiable reliance

Defendant owed plaintiff a fiduciary duty as her sibling co-owner of the LP and GP. (*See Braddock v Braddock*, 60 AD3d 84, 89 [1st Dept 2009] [family members stand in fiduciary relationship toward one another in co-owned business venture, and each is relieved of duty to investigate]). The authority relied on by defendant for the proposition that plaintiff is barred from establishing reliance by virtue of her constructive knowledge of the entity's records and of her own tax returns (*Jana L. v W.129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]), is inapposite absent the fiduciary duty defendant owed plaintiff here. In any event, the tax returns were not available to her until long after she signed the bill of sale. In the other decision relied on by defendant, there was no fiduciary duty mentioned. Rather, the parties were equal partners in certain businesses and properties with no family connection alleged. (*See Matter of Mehta v Mehta*, 196 AD2d 842 [2d Dept 1993], *lv denied* 83 NY2d 961 [1994]).

Plaintiff's belief that defendant would transfer her interest back to her without exercising the option is reasonable given his assurance to her that her interest would not be affected. As defendant was content to run the business without plaintiff's involvement beyond lending her name to corporate documents, he enabled her reliance on him and belief that the transaction was a mere formality, and that he would return the interest to her without a demand. Although the one-dollar option alternative is not enforceable, it is admissible to prove that as part of the fraud,

plaintiff was given to believe that the transaction was a fiction concocted by defendant to help her avoid paying the capital gains tax. Defendant's failure to explain the transaction fully to her and the absence of any provision in the bill of sale affording plaintiff attorney fees in the event of a default in payment and of any consideration for the additional transfer of the GP justify plaintiff's understanding that the transaction was pro forma and that defendant would give her back her interest without any effort on her part.

That plaintiff signed the undated bill of sale and the partially blank option letter reflects her complete trust in him. For defendant to argue that the discretion plaintiff vested in him places his conduct beyond scrutiny, presupposes the absence of fraud and reflects the wrongful abdication of his fiduciary duty to her. His assurance that her interest in the venture was unaffected proves that plaintiff reasonably understood that she was not being divested of her interest.

Plaintiff's failure to conduct her own investigation into the underlying facts purportedly warranting the transaction does not relieve defendant of his duty to her. He knew that she relied on him to do right by her, as she had acceded to the request that she pledge her interest in a life insurance trust for his benefit. Clearly, plaintiff had every reason to trust him. Consequently, *Schwartz v JPMorgan Chase Bank, NA*, 84 AD3d 575, 577 (1st Dept 2011), is inapposite.

Defendant's fiduciary duty to plaintiff, along with her longstanding reliance on him, constitutes clear and convincing evidence that plaintiff justifiably relied on defendant's recommendation that she transfer her interest to him to avoid a large tax liability. (*See also supra*, II.B.).

E. Injury

The tax benefit to plaintiff in selling her interest to defendant, added to the $100,000 consideration, does not approach the value of plaintiff's interest in the venture at the time of the transaction, as evidenced by the proceeds of the sales of Durocher and Lincoln, defendant's impending purchase of Sharon's interest, his concession that the LP was worth $6 million in March 2004, the funds flowing out of AG Properties to his wife, Dalia, E&G, Riverside, Parnes, and himself, and his purchase of the Gusinski note for more than $3 million. The default on the Gusinski note does not disprove plaintiff's injury absent sufficient evidence that the payments on it could not be made. Rather, defendant decided to default on it, thereby creating the condition on which he now relies for his argument that the venture had no value.

Any loss plaintiff would have sustained absent the transaction does not prove that she did not sustain a loss as a result of the transaction. In any event, even a nominal value suffices for a finding of liability. Plaintiff also never received the full consideration.

F. Punitive damages

I decline to impose punitive damages.

III. CONCLUSION

Defendant's great gifts were exploited when his parents inappropriately thrust their troubled son into the difficult position of resolving their divorce finances. Assigning defendant such power apparently had the unintended consequence of convincing him that he, like Arie, could create and disperse interests and funds whenever and however he wished. His expressed resentment of plaintiff likely inspired the fraud, while his power and control of the entities enabled it.

[* 23]

Accordingly, I find that plaintiff is entitled to judgment on her cause of action for fraud in the inducement only.

Within ten days from the date of entry of this order, defendant Sagi Genger shall serve a copy of this order with notice of entry upon plaintiff, and upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who shall assign this matter to a Special Referee for a hearing to hear and report on the amount of damages to be awarded plaintiff Orly Genger, and upon a receipt of the report from the Special Referee, this court shall make a final determination in this matter.

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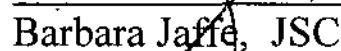

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: February 10, 2016
New York, New York