Genger v Genger
2016 NY Slip Op 31687(U)
September 9, 2016
Supreme Court, New York County
Docket Number: 109749/09
Judge: Barbara Jaffe

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),

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. 057, 058

DECISION AND ORDER

BARBARA JAFFE, JSC:

By decision and order dated April 8, 2016, I awarded plaintiff partial summary judgment as to liability only with respect to the first, seventh, and eighth causes of action advanced in plaintiff's amended complaint, denied the cross motion for summary judgment interposed by defendants Sagi Genger, TPR Investment Associates, Inc., and D&K GP LLC, and referred the matter for a trial on damages. (NYSCEF 1059).

By order to show cause and affirmation of exigency for ex parte relief, each dated July 29, 2016, plaintiff moves for a prejudgment order of attachment, including a temporary restraining order and preliminary injunction, attaching the assets of defendants Sagi Genger, D&K GP LLC, TPR Investment Associates, Inc. and Dalia Genger and those of any entities, trusts, or escrow accounts controlled by or affiliated with them, including the Sagi Genger 1993 Trust, the Orly Genger 1993 Trust, Horizon 2009 Trust, Millennium USA LP,[1] Double Gen Trust, Genger Kids

[1] Removed from order on application of plaintiff's attorney. (NYSCEF 1215).

LP or other entities in which Sagi or his wife Elana Genger or their children are beneficiaries, Manhattan Safety Co., Joshua's Standing Sun, LLC, Batzad, LLC, Bristol Ivory LLC, and Rochelle Portfolio, Inc., and their respective officers, directors, trustees, escrow agents, attorneys, representative, and authorized signatories. I signed the order and TRO restraining and prohibiting those defendants and the aforementioned entities from transferring or paying any assets, except for ordinary and reasonable household expenses collectively not to exceed $50,000 per month, of the SG defendants or any personal or real property in which the SG defendants have an interest, including any and all bank or financial accounts in the name of any SG defendant or on any account in which any SG defendant is a signatory, or any debt owed to any of the SG defendants, to the extent of $50 million, where the garnishees included certain banks as well as David Parnes and his law offices. (NYSCEF 1213). (Mot. seq. 57).

By another order to show cause and affirmation of emergency for ex parte relief, each dated July 28, 2016, plaintiff moves for a prejudgment order of attachment against the assets of defendants Sagi Genger, D&K GP LLC, and TPR Investment Associates, Inc. (SG defendants), including a temporary restraining order and preliminary injunction, restraining and prohibiting certain garnishees from transferring or paying any of the defendants' assets, or any personal or real property in which they have an interest, or any debt owed them, to the extent of $50 million. I signed the order including the TRO. SG defendants were given seven days to efile their opposition. (NYSCEF 1234, 1235). (Mot. seq. 58). They were given four days to efile their opposition. (NYSCEF 1213, 1215).

By letter dated August 1, 2016, counsel for Sagi and TPR sought an extension of time to respond to the two motions (NYSCEF 1214), which I denied. If plaintiff's attorneys were able,

in a matter of days, to sort through defendants' documentation, defendants ought have had little difficulty going through and comprehending their own records.

Defendants oppose, as do nonparties Parnes and Elana Genger and her five minor children. Garnishees do not oppose.

Following oral argument on August 11, 2016, I extended the restraints pending my decision.

I. PERTINENT BACKGROUND

A. April 2016 decision and order

The pertinent factual background is set forth in my April 8, 2016 opinion, and will not be repeated here. In my decision, I ultimately held that Sagi, as CEO of TPR, notwithstanding the family understanding that the 1993 D&K note would never be enforced, caused TPR to foreclose on it at a UCC auction sale held in February 2009 at which the TPR shares pledged by the LP as security for the note were purchased by TPR for $2.2 million, thereby reducing the LP's debt obligation, but leaving an $8.8 million deficiency guaranteed by the Orly Trust and the Sagi Trust. As a consequence, the Orly Trust's interest in the LP's sole asset, its stock interest in TPR, was transferred and sold to TPR. I also found that Sagi had intended this transaction to inure to his benefit. Sagi then attempted, albeit unsuccessfully after court intervention, to rid himself of the remaining approximately $8 million debt on the note by agreeing with himself, via TPR and the Sagi Trust, to forgive it. Given this series of transactions and occurrence, I found that Sagi had breached his fiduciary duty to the Orly Trust in his capacity as general partner of the LP by conducting a sham auction of the LP's shares in TPR, thereby causing the Orly Trust's loss of its only collateral in the LP, while remaining liable on the note.

B. Other pertinent actions involving the parties

On September 1, 2010, in connection with another Genger action, *Arie Genger and Orly Genger, in her individual capacity and on behalf of the Orly Genger 1993 Trust v 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, et al.*, index No. 651089/2010 (2010 action), the parties entered into an escrow agreement by which they provided, in section six, that in consideration of TPR's voluntary deposit of $10,314,005 in escrow, the Orly Trust "will refrain from applying for injunctive, or similar, relief (including but not limited to pre-judgment attachment, sequestration of funds and similar) in connection with the Escrow Amount or other amounts received by TPR in connection with the sale by TPR of any shares of TRI." (Index no. 109749/2009, NYSCEF 1329). By decision dated May 15, 2014, a judge of the federal district court in the Southern District of New York granted TPR summary judgment directing the release of approximately $10.3 million in escrowed proceeds arising from TPR's sale of TRI shares to the Trump Group, and emphasized that he was not deciding "who among the Genger siblings ultimately deserves recompense," and without resolving "any question other than whether TPR is the next (but not necessarily last) beneficiary of the sale of the Orly Trust Shares." (*TPR Investment Associates, Inc. v Pedowitz & Meister LLP, as escrow agent, Dalia Genger, as trustee of the Orly Genger 1993 Trust, and Orly Genger, as beneficiary of the Orly Genger 1993 Trust*, 2014 WL 1979932,* 6, 13 Civ 8423,* 15 [SD NY 2014]).

C. The May 2014 TRO

Soon thereafter, by order to show case dated May 20, 2014 and filed in the 2010 action (NYSCEF 1007), Orly sought to attach the assets of TPR and Sagi. The parties appeared before

me on the record and I acknowledged Orly's concern that the escrowed funds will be dissipated "starting right now," and indicated that I was going to sign the TRO and then render a decision on the order to show cause. Defense counsel interjected to state that he would voluntarily commit that defendants would not spend money "between now and [my] prospective ruling," to which I replied, in essence, that my signing of the TRO should thus be of no consequence to Sagi. (NYSCEF 1015, at 29). The order reflects that the restraint was imposed pending the hearing on the motion, and the hearing on the motion was scheduled to be heard on the papers on June 4, 2014. (NYSCEF 1007). A decision was rendered moot on July 24, 2014, when the plaintiffs' claims in that action were dismissed on appeal. (*Genger v Genger*, 121 AD3d 270 [1st Dept 2014]).

D. June 2016 trial subpoenas and motions to quash them

On or about June 10, 2016, plaintiff served trial subpoenas on 13 banks and financial institutions commanding them to produce on June 16 for the damages trial ordered in the instant case all documents and records for any accounts in Sagi Genger's name and for any account for which Sagi, Dalia, and/or David Parnes have signing authority, or in the name of or for the benefit of TPR, the LP, or D&K GP LLC, a trial subpoena on Sagi commanding him to produce on June 16 for the damages trial all financial records of TPR, the LP, and the GP, all personal financial records showing every transfer of funds between him and TPR, the LP or the GP, and all documents concerning the purpose of such transfers (NYSCEF 1090), and the same trial subpoenas on David Parnes. (NYSCEF 1124). On or about June 15, plaintiff served a trial subpoena on Leah Fang, commanding her to appear on June 21 for the continued damages trial and produce all records in her possession or control relating to TPR, the LP, and the Orly Trust.

(NYSCEF 1131).

By notice of motion efiled on June 14, 2016, defendants advised that on July 28, 2016, they would move for an order quashing the subpoenas served on them. (NYSCEF 1088). The damages hearing commenced on June 16, and was adjourned to August 2.

On June 22, I ordered, on plaintiff's application, that defendants to show cause as to why their motion to quash should not be advanced and denied. (NYSCEF 1110).

By letter dated June 28, 2016, plaintiff's counsel advised that defendants' counsel had communicated with the banks to the effect that their compliance with the subpoenas had been stayed by me and that they need not respond. (NYSCEF 1115). On June 30, 2016, I held a telephone conference with the parties, and issued an order that day, prohibiting defense counsels from communicating with any subpoenaed party concerning the subpoenas. (NYSCEF 1121).

By notice efiled on July 4, 2016, nonparty David Parnes advised that on July 26, 2016, he would move for an order quashing the subpoenas served on the banks and financial institutions. (NYSCEF 1124). By order dated July 5, I granted plaintiff's motion to advance defendants' motion to quash, and thereupon denied defendants' motion to quash. (NYSCEF 1125). By notice efiled on July 11, Leah Fang advised that on July 28, she would move for an order quashing the trial subpoena served on her. (NYSCEF 1129). The motions to quash were denied, respectively, on July 22, 2016, and August 15, 2016, the latter as moot due to Fang's compliance with the subpoena. (NYSCEF 1166, 1347). Interim stays were denied by two Appellate Division justices. (NYSCEF 1116, 1238). On August 11, at oral argument on the motions for an attachment, the parties advised that the damages hearing had been continued to September 10, 2016.

II. ATTACHMENT OF DEFENDANTS' ASSETS

A. Governing law

An order of attachment may be granted where there exists a viable cause of action, a probability of success on the merits, that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212[a]), and one or more grounds exist for an attachment pursuant to CPLR 6201, which are, as pertinent here, that "the defendant is a nondomiciliary residing without the state and that

> the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . .

(CPLR 6201).

In order to establish this element, the plaintiff bears the burden of establishing the defendant's fraudulent intent; mere allegations or suspicious of fraud are insufficient. (*DLJ Mortg. Cap., Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009]). As it is often difficult to prove that the defendant harbored fraudulent intent, the courts scrutinize whether the defendant's activities and/or transactions exhibit "badges of fraud" from which the fraudulent intent may be inferred. (*Id.* at 319-320). Such badges of fraud may include: (1) gross inadequacy of consideration; (2) a close relationship between transferor and transferee; (3) the transferor's insolvency as a result of the conveyance; (4) a questionable transfer, which is not made in the ordinary course of business; (5) secrecy of the transfer; and (6) retention of control of the property by the transferor of the conveyance. (*Id.*). Also considered badges of fraud are "the existence or a cumulative effect of a pattern or series of transactions or course of conduct after

the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors," and the overall chronology of the events and transactions in question. (*In re Hypnotic Taxi LLC*, 543 BR 365 [Bank Ct ED NY 2016]).

As an order of attachment is an extreme and harsh remedy, the prayer for relief must be "construed narrowly in favor of the party against whom the remedy is invoked." (*VisionChina Media Inc. v S'holder Representative Servs.*, 109 AD3d 49, 59 [1st Dept 2013]). Thus, it has been held that a defendant's nondomiciliary status constitutes an insufficient basis for ordering an attachment, even if the other elements of CPLR 6212(a) are established.

On a motion for an order of attachment, the plaintiff is required to post an undertaking, in an amount fixed by the court but not less than $500, with a specified part of it conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, sustained by reason of the attachment if the defendant recovers a judgment or it is finally decided that the plaintiff was not entitled to the attachment, and the balance of it conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. (CPLR 6212[c]).

B. Contentions and analysis

1. Viable cause of action

Having prevailed on her motion for partial summary judgment, plaintiff argues, without dispute, that she has thereby established a likelihood of success on the merits, a proposition not challenged by defendants.

2. Probability of success on the merits

See II.B.1., *supra.*

3. The amount demanded from the defendant exceeds all counterclaims known to the plaintiff

As all counterclaims were dismissed, this element is indisputably established.

4. Defendants are nondomiciliaries residing without the state

This element is undisputed.

5. With intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, defendant has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts

a. Motions to quash

Plaintiff references the motions to quash the trial subpoenas and defendants' efforts to prevent the banks from complying with them, asserting that they thereby attempted to frustrate her attempts to obtain their certified bank records in advance of the damages trial.

While the three aforementioned motions to quash were each filed by different parties and nonparties, they were served, respectively, on June 10, July 4, and July 11, and each movant sought to be heard as late as July 28, only two business days before the August 2 hearing. Additionally, counsel's reliance on CPLR 3103(b) as authority for informing the banks and financial institutions that there was no need for them to comply with the trial subpoenas was not only misplaced as that statute does not pertain to trial subpoenas (*compare* CPLR 3103[a] [court may make protective order denying or limiting use of device for seeking discovery], *with* CPLR 2304 [governing motions to quash or modify subpoenas, which provides for no stay upon making motion]), and his conduct was unethical (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 4.1 ["In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."]; rule 8.4[d] [lawyer shall not "engage in conduct that is prejudicial to the administration of justice"]).

The timing of the return dates for the motions and the prohibited communications with the subpoenaed entities permit a reasonable inference that defendants intentionally attempted to forestall timely cooperation with the subpoenas, which is tantamount to intentionally attempting to frustrate the enforcement of the judgment. But for plaintiff's orders to show cause advancing the first two motions to quash, defendants would have likely succeeded in significantly delaying cooperation with the subpoenas.

b. Sagi's purchase of a $4.85 home in Florida

As Sagi purchased the Florida house one month after I granted plaintiff summary judgment in this action, and three months after I rendered a verdict in her favor against Sagi in another action (*Genger v Genger*, index No. 100697/2008, NYSCEF 812), plaintiff claims that Sagi intended to shield it from the enforcement of a judgment. She observes, without challenge, that in June 2014, Sagi represented to the federal court in another action that he had moved his family residence from New York to Connecticut in order to "better address the special educational needs" of two of his children, and that he intended to remain in Connecticut for another 18 years or so, until his children graduated, whereas at the damages hearing, he testified that he moved his family to Florida for other reasons having nothing to do with the children's education. Thus, plaintiff maintains that Sagi's sudden move to Florida, notwithstanding the prior professed concern for his children, demonstrates his intent to frustrate the enforcement of a judgment in this case. She also details the mechanics behind the financing for the purchase, commencing with Sagi's transfer of $500,000 from an unknown account into his personal account, from which he paid $485,000 by wire to a Miami real estate law firm. Several weeks later, he transferred another $1.9 million into his personal account from an unknown account,

and later that day, sent $1,913,757.07 to the same law firm. (NYSCEF 1236).

Defendants argue that absent anything illegal about purchasing a home in Florida, plaintiff's claim that Sagi is thereby attempting to shield his home from judgment is unfounded, and they observe that Sagi had been living out of state before moving to Florida, and used overseas trust assets to purchase the Florida home. (NYSCEF 1306).

Given Sagi's inconsistent explanations for his family's moves, plaintiff's alternative explanation that he sought to obtain the protection of the Florida homestead law to shield his home from being subject to the judgment gains traction. (*See e.g. Sardis v Frankel*, 113 AD3d 135 [1st Dept 2014] [finding that series of transactions made by transferor after arbitration award rendered against her, including purchase of Florida real estate claimed as homestead, demonstrated concerted effort by transferor to shield assets from impending judgment debtors]).

c. TPR bank statement reflecting transfer of $5 million over six months to unknown overseas accounts

d. Falsity of Sagi's testimony that TPR's $5 million note to Dalia for her TPR shares was transferred to Joshua Standing Sun, LLC (JSS), which was funded by TPR to cover the obligation

Although Sagi testified that the note TPR issued to Dalia for her TPR shares was transferred to JSS, plaintiff alleges that through a complex series of transactions between his trust and JSS, Sagi used JSS as a pass-through for the $5 million which ended up with Sagi.

Defendants rely on the date indicator of a fax transmission and a TPR board resolution to support their contention that, contrary to plaintiff's allegations, the August 1, 2008 assignment of TPR's obligation to pay Dalia pursuant to TPR's note obligating them to pay Sagi was not backdated and is legitimate, and that corporate minutes reflect a board resolution showing that

the $1.6 million payment was for loans Dalia made to TPR years earlier, and not for the note. (NYSCEF 1306).

It is difficult to overlook the nature and volume of the transactions entered into by defendants, credit their evidence and arguments, and find for them as to this issue. (*And see infra*, II.B.5.h.). (*See e.g. DLJ Mortg. Cap., Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009] [badges of fraud include close relationship between transferor and transferee, and retention of control of property by transferor of conveyance]).

e. Rochelle (Fang) Portfolio, Inc. (RPI)

Sagi testified that RPI acquired shares in TPR in exchange for cash and shares allegedly totaling $1 million, and that RPI was owned and controlled by Fang. However, when deposed, Fang indicated that she learned that she had shares in TPR from her daughter Elana, Sagi's wife, and that Sagi had "free reign to do what he wants" with her investments. Moreover, the bank records are alleged to show that Sagi was named as an officer of RPI on its bank account, and was a signatory on it, and that RPI's registered address is Sagi's Park Avenue townhouse. Consequently, plaintiff asserts, without dispute, that Sagi testified falsely that RPI is a non-related party that engaged in an arms-length transaction in acquiring TPR shares for $1 million. (NYSCEF 1236).

These circumstances further support plaintiff's application. (*See In re Hypnotic Taxi LLC*, 543 BR 365 [Bank Ct ED NY 2016] [finding, as sufficient badges of fraud warranting attachment, among others, that debtor structured trusts at issue to reserve right to continue use of properties transferred to trust, beneficiaries of trusts were debtor and his children and parents, debtor maintained control over and use of properties]).

f. Sagi's payments from TPR

Although Sagi has testified that he took no salary from TPR and that he loaned his services to Riverside Advisory and received periodic salary payments from Riverside, plaintiff contends, without dispute, that the records prove that TPR paid Sagi $100,000 in 2013 alone, and he admitted that his wife and Fang were also on TPR's payroll.

g. TPR's payments in 2007 of the legal fees of "parties adverse" to plaintiff

Plaintiff alleges, without dispute, that Sagi, through TPR, paid $1,190,000 in legal fees to Dalia's divorce attorney in 2007, even though Dalia was no longer a TPR shareholder.

h. Nature and volume of defendants' financial transactions

Plaintiff alleges that the bank records that she obtained through the trial subpoenas, which defendants attempted to suppress (*supra*, II.B.5.a.), reveal illicit transactions, self-dealing, and suspicious "pass through" transactions, that millions of dollars have been deposited in Sagi Genger Trust accounts and sent to offshore accounts, and that Sagi and Parnes back-dated and falsified the records, which reflect "bizarre transfers that fit the profile of money laundering." (NYSCEF 1236).

Defendants maintain that plaintiff fails to show any fraudulent intent or any intent to frustrate the enforcement of a judgment, observing that mere suspicion is insufficient, as is the mere removal or other disposition of property, and that plaintiff is barred from seeking an attachment by virtue of her unclean hands based on what they allege are her "numerous false statements." (NYSCEF 1306).

October 2011 TPR note

Plaintiff alleges, without dispute, that Sagi and Parnes created a note issued by TPR in

October 2011, and amended in May 2012, that was based on the D&K note and sold to Manhattan Safety Company in exchange for $3.7 million paid to TPR, and that the bank records reflect that most of the funds were immediately transferred to Sagi as follow:

May 15, 2012	$800,000	Manhattan Safety to TPR
May 18, 2012	450,000	TPR to Sagi's Morgan Stanley account
August 15, 2012	460,000	received in Sagi's Morgan Stanley account
August 16, 2012	400,000	withdrawn from Sagi's Morgan Stanley account
August 16, 2012	400,000	deposited into Sagi's Citibank account
June 26, 2013	1,500,000	Manhattan Safety to Sagi
June 27, 2013	680,000	Sagi to Riverside Advisory LLC
June 27, 2013	632,000	Riverside Advisory to Sagi
June 29, 2013	300,000	Riverside Advisory to Parnes
June 29, 2013	250,000	TPR to Riverside Advisory
June 29, 2013	250,000	Parnes to Manhattan Safety

Series of transactions in 2008

Plaintiff claims that the bank records show that in August 2008, after Sagi had entered into the agreement with the Trump Group, Sagi's Trust received $6.875 million in a Citibank account opened for that purpose on August 22, that the rest of the agreed upon funds were paid by the Trump Group and deposited in the trust account in October 2008, and that within two months, all of those funds were wired overseas, mostly to unidentified accounts including one in Liechtenstein, and from that account $10 million was transferred back to the trust via a series of transfers, with the rest going to the Batzad account in which TPR had an interest, but that Sagi

solely controlled.

Defendants argue that plaintiff's reliance on Sagi's sale of the Sagi Trust shares in TRI and overseas investment of the proceeds eight years ago is too remote to constitute evidence, and given the dismissal of plaintiff's claim with respect to that money, and that other payments were made in settlement of TPR's liability, which was approved by TPR's "independent" Board. Defendants disparage plaintiff's claim that the TRI share proceeds belong to TPR, alleging that her monetization of her beneficial interest in her Trust's TRI shares amounted to $32.3 million, none of which was contributed to TPR or her own Trust. They also complain that plaintiff's characterization of the transactions among Sagi, TPR, and other entities as "money laundering" is "incendiary" and without basis, as evidenced by the stillborn criminal investigation of TPR and Sagi, as is plaintiff's allegation that the justice previously presiding in the matter had indicated in 2012 that Sagi had engaged in illegal conduct.

While allegations of money laundering may be extreme, if not unfounded, defendants' entitlement to funds in the 2010 action is not the issue here. Rather, it is defendants' conduct in wiring funds overseas to unidentified accounts, and then engaging in unusually complex transfers, with proceeds ultimately received by Sagi or by entities controlled by him. These transactions and transfers go beyond the mere transfer of funds that have been found insufficient to warrant an attachment. (*See e.g. JSC Foreign Econ. Assn. Technostroyexport v Intl. Dev. and Trade Svces., Inc.*, 306 F Supp 2d 482 [SD NY 2004] [circumstances of transactions supported inference of fraudulent intent to frustrate enforcement of judgment against them, including, that transferors closed sales for properties while plaintiff's action pending; transferors allegedly received no part of sale proceeds; disbursement of proceeds "hazy at best" and unexplained as to

where all proceeds went; and while counsel explained that some part was paid two mortgage holders, one holder was offshore entity located in British Virgin Islands or Isle of Man and one of transferor's former directors was also director of holder]; *Fireman's Fund Ins. Co. v Kapralos*, 942 F Supp 836 [ED NY 1996] [order of attachment granted on evidence, among others, that most of money paid to debtor from insurance settlement "found its way into a bank account located in Switzerland"]).

i. September 2010 escrow agreement

Defendants argue that the September 2010 escrow agreement precludes plaintiff from applying for injunctive relief, and that the escrowed funds, together with accrued interest, were released to TPR by the federal judge who placed no restriction on their use. As plaintiff's claims here are all brought derivatively on behalf of the Orly Trust, defendants assert that she has no rights greater than those of the Trust. And, as all of the money transfers listed by plaintiff were allegedly received by the Sagi Trust or TPR in connection with the sale of the TRI shares, plaintiff violates the escrow agreement with her motion for an attachment. That the escrow was released is of no moment, defendants claim, as it has not yet terminated absent payment to the escrow agent. (*Id.*).

As I indicated at oral argument on the motion, plaintiff has not violated the escrow agreement.

j. May 2014 TRO

Plaintiff also alleges that in 2014, Sagi and TPR transferred millions of dollars out of TPR after the Trump Group paid it an additional $10.3 million which was deposited into TPR's Citibank account. In the 2010 action, TPR and Sagi were temporarily restrained from

transferring any assets to the extent of $10,377,439.47, and on May 21, 2014, the restraint was extended pending a final decision on plaintiff's motion for an attachment. As plaintiff's claims were subsequently dismissed on appeal on July 24, 2014, a final decision on her attachment motion was rendered moot. Notwithstanding the restraint, plaintiff alleges, Sagi transferred $8.7 million from the Citibank account, leaving $963.18 in it, and over the next several weeks, the account was allegedly used as a pass-through account through which funds were transferred by wire overseas to unknown accounts, including $2.35 million on June 5, 2014, and $2 million on June 16. (NYSCEF 1236).

Defendants deny that they violated the May 21, 2014 TRO, as it was not extended beyond June 4, the date set for hearing plaintiff's application on the papers, and that between May 21 and June 4, TPR "always maintained cash in excess of $10.3 million," observing that an entry in a bank statement dated May 23, 2014 and included in plaintiff's papers reflects a transfer between two domestic TPR accounts, thereby showing that the restrained funds remained within TPR and in the United States for the requisite period. Moreover, they contend, any funds wired abroad constituted "mainly money the Sagi Trust had received for selling its own shares," and any TRI-related payments made by TPR to the Sagi Trust were approved by TPR's "independent" board. (NYSCEF 1306).

Defendants base their interpretation of the May 21 proceeding on the written order, ignoring the concern expressed by plaintiff that defendants would dissipate assets pending the determination. As counsel is undoubtedly aware, temporary restraining orders are automatically marked "pending the hearing" in the *ex parte* office before they are brought to the assigned judge. Thus, given the record and my indication that the restraint would extend to the

determination of plaintiff's motion, defendants must be deemed to have violated that order, notwithstanding defendants' contentions.

k. Overbreadth of proposed order

Sagi and TPR contend that plaintiff fails to show that the drastic remedy of an attachment is necessary absent a "genuine risk" that any judgment entered in her favor will be unenforceable in New York. Thus, they argue that plaintiff fails to demonstrate, as required by CPLR 6201(1) "a real identifiable risk that [they] will be unable to satisfy" any judgment obtained by her. They identify "significant assets" including Sagi's $23 million in equity on the Manhattan townhouse, TPR's market value of $5 to 6 million, and $2 million held in escrow on the "Canadian transaction," and their prompt and full satisfaction of the "rare" judgments rendered against them. They provide no evidence of the actual equity in the townhouse.

Plaintiff alleges that the alleged equity in the Manhattan townhouse, even in combination with the alleged market value of TPR, and the Canadian escrow, is insufficient in terms of the judgment to which they claim entitlement.

Defendants otherwise maintain that the proposed order is overbroad in that it is partly directed at nonparties and at Sagi's spendthrift trusts, and they deny that plaintiff has any damages. Rather, the allegedly improper UCC auction "at most only harmed D&K Limited Partnership - whose majority owners want nothing to do with this attachment." (*Id.*).

6. Undertaking

While plaintiff, in her order to show cause, was ordered that, upon a final determination that she is not entitled to a temporary restraining order, she would pay to SG defendants all damages and costs which may be sustained by the attachment, it appears that she did not post an

undertaking, and must do so now. (CPLR 6212[c]). I find that, given plaintiff's financial condition as well as the amount of money being attached here, an undertaking in the form of a bond of $5,000 per motion, for a total of $10,000, is sufficient. (*See Hume v 1 Prospect Park ALF, LLC*, 137 AD3d 1080 [2d Dept 2016] [$500 bond fixed as undertaking inadequate when court granted order of attachment against defendant's real property in sum of $5 million, and bond thus increased to $2,500]).

7. Conclusion

The totality of this evidence, including badges of fraud emanating from the close relationships among defendants and transferees, some questionable transfers, such as the purchase of the Florida home, transactions which do not appear to have been made in the ordinary course of business, the secrecy of the transfers to unidentified overseas accounts, and Sagi's retention of control of property by the transferor of the conveyance, as well as the cumulative effect and byzantine nature of the transactions, course of conduct during the pendency of other actions, and overall chronology of the events and transactions in question, satisfy plaintiff's burden of proof on the issue of whether the SG defendants intend to frustrate the enforcement of the judgment, and have assigned, disposed of or encumbered or secreted property, or removed it from the state.

Thus, plaintiff has demonstrated that she has a viable cause of action, a probability of success on the merits, that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff, that defendants are nondomiciliaries residing without the state, and that defendants, with intent to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from

the state or is about to do any of these acts.

III. ATTACHMENT OF SAGI'S SPENDTHRIFT TRUST

Pursuant to CPLR 5205(c)(1), property held in trust for a judgment debtor, where the trust was created by or funds held in trust proceeded from someone other than debtor, is exempt from attachment, as is "property which a debtor holds in trust for others, even though he has created the trust . . ." (*Wulff v Roseville Trust Co. of Newark, N.J.*, 164 AD 399 [1st Dept 1914]). However, a defendant's right or interest to or in property or fund held or controlled by a fiduciary is subject to attachment. (12 Carmody-Wait 2d § 76:139 [2016]; 30 NY Jur 2d, Creditors' Rights §109 [2016] [interest in trust is attachable unless property is held by defendant as trustee]; *see Helmsley-Spear, Inc. v Winter*, 101 Misc 2d 17 [Sup Ct, New York County 1979] [interest of beneficiary of spendthrift trust may be attached]). In any event, even if a spendthrift trust is subject to exemption, only future income is exempt, while accrued income due and owing a trust beneficiary may be attached. (*Pray v Boissevain*, 27 Misc 2d 703 [Sup Ct, New York County 1961]).

Here, as defendants concede that the trust is not controlled by Sagi but by an independent trustee, and absent any allegation that the trust was created by or its funds proceeded from someone other than Sagi or that Sagi holds the trust for others, the Sagi Genger spendthrift trust may be attached. (*See Vanderbilt Credit Corp. v Chase Manhattan Bank, NA*, 100 AD2d 544 [2d Dept 1984] [where spendthrift trust was created and funded by judgment debtor and debtor was its beneficiary and someone other than debtor was trustee, trust was not exempt from attachment by judgment creditor; irrelevant whether debtor in creating trust intended to defraud creditors]; *see also Helsmley-Spear, Inc. v Winter*, 74 AD2d 195 [1st Dept 1980, Fein, J.P., dissenting], *affd*

52 NY2d 984 [1981] [purpose of statutes exempting spendthrift trust from attachment is to ensure that beneficiary will not waste money provided for needs, and not to permit beneficiary of pension plan to steal from employer and hide behind exemption statute when employer seeks to recover stolen monies by attaching funds that were originally provided by employer]).

IV. ATTACHMENT OF DALIA'S ACCOUNT

At oral argument, Dalia objected to an attachment of an account she denominates as her "Bristol Ivory" account, which she contends consists of an Individual Retirement Account (IRA), which IRA funds were then used to buy interest or stock in Bristol Ivory, LLC. She claims that the origin of the IRA funds was an IRA owned by Arie which she received as part of their divorce settlement, and that they are exempt from attachment, regardless of whether the IRA funds were then used to buy stock in Bristol. She submits copies of account statements from "IRA Services," which reflect that her account type is a "traditional IRA" with an identified authorized representative, check book, and that it shows the following:

(1) A custodial cash account was opened sometime in 2008, and had a zero balance before the following transfers:

   (a) on November 18, 2008, a "rollover from Millenium Trust" in the sum of $699,525.73; and
   (b) on December 5, 2008, another rollover from Millenium Trust in the sum of $830.41;

(2) On December 9, 2008, shares in Bristol Ivory, LLC were bought in the sum of $700,321.51 and an account was then opened for those shares;

(3) After other fees were paid and dividends received, as of December 31, 2008, the custodial cash account had a balance of $100.01; and

(4) On December 31, 2008, the Bristol account had a share balance of $700,321.510.

The statement also reflects that for the tax year of 2007 to 2008, the deposited amount of

$700,356.14 constituted "rollovers received from prior plans."

For the tax year 2008-2009, Dalia deposited $45,286.06 as "rollovers received from prior plans," which are not identified, and after receiving distributions from Bristol and a cash dividend, her custodial cash account had an ending balance of $61,307. The Bristol account had no activity that year and its balance remained the same as in 2008.

In tax year 2009-2010, after deposits, dividend payments, and fees, the balance in the custodial cash account was $72,980.43, with the Bristol account unchanged.

By letter dated July 5, 2011, the State of Oregon's Secretary of State Corporation Division advised Bristol Ivory, LLC that it had failed to file its annual report with the appropriate fee, and that a failure to do so by August 20, 2011 would result in the administrative dissolution of Bristol and corporate inactive status. The letter reflects that Bristol's date of organization was June 30, 2008, and that it is a domestic limited liability company.

There are no records for the tax years 2010-2011 or 2012-2013. For tax years 2011-2012, 2013-2014, 2014-2015, and 2015-2016, there was minimal activity in the custodial cash account and none in the Bristol account. As of March 31, 2016, the balance in the custodial cash account was $48,663.82, and the balance in the Bristol account is the same as in 2008.

Plaintiff asserts that there is no evidence of the origins the funds or that they were part of Arie's IRA, and that the funds may not be exempt depending on the nature of Bristol, of which she has no information beyond that Dalia lives in a building named the "Bristol." Plaintiff thus raises the inference that Bristol is somehow personally related to Dalia, and, given Dalia's testimony that she knows little about her own financial affairs and relies on Sagi for advice and direction and permits him to exercise control over her affairs, that it is possible that Sagi is

financially involved in Bristol. (*Id.*).

Dalia's bank records do not establish that the approximately $700,000 deposited in her account in 2008 came from Arie's IRA or the connection between her or Arie and the Millenium Trust. Moreover, Dalia does not explain her purchase of shares in Bristol for that approximate amount four days after receiving the second payment from the Trust, and I observe that the Trust was apparently organized six months before the payments were made and in the State of Oregon, rather than in New York. Dalia has thus failed to establish that the funds in these accounts are exempt Trust funds.

V. ATTACHMENT OF NONPARTIES' ASSETS

Sagi's wife Elana, and their five children maintain that as nonparties who were never served with pleadings or with the notice of the order to show cause, and as they are not residents of New York, their accounts were wrongly restrained, as were their out-of-state accounts, and jurisdiction over them was never obtained. They also observe that plaintiff should have been required to post a bond. (NYSCEF 1331).

At oral argument, plaintiff observed that although the Sagi Genger Trust may be a spenthrift trust, Sagi's control of it renders it subject to attachment. Defendants disagreed, relying on the existence of an independent trust who exercises ultimate authority over the trust.

Pursuant to CPLR 6202, any property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. Section 5201 specifies that property against which a money judgment may be enforced is that property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

It is undisputed that Sagi has an interest in these accounts and that the accounts constitute assignable and transferrable property. Sagi's wife and children complain that their accounts were restrained even though they are nonparties and not residents of New York, and their accounts are located outside of New York. For purposes of an attachment, however, the inquiry is whether the court has jurisdiction over the property sought to be attached, not the person. (*See Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303 [2010] [attachment properly granted even though property not located in New York, as attachment operates against property located outside New York as long as court has acquired personal jurisdiction over person against whom attachment is sought]; *see also Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533 [2009] [as New York court may issue judgment ordering turnover of out-of-state assets, if court has personal jurisdiction over garnishee bank, it may order bank to produce property located outside New York]). Thus, jurisdiction over Sagi's wife or children need not be obtained in order to attach out-of-state accounts in which Sagi has an interest. (*Id.*).

To the extent that defendants argue that Sagi has no interest in these bank accounts or that they do not contain defendants' property or interests, it is also undisputed that Sagi funded all of the accounts, whether from his personal funds or from those of the various companies he owns and manages. (*See eg Bd. of Educ. of City of N.Y. v Treyball*, 86 AD2d 639 [2d Dept 1982], *appeal dismissed* 56 NY2d 683 [court properly confirmed order of attachment against bank accounts belonging to defendant's sons, as evidence demonstrated that defendant placed money in bank accounts in sons' names with intent to defraud creditors]).

Moreover, if plaintiff seeks to levy upon the accounts rather than just restrain them, Sagi's wife and children may commence a special proceeding to vacate the attachment and attempt to

show that they have a right to funds in the accounts. On such a motion, the court may vacate the attachment or grant any other appropriate remedy. (CPLR 6221) .

VI. CONCLUSION

Accordingly, based on the foregoing, it is hereby

ORDERED, that plaintiff's motions seeking orders of attachment (motion sequence numbers 57 and 58) is granted, on condition that, within 20 days of the date of this order, plaintiff submit and file a bond in the sum of $10,000 as an undertaking.

ENTER:

Barbara Jaffe, JSC

Dated: September 9, 2016
New York, New York