

<b>Genger v Genger</b>
2018 NY Slip Op 33081(U)
December 3, 2018
Supreme Court, New York County
Docket Number: 651089/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

ARIE GENTER, ORLY GENTER, ORLY GENTER  
1993 TRUST,

**Plaintiff,**

- V -

SAGI Genger, TPR Investment  
Associates, 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, Trans-Resources, Inc., William  
Dowd, Arnold Broser, David Broser,

## Defendants

**INDEX NO.** 651089/2010

**MOTION DATE**

**MOTION SEQ. NO.** 046

## **DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 046) 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1511

were read on this motion to/for confirm/disapprove award/report

By interim decision and order dated March 12, 2018, I held in abeyance defendant TPR Investment Associates, Inc.’s motion to confirm the May 4, 2017 report and recommendation of a judicial hearing officer (JHO) and plaintiff Arie Genger’s cross motion to reject the report “pending a detailed report and recommendation from [the JHO] as to the fees challenged by Arie Genger as reflected in the invoices annotated by counsel and set forth in NYSCEF 1505.” I also referred the matter to the JHO for the issuance of a supplemental report on that issue. (NYSCEF 1511). In September 2018, the reference reached the JHO who was unable to issue a

supplemental report between then and now. Therefore, I now review the issue identified in the interim order.

#### I. 2015 ORDER AND HEARING BEFORE JHO

By decision and order dated May 19, 2015, I found, as pertinent here, that defendant TPR was entitled to damages “allegedly sustained by TPR in connection with the temporary restraining order and preliminary injunction granted in plaintiffs’ favor” related to proceeds of certain shares, specifically the “reasonable and necessary fees and expenses incurred in opposing the preliminary injunction and prosecuting the appeal [of the decision granting the injunction].” (NYSCEF 1504).

The hearing was held before the JHO on November 1, 2016, and the JHO directed plaintiff’s counsel to object to specific fees requested by TPR in a post-hearing memorandum. (NYSCEF 1499). The parties submitted their post-hearing briefs in December 2016. (NYSCEF 1459-1484).

By report dated May 16, 2017, the JHO determined, as pertinent here:

Turning to the argument that the invoices include charges for work in connection with appeals on the underlying claims, as opposed to only the propriety of an injunction, and that therefore the party seeking the fee is entitled to recover, at most, something in the neighborhood of \$5,000 or \$6,000, Judge Jaffe’s decision, as I note, states, and I’m quoting, TPR is entitled to recover reasonable and necessary fees and expenses incurred in opposing the preliminary injunction and in prosecuting the appeal. The appeal involved a little more – actually, the appeal resulted in the dismissal of the action, which accomplished the vacating of the preliminary injunction. As I read the language, the party seeking the fee is entitled to fees incurred in prosecuting the appeal, even though the appeal involved more than an appeal from the preliminary injunction.

(NYSCEF 1493).

The JHO thus determined that of the \$410,686.23 sought by TPR, only \$351,482.70 was recoverable. He then reduced that amount by 80 percent, as directed in the May 2015 order, and

awarded TPR \$70,296.54. The JHO also declined to award fees incurred in litigating the fee award, finding that the issue should be raised before me. (NYSCEF 1488).

## II. ARIE'S OBJECTION TO THE INVOICES

### A. Billing for fees of an unadmitted attorney named Daniel McGuire (p. 2 of the invoices; NYSCEF 1505)

Arie conceded at the hearing that McGuire worked as a paralegal, and the invoices reflect that McGuire's hourly billing rate was \$150. Arie submits no authority for the proposition that an unadmitted attorney may not work and bill as a paralegal.

### B. Billing related to a "Delaware action" as not being connected to opposing the injunction (pp. 3-8; 6; 4; 7-9)

At the hearing, TPR's counsel testified as follows:

"(T)he preliminary injunction which Arie Genger got from Justice Feinman, it was timed and it said - Justice Feinman ruled 'the injunction shall remain in place until a court of competent jurisdiction shall make a finding as to the ownership of the underlying shares.'

So, in order to lift the injunction, the first step we had to do was to go Delaware and get that finding from the Delaware court, which was a court of competent jurisdiction in fact, the Court which at that time had jurisdiction over the matter . . . and seek the requisite findings in order to get the injunction lifted.

So the August 26, 2013 invoice were our efforts to comply with Justice Feinman's preliminary injunction and get the requisite rulings such that we could get our money out of injunction.

This testimony, along with the prior justice's order grant of the injunction "pending the determination by a court of competent jurisdiction" of ownership of the shares" (NYSCEF 210), sufficiently connects the Delaware litigation to the injunction. The fees related thereto were reasonably and necessarily incurred in opposing the preliminary injunction.

C. fees incurred from 7/8/13 to 9/2/13 as “related to a different TRO that was never issued”  
(pp. 8-12)

As TPR’s counsel did not testify at the hearing about these specific fees, although conceding that several different TROs were issued in the various cases between the parties, and as counsel did not address the issue in TPR’s reply to Arie’s objections, I find that TPR does not establish that these fees were incurred in opposing the injunction and prosecuting the appeal. I thus reduce the JHO’s overall award of \$351,482.70 by \$17,123, for a total of \$334,259.70, which I further reduce by 80 percent for a sum total of \$66,871.94.

D. Fees incurred related to proceedings before the Appellate Division, First Department, related to appeal of prior justice’s decision, specifically, “motion for extension to file merits appeal” (pp. 17-20); “merits [of] cross-appeal” or argument related thereto (pp. 5-12; 20; 25-26; 33; 8); motion “to strike portion of merits appeal” and/or “reply brief on cross-appeal” (pp. 8-12; 28); and motion to reargue merits appeal (pp. 10-12; 11-12; 14; 30)

In my May 2015 decision and order, I found that TPR is entitled to fees incurred for prosecuting the appeal which resulted in the lifting of the injunction. Therefore, these fees are recoverable.

E. Fees incurred in moving for leave to appeal to the Court of Appeals (pp. 7-8)

For the same reason as above (II.D.), these fees are recoverable

III. OTHER ISSUES

TPR asserts that despite my May 2015 order directing a proration of the fees and expenses, it is unwarranted. Having already determined the issue, I do not revisit it.

TPR also seeks fees incurred for pursuing the fee application, in the sum of \$20,149.85. (NYSCEF 1492). Arie objects, observing that not only are fees not authorized by CPLR 6312 but the fees were never presented to the JHO for a review of their reasonableness. (NYSCEF 1501). Absent any statutory authority for the fees-on-fees, I do not award them. (*Sage Realty Corp. v*

*Proskauer Rose LLP*, 288 AD2d 14 [1<sup>st</sup> Dept 2001], *lv denied* 97 NY2d 608 [2002] [award of fees on fees must be based on statute or agreement]).

Arie's argument that no fees should be awarded as TPR has not shown that they were sustained as a result of the injunction, rather than incurred in prosecuting the overall merit of the case, is academic given my May 2015 order. Arie also submits no authority for the proposition that TPR/Sagi's alleged violation of the injunction prevents TPR from recovering their fees and costs.

#### IV. CONCLUSION

CPLR 4403, which provides that a judge may confirm or reject, in whole or in part, the report of a referee; may make new findings with or without taking additional testimony; and may order a new trial or hearing. This section also applies to judicial hearing officers. (*GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549 [2d Dept 2014]). A referee's report should be confirmed if the referee's findings are supported by the record. (*Barrett v Toroyan*, 45 AD3d 301 [1<sup>st</sup> Dept 2007]).

Here, the findings made by the JHO are supported by the record for the most part, and are supplemented here. However, there remains the issue of the \$500,000 undertaking posted by Arie and its impact, if any, of an award to TPR. Accordingly, it is hereby

ORDERED, that the motion by TPR to confirm the May 16, 2017 report and recommendation is granted, and the cross motion to reject it is denied; it is further

ORDERED, that the report and recommendation is confirmed in part and modified in part, to the extent of awarding TPR \$66,871.94 for its reasonable costs and expenses; and it is further

ORDERED, that the parties are directed to submit jointly, within 30 days of the date of this order, a proposed order and judgment addressing a judgment on the fees award and the resolution of the undertaking.

12/3/2018

DATE

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CASE DISPOSED

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DENIED

APPLICATION:

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GRANTED

SETTLE ORDER

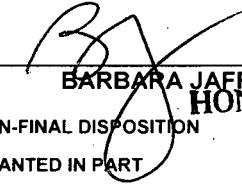
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NON-FINAL DISPOSITION

GRANTED IN PART

 HON. BARBARA JAFFE OTHER

SUBMIT ORDER

 REFERENCE

FIDUCIARY APPOINTMENT