

**Wenger v L.A. Wenger Contr., Co.**

2010 NY Slip Op 32675(U)

September 23, 2010

Sup Ct, Suffolk County

Docket Number: 31701-2008

Judge: Emily Pines

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present:*** **HON. EMILY PINES**  
 J. S. C.

Original Motion Date: 09-14-2010  
 Motion Submit Date: 09-14-2010  
 Motion Sequence .: 005 MD  
 006 MD

\_\_\_\_\_ X Action # 1 Attorney for Petitioner  
 Index # Joseph Cooke, Esq.  
**DAVID WENGER,** 31701-2008 Milber Makris Plousadis & Seiden  
 1000 Woodbury Road, Suite 402  
 Woodbury, New York 11797

**Petitioner,**

**-against-**

**L.A. WENGER CONTRACTING, CO., AND**  
**LOUIS WENGER,**

Attorney for Respondents  
 Eliot Bloom, Esq.  
 114 Old Country Road, Suite 308  
 Mineola, New York 11501

**Respondents.**

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**DAVID WENGER,**

Action # 2  
 Index # 02149-2009

**Petitioner,**

**-against-**

**RAILROAD REALTY GROUP, INC., ECS**  
**REALTY INC., GDS REALTY GROUP, INC.,**  
**WOODGLEN REALTY LLC, AND LOUIS**  
**WENGER,**

**Respondents.**

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In these two dissolution proceedings, consolidated for joint trial, scheduled for October 4, 2010, Louis Wenger moves, by Notice of Motion (motion sequence # 005) for Summary Judgment, dismissing the Petitioner's complaint. David Wenger cross-moves, by Notice of Cross-Motion (motion sequence # 006) for partial Summary

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Judgment, declaring, as a matter of law, that he is a 31% shareholder of the corporations that are the subject of these litigations. Each party opposes the other's motion.

In support of Louis Wenger's motion, his counsel asserts that the sole basis for the Petitioner's claims of ownership of shares of L A Wenger Contracting Co, Inc, is a document, called the Louis Wenger Grantor Retained Annuity Trust # 1 "(GRAT)". Based upon the opinion of an attorney and CPA, submitted in support of his motion, counsel argues that only if the conditions set forth in that document were met, the GRAT would have effectively transferred the 31% shares to the Petitioner. However, based upon the evidence presented to him, Louis Wenger's expert opines that no such transfer ever occurred. The expert, David DePinto, explains that the GRAT is an irrevocable trust, used primarily as a gifting vehicle. The Grantor receives from the IRS the value back in the form of an annuity. Pursuant to the terms of the trust in question, the Grantor ( Louis Wenger) was to transfer 1665 shares of stock of L A Wenger Contracting, Inc, valued at \$1,250,000, to the trust, in exchange for the right to receive back annual payments of \$200,000 for four consecutive years commencing in 1996. Based on DePinto's review of the documents provided to him, including the 1996 income tax return; the 1996 Louis A Wenger Gift Tax Return and an affirmation of the GRAT Trustee, in which he stated no transfer to the Trust ever occurred, the expert concluded that no shares were ever transferred to the Trust and that no annuity payments were made back to Louis Wenger as the Grantor. Accordingly, counsel , based on the expert's affidavit urges the Court to find that no gift was made and no shares were transferred.

Both in opposition to the Respondent's motion and in support of David Wenger's cross-motion for partial summary judgment, Petitioner's counsel submits the affidavits by Ronald Eager (CPA) and Jeffrey Greener (Trusts and Estates attorney). Based on Eager's review of documents, he states that the corporate minutes for L A Wenger Contracting demonstrates that actual ownership of the shares of stock in the subject corporation were, in fact, transferred. Four replacement stock certificates were signed by both Louis Wenger and David Wenger. In addition, Eager cites from documents allegedly not reviewed by DePinto, demonstrating that shares of replacement stock certificates were allocated, 69% to Louis Wenger and 31% to David Wenger of the total shares of the subject corporation. The expert states that the 1996 gift tax return of Louis Wenger also demonstrates that the value of shares transferred by Louis Wenger to the

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GRAT was \$621,660.00. Thus Louis Wenger received the benefit of that gift on his personal tax return as a result of the formation of the GRAT. Eager cites to a letter dated August 21, 1997 from an L A Wenger Contracting employee confirming that signed copies of stock certificates were provided to the corporation's attorney. In addition, Eager avers that the subject corporation did make annuity payments required under the GRAT. As the GRAT paperwork was not finalized until 1997, the \$200,000 annuity payment for 1996 was not made; however, a review of correspondence demonstrates a distribution of \$400,000 was made in 1997 and the 1998 and 1999 payments of \$200,000 each as per the tax returns for those years. According to the expert, DePinto was not shown the corporate tax returns for the years in question and, therefore, his conclusions were based on erroneous facts. He further opines that consistent with the valid completion of the GRAT, every corporate tax return filed by the corporation starting with the year 2000 has listed David Wenger as a 31% owner. With regard to the corporations set forth in the second action which were not the subject of a GRAT, he opines that the nine years of tax returns demonstrate 31% ownership in the hands of David Wenger.

Greener supports the same conclusion; i e , that the GRAT was effective and that the donative intent of the document was confirmed by the Louis Wenger Contracting tax returns filed for 2000 through 2009. Petitioner's counsel asserts that Respondent is equitably estopped from asserting David Wenger's lack of ownership in the corporation, or in any of the corporations in the second lawsuit, due to his nine years of tax returns setting forth the 31% ownership.

In opposition to the cross-motion, Respondent's counsel submits another affidavit by David DePinto, in which he now states he has had the opportunity to review the 1997, 1998 and 1999 corporate tax returns for L A Wenger Contracting. However, he states that the Affidavit of the Trustee of the GRAT that he never took possession of the right, title and ownership of the shares defeats any argument that they were, in fact transferred to the trust. In addition, DePinto avers that if dividend distributions were made as Eager sets forth, they would have been violative of the Tax Code's prohibition against distributions of selective or unequal dividends. If, however, distributions were made pro rata the payments would not have been in accord with the intent of the trust documents. Accordingly, he believes the trust was never properly funded and failed under EPTL §

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7-12.18.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v New York University Medical Center**, 64 NY 2d 85, 487 NYS 2d 316 (1985); **Zuckerman v City of New York**, 49 NY 2d , 49 NY 2d 557, 404 NE 2d 718, 427 NYS 2d 595 ( 1980). Summary judgment is a drastic remedy and should not be granted where any doubt exists as to the existence of a triable issue; however, once a prima facie showing has been made by the proponent, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. **State Bank of Albany v McAuliffe**, 97 AD 2d 607, 467 NYS 2d 944 ( 3d Dep't 1983). The role of the court in deciding a motion for summary judgment "(i)s not to resolve issues of fact or to determine matters of credibility, but to determine whether such issues exist". **Dyckman v Barrett**, 187 AD 2d 553, 590 NYS 2d 224 ( 2d Dep't 1992).

The requisite elements of a valid inter vivos gift are 1) donative intent; 2) delivery of the subject matter; and 3) acceptance by the donee. **In re Estate of Michael Cristo**, 86 Ad 2d 700, 446 NYS 2d 555 ( 3d Dep't 1982).

The fact that a shareholder is never formally issued stock certificates, or does not physically possess such is not dispositive on the question of his/her status. A putative shareholder's interest can be proved in a number of ways; including, parties' actions, tax returns, financial statements, bank applications and other such indicia of ownership. **See, Blank v Blank**, 256 Ad 2d 688, 681 NYS 2d 377 ( 3d Dep't 1998).

It appears to the Court, based upon the excellent affidavits submitted by both sides to this litigation, that the Court is faced with issues that require a trial, which will likely involve both questions of fact and a battle of the experts. While the Summary Judgment motion does appear to establish, prima facie, that the GRAT was never properly funded; the cross motion appears to establish the opposite. With regard to the Petitioner's arguments concerning "equitable estoppel" such are properly referred to trial, where the Court will have the opportunity to consider the credibility of witnesses. Accordingly, the Court denies both the Motion and the Cross motion for Summary Judgment and refers to

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trial the issues of 1) whether David Wenger is a 31% shareholder of any of the corporations that are the subject of these proceedings; 2) whether, if so, he can prove entitlement to dissolution pursuant to BCL § 1104-a; 3) whether there has been a breach of fiduciary duty by putative co-shareholder, Louis Wenger and 4) any damages that have been incurred.

The trial is scheduled for October 4, 2010 commencing at 11 a.m.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: September 23, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.