

Matter of Aoki
2016 NY Slip Op 31898(U)
October 13, 2016
Surrogate's Court, New York County
Docket Number: 2008-2604/E
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
Date: October 13, 2016

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Proceeding by Devon Aoki and Steven Aoki to Compel
Keiko Ono Aoki to File an Interim Account
as Trustee of the Trust Under the Will of

DECISION AND ORDER

ROCKY H. AOKI,
Deceased.

File No.: 2008-2604/E

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M E L L A, S.:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion of Keiko Ono Aoki, dated January 8, 2015, to Dismiss, with Affidavit in Support, dated January 8, 2015, of Jaclene D'Agostino, Esq., attaching Exhibits A through G	1, 2
Memorandum of Law, dated January 8, 2015, in Support of Motion	3
Affirmation, dated February 11, 2015, of David C. Rose, Esq., in Opposition to Motion, attaching Exhibits A through F	4
Petitioners' Memorandum of Law, dated February 11, 2015, in Opposition	5
Respondent's Reply Memorandum of Law, dated March 6, 2015, in Further Support	6

This is a motion by respondent Keiko Ono Aoki to dismiss the petition by Devon Aoki and Steven Aoki to compel an interim accounting from her as trustee of the trust established under the will of decedent Rocky Aoki.¹ They allege several circumstances in which they believe she has wasted and mismanaged the trust's assets. As set forth below, the motion is denied, and the account is directed to be filed.

A central claim in this motion to dismiss is that petitioners lack standing (*see* CPLR 3211[a][3]). However, clarity on the question of petitioners' standing to compel respondent's account has been provided by the New York State Court of Appeals in a decision in a related proceeding. That proceeding sought a declaration as to the validity of certain releases of a limited testamentary power of appointment that Rocky Aoki held over the remainder of a different trust, the Benihana Protective Trust (BPT), a trust which terminated upon Rocky's death

¹In light of the fact that they have the same surnames, first names are used herein to refer to the parties.

on July 6, 2008.

This proceeding to compel her account, along with the fully submitted motion to dismiss, was stayed pending the decision by the Court of Appeals, which has now issued (*Matter of Aoki*, 27 NY3d 32 [2016]). That decision upheld the validity of decedent's partial releases of his power of appointment (*id.*; see EPTL 10-9.2). Those partial releases, by their terms, limited the class of appointees of the BPT assets to decedent's issue – to the exclusion of his spouse, Keiko, who survived him.

Decedent's will, probated in this court, provides for alternative exercises of the power of appointment over the BPT assets that explicitly depend on whether the validity of the releases is upheld. If the releases are valid, as they have now been determined to be by the Court of Appeals decision, the power is exercised in decedent's will in favor of petitioners, 50% to Devon and 50% to Steven, with the proviso that the assets be held in further trust, with Keiko as trustee, until each turns 45 years of age. It is for this testamentary trust that Keiko's interim account is sought, and it is clear that, as presumptive beneficiaries, petitioners are persons interested (SCPA 103[39]), who are affirmatively given standing by statute to compel an account (SCPA 2205[2][b]; *cf. Matter of Malasky*, 290 AD2d 631 [3d Dept 2002]).²

Dismissal is also sought by respondent under CPLR 3211(a)(7) on the basis that petitioners have failed to state a claim because the interim account requested is premature as a

²The decision in *Matter of Ellis* (NYLJ, May 5, 1998, at 32, col 2 [Sur Ct, Westchester County]), cited by Keiko, does not provide support for her position that this proceeding should continue to be stayed because she has filed a separate proceeding arguing that Steven and Devon violated the no-contest clause of decedent's will. In *Ellis*, the sole basis for the application to compel an accounting was that more than seven months had elapsed since the issuance of letters testamentary. There were no allegations of waste or mismanagement, unlike those made by petitioners here, and consequently, the court cannot conclude that the best interests of the trust would be served by dismissing this proceeding or staying it pending resolution of that one (*cf. Matter of Moloney*, NYLJ, May 16, 2014, at 35 [Sur Ct, Suffolk County]).

matter of

law. No account of the testamentary trust should be ordered, respondent argues, unless and until the account of the trustees of the BPT is settled because “Schedule A of any account to be filed by Keiko as the trustee of the Testamentary Trust is dependent upon an adjudication of the principal values remaining on hand at the close of the BPT accounting period, inasmuch as the testamentary trust is a recipient of those BPT assets” (R’s Mem of Law at 7).

Such an argument is logically directed at a beneficiary’s request for a final account, but only an interim account is sought here. In general, the court retains discretion to deny a request to compel an accounting based on the allegations before it and the best interests of the trust (*Pollock v Manufacturers & Traders Trust Co.*, 154 Misc 67 [Sup Ct, NY County 1934]). However, the facts that a prior fiduciary’s account is not settled or that other assets may eventually come into the trustee’s control based on the outcome of a related litigation do not preclude the trustee from accounting for the assets that have already come under her stewardship (*see Matter of Heubach*, 165 Misc 196, 203 [Sur Ct, Kings County 1937], *citing Matter of Engel*, 140 Misc 276 [Sur Ct, Kings County 1931]; *see also Parker v Rogerson*, 33 AD2d 284, 291 [4th Dept 1970]). Although the accounting proceeding for the BPT assets, in which Keiko has filed objections, was likewise stayed by this court pending the Court of Appeals decision, and is yet to be decided, a resolution of that proceeding is not a necessary antecedent to an interim account by Keiko for the administration of assets she already holds as trustee and has administered in such capacity since 2010.

This is not a situation where there is a separate valuation proceeding as to a trust’s assets, pending the outcome of which the request for an account may be postponed (*cf. Matter of Albert Ajar*, NYLJ, June 9, 1992, at 25, col 1 [Sur Ct, Nassau County] [litigation as to valuation of

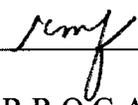
shares held by intervivos trust “tangential” to accounting for testamentary trust - account ordered]). Nor is this a situation where there has been a substantial interim account filed for an estate, and a final account – bringing the account to date – until the objections to the interim account are resolved would be unnecessary or a burdensome expense (*Matter of Mary LaGreca*, NYLJ, Mar. 6, 1992, at 27, col 4 [Sur Ct, Westchester County]). Respondent’s reliance on these cases is misplaced.

In light of the petitioners’ allegations of possible waste or mismanagement of trust assets and the several years during which Keiko as trustee has managed them, the court cannot conclude that the request for an account is premature or a wasteful exercise, and the interim account can and should be directed (*see Matter of Klein*, 260 App Div 883 [2d Dept 1940]; *Matter of Rodriguez*, NYLJ, Dec. 15, 1998, at 27, col 5 [Sur Ct, Bronx County]).

Accordingly, the motion to dismiss this petition is denied, and respondent Keiko Ono Aoki is ordered to file an account of her proceedings as trustee of decedent Rocky Aoki’s testamentary trust through September 30, 2016, together with a petition for its judicial settlement and all information necessary for the court to issue a citation to persons interested, within one hundred and twenty (120) days of service upon her of this decision and order, with notice of entry.

This decision constitutes the order of the court.

Dated: October 13, 2016



SURROGATE