

**Rubinberg v Stone Jupiter Trust**

2013 NY Slip Op 33094(U)

December 4, 2013

Supreme Court, Suffolk County

Docket Number: 13-13386

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

## MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

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RANDY STONE RUBINBERG,

By: Garguilo, J.S.C.

Dated: November 22, 2013

Petitioner,

Index No. 13-13386

Mot. Seq. # 001 - MD; CDISPSUBJ

- against -

STONE JUPITER TRUST,

Return Date: 6-4-13

Adjourned: 9-25-13

Respondent.  
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BAINTON LYNCH, LLP

ARENT FOX KINTNER PLOTKIN

Attorney for Petitioner

Attorney for Respondent

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In this special proceeding pursuant to CPLR Article 77, the petitioner Randi Stone Rubinberg seeks to compel her mother, Nancy Stone (Stone), as trustee of the respondent Stone Jupiter Trust, to render and settle an account of her actions as trustee. It is undisputed that the petitioner is a beneficiary of the Stone Jupiter Trust which was created by a written declaration of trust made by Stone's mother and the petitioner's grandmother, Ruth Drucker, on October 19, 1998. It is also undisputed that the Stone Jupiter Trust's assets consists of: (1) a 1/8 beneficiary interest in the Jupiter Master Trust, an entity that has a 99% ownership interest in Efficiency Leasing of Florida LLC (EL Florida), which owns commercial real estate in Tampa Florida; and (2) a 1/8 ownership interest in Efficiency Leasing of Maryland LLC (EL Maryland), a limited liability company that owns commercial real estate in Maryland.

In addition, the parties do not dispute the following facts: The extended family of Ruth Drucker conducts a family business which operates in several states and is run through a closely-held corporation, Sunbelt Holding Inc. (Sunbelt). The Jupiter Master Trust (Master Trust) was created as part of an estate plan by the older generations of the extended family to benefit future generations. As a result, Ruth Drucker created the Stone Jupiter Trust (Trust). Stone's children, the petitioner and her brother, Chad Stone, are income beneficiaries of the Trust, and Stone's grandchildren are the residual beneficiaries. Chad Stone has two minor children, and the petitioner has no children. Stone's brother, Steven Drucker, the original trustee of the Trust resigned on March 12, 2010, and Stone has served as the trustee as of that date.

The petitioner now seeks an order compelling Stone to render a formal accounting regarding the Trust. In support of her application, the petitioner submits, among other things, correspondence from her attorney to the former trustee and legal representatives of the Trust requesting an accounting,

correspondence from the Trust's legal representatives, and a copy of the Agreement of Trust. The petitioner alleges that, on April 9, 2013, her attorney received a fully executed copy of a confidentiality agreement which Sunbelt insisted upon, and that an accounting has not been provided. This proceeding was commenced by order to show cause on May 17, 2013 seeking an order "requiring Nancy Stone, as trustee, to render and settle an account of her proceedings as such trustee ..."

In opposition, Stone submits the affirmation of her attorney, who indicates that she transmitted an "accounting" from the accountant for the Trust to the attorney for the petitioner which contained the financial statements of EL Florida and EL Maryland for 2010; balance sheets of EL Florida and EL Maryland for 2011 and 2012; profits & loss statement of EL Florida and EL Maryland for 2011 and 2012; 2010 and 2011 Federal Tax Returns for the Master Trust; 2010 and 2011 Federal Tax Return for the Trust; and Federal Tax Returns for EL Florida and EL Maryland for 2010, 2011 and 2012. Counsel for Stone contends that, based on this transmittal, the petitioner has received the relief requested in this proceeding. That is, an accounting for the Trust during the years that Stone has served as trustee.

At a hearing held in this proceeding on August 14, 2013, Stone agreed to provide information for the period that Steven Drucker was trustee for the Trust "to the extent that it was readily available." On August 30, 2013, counsel for Stone provided the petitioner with financial information regarding the subject entities for the period from 2002 to 2009, with some slight exceptions. Counsel for Stone indicates that this is the information "that was readily available to ... the accountant for the [Trust]." Said information is now before the Court for *in camera* review and includes, among other things: Federal Tax Returns for the Trust for 2002 through 2009, Federal Tax Returns for EL Florida and EL Maryland for 2002 through 2009, Federal Tax Returns for the Master Trust for 2002 through 2009, and financial statements for EL Florida and EL Maryland for 2005 through 2009.<sup>1</sup>

The petitioner now contends that the information is inadequate as a "substitute accounting" because the documents (a) do not cover the entire period of the Trust; (b) are not submitted under oath; (c) do not reflect the "fair value" of real estate assets, but instead reflect depreciated book values; (d) do not show unrealized gains and losses of the Trust's principal; (e) do not show the opening principal balance of the Trust, and are incapable of showing whether the trustee (and her predecessor) has achieved a reasonable rate of return on the principal of the Trust or to otherwise provide information to enable the petitioner to evaluate the trustee's performance; (f) do not explain the details of loans to related parties so that the propriety of such transactions can be evaluated; (g) do not explain the details of loans from related parties so that the propriety of such transactions can be evaluated; (h) do not disclose the terms of the leasing of the real property to related parties so that a determination can be made as to whether the terms of such leases are fair and reasonable; (i) do not disclose the trustee's interest in the entities with which the Trust has engaged in transactions that have resulted in losses year after year; and (j) do not explain why the trustee has permitted the Trust to lose money year after year by engaging in

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<sup>1</sup> By letter dated November 6, 2013, the respondent submits additional materials for *in camera* review after the submission date of this petition and without leave of court. However, it appears that the submission is made with the consent of the petitioner. Regardless, a review of the materials reveals that they consist of financial reports for the Trust and the subject trust assets for the years 2011 and 2012. Nothing therein, or in the subsequent correspondence by the parties regarding the documents, changes the findings herein.

related party transactions without taking action to remedy such losses.

In her sur-reply<sup>2</sup>, Stone submits four affidavits and a memorandum of law. In her affidavit, Stone swears to many of the undisputed facts herein. She states that she became the trustee of the Trust on March 12, 2010, that an accounting was not conducted at that time because it was determined that the expense would unduly burden the trust, and that the information provided to the petitioner often refers to the Nancy Stone Jupiter Trust, which is merely a “clerical error.”<sup>3</sup> Stone further swears that she does not have a personal interest in the Master Trust, and that she does not have a membership interest in EL Florida or EL Maryland. In addition, she has not been employed by or had any management or control over those two entities.

In his affidavit, Chad Stone swears that he and his sister are beneficiaries of the Trust, that he has “significant experience with financial and accounting-related issues” in his employment in the family business, and that he has familiarity with the assets of the Trust. He states that those assets are “indirect interests in non-income producing real estate,” and that he is satisfied with the information provided by Stone. Chad Stone further swears that he is opposed to the relief requested by the petitioner as it would unduly burden the Trust and adversely impact the financial interests of himself and his children.

William McMullan (McMullan) swears, in his affidavit, that he prepared the Trust at the direction of Ruth Drucker, that the Trust was created for the benefit of future generations, and that the Trust was created with “nominal consideration.” He states that, for this reason, schedule A attached to the trust document was intentionally left blank. McMullan further swears that, reflecting the purpose of the Trust, the petitioner and Chad Stone are income beneficiaries and the corpus will pass to the children, if any, of the two lifetime beneficiaries. In her affidavit, counsel for Stone swears, among other things, that she transmitted the additional information to the attorney for the petitioner on August 30, 2013.

Here, it is determined that Stone has furnished information to adequately apprise the petitioner of the assets and proceedings of the Trust. It is undisputed that the Trust’s assets are a small percentage of the Master Trust and a real estate holding corporation which are part of a larger family estate plan. The majority of the petitioner’s contentions (items c, d, and f - j, above) involve matters in which the petitioner does not have an interest, or actions which do not lie within Stone’s ability to control. The petitioner’s remaining contentions do not merit burdening the trust with the cost of a judicial accounting. Under the circumstances, the determination of the application for an accounting rests in the discretion of court (*see eg. Pollock v Manufacturers & Traders Trust Co.*, 154 Misc 67, 276 NYS 363 [Sup Ct, New York County 1934]). The petitioner has failed to indicate any reason to require a formal accounting, or that the benefit to her by undertaking such an endeavor would outweigh the resulting cost and expense (*see eg. Zamax Mfg. Co. v Grossman*, 102 NYS2d 833 [Sup Ct, Rockland County 1951]; *see also*

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<sup>2</sup> The undersigned granted Stone permission to submit a sur-reply to the petitioner’s contentions on September 9, 2013.

<sup>3</sup> The petitioner raises the question whether the information provided refers to another trust entity. The affidavit of Stone resolves the issue.

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*Tooley v Exempt Firemen's Benevolent Assn. of City of Yonkers*, 13 AD2d 685, 213 NYS2d 937 [2d Dept 1961]; *Ball Motors v Orange County Trust Co.*, 13 AD2d 531, 213 NYS2d 503 [2d Dept 1961]).

Nonetheless, the petitioner additionally argues that the information provided raises questions and indicates a lack of diversity in the Trust's investment portfolio pursuant to EPTL 11-2.3 (b) (2). EPTL 11-2.3, the Prudent Investor Act, provides in pertinent part:

(b) Prudent investor standard.

\* \* \*

(2) A trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.

(3) The prudent investor standard requires a trustee:

\* \* \*

(C) to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument;

\* \* \*

(4) The prudent investor standard authorizes a trustee:

\* \* \*

(B) to consider related trusts, ...

The Trust document executed on October 19, 1998 provides as follows:

FOURTH: In addition to ... the powers conferred by law ... the Trustee hereunder shall have the powers hereinafter enumerated ... in the Trustee's absolute discretion:

1. To purchase or otherwise acquire, and to retain, ... any and all stocks, bonds, ... or any variety of real or personal property ... and to make or retain any such investment without regard to degree of diversification ... Investments need not be diversified and may be made or retained with a view to a possible increase in value.

Under the Prudent Investor Act, the trustee must diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes, terms, and provisions of the governing instrument (EPTL 11-2.3 [b] [3] [C]). It has been held that a

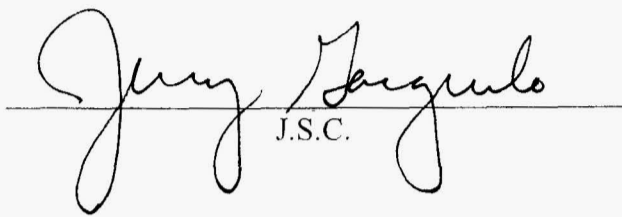
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decision not to diversify in order to sustain a closely-held corporation as a family business is appropriate (*Matter of Hyde*, 44 AD3d 1195, 845 NYS2d 833 [3d Dept 2007]). Here, considering the relationship of the Trust to the Master Trust, the express language of the Trust, and the nature of the assets held by the Trust, the petitioner's contention is without merit.

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

12/4/13

  
J.S.C.