

Matter of Benihana Protective Trust

2014 NY Slip Op 31104(U)

April 30, 2014

Surrogate's Court, New York County

Docket Number: 2008-2604/C

Judge: S. Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
DATA ENTRY DEPT.
APR 30 2014

-----X
Proceeding for the Settlement of the Account of
Proceedings of KANA AOKI NOOTENBOOM,
KEVIN AOKI, KYLE AOKI and KENNETH
PODZIBA, as Trustees of the Benihana Protective
Trust, created under Trust Agreement dated June 8,
1998 by and between

DECISION AND ORDER

ROCKY H. AOKI,
as Grantor,

File No. 2008-2604/C

and Kevin Aoki and Darwin C. Dornbush, as trustees,
for the benefit of Rocky H. Aoki and others.

-----X
M E L L A, S.

The following papers were considered in deciding this motion to disqualify counsel:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion dated January 10, 2014, Affirmation of Richard Feldman, Esq., dated January 10, 2014, with Exhibits A through P	1, 2
Memorandum of Law in Support of Motion, dated February 7, 2014	3
Affirmation In Opposition of Faith Carter, Esq., dated February 18, 2014, with Exhibits A through J	4
Memorandum of Law in Opposition to Motion, dated February 18, 2014	5
Reply Affirmation of Richard Feldman, Esq., dated February 24, 2014, with Exhibits A through E	6

Objectant Keiko Ono Aoki ("Keiko") moves to disqualify the law firm of Holland & Knight LLP as counsel to the co-trustees who have petitioned for judicial settlement of their accounting for a lifetime trust, known as the Benihana Protective Trust (the "BPT"). Decedent Rocky Aoki ("Rocky") established the BPT under a June 8, 1998 trust agreement, and the trust terminated on Rocky's death, which occurred on July 10, 2008. One day before that, Kenneth Podziba, as the one co-trustee who is not a member of the Aoki family and had no beneficial

interest in the trust, authorized a distribution of cash and stock (the “July 2008 Distribution”) to six of Rocky’s children as permissible trust beneficiaries, three of whom, Kana Aoki Nootenboom, Kevin Aoki, and Kyle Aoki, also served as co-trustees with Podziba. Holland and Knight represented all the co-trustees at the time of the July 2008 Distribution and continues to do so today.

In 2006, Rocky had commenced an action in Supreme Court against the trustees of the BPT, which held – via a corporation owned by the trust, Benihana of Tokyo, Inc. (“BOT”) – Rocky’s interests in the restaurant chain he had founded, Benihana, Inc. It was in the context of that 2006 action by Rocky that Justice Ira Gammerman issued the following order from the bench on February 13, 2007:

“This is a motion to compel the trustees of the trust to give the attorneys for the plaintiff 48 hours notice in the event they intend to sell any of the stock owned by BOT. That motion is granted, and . . . such notice is to be given.”

The current motion to disqualify by Keiko, who is Rocky’s surviving spouse, executor and testamentary trustee, is related to the July 2008 Distribution to Rocky’s children in light of what has come to be called the “48-Hour Order.” No notice was given to plaintiff’s attorneys in that proceeding prior to the July 2008 Distribution. In addition to filing other objections claiming that this distribution was improper, Keiko has objected to it on the ground that the distribution of the stock to the children violated the 48-Hour Order.¹

¹Although the 2006 action was transferred to this court, and the issue of the propriety of the July 2008 Distribution given the 48-Hour Order was raised in that action, the court has expressed to the parties a preference for handling all objections to the July 2008 Distribution at one time in this accounting proceeding. On consent of the parties, settlement of this account awaited the resolution in this court of a probate contest and of a related dispute regarding the validity of certain partial releases of the testamentary power of appointment that Rocky held over the corpus of the BPT. Further factual and procedural background of those proceedings is set forth in various court decisions and need not be repeated here (*see Matter of Aoki*, NYLJ, May

On her motion, Keiko argues that disqualification of Holland & Knight as counsel is warranted on four different grounds: (1) that Holland and Knight lawyers were instrumental in what movant describes as the “unlawful” July 2008 Distribution to Rocky’s children, which was made following their advice; (2) that Holland and Knight lawyers will “necessarily” be witnesses adverse to their clients on the facts of the distributions; (3) that the law firm represents both Podziba, the disinterested trustee, and the interested trustees, that is, decedent’s children, who have conflicting interests; and (4) that the law firm’s acts regarding the July 2008 Distribution and continued representation of the co-trustees give rise to an appearance of impropriety. Each particular claim is addressed in turn below.

In general, the party seeking disqualification bears the burden of “establishing that such a drastic remedy is warranted” (*O’Donnell, Fox & Gartner, PC v R-2000 Corp.*, 198 AD2d 154, 155 [1st Dept 1993]), by making a clear showing that disqualification is necessary (*Aryehy v Aryehy*, 14 AD3d 634 [2d Dept 2005]). On motions to disqualify counsel, “[c]ourts must . . . consider such factors as the party’s valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation” (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 440 [1987]).

The first ground concerns the advice of counsel defense, but the co-trustees have not asserted it as a defense to the July 2008 Distribution. Consequently, to the extent that the motion is based on the mere possibility that the trustees will claim advice of counsel in justifying the

17, 2010, at 18, col 3 [Sur Ct, New York County], *affd Matter of Aoki*, 99 AD3d 253 [1st Dept 2012]; *Matter of Aoki*, NYLJ, Sept. 13, 2010, at 18, col 2 [Sur Ct, New York County]; *Matter of Aoki*, NYLJ, Sept. 27, 2010, at 20, col 6 [Sur Ct, New York County]; *Matter of Aoki*, NYLJ, Decision of Interest, Jan. 18, 2013, File No. 2008-2604, 1202584642736, at *1 [Sur Ct, New York County, Decided December 27, 2012] [which is currently on appeal].

distribution, it must be denied without prejudice to refiling it upon a later showing that the co-trustees actually interpose such advice as a viable defense to the objections in this accounting proceeding.

The second ground refers to the advocate-witness disqualification rule (22 NYCRR § 1200, Rule 3.7),² but, similarly, this does not provide a ground for the disqualification of co-trustees' counsel. The current record and the arguments advanced do not support a finding that any attorney currently employed by the firm will "likely" be called as a witness on any significant and disputed factual issue or that his or her testimony would be adverse to the petitioners' interests (*see* 22 NYCRR § 1200, Rule 3.7; *Transcontinental Constr. Svcs v McDonough, Marcus, Cohn & Tretter*, 216 AD3d 19 [1st Dept 1995]; *Matter of Florio*, 39 Misc 3d 1225(A), 2013 NY Slip Op 50730(U) [Sur Ct, Nassau County, May 8, 2013]; *see also S & S Ventures*, 69 NY2d 437).³

With respect to the third ground for disqualification, movant states that a conflict between the co-trustees represented by Holland and Knight would arise, namely between Podziba as disinterested co-trustee and the other co-trustees who are Rocky's children, were the court to rule that the July 2008 Distribution of stock violated the 48-Hour Order. No such ruling, however,

²Rule of Professional Conduct 3.7, which is also called the advocate-witness rule, provides that a lawyer may not act as advocate in a matter in which the "lawyer is likely to be a witness on a significant issue of fact" (22 NYCRR § 1200, Rule 3.7[a]). The Rule is also imputed to the lawyer's firm under subsection (b)(1), and a lawyer may not act as advocate "if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client" (22 NYCRR § 1200, Rule 3.7[b][1]).

³The court thus need not reach the co-trustees' alternate argument, based on an exception to disqualification under the advocate-witness rule, that "disqualification of the lawyer would work substantial hardship on the client[s]" (22 NYCRR § 1200, Rule 3.7[a][3]).

has been made by the court, and movant, therefore, essentially admits that there is no present conflict between the trustees. Consequently, there is no current basis for holding that a conflict requiring disqualification exists, and this portion of the motion is denied without prejudice to re-filing in the event that an alleged material conflict arises among the jointly represented co-trustees.

Movant's allegations, in connection with the fourth ground for disqualification, that the firm's conduct and continued representation of the trustees raises an appearance of impropriety, are vague and conclusory, and do not provide the type of facts that support disqualification (*cf. O'Donnell*, 198 AD2d at 155 [conclusory or speculative assertions insufficient]).

But for this issue regarding disqualification of counsel, discovery was to have been completed on the objections to the co-trustees' account. In an attempt to clarify the issues raised, however, the court will direct the petitioning co-trustees to file and serve a verified reply to the objections within 45 days of the date of this decision; the parties will then have an additional 120 days from that filing to complete discovery, which deadline may be further extended by stipulation of all parties, provided it is submitted prior to the deadline sought to be extended.

Accordingly, the motion to disqualify Holland & Knight LLP as counsel to the co-trustees is denied as set forth in this decision. The petitioning co-trustees shall file and serve a verified reply to the objections within 45 days of the date of this decision.

This decision constitutes the order of the court.

Dated: April 30, 2014



SURROGATE