Ruth Bronner and Zwi Levy Family Sprinkling Trust
2016 NY Slip Op 30086(U)
January 15, 2016
Surrogate's Court, New York County
Docket Number: 2012-2271
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Petition for a Compulsory Accounting and Related Relief in the RUTH BRONNER AND ZWI LEVY FAMILY SPRINKLING TRUST, an inter vivos trust f/b/o Ruth T. Bronner

DECISION

File No.: 2012-2271/No Subfile

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Petition for a Compulsory Accounting and Related Relief in the RUTH BRONNER TRUST created on July 2, 1993 by Ruth T. Bronner for the benefit of RUTH T. BRONNER, Kevin Yinon Levy, Eliya Levy and Moriah Frummet Rachel Levy

File No.: 2012-2271/A

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Petition for a Compulsory Accounting and Related Relief in the THE BRONNER FAMILY SPRINKLING TRUST, an inter vivos trust f/b/o Ruth T. Bronner

File No.: 2012-2271/B

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Petition for a Compulsory Accounting and Related Relief in the RB & ZL FAMILY SPRINKLING TRUST created on January 14, 1993 by Zwi O. Levy f/b/o Zwi O. Levy, Ruth T. Bronner, Kevin Yinon Levy, Eliya Levy and Moriah Frummet Rachel Levy.

File No.: 2012-2271/C

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M E L L A, S.:

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Notice of Motion for Summary Judgment, dated April 2, 2014, of Petitioner Ruth T. Bronner, in File Nos.: No subfile, /A, & /C	1
Notice of Cross Motion for Partial Summary Judgment, dated April 30, 2014, of Respondent Warren R. Gleicher, in File Nos.: No subfile, /A, & /C	2
Affirmation of Brendan P. Kearse, Esq. In Support of Ruth Bronner's Motion for Summary Judgment, dated April 2, 2014, in File Nos.: No subfile, /A, & /C	3
Separately Bound Exhibits A through UU in Support of Ruth Bronner's Motion for Summary Judgment, in File Nos.: No subfile, /A, & /C	4
Memorandum of Law in Support of Ruth Bronner's Motion for Summary Judgment, dated April 2, 2014, in File Nos.: No subfile, /A, & /C	5
Affidavit of Ruth T. Bronner, dated March 21, 2014, in Support of Her Motion for Summary Judgment, reaffirming unspecified, prior affidavits, in File Nos.: No subfile, /A, & /C	6

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Affidavit of Warren R. Gleicher, dated April 30, 2014, in Opposition to Petitioner's Motion for Summary Judgment and in Support of Respondent's Cross-Motion for Summary Judgment, dated April 30, 2014, with annexed Exhibits A through J, In File Nos.: No Subfile, /A, & /C	7
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Affidavit of Harold Schertz in Opposition to Petitioner's Motion for Summary Summary Judgment and in Support of Respondent's Cross-Motion for Summary Judgment, dated April 30, 2014, with Annexed Exhibits A Through F, in File Nos.: No Subfile, /A, & /C	9
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In these four proceedings, Ruth Bronner ("Bronner") petitions to compel accountings for four trusts from their trustee, respondent Warren Gleicher ("Gleicher"). In three of the four proceedings – involving, respectively, The Ruth Bronner and Zwi Levy Family Sprinkling Trust, The Ruth Bronner Trust, and The RB & ZL Family Sprinkling Trust – Gleicher opposed the petition on the ground that Bronner waived her right to an accounting by executing certain releases on March 7, 2006. These 2006 releases were executed by Bronner before an Israeli notary, and, by their terms, they waive her right to an accounting for each of these trusts. In the fourth proceeding, involving The Bronner Family Sprinkling Trust ("BFST"), the trustee opposed the relief sought on the ground that Bronner was not a beneficiary of this trust and thus had no standing to seek an accounting.

Discovery has concluded, and Bronner now moves for summary determination that, regarding the three trusts of which she was concededly a beneficiary, the 2006 releases were not fairly obtained from her by the trustee as a matter of law and, as a result, he should be compelled to

account. The trustee has opposed that motion and, in addition, has cross-moved for partial summary judgment "dismissing [Bronner]'s fraud claim in her challenge" to the 2006 releases. The trustee also separately moves for summary judgment dismissing the petition to compel an accounting of the BFST, on the ground that the evidence demonstrates that Bronner is not a beneficiary and thus lacks standing to compel an account. Bronner opposes that motion claiming that statements by professionals who provided services to the BFST's trustee indicating that she is a beneficiary of this trust, as well as evidence of tampering with the original trust document establishing the BFST, creates a question of fact as to whether she is a beneficiary.

For the reasons set forth below, Bronner's motion is denied. Material questions of fact exist regarding the disclosures to and the knowledge of Bronner before executing the releases and waivers, including credibility determinations, that should be resolved after a hearing. Gleicher's cross-motion for partial summary judgment dismissing Bronner's fraud claims is granted in part and denied in part, while his cross-motion for summary judgment as to whether Bronner is a beneficiary of the BFST is denied.

Procedural History

Before answering the four compel account petitions, the trustee moved to dismiss them, and this court, by decision dated October 23, 2012, held in abeyance the motion to dismiss regarding the BFST, pending discovery on whether Bronner was actually one of its beneficiaries (*Matter of Bronner*, NYLJ, Nov. 13, 2012, at 23, col 1 [Sur Ct, New York County]). The motion to dismiss the other three proceedings on statute of limitations grounds was denied by the court in the same decision. The court then converted the motions to dismiss based on the 2006 releases to motions for summary judgment, and permitted discovery, and further submissions after its conclusion, limited to whether the 2006 releases were obtained fairly from Bronner (*id. citing Matter of*

Amuso, 13 Misc 2d 686 [Sur Ct, Nassau County 1958]). Issue was joined. The Appellate Division, First Department affirmed this court's effective denial of the motions to dismiss (112 AD3d 429 [1st Dept 2013]). Leave to appeal to the Court of Appeals was denied. The trustee withdrew all his prior motions, and the present summary judgment motions and cross-motion were filed.

Background

The Trusts of Which Bronner Was Concededly a Beneficiary

According to Gleicher, the execution of the 2006 releases by Bronner was part of a series of transactions in late 2005 and early 2006, through which The Ruth Bronner and Zwi Levy Family Sprinkling Trust, The Ruth Bronner Trust, and The RB & ZL Family Sprinkling Trust ("the Three Trusts") were to be terminated and their assets transferred to a foreign trust, called the RB Trust, for which an individual named Andre Zolty, a resident of Geneva, Switzerland, serves as trustee.

The current dispute arises in the context of petitioner Bronner's separation from her husband, Zwi Levy, which occurred in November of 2009. Bronner argues that Gleicher and Levy used the 2005 and 2006 transfers of assets from the Three Trusts to divest her of her own parents' wealth, namely, real estate interests owned by businesses established by her parents and held in these trusts. Although she desires to be divorced from her husband, she claims that a "tactic used to dispossess [her]" of her parents' wealth[1] is "noted" in her "husband's recalcitrance to grant [her] a divorce 'get' despite [their] separation . . . . unless [she] blindly and without question accept[s] a monetary agreement. . . ." She further states that the consequence of her "failure to accept [her] husband's extortion" is to "remain chained in this marriage until [she] die[s]."

[1]Her mother died in 2006 and her father, in 2011.

Bronner's "replacement in the [family real estate and diamond] business management by [her] husband may be due to a patriarchal *weltanschauung* on par with the ultra-Orthodox lifestyle of [her] brothers" – Israel and Jacob, whom Bronner claims, are intent on denying her access to information about the family business and trusts.[2] Bronner further asserts that the 2005-2006 transactions as well as the claim that she is bound by the 2006 releases are part of a series of "unimaginable acts of deceit" perpetrated by her brothers with the assistance of Levy, Gleicher and Zolty, for the purpose of divesting her of her assets.

Levy is not a party to the current proceedings, but has provided affidavits in support of Gleicher's motions and states that he conveyed the 2006 releases to Bronner. Claiming he made complete disclosures regarding the transactions to her, Levy takes strong issue with Bronner's characterizations. According to Levy, Bronner's lack of involvement in the family business "ha[d] nothing to do with religious reasons related to her being a woman, but is for reasons originating, in [her brothers'] view, from her personal unsuitability and incompatibility." Levy notes that "other female members of the family" including "in particular [Bronner's] mother, were very much involved in business."

Regarding the Israeli marital dissolution proceedings, Levy states that Bronner's "contentions against [him] with respect to the purported use of a *get* as a means of pressure, are groundless and untrue." Levy further states that Bronner's "request for a divorce was denied by the [Israeli] Rabbinical Court because, among other things, [Bronner] would not agree to a reasonable financial settlement (proposed by the Family Court) in which she would have received more than half of our joint property."

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[2]According to Bronner, their other sibling, David, left the family business after "bitter legal proceedings," culminating in her "brothers Israel and Jacob [buying] out David's share."

Gleicher states that the 2005-2006 transfers of assets from the Three Trusts,[3] of which the parties agree Bronner is a beneficiary, were made at the request of Levy and Bronner with the purpose of terminating those trusts. According to Gleicher, the need to transfer the assets from the Three Trusts, arose, because in "2005, petitioner and her husband resided in Israel" and due to "impending changes in Israeli tax law, it was beneficial for the beneficiaries of [these] trusts to have the assets of the . . . Trusts sold to another trust that had previously been created by [Bronner]'s grandmother for her benefit."[4] This was the RB Trust and, according to the instrument that establishes it, it is a Jersey Isle Trust, for which Zolty serves as trustee. Gleicher asserts that, in 2006, Bronner was a beneficiary of the RB Trust just as she was a beneficiary of the Three Trusts, and thus her "position" did not change as a result of the transfers.

An affidavit from Gleicher explains that the transfer happened as follows:

> "The Three . . . Trusts transferred all of their assets to a newly formed limited liability company known as Associated One LLC ('Associated One') on December 21, 2005. On December 23, 2005, Associated One then sold all of its assets to the RB Trust for $4,008,956, consisting of $2,705,654 in cash and $1,303,362 in a promissory note (the 'RB Note'). On December 29, 2005, $2,705,636 was wired into an escrow account at [the firm in which Gleicher is a partner]. On February 2, 2006, $2,362,008.83 was wired from . . . [the] escrow account to the bank account of Associated One . . . . After this sale, the cash and RB Note were Associated One's only assets, and they were subsequently distributed to Petitioner and her husband . . ."

Gleicher Affirmation of September 11, 2012, paragraph 8 at pp. 3-4.

Gleicher further explains, that in exchange for transferring the assets to the Associated One LLC, the Three Trusts received a proportional percentage interest of Associated One, with The

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[3]Gleicher refers to these transfers, collectively, as the "Winding up Transaction."

[4]In a later affirmation, Gleicher clarifies that Bronner was not the only beneficiary of this trust created by her grandmother.

Ruth Bronner Trust obtaining 11.9998%, The Ruth Bronner and Zwi Levy Family Sprinkling Trust, obtaining 12.4256%, and the RB & ZL Family Sprinkling Trust, receiving a 75.5746% interest in Associated One. Other than these interests in Associated One and a small amount of cash, the Three Trusts owned no other assets after the transfer. By March 2006, according to Gleicher, Associated One's only assets were $2,362,093.83[5] in cash and the RB Note in the amount of $1,303,302.

As a general matter, Gleicher explains that early on as trustee of the Three Trusts (and several other Bronner family trusts, not at issue here), "Levy and other members of the Bronner Family [requested that he] direct communications regarding the Trusts and their assets to Harold Schertz, the asset manager for the real property interests held by the trusts." Schertz has provided an affidavit in opposition to Bronner's motion for summary judgment, in which he confirms that, in January of 1995, he began to serve as asset manager for the real estate holdings in the United States owned by various trusts benefiting members of the Bronner family. These included the Three Trusts. Schertz states that he became friends with Bronner and her husband, to the point that Bronner referred to him as "Uncle Heschy."

Schertz also states that he "acted as the 'central clearing house' for information pertaining to the Trusts and the real property assets held in the Trusts in the United States." He understood that Levy had asked Gleicher "to direct all communications and documents pertaining to the New York Trusts to [him]." According to Schertz, his "general practice was that, when Mr. Gleicher needed to communicate with [Levy] or [Bronner], he would do so through me." Schertz would, in

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[5]Gleicher explains the difference between the amount transferred in cash to Associated One on December 23, 2005, and this amount as follows: there was $4,032.83 in interest earned, $500 in LLC filing fees paid, and $347,160 withheld and paid for income taxes of the beneficiaries of the Three Trusts.

turn, communicate with Levy "as the representative of the family."

Regarding the transfer to the RB Trust, Schertz explains that Levy "told [him] . . . that due to changes in the tax law [in Israel], Mr. Gleicher had been requested to formulate a plan to comply with the new law, and that it had been decided that the [Three] Trusts were to be shut down and their assets distributed, the plan being that those assets would ultimately end up in the RB Trust. . . ."

The 2006 Releases

In anticipation of the transfer of the assets of the Three Trusts, Gleicher states that he prepared a document entitled "Receipt, Release, Refunding Agreement and Waiver of Accounting" for each trust, and sent the documents to Schertz with a request that Bronner and Levy sign, date and have them notarized, and then return them to him. According to Gleicher, on March 7, 2006, – having directed the termination with and through her spouse and knowing that the Three Trusts's assets in the amount of approximately $4 million were to be transferred to the RB Trust – Bronner executed the releases for each of the Three Trusts before an Israeli notary, Nadav Blum.

In relevant part, these provided that the beneficiaries and Gleicher have requested, in "view of the cost of preparation of a judicial or nonjudicial accounting settlement, that the account of proceedings of the trustee be settled non-judicially by this Agreement and that all parties to this Agreement agree to waive the preparation of a judicial and non-judicial accounting. . . ." The 2006 releases also provide a release and indemnification of Gleicher by Bronner for any claims regarding the Three Trusts. For The Ruth Bronner Trust, the release provides that Gleicher is "distributing the principal and all income to Ruth Bronner as the beneficiary under the Trust Agreement." For the other two trusts, the releases provide that Gleicher is "distributing the principal and all income to Zwi O. Levy as beneficiary. . . ." All three releases were first executed without a notary, but

Gleicher insisted that they be executed before a notary, which was accomplished some two weeks later. Although Bronner in her affidavit states that she does not recall signing the 2006 releases, her petition makes no claims of forgery, nor do her motion papers offer any support for such claim.

The Disclosures to Bronner in Obtaining the Releases

It is undisputed that Gleicher made no disclosures directly to Bronner regarding the transactions that culminated in the execution of the 2006 releases. Instead, pursuant to the practice in administering these trusts, Schertz confirms that it was he who sent the unsigned releases, after receiving them from Gleicher, to Levy in Israel. Schertz discussed them with Levy, apparently at length, and Schertz was confident that Levy understood their meaning and import. Levy informed Schertz that Levy "had spoken to [Bronner] about the Waivers and their meaning." Schertz also states that, around the time he sent Levy the unsigned releases, he called Levy and Bronner's home in Israel, and Bronner answered. Schertz then "mentioned to [Bronner] that she should expect the Waivers and that she and [Levy] needed to sign and return them to Mr. Gleicher in New York." Although Schertz does not state that he otherwise discussed the transactions with Bronner, he states that "during the two weeks that she and [Levy] had the Waivers, [Bronner] had every opportunity to ask [him] about the Winding Up Transaction, the assets in the New York Trusts and the Waivers . . . and [he] would gladly have answered any questions on these matters."

Levy, for his part, explains that due to changes in the tax laws, he and Bronner "decided to act to terminate the [three] Gleicher Trusts in the United States, by selling the underlying assets and transferring the proceeds distributed to us to the Zolty [the RB] Trust in which we are beneficiaries." He explains that "[t]he decision was made jointly and with full consent by me and [Bronner], having all the necessary information before us." Levy states that, like himself, Bronner "was also fully aware of the condition of the trusts and their financial investments at that time

[when the 2006 releases were executed]." In his deposition, Levy testified that, prior to the execution of the 2006 releases, he showed to Bronner a one-page spreadsheet entitled "Cash from Operations" which reflects the distribution to each of the Three Trusts of the cash proceeds from the sale of assets to the RB Trust. And further, Levy asserts that he was there when Bronner executed the 2006 releases before the Israeli notary. Apart from the spreadsheet and the releases themselves, no other documentary evidence has been submitted in an attempt to demonstrate what was disclosed to Bronner prior to their execution.

Bronner, for her part, avers that even if she signed the 2006 releases, which, as stated above, she does not recall doing, "such a document would have no effect, since the notary did not – nor did anyone else for that matter – ever explain to me what I was signing and what the significance, implications and ramifications were."

Transactions After Execution of the 2006 Releases

Gleicher received the notarized 2006 releases on March 15, 2006. The next day, Associated One distributed all but $4,728.13 (reserved for taxes and expenses) of its cash to the Three Trusts, in proportion to each trust's percentage interest in the LLC. The Ruth Bronner Trust, as told by Gleicher, received $481,066 in cash or 11.9998% of the $4,008,956 sales proceeds that Associated One had received. Out of this sum, $124,686 was used to pay taxes, and $355,000 remained in The Ruth Bronner Trust. According to Gleicher, The Ruth Bronner Trust did not receive any portion of RB Note from the RB Trust for its interest in Associated One. The two other trusts also received payouts from Associated One, with The RB & ZL Family Sprinkling Trust receiving $3,029,750 (75.5746% of $4,008,956), comprised of a $1,177,084 share of the RB Note given to Associated One for its assets, and $1,647,000 in cash – and $205,555 having been withheld for income taxes, and with The Ruth Bronner and Zwi Levy Family Sprinkling Trust,

receiving $498,136 (12.4256% of $4,008,956), comprised of a $126,818 share of the RB Note and $355,000 in cash because $16,919 had been withheld for income taxes.

Also on March 16, 2006, Gleicher "received instructions originating from . . . Levy . . . that the assets of the Three . . . Trusts should be wired to Mr. Zolty, the Trustee of the RB Trust." In explaining this transfer, Gleicher refers to two documents. One is an email from Schertz to Gleicher relaying the account numbers to Gleicher and Aryeh Victor, an accountant at SRI, LLC, a company owned by Schertz. The other is a document that is partially typewritten and partially handwritten. The top is an email from Levy to Schertz dated February 20, 2006, giving an account number for "Mr. Andre Zolty" and requesting the "DATE and FINAL AMOUNT that is being sent out." Below that, in handwriting, is a "FAX" number, and the following: "Hi Heshie Please transfer the money distributed from the trusts to me, to the above bank account Thank you [signature illegible and then name printed] Zwi Levy." Below that, in different handwriting is: "Please take care of transferring my money to the same account Thank You, [signed legibly] Ruth T. Bronner." According to Schertz, these handwritten instructions were provided in response to a request by him as to "where both [Levy] and [Bronner] wanted the funds [of the Three Trusts' cash assets] to go." Schertz states he received these handwritten instructions and conveyed them to Gleicher (although Schertz is not certain that Gleicher saw the handwritten notes at that time). A March 16, 2006 email from Schertz to Levy, which is attached to Bronner's papers and which she indicates she retrieved from Levy's computer states:

> "The following were the transfers from Associated One LLC:
>
> "Ruth Bronner Trust $355,000.00
> "Ruth Bronner and Zwi Levy Family Sprinkling Trust $355,000.00
> "RB & ZL Family Sprinkling Trust $1,647,000.00
>
> "Total to be wired tomorrow $2,357,000.00

> "This leaves approx 3000 and change in the account to cover bank charges wire charges and filing fees for associated one llc will distribute anything left when we close it up."

Bronner's Fraud Claims

As an additional point, Bronner argues that the 2006 releases do not bar her petitions because they were obtained by fraud. She describes "four (4) basic frauds" as follows: (1) the fraudulent promise in the 2006 releases that "all" the trust assets would be distributed, such that Gleicher would be left holding no trust assets and the trusts would be terminated; (2) the fraudulent promise in the 2006 releases that, upon their execution of those releases, the distributions would be made directly "to" Bronner and Levy; (3) the fraud that actual distributions that were made by Gleicher to Zolty, as trustee, violated the express terms of two of the Three Trusts; and (4) the fraud concerning the RB Note, "specifically the fact that the $1.3 million Note was simply hidden away in . . . Gleicher's files after he as trustee received it in partial payment from the RB Trust for all the three . . . trusts' assets, rather than its being given to [Bronner] or [Levy] or even to the foreign trust (the RB Trust) that Gleicher alleges [Bronner] and [Levy] directed him to send all the trust assets to." Gleicher denies all these allegations and states that the assets of the Three Trusts were, in fact, transferred to Zolty as trustee of the RB Trust, on March 17, 2006, as planned, and as confirmed and requested by Bronner's (and Levy's) own handwritten notes and signature.

The BFST

For the fourth trust at issue in these proceedings, the BFST, the dispute between the parties centers on whether the original December 13, 1993 trust agreement – which was between Marie Lesman Bronner (the spouse of Bronner's brother) and Levy as grantors and Gleicher as trustee – was tampered with to exclude Bronner as a beneficiary. Gleicher asserts that the original of the trust agreement was kept in a three-ring binder in his office, and that the trust's beneficiaries have

always and only been the "descendants of ISRAEL BRONNER, JACOB BRONNER, and RUTH BRONNER and qualified charities" who may receive "so much of the trust principal and income (including all or none) as the trustee deems appropriate for any purpose."

Bronner's counsel states that he personally reviewed the original trust agreement in the office of Gleicher's counsel and "observed that the trust had been stapled and unstapled repeatedly, there were two pages numbered page 2 with differing terms that conflicted, one of those two page 2s had never been stapled at all, the trust was presented . . . in a three ring binder but some pages had also previously been 2 hole [sic] punched as well."

Gleicher concedes that the "original Trust Agreement, as well as the copies in my file, mistakenly contain two versions of Page 2." His "best recollection as to why this occurred is that, at the request of a Bronner family member, certain additions were made to Page 2 . . . ." However, he notes that none of these additions or changes "affects the identity of the beneficiaries of the Trust, and neither [version of page 2] lists [Bronner] as a beneficiary."[6] Gleicher also points to two documents he prepared not long after the establishment of the BFST indexing the Bronner family trusts then in existence, and describing each briefly. In neither of these documents, is Bronner listed as a beneficiary of the BFST.

Bronner, on this issue, states, "[A]ccording to the original trust deed [a copy of which she does not provide], I am indeed both a beneficiary and advisor; changes to the [BFST] trust deed were recent backdates with the intention to prevent my access to the assets in the family business and parents' inheritance." She also provides an affidavit from a forensic document examiner, who

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[6]Gleicher also notes that Schedule A to the BFST states that it is "f/b/o [for the benefit of] the descendants of Jacob Bronner, Marie Bronner and Zwi Levy." Gleicher states that this is a "mistake," and again, that this, nonetheless, does not identify Ruth Bronner as a beneficiary of the BFST.

after analyzing the original trust document concludes that page one is in a different font size than page two of the document, specifically, "Page 1 of the trust instrument is printed in a 12 point font. The remaining pages of the trust instrument are printed in an 11 point font."

Bronner further relies on the statements of two professionals, one, former counsel to the trustee, Jerome Caulfield, and the other from the trusts' accountant, Aryeh Victor, to the effect that Bronner was a beneficiary of the BFST. However, Caulfield later provided an affirmation explaining that his April 18, 2011 statement in a letter to Bronner regarding Bronner's status as a beneficiary of the BFST was based on statements made to him by Gleicher who "said that [Gleicher] was trustee of the Bronner Family Sprinkling Trust, a trust in which [Gleicher] thought [Bronner] was one of several discretionary beneficiaries" and not from his own independent review of the trust instrument.

An affidavit from Victor explains that he "incorrectly testified" at his deposition that "it was my understanding that Jacob Bronner, Israel Bronner, and Ruth Bronner are beneficiaries" of the BFST. He "simply assumed, given the words "Bronner Family" in the title, that the Trust must refer to Jacob, Israel and Ruth." Victor was informed that this assumption was incorrect, and provided an errata sheet confirming that his deposition testimony was erroneous.

Gleicher's affirmation in support of his motion does not explicitly address the statements originally made by Caulfield and Victor, but it is clear from his submissions that Gleicher believes that such statements must be disregarded in favor of the later explanations because the BFST has always benefited the descendants of Ruth, Jacob and Israel, not them individually.

Gleicher also retained a forensic document examiner. After review and analysis of the original, this examiner concluded that "the size of the font on page one of [the BFST agreement] is

consistent with the size of the font on the rest of the pages" – a conclusion that Gleicher claims can be seen with the naked eye.

DISCUSSION

Summary Judgment Standard

As is well-established, a court should not grant summary judgment where there is any doubt as to the existence of material factual questions (*Birnbaum v Hyman*, 43 AD3d 374 [1st Dept 2007]; *In re Suzanne RR*, 35 AD3d 1012 [3d Dept 2006]). The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of such factual questions (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If that showing is made, then the burden shifts to the party opposing the motion, who, to avoid summary resolution, must provide "proof in admissible form sufficient to establish the existence of material issues of fact which require a trial" (*id.*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to make such a showing (*Zuckerman v City of New York*, 49 NY2d 557, 562-63 [1989]).

Bronner's Motion for Summary Judgment Regarding the 2006 Releases

The Appellate Division, First Department affirmed this court's prior denial of the trustee's motions to dismiss (112 AD3d 429 [2013]).[7] Those motions concern the Three Trusts and were

[7]Bronner asserts that the First Department decision is "law of the case," and argues that her summary judgment motion must be granted on the strength of a statement in that court's decision that the trustee "failed to conclusively demonstrate the integrity and fairness of the transaction which transferred the trusts' assets, or to establish that he fully informed petitioner of the effect and ramifications of the releases and waivers." Bronner argues that, only if in this new record, the trustee can demonstrate "conclusively" that he made all the necessary disclosures concerning the transactions and the waivers, may her motion be denied. The prior appeal, however, dealt with a denial of a motion to dismiss before discovery was taken, and deposition transcripts are now part of the record. Moreover, the trustee's "failure to conclusively demonstrate fairness" on a motion to dismiss is different from the issue of whether the trustee has

premised on a claim that the language of the 2006 releases executed by Bronner barred the accountings sought by her in these proceedings. After the appellate court decision, the question is not what is explicitly stated in the 2006 releases, but whether those releases were obtained fairly, that is, whether there were adequate disclosures to, and understanding of the transaction by, Bronner (*see Matter of Amuso*, 13 Misc 2d 686 [Sur Ct, Nassau County 1958]). The law is clear that a trustee, in seeking to obtain a release and waiver from a beneficiary, is interested in the transaction, making it one of self-dealing. Consequently,

> "'[i]n the case of releases, as in other instances of dealing between a fiduciary and the person for whom he is acting, there must be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary, and there must be adequate consideration paid. In addition, the trustee must negative fraud by positive misrepresentation or concealment, or duress or undue influence, or by other unfairness.' (Bogert, Trusts and Trustees § 943, at 475-478 [rev 2d ed 1982].) The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is not sufficient to insulate the release from a subsequent attack by the beneficiaries; the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars" (*Birnbaum v Birnbaum*, 117 AD2d 409, 416 [4th Dept 1986]; *see also Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692 [1978]).[8]
>
> Here, Bronner has stated under oath that no disclosures were made to her regarding the

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supplied sufficient evidence to raise a question of fact requiring a trial as to whether the process of obtaining a release was fair.

[8]Bronner also argues that Gleicher had a conflict of interest in that he represented her husband and brothers or other family members as an attorney – a claim that Gleicher denies. Were this the only allegation, this would be insufficient to shift the burden to the attorney or the other party represented by that attorney to show fairness and the absence of fraud (*Matter of Aoki*, 117 AD3d 499, 502 [1st Dept 2014] [leave to appeal has been granted by the Court of Appeals]). Here, there is no question that Gleicher, as trustee, is interested in the transaction seeking a release and waiver of an accounting from a trust beneficiary (*Birnbaum*, 117 AD2d at 416). Apart from the fiduciary context, which is the case here, releases are generally treated as contracts subject to defenses to enforcement as would any contract (*see Matter of Jacker*, 105 AD3d 1048 [2d Dept 2013]).

transactions that were the subject of the 2006 releases or that she does not recall having received any. Bronner has also sworn that no one explained to her the content of the releases and the consequences of executing them. Given the absence of documentary evidence indicating otherwise, under the circumstances, Bronner has made out a prima facie case that those releases were not obtained fairly, and that therefore, the releases may not be deemed to foreclose Bronner from seeking accountings for the Three Trusts.

Trustee Gleicher's Opposition

In his efforts to resist a summary determination, Gleicher asserts that Bronner has conceded that she designated her spouse, Levy, as her agent for all matters concerning the Three Trusts. Since there is no dispute that Levy was fully informed, Gleicher argues, Levy's knowledge can be imputed to Bronner, his principal, and Bronner should not be heard to complain about the lack of disclosure to her.

This affirmative defense, however, may not be considered by the court because it was not pled and thus it is asserted in violation of the requirement of CPLR 3018 (b) that "all matters [be pled] which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." Here, only in opposition to Bronner's motion did Gleicher raise this agency claim, and Bronner was deprived of a meaningful opportunity to examine the facts pertaining to this issue now that the parties have concluded their continent-spanning discovery.[9]

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[9]The need for Gleicher to have pled this defense becomes apparent in light of the imposition of certain duties by the law of agency (*Cristallina S.A. v Christie, Manson & Woods Int'l., Inc.*, 117 AD2d 284 [1st Dept 1986]; *see McCormack v Security Mut. Life Ins. Co.*, 220 NY 447 [1917]), so that the principal may take steps to protect her or his interests (*Klein v Twentieth Century-Fox Int'l Corp.*, 201 Misc 132 [Sup Ct, New York County], *aff'd* 279 App Div 989 [1st Dept 1952]).

Even if the court were to entertain this defense, it is meritless. As Bronner emphasizes, Gleicher himself did not act as though Levy was Bronner's agent for the purposes of the 2006 releases. Instead, he actively demanded that Bronner personally execute them. In this light, Gleicher's agency argument may be deemed an after-the-fact attempt to vary his prior understanding and is inconsistent with his own acts.[10] Additionally, an informal assumption of particular roles in a family – here that Levy by Bronner's description "was responsible for financial business matters" – is different from conferring specific authority on Levy as agent to act on her behalf for her interests under these trusts.[11] The trustee's attempt to use an unpled defense under the law of agency fails as a matter of law under the circumstances presented.

Evidence submitted by Gleicher is more problematic for Bronner. Those submissions include Levy's sworn statements, from his deposition and affidavits, that the decision to engage in the winding up of or transfer of the assets in the Three Trusts, was a joint effort of Levy and Bronner, made with full information and understanding about what was occurring. Gleicher has also provided sworn statements by Schertz, who has personal knowledge of certain aspects of the relevant transactions, and who avers that the transactions that culminated in the "shut down" of the

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[10]Even if the trustee could be considered a "third party" to the release transaction, a proposition which seems dubious at best, third parties dealing with agents cannot operate in a vacuum, and, as circumstances warrant, should conduct a "reasonable inquiry into the scope of the purported agent's authority" (*1230 Park Assoc., LLC v Northern Source, LLC*, 48 AD3d 355 [1st Dept 2008]). Here, neither Gleicher nor Levy ever acted as though Levy was Bronner's agent for all purposes.

[11]To credit such an informal agency relationship in this context may erode the trustee's duties of care, loyalty, and diligence owed to the trust's beneficiaries (*see Matter of Hunter*, 190 Misc 2d 593 [Sur Ct, Westchester County 2002]). None of the cases on which Gleicher relies – *Center v Hampton Affiliates, Inc.*, 66 NY2d 782, 784 (1985), *Kirschner v KPMG LLP*, 15 NY3d 446, 465 (2010), *Seward Park Housing Corp. v Cohen*, 287 AD2d 157 (1st Dept 2001) – arose in the context of a fiduciary seeking a release from a beneficiary.

Three Trusts were initiated out of concerns with a change in the tax laws in Israel at the time. Additionally, the handwritten document[12] in which Levy and Bronner instruct Schertz, the asset manager for the trusts' property, to "transfer" the money distributed from the trusts (to which Bronner refers as "my money") to an account on Zolty's name in Switzerland is documentary proof that tends to corroborate Gleicher's argument that Bronner was at least knowingly complicit in the transfer of the assets of the Three Trusts to the RB Trust. This evidence is sufficient to raise genuine questions of material fact concerning what was known by or disclosed to Bronner, when the trustee sought and obtained the 2006 releases from her (*see Kindzierski v Foster*, 217 AD2d 998 [4th Dept 1995], *citing Krupp v Aetna Life & Cas. Co.*,103 AD2d 252 [2nd Dept 1984]).

Bronner's Additional Arguments that Accounts Should Be Compelled Without a Hearing

In an attempt to avoid fact-finding on whether she was informed of the transactions at the time she executed the releases, Bronner makes two main arguments: (1) without financial disclosure regarding the Three Trusts, the 2006 releases are *per se* invalid and cannot be enforced; and (2) the 2006 releases are also unenforceable because any disclosure in connection with them came not from the trustee himself, but from Levy. Neither argument has merit.

While the duties and obligations of a trustee, who stands in fiduciary relation to trust beneficiaries, are exacting in terms of loyalty and the avoidance of self-dealing (*see Bialystoker*, 45 NY2d 692), Bronner submits no authority expressly holding that the absence of an informal account regarding trust assets at the time a waiver is obtained renders a release of the trustee and a judicial accounting waiver unenforceable *per se*. The cases on which Bronner relies indicate that an informal account is often or typically provided when a release is sought, but none mandate it as

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[12]Bronner does not deny that it is her handwriting in this document.

a necessary precondition (*see Matter of Fechter*, 25 Misc 2d 229 [Sur Ct, Nassau County 1960]; *Matter of Leyden*, NYLJ, Mar. 2, 1995, at 31, col 1 [Sur Ct, New York County] [fairness "typically" shown by "submitting the informal account on which the release was based"]).

To be sure, a fiduciary "act[s] at his peril" in seeking a general release without evidence of an appropriate accounting (*Fechter*, 25 Misc 2d at 230), but here, if Gleicher's version of the facts is credited, it was Levy and Bronner themselves, as beneficiaries and grantors,[13] who requested this transaction for tax reasons. Under such a circumstance, again, if credited as true, it could naturally follow that the beneficiaries did not desire to incur the expense of informal accountings and wanted to waive them. To hold otherwise, would impose on a trustee the obligation to always prepare an account, no matter how well a beneficiary was informed or how strongly they desired to waive one. Of course, an accounting fiduciary may prepare an account when seeking a beneficiary's release, but nothing forbids a trustee from pursuing a time- and cost-effective route of foregoing an accounting, formal or informal, as requested or agreed-to by informed beneficiaries (*cf. Matter of James*, 173 Misc 1042 [Sur Ct, New York County 1940] [release on informal account, but court noting possibility of avoiding "expense and delay"]); *Matter of Salomon*, 175 Misc 264 [Sur Ct, Kings County 1940] [same]). Here, Levy states that all the details of the "transaction, including amounts," were conveyed to Bronner by him in discussions with her, and further that Bronner

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[13]According to the trust agreements, Levy was the grantor of The Ruth Bronner and Zwi Levy Family Sprinkling Trust and The RB & ZL Family Sprinkling Trust, while Bronner was the grantor of The Ruth Bronner Trust. Although trustee Gleicher avers that he, in 1993, "created the three New York Trusts [at issue] for the benefit of [Bronner] and her family, namely her husband, Zwi Levy, and their children," it is clear from the trust instruments, attached to Gleicher's affirmation in which this statement is made, that Gleicher was not the creator or grantor of these trusts. While Gleicher further states that, although he is an attorney, he "never acted as legal counsel to Petitioner or her husband, brothers, children, or any other member of her family," his use of the term "created" may mean that he drafted the trusts, or perhaps that he executed the trusts as trustee.

understood at the time that the Three Trusts were terminating, and that the cash assets of the trusts were to be distributed to the RB Trust.[14]

The argument by Bronner that Gleicher could not have delegated to Levy his duty to disclose, and that the trustee alone was required to make the disclosures to her in obtaining the 2006 releases suffers from a similar flaw. Bronner attempts to extract from the case law discussing releases obtained by fiduciaries from beneficiaries, a rule that such fiduciary must be the source of any disclosures regarding the release. That the usual practice is for the trustee or fiduciary itself to make the disclosures to the beneficiary does not translate into a hard and fast rule. Rather, the appropriateness of a disclosure must be determined in light of the circumstances, with the touchstone being fairness (*Matter of Amuso*, 18 Misc 2d 686 [Sur Ct, Nassau County 1958]). In the cases on which Bronner relies, it was in fact the fiduciary who made the disclosures to the beneficiaries, but Bronner offers no authority which explicitly requires that the disclosures necessary to obtain a release and waiver come from the trustee's mouth and no one else's. Undoubtedly, relying on a third party to disclose information to the beneficiaries is done "at the peril" (*Fechter*, 25 Misc 2d at 230) of the fiduciary who seeks to avoid an accounting based on a waiver from those beneficiaries. It does not follow, however, that the disclosures based on which the release and waiver were secured must always and only be made by that fiduciary.

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[14]In this case, the court is assuming that no informal accounts, as such, were presented to Bronner for the Three Trusts. The undated, one-page spreadsheet entitled "Cash from Operations," which Levy states he showed to Bronner prior to her execution of the 2006 releases may be evidence of the disclosures alleged to have been made to Bronner, but it is not on the order of an account –describing the transactions of the Three Trusts– that could lead to a finding, without a hearing, that sufficient disclosures were made (*see e.g. Matter of Carney*, 45 Misc 3d 1210(A), 2014 NY Slip Op 51514(U) [Sur Ct, Nassau County 2014]; *Matter of Gilchrist*, 206 Misc 687 [Sup Ct, Westchester County 1954], *modified on other grounds*, 286 App Div 869 [2d Dept. 1955].

As a general matter, a trustee cannot delegate duties wholesale to another (*Matter of Jones*, 1 Misc 3d 688, 689 [Sur Ct Broome Co 2003] [citations omitted]; *see Matter of Rothko*, 43 NY2d 305, 319-322 [1977]). But Bronner here does not claim that Gleicher abdicated his role entirely as trustee in favor of another. Instead, she takes issue with Gleicher's reliance on Levy to convey information regarding the termination of the Three Trusts. Gleicher explains, however, and Schertz corroborates, that Gleicher acted in accordance with how the beneficiaries themselves understood communications regarding the Three Trust should be made – through Schertz and Levy. Moreover, delegation of non-discretionary functions is not necessarily prohibited and, even for discretionary investment determinations, such delegation is now authorized by statute, EPTL 11-2.3(c), provided there is oversight.[15] Bronner points to no authority for her position that the trustee cannot delegate in this instance, and moreover, she does not even attempt to show why Gleicher's delegation to Levy to make the disclosures would be unreasonable or negligent, given Gleicher's explanation that the transfer or the Winding Up Transaction was done to further the interests of the grantors-beneficiaries – Levy and Bronner – at their or, at least, at Levy's request, based on changes in the Israeli tax law.

Consequently, the material questions of fact raised by Gleicher necessitate a hearing and his failure to provide an informal account or to make disclosures directly to Bronner regarding the 2006 releases does not provide grounds for granting summary judgment to Bronner and ordering the accounts requested.

Gleicher's Cross-Motion for Summary Judgment Regarding Bronner's Claims of Fraud

Bronner also grounds her entitlement to summary determination on her argument that the

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[15]Despite a traditional antagonism to delegation by a trustee in the common law, the latest Restatement of Trusts takes the view that delegation is permitted if a prudent person of comparable skill in the trustee's position would do so (Restatement [Third] of Trusts § 80).

2006 releases, having been secured by fraud, cannot bar her from obtaining an account from Gleicher. As noted, in response, Gleicher has cross-moved for partial summary judgment dismissing these claims.

To prevail on her motion, Bronner must provide clear and convincing proof of a knowing misrepresentation by the trustee on which she acted to her detriment. Fraud is often described as requiring a showing of the following elements: a representation, falsity, scienter, justifiable reliance, and injury (*see Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112 [1969]; *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]).[16] The above-described first, second, and fourth frauds claimed by Bronner overlap to some degree because they all center on what she claims was a misrepresentation in the 2006 releases themselves, namely, that all the assets of the trusts were to be distributed to either Levy, in the case of The Ruth Bronner and Zwi Levy Family Sprinkling Trust and The RB & ZL Family Sprinkling Trust, or to Bronner, in the case of The Ruth Bronner Trust.

Bronner claims she never received the assets from The Ruth Bronner Trust, and that she was unaware of the RB Note, which was part of the consideration paid for the Three Trusts' assets that had been transferred to the Associated One entity. She claims that the RB Note was never transferred to her or to Levy or returned to the RB Trust. Discovery has revealed that the RB Note

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[16]The court notes that Bronner makes claims of a "larger fraud" grounded on an assertion that the "entire trust structure and how it appears to have been run . . . smacks of fraud, whether tax evasion, money laundering, or a simple effort to defraud Ruth Bronner out of her rightful share of the Bronner family U.S. business that were held in these trusts." To the extent that she makes such claims to avoid the consequences of the 2006 releases or to persuade the court to order the accounts *sua sponte*, Bronner's claimed "indicia" of such a larger fraud lack the particularity required by CPLR 3016(b) regarding fraudulent acts or misrepresentations, or are based on speculation or conjecture which is insufficient to create a question of fact (*Votta v Votta Enterprises, Inc.*, 249 AD2d 536 [2d Dept 1998]; *Matter of Turner*, 56 AD3d 863 [3d Dept 2008]).

was, in fact, kept in Gleicher's files, as an obligation of the RB Trust to Associated One. There is no indication on the RB Note instrument itself that it was ever transferred or assigned to either Levy or Bronner.[17]

Gleicher in support of his cross-motion explains that the note should be "treated" as having been distributed to Levy because this note was to constitute part of the consideration that the RB Trust paid to Associated One, but only for those assets that belonged to The Ruth Bronner and Zwi Levy Family Sprinkling Trust and The RB & ZL Family Sprinkling Trust. Pursuant to the terms of the 2006 releases, the assets from these two trusts were to be distributed only to Levy, and not Bronner. Gleicher claims that both he and Levy have "confirmed that they agreed to distribute the RB Note to . . . Levy in March of 2006, and in fact did so." What "in fact did so" means remains unclear in this record.

Notwithstanding Gleicher's and Levy's assertions[18] to this effect in support of the cross-motion, no document explicitly supports their claim that the RB Note was, in fact, distributed to Levy. Gleicher relies on the tax returns for the trusts. But it is nowhere explained how the RB

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[17]There is also no indication in this record that the obligor, the trustee of the RB Trust, was ever notified of such a transfer or assignment.

[18]In his deposition, Levy testified as follows:

"Q [by Bronner's counsel]. Did you – around the time of the trust terminations, did you tell Ruth Bronner that you would be . . . entitled to a note worth $1.3 million?

"A [by Levy]. We discussed it. Yes.

* * *

"Q. . . . . Do you have any document or witness that you can point to which would . . . support your testimony that you told Ruth Bronner about the $1.3 million note being yours on termination of the New York trusts? [objection to form; allowed to answer]

"A. As I said again, it was a discussion between a husband and a wife. And we normally don't have witnesses on that. . . .

"Q. And there are no documents that support your testimony that you told Ruth Bronner about the $1.3 million note, correct?

"A. About the specific note, no" (Levy Deposition Transcript, Ex. E to April 30, 2014 Affirmation of Thomas Fleming, Esq., at pp 81 to 83).

Note, being payable to Associated One, and not to the trusts (which held only fractional interests in Associated One), would have to be reported in the trusts' tax returns (and indeed, the returns are silent as to the RB Note). Nor does Gleicher explain why a portion of the RB Note did not constitute consideration for the assets of Associated One that had been a part of The Ruth Bronner Trust.

Gleicher also relies on the decision in *Municipal Consultants & Publishers, Inc. v Town of Ramapo* (47 NY2d 144 [1979]) for the proposition that the agreement to assign the RB Note to Levy was a contract that was "effective at the time [it] was made, although the contract [was] never reduced to writing and signed." However, even if Gleicher's and Levy's representations are sufficient to make out the trustee's prima facie case that the RB Note was intended to be distributed only to Levy and should have been, Bronner has raised questions of fact requiring a hearing on the issue of whether "all" the trust assets were distributed. As Gleicher concedes, the RB Note was never formally assigned to Levy, continuing to be payable to Associated One, and it remains –accruing interest– in Gleicher's files. That the RB Note was never assigned or transferred lends support to Bronner's argument that the representation in the 2006 releases that all the assets of the Three Trusts were to be distributed to Levy and Bronner was false. This evidence is sufficient to raise a question of fact on Bronner's fraud claim.[19]

There is a different result regarding the cash portion of the transfer transaction, however. Gleicher has made out a prima facie case of entitlement to summary judgment based on Levy's and Bronner's handwritten notes to Schertz, which requested that the trusts' cash be distributed to Zolty as trustee. Although Bronner argues that this document is "inherently unreliable," given that

[19]The fact that Bronner has not with precision defined her injury is not fatal, since the record indicates that she may have been damaged, including losing her right to seek accountings (*see Shafran v Kule,* 159 AD2d 263 [1st Dept 1990]; *see also* CPLR 3002[e]).

she does not contest that it is her handwriting instructing the distribution of her funds from the trusts, she should not be heard to claim that these were not distributed "to" her. Bronner was given the opportunity to exercise dominion and control of these assets, and did, in fact, by this writing direct their distribution to Zolty as trustee of the RB Trust. This conclusion is supported by documentary evidence of Gleicher's transfer of the funds to Zolty.

Given the above analysis, no fraud claim regarding the cash portion of the Trusts' assets survives, but there remains a question of fact as to whether the 2006 releases were fraudulent regarding the distribution of the RB Note in light of the representation on the releases that "all" assets would be distributed to Levy and Bronner and whether the RB Note was consideration for purchasing of the assets of the trusts for which only Levy was to receive the proceeds, to the exclusion of The Ruth Bronner Trust (for which Bronner was to receive the proceeds pursuant to the 2006 releases).

The court turns to the "third" claimed fraud by Bronner, that the trustee violated the express terms, specifically Article 2.4, of two of the three trusts (The Ruth Bronner and Zwi Levy Family Sprinkling Trust and The RB & ZL Family Sprinkling Trust) by transferring the assets to the RB Trust.[20] This is technically not a claim of fraud, since it is not based on any alleged misrepresentation. Consequently, Bronner has not established a question of fact requiring a hearing on this claimed "fraud." Bronner appears to argue, however, and the parties have briefed the question, that, under a proper construction of Article 2.4 of these two trusts, the transaction was void because it was beyond the power given to the trustees in the governing instruments (*see* EPTL 7-2.4). Article 2.4 is identical in both The Ruth Bronner and Zwi Levy Family Sprinkling Trust

[20]Bronner does not make this argument regarding The Ruth Bronner Trust, which does not contain the language in Article 2.4 of the other two trusts.

and The RB & ZL Family Sprinkling Trust, and provides:

> "The independent trustee shall have the power at any time during the term of the trust to transfer all or a portion of the property of this trust into another trust (either domestic or foreign) for the benefit of one or more beneficiaries of this trust (other than the grantor)."

In opposition, the trustee points out that the trusts' assets were not transferred directly from these two trusts to the RB Trust. Instead, as explained in detail in an affirmation of the trustee, the assets of these two trusts were distributed to Levy and Bronner, the beneficiaries, and ultimately transferred to the RB Trust via the use of the Associated One LLC entity, and the cash portion of the proceeds were directed to Zolty, as trustee, pursuant to the handwritten notes of Levy and Bronner.

In any event, Bronner fails to explain how the trustee's actions violated Article 2.4, especially in light of the trustee's reliance on Article 2.1 of the two trusts in question, which states that "the independent trustee may distribute to and among the grantor, the grantor's spouse, her descendants, spouses of her descendants and qualified charities (in whatever proportions the trustee deems appropriate, so much of the trust principal and income (including all or none) as the trustee deems appropriate for any purpose." Bronner offers no explanation as to how the trustee's reliance on Article 2.1 of these two trusts was improper. Consequently, her claim that the trustee's action in this regard constitutes "fraud" fails as a matter of law.

In light of the foregoing, the court denies Bronner's motion for summary judgment seeking an order compelling accountings from respondent Gleicher as trustee of the Three Trusts, and the court grants in part Gleicher's cross motion for partial summary judgment, dismissing Bronner's claims of fraud regarding the cash portion of the asset transfer transaction as well as regarding her claim that the transfers here were acts beyond the power of the trustee.

Gleicher's Motion for Summary Judgment Concerning the BFST

In the remaining motion, Gleicher seeks summary judgment dismissing Bronner's petition to compel an account for the BFST, on the ground that she is not a beneficiary of that trust and thus lacks standing.[21]

Gleicher's proof in support of his motion establishes, prima facie, that Bronner is not a beneficiary. Since the BFST's creation in 1993 by Levy and Bronner's sister-in-law as grantors, Bronner, according to her own submissions, had no knowledge of this trust. Gleicher also states that the BFST agreement which bears the original signatures does not identify Bronner as a beneficiary and that none of the copies of the BFST produced in discovery identifies her as a beneficiary. Gleicher as drafter of the trust avers, as does Levy, as grantor, that Bronner was never intended to be a beneficiary of this trust, which Levy explained was to be "a very specific trust . . . . a generation-skipping trust, something like that. . . ." Gleicher finally relies on two documents he prepared, one in January and the other in October of 1994, that provided an overview of the numerous trusts created by or benefiting the Bronner family (as of October of 1994, there were 19 such trusts). These documents indicate that, as per the trust agreement, the beneficiaries of the BFST are the "descendants of Jacob, Israel and Ruth Bronner."

Gleicher concedes that the BFST agreement maintained in his binder "mistakenly contains two versions of Page 2." His "best recollection as to why this occurred" relates to the differences between the two versions. Certain additions appear in one of the versions of Page 2 that do not

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[21]As the mother of at least one infant who Gleicher claims is a beneficiary of the BFST, Bronner may have been able to petition for an account from Gleicher on behalf of her child (*see Matter of Wahistrom-Johnson*, NYLJ, Dec. 8, 2006, at 26, col 1[Sur Ct, New York County]), but she has not sought that relief. She only petitions here on the basis that she, herself, is a beneficiary with standing to compel one.

appear in the other. None of these additions, Gleicher is correct, "affects the identity of the beneficiaries of the Trust, and neither lists [Bronner] as a beneficiary."

The same explanation is provided by Gleicher concerning a "mistake" in Schedule A to the BFST, which states that it is "f/b/o [for the benefit of] the descendants of Jacob Bronner, Marie Bronner, and Zwi Levy." He states that Schedule A should have indicated that it was "f/b/o the descendants of Israel Bronner, Jacob Bronner, and Ruth Bronner, consistent with Section 2.1" of the trust instrument. Although clearly erroneous, Gleicher stresses, this statement does not identify Bronner as a possible beneficiary.

In the face of this evidence and these explanations, Bronner proffers that, "The trust deed that I most suspect in being recently altered retroactively is the [BFST] for the very reason of the potential risk it presents (due to the trustee's declaration of the trust's being open) in turning into an instrument for my discovery and eventual distribution on my behalf of the assets in my share of the business partnerships and parents' inheritance."[22] In addition to the suspicion raised by the existence of two "page 2's" and the "mistake" in Schedule A, Bronner relies on four pieces of evidence to achieve her goal of raising a question of fact as to her status as beneficiary: first, Jerome Caulfield's and Aryeh Victor's statements that Bronner was a beneficiary of the BFST; second, that Gleicher's typed summary of the BFST[23] maintained in Schertz's files may have the handwritten word "changed" on it; third, that Bronner's forensic document examiner has opined

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[22]Bronner also argues in her affidavit that the RB Trust, for which Zolty serves as trustee, was improperly "backdated sometime in 2006" to appear that it was created by her paternal grandmother in 1975. The truth of this assertion is not relevant to the issues in these motions, but it is noted because it apparently led to Bronner's suspicions that the BFST instrument was altered.

[23]While this document purports to provide overviews of all the trusts, it was redacted to provide only the synopsis of the BFST.

that the first page of the BFST instrument is in a different font size than the rest of the document, disagreeing with the trustee's expert on this point; and fourth, that the "metadata" regarding the BFST electronic text file turned over by the trustee in discovery indicates that the document may have been altered after the date of its execution.[24]

Gleicher undermines the strength of most of Bronner's allegations in emphasizing that most of the evidence on which Bronner relies does not mention or even suggest her status as a beneficiary. The expert document examiners, for example, disagree only about the font size of the page one of the document, not whether the instrument has been tampered with to exclude Bronner as a beneficiary. The other evidence of tampering, such as unstapling and stray words stating "changed" without any other indication of their meaning may not alone be sufficient to raise a question as to whether Bronner is a beneficiary (*see Matter of Sweetland*, 273 AD2d 739 [3d Dept 2000]; *Matter of Feinberg*, 37 Misc 3d 1206(A); 961 NYS2d 360 [Sur Ct, Queens County 2012]).

This may likewise be the situation regarding the metadata on which Bronner purports to rely. The trustee provided a thumb drive of an electronically stored document to Bronner's counsel stating that the "metadata for the document on the enclosed thumb drive does not reflect the original metadata for this document, as such original metadata no longer exists." Nonetheless, Bronner's counsel states that the metadata for what he describes as "a fake page 1 and page 2"

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[24]A possible fifth was mentioned by Bronner: that the BFST was copied from or was to be essentially identical to another trust known as the Bronner Family Trust (also known as the B Family International Trust), which included Bronner as a beneficiary. This argument was not made in the petitioner's memorandum of law and appears to have been waived. In any event, it is meritless. Gleicher provides the B Family International Trust instrument, for which a British Virgin Islands trust company, the Trident Trust Company (BVI), Ltd., serves as trustee. Although this trust benefits Bronner, the trust instrument shows that it was "made" on June 30, 1995, more than a year and a half after the BFST was established in December of 1993, thereby negating Bronner's claims that the BFST was designed to mimic that trust, which was not then in existence.

produced by Gleicher has not been lost and, as proof, he provides a printout of a screen shot of the screen in which the metadata "of the thumb drive" appears indicating: "Date Modified: 5/16/1995 5:52 P.M." Gleicher counters that this is not the correct metadata, since even its "date of creation" shows a date of November 30, 2007, corresponding to the date the law firm changed its document management system. And in any event, even if the document was modified or the metadata corrupted, such circumstances do not provide a basis for inferring that Bronner was a BFST beneficiary.

More relevant to that question, however, are the statements by Caulfield and Victor that Bronner was a beneficiary of the BFST. Gleicher argues that both have "confirmed that their statements were in error," but that is not precisely correct regarding Caulfield. His affirmation explains that his statement was based on information he received from Gleicher, not that his statement was in error. Gleicher's affirmation makes very clear that Bronner was never intended to be and is not a beneficiary of the BFST, but nowhere in it does Gleicher deny that he told Caulfield that she was or explain that he mistakenly did so.

With respect to the change in Victor's deposition statement, a deponent is permitted to correct testimony within 60 days of the day the transcript is provided to him for examination (CPLR 3116[a]). Here, Victor changed his answer from "yes" or "it is my understanding" to "I don't know" regarding Bronner's being a beneficiary of the BFST with the explanation "clarify response; recollection of events."[25] Victor's affidavit is support of Gleicher's motion, explains that he "had no actual knowledge as to who the beneficiaries of that Trust were at the time of [his] testimony." As noted, Victor further indicates that his assumption at the time that Bronner was a

[25]Bronner does not claim lack of compliance with CPLR 3116(a).

beneficiary of this trust was incorrect. Appellate authority is clear, however, that a significant conflict between deposition testimony and a subsequent errata sheet on a material fact tends to create a credibility issue precluding summary judgment (*Natalie v Woodcock*, 35 AD3d 1128 [3d Dept 2006]; *Binh v Bagland*, 286 AD2d 613 [1st Dept 2001]; *see also Ashford v Tannenhauser*, 108 AD3d 735 [2d Dept 2013]).[26]

On balance, Bronner's evidence, taken together, is sufficient to create a doubt on the question of Bronner's status as a beneficiary of the BFST, and, in light of which, summary judgment is not a proper remedy (*Herrin v Airborne Freight Corp.*, 301 AD2d 500 [2d Dept. 2003]; *Flower v Noonan*, 271 AD2d 825 [3d Dept 2000]).

CONCLUSION

Accordingly, petitioner Ruth Bronner's motion for summary judgment is denied. Respondent Warren Gleicher's cross-motion to dismiss Bronner's claims of fraud is granted in part and denied in part. Finally, Gleicher's motion for summary judgment dismissing Bronner's petition to compel an accounting for the Bronner Family Sprinkling Trust is denied.

This decision constitutes the order of the court.

Dated: January 15, 2016

SURROGATE

[26]The case on which Gleicher relies for the proposition that Bronner has waived the ability to challenge the statements in Victor's errata sheet corrections, *Rivera v City of New York* (6 Misc 3d 829 [Sur Ct, Bronx County 2004), does not stand for such a principle. There, the errata statement was filed late, and the court ruled that the opposing party waived its right to challenge the lateness after waiting three years. That is not the case here.