

<b>Matter of Rotondi v Rotondi</b>
2019 NY Slip Op 30825(U)
March 25, 2019
Supreme Court, Kings County
Docket Number: 518114/17
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>th</sup> day of March, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X

IN THE MATTER OF THE APPLICATION OF FRANK ROTONDI,

Index No. 518114/17

*Petitioner,*

- against -

DECISION AND ORDER

NICHOLAS ROTONDI, AS TRUSTEE OF THE ROTONDI FAMILY IRREVOCABLE TRUST,

MOTION SEQUENCE #3

*Respondent.*

-----X

The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavit (Affirmation) \_\_\_\_\_  
Exhibits A & B \_\_\_\_\_

\_\_\_\_\_  
1/2  
\_\_\_\_\_  
3  
\_\_\_\_\_  
4

Upon a review of the foregoing papers and oral argument the Court finds as follows:

Petitioner Frank Rotondi (hereinafter "Petitioner" or "Frank") moves this Court for an Order:

- 1) Compelling an accounting in relation to the subject trust pursuant to SCPA §§2205 and 2206; and
- 2) Setting the matter down for a conference pursuant to SCPA §§711, 719 and 2102, once an accounting is filed.

### ***Background***

Frank, Nicholas (hereinafter “Nick” or “Respondent”) and Paul Rotondi are apparently brothers whose parents are Joseph and Angela Rotondi. Nick is the Trustee and a residuary beneficiary of the Rotondi Family Irrevocable Trust, dated July 10, 2015 (Rotondi Family Trust), which was established by Joseph and Angela Rotondi as “grantors” (amended petition at ¶ 2). Frank is a residuary beneficiary of the Rotondi Family Trust and Paul is a residuary beneficiary and the Successor Trustee of the Rotondi Family Trust (*id.* at ¶¶ 6 and 11).

### ***This Special Proceeding***

Frank commenced this special proceeding, pursuant to CPLR 7701, against Nick, as Trustee of the Rotondi Family Trust, seeking an order: (1) compelling an accounting, pursuant to SCPA §§ 2205 and 2206; (2) removing and disqualifying Nick as Trustee, pursuant to SCPA §§ 711 and 719; (3) appointing Frank as Trustee or, alternatively, appointing an independent trustee; (4) directing Nick to return in excess of \$250,000 to the Rotondi Family Trust, pursuant to SCPA § 2102; and (5) awarding the Rotondi Family Trust damages, costs and legal fees (*id.* at ¶ 1). According to the amended petition:

“[i]n his role as Trustee, [Nick] has committed a variety of breaches of his fiduciary duties, including *inter alia*: (1) comingling trust assets with his own; (2) failing to supply an accounting despite repeated demands, and making it impossible to prepare a proper accounting by paying for trust services for more than \$250,000 in cash; (3) the inability to supply proof or receipts for purchases in excess of \$250,000; (4) withdrawing money from an irrevocable trust and returning it to the grantor[s]; (5) self-dealing, and it is believed upon information, conversion of certain trust assets; and (6) performing an improper distribution” (*id.* at ¶ 3).

By Decision and Order of this Court dated July 25, 2018 in relation to a motion by Nick pursuant to CPLR 3211(a)(1) and (a)(7) this Court held that paragraphs 9, 23 and 26 of the Amended

Petition were dismissed (the “Prior Decision”). In the Prior Decision the Court discussed the prior history of the proceeding. The Prior Decision provided that;

*... on or about April 10, 2017, in response to Frank’s two demands for an accounting, Nick allegedly provided Frank with “an Excel spreadsheet that listed a variety of charges to the [Rotondi Family Trust], and contained roughly 500 pages of receipts and bank statements” (First Accounting) (id. at ¶ 15). The amended petition alleges that:*

*“[u]pon review of this [First Accounting], it became apparent that: 1) [Nick] had made multiple, substantial withdrawals of cash from the trust, totaling over \$230,000; 2) that almost \$85,000 of the trust’s money was spent to pay his personal credit cards; 3) that his Excel spreadsheet – which contained multiple entries that were not associated with any receipts – left hundreds of thousands of dollars unaccounted for; and 4) that the trustee spent or gave money to the grantors of the irrevocable trust” (id. at ¶ 16).*

*Allegedly, on July 7, 2017, Nick “via an accountant he engaged to assist him, made a second production” to Frank (Second Accounting) (id. at ¶ 17). The amended petition alleges that:*

*“[u]pon review of [the Second Accounting], it has become apparent that: [1]) the trustee has spent over \$470,000 allegedly remodeling a house occupied by the [grantors]; 2) there are no receipts at all for roughly \$250,000 worth of purchases in connection with this remodeling; 3) the trustee spent money on and transferred money to the grantors of the irrevocable trust; 4) it was confirmed that roughly \$270,000 was held in cash by the trustee; and 5) the tabulations performed did not correctly reflect the receipts supplied” (id. at ¶ 18).*

*The amended petition further alleges that “[p]ursuant to Section 3 (A) of the trust, JOSEPH and ANGELA ROTONDI were income beneficiaries, and under no circumstances could the Trustee invade or distribute principal for the[ir] benefit . . .” and “[Nick] invaded principal of the Rotondi Family Trust and distributed it to the grantor[s], in direct violation of Section 3, Subsection A, which provides ‘this Trust is*

irrevocable and JOSEPH AND ANGELA ROTONDI have no right to the corpus of the trust.” (id. at ¶¶ 9 and 23).

### **The Rotondi Family Trust**

Section 3 (A) of the Rotondi Family Trust actually provides that:

“[t]he Trustee shall apply and distribute so much of the income of the Trust to the lifetime beneficiaries, **JOSEPH ROTONDI AND ANGELA ROTONDI** (also referred to herein as the ‘lifetime’ or ‘income’ beneficiaries), as the Trustee, in his or her absolute discretion, determines to be advisable to provide supplemental benefits (as defined herein) for their support, comfort, and happiness and for their funeral expenses, except as provided below. The Trustee shall be prohibited from making any distribution to any governmental entity to replace or reimburse or supplant any public assistance benefit of any county, state, federal, or other governmental agency which has a legal responsibility to serve the lifetime beneficiary. The Trustee shall preserve to the maximum extent possible in order to insure the lifelong supplemental care and support of the lifetime beneficiaries and to provide the lifetime beneficiary a source from which their needs [m]ay be met to the extent that they are not adequately provided for, in the sole and absolute discretion of the Trustee, by governmental or charitable agencies or organizations. For the purposes of this Trust, **JOSEPH ROTONDI AND ANGELA ROTONDI** shall be considered lifetime beneficiaries. This Trust is irrevocable and **JOSEPH ROTONDI AND ANGELA ROTONDI** have no right to the corpus of the Trust, except as lifetime beneficiaries holding a ‘life’ interest in the corpus deposited hereunder” (emphasis added).

Section 3 (B) of the Rotondi Family Trust further provides, in relevant part:

“[u]ntil the death of the lifetime beneficiaries, **JOSEPH ROTONDI AND ANGELA ROTONDI**, the Trustees, at any time or at times that they deem it advisable, [m]ay pay or apply to or for the benefit of the lifetime beneficiaries, so much, all or none, of the net income and/or such sum or sums out of the principal of the trust, as the Trustee, in his or her absolute discretion, shall deem to be in the best interest of the lifetime beneficiary. . . .”

The Court held that:

... Specifically, Section 3 (A) of the Rotondi Family Trust provides, in part, that the Trustee “shall apply and distribute so much of the income of the Trust to the lifetime beneficiaries . . . to provide supplemental benefits . . . for their support, comfort, and happiness” “in the sole and absolute discretion of the Trustee.” Similarly, Section 3 (B) provides that trust income and principal may be used for the benefit of the lifetime beneficiaries, Joseph and Angela Rotondi, at any time that the Trustee “deem[s] it advisable.” These provisions of the Rotondi Family Trust disprove the allegations in paragraphs 9, 23 and 26 of the amended petition, all of which allege that Nick violated the Rotondi Family Trust by distributing principal to the grantors, Joseph and Angela Rotondi, without justification. Consequently, these particular allegations in the amended petition are subject to dismissal.

Otherwise, the amended petition adequately pleads that Nick breached his fiduciary duties under the Rotondi Family Trust by allegedly comingling trust assets with his own, failing to provide an adequate accounting, failing to provide receipts for cash purchases using trust principal and self-dealing by using his own credit card for trust-related purchases. Nick’s dismissal motion fails to challenge the adequacy of Frank’s pleadings and, instead, seeks to disprove the allegations with affidavit testimony and other exhibits/documents that cannot be considered on a pre-answer dismissal motion before the parties engaged in any discovery. Discovery, however, is warranted regarding the trust income and principal that Nick applied to the renovation of Joseph and Angela Rotondi’s Staten Island residence.

The Petitioner, by affirmation of good faith by its counsel, represents that both before and after the Prior Decision, the Petitioner sought an accounting and discovery from the Respondent and that the Respondent has not complied with these requests. Petitioner contends that Respondent’s alleged failure to comply necessitated the instant application.

Respondent opposes the motion and contends that he has acted in good faith, has provided an accounting, and that accordingly, Petitioner is not entitled to one. The parties have provided, and have agreed, that the documentation previously provided to the Petitioner from Respondent be made part of this motion. (Exhibits "A" and "B").

### The Accounting

Based upon the papers before this Court the Court finds that an accounting is in Order. Respondent contends that an accounting has already been provided, however a review of the documentation as provided in Exhibits A and B reflects that these documents, even taken together do not meet the general requirements of a Trust Accounting. For example, the material documentation (Exhibits A and B), purportedly in support of the narrative provided by Shaun A. Roberts, does not refer to schedules and/or page numbers reflecting same. Respondent provides an unsworn narrative from Mr. Roberts and a series of documents without any specified correlation. Moreover, there is an admitted sum of cash withdrawals without explanation. Mr. Roberts himself states that "[t]he trustee would need to account for his expenditures prior to any reimbursement from the Trust."

Clearly this Court has concurrent jurisdiction with the Surrogates Court, and "...as a general rule, in courts of a particular subject matter the court first assuming jurisdiction should retain the action." *Gaentner v. Benkovich*, 18 A.D.3d 424, 425, 795 N.Y.S.2d 246, 248 [2<sup>nd</sup> Dept, 2005], quoting *Burmax Co. v. B & S Indus., Inc.*, 135 A.D.2d 599, 599, 522 N.Y.S.2d 177, 178 [2<sup>nd</sup> Dept, 1987]. In any event there has been no application for a transfer.

In furtherance thereof, it is clear that an application under §§2205 and 2206 may be maintained, and the Petitioner is a "person in interest," as intended in §2205(2)(b) and defined in SCPA §103(39). In addition, the statement by Mr. Roberts is not sworn. See also SCPA §2209.

Additionally, this proceeding was commenced pursuant to Article 77 of the CPLR. As such the Court is given broad discretion and authority within the context of the subject matter of this

proceeding. See *Chiantella v. Vishnick*, 84 A.D.3d 797, 797, 922 N.Y.S.2d 525, 526 [2<sup>nd</sup> Dept, 2011]; *Gouiran v. Gouiran*, 263 A.D.2d 393, 693 N.Y.S.2d 127 [1<sup>st</sup> Dept 1999]. Moreover, discovery which otherwise would be subject to Court approval in most special proceedings, is permitted in a CPLR Article 77 proceeding, pursuant to CPLR Article 31. See CPLR §408.

Accordingly, the Petitioner's motion is granted to the extent that:

Respondent is hereby ORDERED:

- 1) to account to this Court (with a copy to Petitioner), in accordance herewith, within forty five (45) days, of service of a copy of this Decision and Order, for all of the Trust property or effects which have been received and distributed by him from the date of the creation of the Trust to the date of such accounting; and
- 2) to turn over to Petitioner, within thirty (30) days of service of a copy of this Decision and Order, all records in his possession relating to the Trust or its assets for the aforementioned period; and
- 3) to give testimony under oath, at an examination before trial on or before June 14, 2019, concerning the accounting, nature and value of the Trust corpus, any income he received, any disbursements, distributions and/or payments he made.

The parties shall appear for a status conference in this matter on June 19, 2019 at 9:30 am.

This constitutes the Decision and Order of this Court.

ENTER:

  
 Carl J. Landicino  
 J.S.C.

2019 APR -1 AM 9:19  
 KINGS COUNTY CLERK  
 [Handwritten initials]