

Matter of Aoki
2020 NY Slip Op 30780(U)
March 11, 2020
Surrogate's Court, New York County
Docket Number: 2008-2604/H/I
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
DATA ENTRY DEPT.
MAR 11 2020
DECISION and ORDER

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In the Matter of the Application of Devon Aoki and Steven
Aoki as Beneficiaries of the Trust Created under Article VIII
of the Will of

ROCKY H. AOKI, also known as
Hiroaki Aoki,
Deceased,

File No.: 2008-2604/H/I

to Revoke the Letters of Trusteeship Issued to Keiko Ono
Aoki as Trustee of the Trust.

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M E L L A, S.:

At the call of the calendar on February 11, 2020, the court suspended the letters of trusteeship issued to Keiko Ono Aoki for a trust created under the will of decedent Rocky Aoki and scheduled a full evidentiary hearing on the revocation of her letters for July 14, 2020. In the exercise of discretion, after reviewing her answer, affidavit, and submissions, and hearing counsel's arguments in opposition, the court determined that the circumstances here warranted her immediate suspension, pending a hearing (*see* SCPA 712, 713; *Matter of Hurley*, NYLJ, June 27, 2011, at 23, col 4 [Sur Ct, NY County]; *Matter of Kaufman*, 137 AD3d 1035 [2d Dept 2016]; *see also Matter of Chase*, 44 AD3d 1180 [3d Dept 2007]; *Matter of Rose BB*, 300 AD2d 868 [3d Dept 2002]; *Matter of Duell*, 258 AD2d 382 [1st Dept 1999]; *Matter of Hargrow*, 16 Misc 3d 1117[A], 2007 NY Slip Op 51450[U] [Sur Ct, Bronx County 2007]).

Petitioners Devon and Steven Aoki, each receiving 50% of the trust remainder upon reaching the age of 45, have provided substantial evidence of probable waste and mismanagement of trust assets by the trustee (*see* SCPA 711[2] & [8]; *Matter of Duke*, 87 NY2d 465, 473-473 [1996]). That evidence includes proof of Ms. Aoki's mismanagement as well as disregard for her duties as trustee in causing Benihana of Tokyo (BOT), a wholly owned trust

asset, to litigate against Benihana, Inc. (BI), and the eventual loss of BOT's license to operate a Benihana restaurant in Hawaii. The concededly valuable license¹ was for the running of the only restaurant in the Benihana franchise that the trust retained in the United States. Ms. Aoki's conduct in this regard has been the subject of fact-finding on the record by United States District Court Judge Paul Engelmayer in several of his decisions, and by the members of the arbitration panels that determined the disputes between BOT and Benihana, Inc. (*see Matter of Marsh*, 173 AD2d 336 [1st Dept 1991]).² This court's determination to suspend Ms. Aoki's authority was made in view of those findings, which describe conduct on the part of Ms. Aoki inconsistent with that expected of a fiduciary (*see Matter of Wohl*, 36 NYS2d 926 [Sur Ct, NY County 1942]). Such conduct included her failure to abide by directions of a court. Although a testator's choice

¹The trustee in opposition argues that the loss of the license was not significant, but such a position is undermined by her concession that \$4.3 million of trust assets has been paid to BOT's attorneys in defending against its loss. This figure for BOT's own attorneys fees is in addition to upwards of the several million dollars in attorneys fees incurred by BI and imposed against the trust or her individually. It is noted that, in the separate but related testamentary trust accounting pending before this court, the trustee charges herself with \$33.9 million in assets.

²The entire, lengthy arbitration and litigation history in multiple states will not be recounted here. However, as an example, Judge Engelmayer stated the following in determining that the trustee was acting in bad faith, "[T]he record makes clear that BOT engaged in and then defended indefensible conduct to advance an ulterior motive. . . . [involving] Ms. Aoki's express strategy to bring suits 'whether there was merit' to them or not as part of 'her overall strategy . . . to force BI to expend large counsel fees contesting her unreasonable actions in courts in New York, Delaware, and Hawaii, so that they might entertain discussions to have BOT purchase the assets of BI'" (*Benihana of Tokyo, LLC v Benihana, Inc.*, 14 CIV 224 (PAE), 2018 WL 3574864, at *9-10 [SDNY July 25, 2018], *aff'd* 771 Fed Appx 71 [2d Cir 2019])[the district court also noting egregious violations of governing agreements by Ms. Aoki, as C.E.O. of BOT, and a proceeding involving breaches of the injunction governing practices at the Hawaii restaurant that an arbitral panel put in place and which the federal district court confirmed and which resulted in a finding of contempt]). In another example, Judge Engelmayer held: "[Ms. Aoki's] actions, or more precisely her long record of inaction, bespeaks an implicit attitude that she and BOT were free to disregard these contractual, and legal, and eventually injunctive formalities" (SDNY, Engelmayer, D.J., June 6, 2017, Tr at 412, lns 18-21 [Ex. K to Removal Petition]).

of trustee should be disturbed by a court only sparingly, in this case petitioners' submissions sufficiently substantiate the existence of misconduct jeopardizing the trust estate (*see Matter of Duke*, 87 NY2d at 472).

Because Rocky Aoki's will gives the power to Keiko Aoki to designate her successor fiduciary, the court directed Ms. Aoki to designate — by an instrument filed with the court — a person or entity to act as successor interim trustee during the period of her suspension. In light of the seriousness of petitioners' allegations and the suspension of the trustee's powers, the court must be assured that a successor trustee to whom it issues letters of trusteeship, even on an interim basis, is "properly qualified to perform the duties required" (*Matter of Hayden*, 141 Misc 644, 645 [Sur Ct, Jefferson County 1931]; *Matter of Singer*, 12 Misc 3d 621, 626 [Sur Ct, NY County 2006]; *see also Matter of Hall*, 275 AD2d 979 [4th Dept 2000]; *Matter of Zerega*, 81 Misc 113, 123-24 [Sur Ct, NY County 1913]). To ensure such successor's qualifications in this context, the court invited petitioners' input on the fitness and qualifications of Ms. Aoki's proposed successor (*cf. Matter of Barenholtz*, 201 AD2d 305 [1st Dept 1994]).

However, to the extent that such input might raise a question as to the interpretation of the no-contest clause of decedent's will, the court determined, on its own initiative, as in an application for a will construction (EPTL 3-3.5[b][3][E]), that petitioners' input will not trigger the will's no-contest clause (*see Matter of Prevratil*, 121 AD3d 137 [3d Dept 2014]). This court already determined in a prior proceeding that a beneficiary's challenges to the trustee's acts in administering the trust do not violate the no-contest clause of decedent's will (*Matter of Aoki*, NYLJ, April 17, 2019, at 22, col 4 [Sur Ct, NY County]).

Accordingly, the letters of trusteeship issued by the court to Keiko Ono Aoki under the

will of decedent Rocky Aoki are suspended, and she is without power over the trust assets, pending a hearing, currently scheduled for July 14, 2020, at which time all issues raised by the pleadings may be addressed. Ms. Aoki shall, by instrument filed and served no later than February 18, 2020, designate a successor trustee, to which petitioners may respond no later than February 26, 2020; a succinct reply, if any, by Ms. Aoki shall be filed and served no later than March 4, 2020, and the matter is scheduled to be called at 3:30 p.m. on March 12, 2020. A separate, pre-hearing order may also be entered.

This decision, together with the transcript of the February 11, 2020 proceedings, constitutes the order of the court.

Dated: March 11, 2020



SURROGATE