

<b>Matter of Hoppenstein</b>
2021 NY Slip Op 32004(U)
August 10, 2021
Surrogate's Court, New York County
Docket Number: 2015-2918/F
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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 In the Matter of the Accounting by the Trustee of the Trust  
 dated October 10, 2005, created by

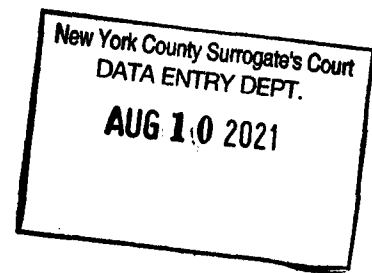
REUBEN HOPPENSTEIN,

Grantor.

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 M E L L A, S. :

The following papers were considered in determining these motions for protective orders and sanctions:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Ross Katz, Esq., for a Protective Order and Sanctions, dated April 8, 2021	1
Affirmation of Ross Katz, Esq., in support of Motion for a Protective Order and Sanctions, dated April 8, 2021, with Exhibits A to H	2
Memorandum of Law in Support of Motion for a Protective Order and Sanctions, dated April 8, 2021	3
Amended Notice of [Cross-] Motion by Jason J. Smith, Esq., for a Protective Order and Sanctions, dated April 10, 2021	4
Amended Affirmation of Jason J. Smith, Esq., in support of Cross-Motion for a Protective Order and Sanctions, dated April 10, 2021, with Exhibits A to L	5
Amended Memorandum of Law in support of Cross-Motion for a Protective Order and Sanctions, dated April 10, 2021	6
Affirmation of Andrew LaBella, Esq., in Opposition to Motions for Protective Orders and Sanctions, dated April 30, 2021, With Exhibits 1 to 39	7
Memorandum of Law in Opposition to Motions for Protective Orders and Sanctions, dated April 30, 2021	8
Affirmation of Jason J. Smith, Esq., in further support of [Cross-] Motion	



DECISION and ORDER  
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for a Protective Order and Sanctions, dated May 7, 2021	9
Reply Memorandum of Law in Further Support of [Cross-] Motion for a Protective Order and Sanctions, dated May 7, 2021	10
Memorandum of Law in Further Support of Motion for a Protective Order and Sanctions, dated May 7, 2021	11

This is a contested proceeding to settle the account of the trustee of the inter vivos trust known as the Reuben Hoppenstein 2005 Trust (the 2005 Trust, or Trust). The objectants are Cheryl Hoppenstein and her five children, who were discretionary income and principal beneficiaries of the Trust. Cheryl is one of four children of Reuben Hoppenstein, the now deceased grantor. Among other objections, Cheryl and her children allege that in July 2008 the trustee impermissibly and imprudently loaned \$985,890 from the 2005 Trust to himself, as trustee of a different trust. The loan became uncollectible and worthless.

Objectants have served requests for Discovery and Inspection on Charles Hoppenstein and Ava Hoppenstein Shore, the trustees of three trusts that succeeded to the assets of the 2005 Trust under circumstances described below. Objectants served identical disclosure requests on Joel Hoppenstein, who was substituted in this proceeding for the original trustee of the 2005 Trust, Abraham Hoppenstein, as personal representative of Abraham's estate, after Abraham's death in October 2019. Charles, Ava, and Joel move here for protective orders (CPLR 3103) and for sanctions.<sup>1</sup>

During the relevant period, the Trust agreement authorized the trustee to "distribute all or any part of the Trust Principal and the net income of such trust received during the Grantor's lifetime to such one or more of the Grantor's descendants living on the date of such distribution,

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<sup>1</sup> Two motions are before the court, one filed by Joel and the other filed by Charles and Ava.

and in such shares or proportions, as the Trustees may determine. . . .” Relying on this Trust provision and decanting as authorized by EPTL 10-6.6, the trustee – who was the brother of the grantor –distributed all of the Trust assets in 2011 to three new trusts created by the grantor in the same year. The new trusts were for the benefit, respectively, of each of Cheryl’s three siblings, Charles, Ava, and Tivia, and their respective descendants, to the exclusion of Cheryl and her five children. The trustees of the 2011 trusts were Charles and Ava, who subsequently transferred all the assets in the 2011 trusts to three similar trusts that the grantor created in 2013, also with Charles and Ava as trustees and also excluding Cheryl and her children as beneficiaries.

As successors to the assets in the 2005 Trust, trustees Charles and Ava moved in April 2019 for summary judgment dismissing the objections of Cheryl and her children, on the ground that objectants had no standing because the 2011 transfers had eliminated their interest in the 2005 Trust. The court denied the motion for summary judgment in its July 29, 2019 decision, noting that there were triable issues of fact as to whether the 2011 transfers were made in violation of the trustee’s duty of impartiality to the beneficiaries, or for an improper motive. The court held that objectants had standing to argue in favor of their standing. It further directed objectants to amend discovery demands they had previously served, and to limit the amended demands to the issue of the bona fides of the 2011 transfers.

Objectants nevertheless served extensive new discovery demands on Charles, Ava, and Abraham, the original trustee, that exceeded the scope of the discovery contemplated by the court’s ruling. In a decision dated November 20, 2019, and affirmed on appeal (*Hoppenstein v Shore*, 187 AD3d 469 [1st Dept 2020]), the court denied objectants’ motion to compel

compliance with their new deposition and document demands and granted the cross-motions of Charles, Ava, and Abraham to the extent they sought protective orders.

Objectants, however, here again asked for broad discovery that violates the court's previous orders. They have continued to make extensive and burdensome demands for documents such as operating agreements, ownership agreements, and reorganization agreements for entities with only indirect connections to the Trust assets. In their papers on the present motion, objectants fail to explain how the documents they demand might shed light on facts that are probative of the trustee's motive. Objectants make the conclusory statement that the purpose of the 2011 transfers was to shield the trustee from potential objection from Cheryl, but they do not explain how the documents they seek might lead to evidence supporting their allegation. Their conduct requires the court to rule for the third time on virtually the same issues.

The Appellate Division has clearly approved the authority of this court to limit the scope of discovery as it has done. The 2020 opinion states:

“The [Surrogate's] court providently exercised its discretion in limiting discovery. In the event the transfer is found to be valid, information concerning the assets of the 2005 trust and of the recipient trusts is not material and necessary. If the transfer is set aside, the court may revisit the issue of the proper scope of discovery.” (*id.* at 470 [internal citations omitted]).

Only one of objectants' current demands is for information about the trustee's motive for the 2011 transfers. The court denies the request for a protective order against that demand, Number (17) in all three Requests for Discovery and Inspection dated March 19, 2021. The motion is granted with respect to the balance of the demands, *i.e.*, those numbered (1) to (16) and (18) in all three Requests, and they are stricken.

The Rules of the Chief Administrative Judge allow the court in its discretion to award costs in the form of reasonable attorney fees resulting from frivolous conduct, defined to include conduct that “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.” In determining whether conduct is frivolous, the court may take into consideration “whether or not the conduct was continued when its lack of legal . . . basis was apparent, should have been apparent, or was brought to the attention of counsel . . . .” 22 NYCRR 130-1.1 (a), (c)(1), (c)(3). In view of the repeated repudiation by objectants’ counsel of the court’s orders, including his request for documents that in some instances were duplicative of documents for which the court previously granted a protective order, the request for sanctions is granted in an amount to be determined in light of further submissions. Counsel for movants Ava Hoppenstein Shore and Charles Hoppenstein and counsel for movant Joel Hoppenstein are directed to submit a proposed order for sanctions in respect of attorney fees related to these motions, with notice of settlement, supported by an affidavit of legal services. The decision as to the amount of sanctions is held in abeyance pending such submission and notice.

This decision constitutes the order of the court as to the branch of each of the motions for a protective order.

Dated: August 10, 2021

  
SURROGATE