

Matter of Aoki
2022 NY Slip Op 31938(U)
May 10, 2022
Surrogate's Court, New York County
Docket Number: File No. 2008-2604/H & /I
Judge: Rita 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 Application of Devon Aoki and Steven
Aoki as Beneficiaries of the Trust Created under
Article VIII of the Will of

DECISION and ORDER

ROCKY H. AOKI, also known as
Hiroaki Aoki,

File No.: 2008-2604/H & /I

Deceased,

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.:

The following papers were considered in the determining Petitioners' summary judgment motion as well as discovery motions by Respondent and Petitioners:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, dated September 17, 2021, for Summary Judgment, With Affirmation, dated September 17, 2021, of David C. Rose, Esq., Attaching Exhibits 1 through 56	1, 2
Memorandum of Law in Support of Motion	3
Affirmation, dated November 12, 2021, of Jordan Pietzsch, Esq., In Opposition to Motion, Attaching Exhibits 1 through 16	4
Affidavit, dated November 12, 2021, of Keiko Ono Aoki in Opposition, Attaching Exhibits 1 through 18	5
Respondents' Memorandum of Law in Opposition	6
Reply Affirmation, dated December 22, 2021, of David C. Rose, Esq., Attaching Exhibits 56 through 73	7
Reply Affirmation, dated December 22, 2021, of Andrew Goldsmith, Esq., in Support of Motion	8
Petitioners' Reply Memorandum of Law	9
Notice of Motion, dated August 20, 2021, to Compel Discovery, With Affirmation, dated August 20, 2021, of Vincent Levy, Esq., Attaching Exhibits A through W	1,2
Memorandum of Law in Support of Motion to Compel	3
Notice of Cross-Motion, dated September 17, 2021, for a Protective Order, With Affirmation, September 17, 2021, in Support of David C. Rose, Esq., Attaching Exhibits 1 through 15	4,5

Affirmation, dated September 17, 2021, of Andrew M. Goldsmith, Esq., In Support of Cross-Motion	6
Petitioners' Memorandum of Law in Support of Cross-Motion <u>Papers (Con't)</u>	7 <u>Numbered</u>
Affidavit, dated September 3, 2021, of Devon Aoki in Support of Cross-Motion	8
Affidavit, dated September 3, 2021, of Steven Aoki in Support of Cross-Motion	9
Reply Affirmation, dated October 1, 2021, of Jordan Pietzsch, Esq., in Support of Motion to Compel	10
Respondent's Reply Memorandum of Law	11

Before the court on February 15, 2022, was the summary judgment motion of Petitioners Devon Aoki and Steven Aoki in this proceeding to remove Respondent Keiko Ono Aoki as Trustee of the Trust for Petitioners' benefit established under the will of decedent Rocky Aoki (*see* SCPA 711 [2], [3], [8], [10]; 712; 719 [10]). The motion was for an order directing removal without conducting a hearing. At the call of the calendar, the court denied the motion in favor of a hearing (*Matter of Duke*, 87 NY2d 465 [1996]; *Massey-Hughes v Massey*, 200 AD3d 1684 [4th Dept 2021]).¹

Relevant Background

On February 11, 2020, upon the return of process in the instant Petition, the court suspended the authority of Respondent to act as Trustee, and, in March 2020, appointed an interim Successor Trustee who has been serving since (*see* SCPA 712, 716).² A hearing on

1 As will be discussed below, discovery will need to be completed prior to the hearing.

2 Respondent argues that the court's decision to suspend the Trustee's letters instead of permanently revoking those letters upon the initial return of process is "law of the case" and that the court is bound by its own decision to conduct a hearing before it could direct revocation. This argument is meritless. A court's prior determination does not necessarily preclude a later motion for summary judgment based on an expanded record (*see Smith v Metropolitan Transp. Authority*, 226 AD2d 168, 168 [1st Dept 1996]). To hold otherwise in a removal proceeding in particular would unduly burden the court's ability to oversee fiduciaries to whom it has issued letters.

Respondent's permanent removal was scheduled several times and adjourned on consent of all parties due to the on-going COVID-19 pandemic and the need to complete certain discovery.

A prior discovery dispute had been brought before the court by motion since the initial court appearance (*Matter of Aoki*, NYLJ, July 7, 2021, at 18, col 2 [Sur Ct, NY County]). In the latest set of motions, Respondent sought to compel disclosure from Petitioners, on the one hand, and, in a cross-motion, Petitioners sought a protective order regarding the demands Respondent sought to enforce.³ These discovery motions were also resolved at the call of the February 15, 2022 calendar.

Petitioners' Summary Judgment Motion Seeking Immediate Removal

Movants established, through their motion papers and exhibits, a prima facie case for Respondent's summary removal, based on proof of, among other things, her loss—as the self-appointed Chief Executive Officer of Benihana of Tokyo, LLC (BOT), an entity wholly owned by the Trust—of a valuable license to operate a Benihana Japanese restaurant (the restaurant chain originally established by decedent) in Honolulu (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [proponent of summary judgment must make prima facie showing of entitlement to judgment as a matter of law]; *Genger v Genger*, 123 AD3d 445, 445-446 [1st Dept 2014]; *Matter of Joan Moran Trust*, 166 AD3d 1176, 1179 [3d Dept 2018] [petitioner for removal of trustee has burden of demonstrating that trustee violated or threatens to violate their trust or is otherwise unsuitable to execute trust]). Protracted litigation between BOT and Benihana, Inc.,⁴

³ Prior to those motions being scheduled to be heard by the court, Petitioners filed the instant summary judgment motion thus staying discovery automatically pursuant to CPLR 3214(b).

⁴ This entity, also known as “B.I.” in these proceedings, is not controlled by the decedent's Trust or other members of decedent's family but owns restaurants as well as certain licensing rights for the Benihana restaurant brand and trademark in the United States.

in the United States District Court for the Southern District of New York and arbitration proceedings involving the same parties had led to significant findings against BOT, including a determination that BOT, while led by Respondent, had breached the Benihana license, a judicial finding of contempt against BOT, the federal court's conclusion that BOT and Respondent had engaged in bad faith and, eventually, the loss by BOT of the license. This is all in addition to the imposition on BOT of significant attorneys fees incurred by Benihana, Inc., in the disputes with BOT as well as the expenditure of millions of dollars of trust assets to pay BOT's own legal fees.⁵ With no apparent necessity substantiating these multi-million dollar outflows from the Trust or the company which it controls, and the loss of the license to operate the restaurant, movants' evidence is sufficient to establish "waste" or "improperly applied . . . assets of the [trust] estate" to warrant removal (SCPA 711 [2]; see *Matter of Mergenhagen*, 50 AD3d 1486, 1488 [4th Dept 2008]; *Matter of Davidson*, NYLJ, Oct. 31, 2017 at 22, col 3 [Sur Ct, NY County]; cf. *Matter of McGillivray*, 138 NY 308 [1893]).

That, however, does not end the inquiry. In laying bare her proof, as she was required to do in opposition to this summary judgment motion (*Bank of N.Y. Mellon v Slavin*, 156 AD3d 1073, 1076 [3d Dept 2017]), Respondent has raised questions requiring a trial by explaining the circumstances and the basis of her management and litigation decisions. Specifically, she avers that her actions were taken in good faith and in furtherance of her duty to make the Trust assets

⁵ The facts of the loss of the Hawaii restaurant license, the defeats in the arbitrations and federal litigation and the imposition of attorney's fees are uncontroverted by Respondent in her Verified Answer, in which she either admits the facts or refers this court to the decisions issued by the arbitration panels or the courts. As such, these facts may be relied upon to establish a prima facie case.

productive (*see Matter of Hubbell*, 302 NY 246 [1951]).⁶ Respondent explains her belief, for instance, that certain “local adaptations were critical to [the Honolulu restaurant’s] success” which were consistent with the actions of BOT’s prior management. She avers that a private equity firm purchased B.I., and the firm “wanted the rights to the remaining international markets that BOT held.” After Respondent declined B.I.’s offer to sell BOT to B.I., she states that B.I. “began its campaign of strict enforcement of the License Agreement, and the License Agreement litigations began in 2013.” Further, “[she] never instructed any attorney to pursue litigation that [she] believed to be without merit.”

Despite Petitioners’ providing additional facts here, Respondent’s opposition demonstrates that the issues regarding her actions in management of the Honolulu restaurant as violative of the B.I. license, as well as her B.I. litigation strategies and whether they were in good faith and not improper self-dealing, are not resolvable on the papers summarily.⁷ They involve factual determinations that entitle Respondent to have her day in court (*see Matter of Wallens*, 9 NY3d 117 [2007] [matter remanded to Surrogate’s Court to conduct evidentiary hearing on trustee’s breach of fiduciary duty issue]; *Bon Temps Agency v Greenfield*, 212 AD2d 427 [1st Dept 1995]; *Matter of Kopple*, NYLJ, Dec. 9, 1983, at 19, col 1 [Sur Ct, Nassau County]).

Those are not the only acts upon which movants would ground removal. They also

⁶ Respondent maintains that, until the 2016 decision of the New York Court of Appeals in litigation in decedent’s estate, she believed in good faith that she was the beneficiary of the assets of the Trust that controlled that entity.

⁷ Not all breaches require removal (*Matter of Burkich*, 12 AD3d 766, 768 [3d Dept 2004]), and the court’s reference to “good faith and not improper self-dealing” merely seeks to embody the claims of the parties. This reference in no way limits the ability of Petitioners to prove at trial such significant failures under the statutory standard (EPTL 11-1.7 [a] [1] “to exercise reasonable care, diligence and prudence” to justify removal.

challenge as improper: (1) the sale of BOT's 75% interest in Benihana Holdings Pte., LTD (which owned rights to the Benihana trademark in certain countries outside of the United States) to an entity referred to herein as Minor International, which also included a right to purchase the remaining 25% at fair value if Respondent was removed as Trustee; (2) investment of Trust assets in entities referred to herein as "KOA" that owned or ran noodle restaurants, in which BOT and Respondent individually each owned 50%, but which proved unsuccessful and closed in 2016; and (3) use of Olympic Tower apartments in Manhattan or a Hudson Valley residence for personal or not proper BOT uses, in addition to using Trust assets improperly to pay for personal expenses at these locations.

Respondent, however, disputes all such assertions and defends her actions as proper. Regarding the sale to Minor, she asserts that it was properly vetted and the sale of 75% of the interest was significantly more than a prior offer for 100%. She further challenges movants' argument that the provision for the purchase of the remaining 25% interest upon her removal is a "poison pill" by maintaining that the Trust is protected regarding the price to be paid, which is fair value (*see Matter of Goldstick*, 177 AD2d 225, 237 [1st Dept 1992]). Although, as a general matter, launching a joint venture between the Trust and the Trustee individually could be sanctionable, the decedent's will authorized that Respondent as his Trustee "shall be free to exercise all [her] powers as Executors or Trustees without restriction by reason of any interest [she] may personally have in any such organization."⁸ Movants have not shown that her

⁸ This court had occasion to examine this will provision in its prior decision determining that Petitioners' challenges to Respondent's acts as Trustee would not trigger the will's no contest clause (*Matter of Aoki*, 2019 NY Slip Op 30973[U] [Sur Ct, NY County, April 12, 2019]). That decision also resolved Petitioners' challenge to the enforceability of the "Business Act Immunity Clause," as the parties have referred to this provision previously, determining that it was not void and could permit Respondent's administration of and personal involvement with the Trust's

activities absolutely fell outside such authority, and Respondent in opposition claims the KOA noodle restaurant venture was a valid business strategy (*see O'Hayer v de St. Aubin*, 30 AD3d 419, 426-27 [2d Dept 1968]; *see also Magid v Sunrise Holdings Group, LLC*, 160 AD3d 941 [2d Dept 2018]).

Likewise, regarding the use of the Manhattan apartments and residence upstate, Respondent explains that they are used for proper Trust or BOT purposes and that Trust assets expended were not solely for her personal use. Thus controverted, these additional grounds are insufficient to nullify the testator's choice of fiduciary without a hearing (*Matter of Duke*, 87 NY2d at 473; *Matter of Reimels*, 20 Misc 3d 1118[A]; 2008 NY Slip Op 51396[U] [Sur Ct, Nassau County 2008]; *see Matter of Hubbell*, 302 NY at 258 ["Normally, the determination of whether the conduct of a trustee measures up to the appropriate standards of prudence, vigilance and care, is a fact to be found by the trial court"]). The "bona fides" of the challenged actions are properly assessed at a trial (*see Matter of Wallens*, 9 NY3d at 123; *Matter of Heller*, 6 NY3d 649 [2006]; *Lingke v Wilkerson*, 57 NY 445 [1874]; *cf. Everett v Phillips*, 288 NY 227 [1942]).

Movant's requested dismissal of Respondent's laches defense, however, the only defense pleaded in her answer, can be granted. The request was unopposed and thus the defense was abandoned (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). In any event, the defense is meritless. This removal proceeding was commenced the same year in which the court issued its decision confirming that challenges to the Trustee's acts administering the Trust and its assets did not trigger the will's no contest clause (*see Mergenhagen*, 50 AD3d at 1487; *Matter of D'Onofrio*, 97

assets.

Misc 2d 250 [Sur Ct, Bronx County 1978]; *Matter of Modell*, NYLJ, July 23, 2014, at 22, col. 3 [Sur Ct, NY County]).

Discovery Motions

Upon the denial of summary removal of the suspended Trustee, the court, on the record on February 15, 2022, also resolved the prior cross-motions regarding discovery. By order dated March 2, 2022, memorializing its ruling, the court directed that “Respondent Keiko Aoki’s demands for documents to Petitioners shall be reformulated and narrowed to correspond to the issues raised in the pleadings in this proceeding (*i.e.*, the particular acts of misconduct in which, according to the Petition, Keiko Aoki engaged and which warrant her removal and her denials of those allegations in her Verified Answer) and served promptly, but in any event, no later than March 16, 2022” (*see Matter of Hoppenstein*, 187 AD3d 469 [1st Dept 2020]). Other pretrial requirements and deadlines were established in the March 2, 2022 order, which was made in consultation with the parties.

The court further notes that Respondent, seeking to substantiate her good faith, has confirmed that she is relying on “advice of counsel” as a defense. Movants protest that it should have been pled as a defense under CPLR 3018(b) or be considered waived. That is not the whole picture because courts may allow advice of counsel to be asserted even though not formally pled based on the situation before it (*Nichols v Hack*, 96 AD3d 1608 [4th Dept 2012]; *Edwards v New York City Tr. Auth.*, 37 AD3d 1575 [1st Dept 2007]). Here, Petitioners cannot claim prejudice in that document discovery or any depositions have yet to conclude.⁹

⁹ Nor does it appear that Petitioners can claim surprise because the issue of whether Respondent ignored the advice of her lawyers is put at issue by the petition itself.

CONCLUSION

Accordingly, the motion for summary judgment removing Keiko Ono Aoki as Trustee without a hearing was denied, except to the extent of dismissing Respondent's affirmative defense of laches. The motion to compel discovery from Petitioners was denied and the motion for a protective order was granted as set forth in this decision.

This decision, together with the transcript of the February 15, 2022 proceedings, constitutes the order of the court.

Dated: May 10, 2022



SURROGATE