

Matter of Aoki

2023 NY Slip Op 31189(U)

April 14, 2023

Surrogate's Court, New York County

Docket Number: File No. 2008-2604/H/I

Judge: Rita Mella

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This opinion is uncorrected and not selected for official publication.

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.

-----X
In the Matter of the Judicial Settlement of the First
Intermediate Account of Proceedings of Keiko Ono Aoki, as
Trustee of the Trust under Article VIII of the Will of

ROCKY H. AOKI, also known as
Hiroaki Aoki,

File No.: 2008-2604/F

Deceased.

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M E L L A, S.:

The following papers were considered in determining these motions for summary judgment and cross-motion for sanctions in the above-captioned matters:

<u>Documents Considered</u>	<u>Numbered</u>
Notice of Motion, dated October 7, 2022, for Summary Judgment or for a Stay by Keiko Ono Aoki, and Affirmation of Vincent Levy, Esq.	1, 2
Keiko Ono Aoki's Memorandum of Law in Support of Summary Judgment	3
Devon Aoki and Steven Aoki's Memorandum of Law in Opposition to Summary Judgment Motion of Keiko Ono Aoki	4
Affirmation of David C. Rose, Esq., in Opposition to Summary Judgment Motion of Keiko Ono Aoki, attaching Exhibits	5
Guardian ad Litem's Memorandum of Law in Opposition to Keiko Ono Aoki's Summary Judgment Motion and in Support of Cross-Motion for Sanctions	6
Affirmation of Vincent Levy, Esq., in Further Support of Keiko Ono Aoki's Summary Judgment Motion	7
Keiko Ono Aoki's Reply Memorandum of Law in Further Support of Summary Judgment of Keiko Ono Aoki and in Opposition to Cross-Motion for Sanctions	8

<u>Documents Considered</u>	<u>Numbered</u>
Notice of Motion for Summary Judgment, dated October 14, 2022, by Guardian ad Litem, and Affirmation of Jessica M. Baquet, Esq., attaching Exhibits	9, 10
Guardian ad Litem’s Memorandum of Law in Support of Guardian ad Litem’s Summary Judgment Motion	11
Keiko Ono Aoki’s Memorandum of Law in Opposition to Summary Judgment Motion of Guardian ad Litem	12
Guardian ad Litem’s Reply Memorandum of Law in Further Support of Guardian ad Litem’s Summary Judgment Motion	13
Jessica M. Baquet, Esq.’s Reply Affirmation in Further Support of Guardian ad Litem’s Summary Judgment Motion (attaching Exhibit)	14
Notice of Cross-Motion for Sanctions, dated November 4, 2022, by Guardian ad Litem, and Affirmation of Jessica M. Baquet, Esq., in Support Guardian ad Litem’s Memorandum of Law in Opposition to Keiko Ono Aoki’s Summary Judgment Motion and in Support of Cross-Motion for Sanctions	15, 16 (same as #6 above)
Keiko Ono Aoki’s Reply Memorandum of Law in Further Support of Summary Judgment of Keiko Ono Aoki and in Opposition to Cross-Motion for Sanctions	(same as #8 above)

At the call of the calendar on December 2, 2022, the court denied two motions for summary judgment in these trustee removal and accounting proceedings in the estate of decedent Rocky Aoki. The court also denied a cross-motion for sanctions by the guardian ad litem appointed to represent infant trust beneficiaries (GAL) in both proceedings.

The removal proceeding was commenced by two of decedent’s children, Devon Aoki and Steven Aoki (Devon and Steven),¹ who are the beneficiaries of a trust created under decedent’s will, and they seek the removal of Keiko Ono Aoki (Keiko) as trustee of that trust. Keiko is decedent’s surviving spouse, and she serves as executor of decedent’s estate. She also served as trustee of the trust but, in March 2020, the court suspended her letters pending a hearing to determine her removal (*see Matter of Aoki*, NYLJ, March 16, 2020, at 23, col 4 [Sur Ct, NY County]). An interim

¹ First names are used herein for convenience of referring to those with the same surname.

successor trustee was appointed by the court and has been serving in that role during the pendency of these proceedings (*see Matter of Aoki*, NYLJ, March 17, 2020, at 30, col 6 [Sur Ct, NY County]).

The accounting proceeding was commenced by Keiko and she seeks the settlement of her account as testamentary trustee. Devon and Steven have interposed objections and so has the GAL.

The Summary Judgment Motions

One of the instant summary judgment motions was made by Keiko, who requested an order determining that Devon and Steven lack standing to participate in the removal and accounting proceedings because, in Keiko's view, they engaged in acts that triggered the no contest clause in decedent's will (SCPA 1420).² Specifically, Keiko argued that, when Devon and Steven sought a construction in a prior proceeding to determine the validity and scope of the Business Acts Immunity Clause (or BAIC) in decedent's will,³ they triggered the no contest provision in the will and should be considered by the court to have predeceased their father. In that construction proceeding the court held, among other things, that the BAIC did not shield Keiko from a removal proceeding based on her acts as trustee (*Matter of Aoki*, NYLJ, April 17, 2019, at 22, col 4 [Sur Ct, NY County]).⁴

2 This will provision states: "If any beneficiary under this Will in any manner, directly or indirectly, contests this Will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this Will is revoked and shall be disposed of in the same manner provided herein as if the contesting beneficiary had predeceased me."

3 The BAIC provision in decedent's will states: "The Executor or Trustee is permitted to be counsel to, or a partner of, employee, shareholder, officer or director of, any organization in which my estate, or any Trust under this Will, has any interest. Furthermore (i) she may receive dividends, profits, salary and other compensation from the organization, (ii) she shall be free to exercise all their powers as Executors and Trustees without restriction by reason of any interest they may personally have in any such organization, and (iii) she shall not be held accountable or surchargeable as fiduciaries under this Will for any action taken, or for failure to take any action, as counsel, or as partners, employees, shareholders, officers or directors."

4 Although that decision determined that a removal proceeding based on Keiko's acts as trustee would not trigger the no contest clause, and although that decision cited to the "safe harbor" provisions of EPTL 3-3.5(b)(3)(E), the court did not explicitly determine that the inquiry into the validity of the BAIC in decedent's will fell within such "safe harbors" (*Matter of Aoki*, NYLJ, April 17, 2019, at 22, col 4 [Sur Ct, NY County]).

The other summary judgment motion determined by the court on December 2, 2022, was filed by the GAL and sought Keiko's summary removal as fiduciary of the estate and the trust (SCPA 719, 711). This motion was made in the removal and accounting proceedings and was premised on Keiko's litigation activities before the court, including her instant summary judgment motion. Keiko's activities, the GAL argued, reflected not only her "ulterior motive" to subvert the court's proceedings but also her hostility towards the trust beneficiaries, thus demonstrating Keiko's want of understanding of her duties as fiduciary. According to the GAL, Keiko's litigation activities were sufficient to establish, without a hearing, that Keiko should be summarily removed as trustee and as executor of decedent's will.

Neither movant for summary judgment, however, established entitlement to judgment as a matter of law, as required to obtain such relief (CPLR 3212; *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]).⁵

Keiko failed to demonstrate how Devon and Steven, in seeking to construe the Decedent's will and its BAIC provision in the prior proceeding, were not protected by the "safe harbor" rule set forth in EPTL 3-3.5(b)(3)(E). That statute provides in relevant part: "(3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will: . . . (E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof" (EPTL 3-3.5[b][3][E]).⁶ Notwithstanding Keiko's attempt to characterize the

⁵ The court notes that Devon and Steven had previously moved for summary judgment to remove Keiko as trustee without a further hearing, and the court denied the motion (*see Matter of Aoki*, NYLJ, June 27, 2022, at 21, col 1 [Sur Ct, NY County]).

⁶ SCPA 1420(1), which provides for a proceeding to construe a will, indicates that such a proceeding is one that seeks to determine the "validity, construction, or effect of any provision of a will."

prior construction proceeding as a contest or challenge to decedent's will and the BAIC, it is clear that Devon and Steven were seeking a construction of the BAIC, which is within the protection of the statute (*Matter of Harrison*, 184 AD2d 42, 46 [3d Dept 1992]; see *Matter of Greenfield*, 13 AD2d 846 [2d Dept 1961]; *Matter of Lang*, 60 Misc 2d 232 [Sur Ct, Erie County 1969] [request to construe provision of will exonerating trustees from liability for trust management did not violate in terrorem clause]).

In particular, Devon and Steven's proceeding sought to determine the validity and scope of the BAIC, and even if characterized as a challenge to the validity of that provision of the will, the proceeding was still a construction proceeding covered by the statutory "safe harbor" (SCPA 1420[1]; EPTL 3-3.5[b][3][E]; see *Matter of Robbins*, 144 Misc 2d 510, 514 [Sur Ct, NY County 1989] [beneficiary may seek will construction without fear of forfeiture even if in reality application represents indirect attack on will]; *Matter of Rhodes*, 22 Misc 3d 766, 774-75 [Sur Ct, Westchester County 2008]; *Matter of Zorskas*, 18 Misc 3d 600, 602 [Sur Ct, Nassau County 2007]; *Matter of Shuster*, NYLJ, May 17, 1999, at 30, col 1, 1999 NYLJ Lexis 6151, [Sur Ct, Kings County]; *Matter of Cohn*, 29 Misc 2d 661, 664 [Sur Ct, Kings County 1960]; *Matter of Brush*, 154 Misc 480, 487 [Sur Ct, Kings County 1935], *aff'd* 247 App Div 760 [2d Dept 1936]; *Matter of Rosenstein*, 152 Misc 777, 780-81 [Sur Ct, NY County 1934]). *Matter of Rhodes* illustrates this point. There, the court held that the inquiry into the scope and effect of certain tax clauses in decedent's will sought a construction within the statutory safe harbor (22 Misc 3d at 774-775). Even before the enactment of the current version of the "safe harbor" provision found in EPTL 3-3.5, the rule was the same. In *Rosenstein*, for example, the court held that a challenge to the validity of the dispositive provisions of a will on the ground that those provisions violated the Rule Against Perpetuities was a construction that did not trigger the no contest clause in the will because in construction

proceedings, the court “search[es] the will to ascertain only its true meaning and effect” (152 Misc at 781 [Sur Ct, NY County 1934]). Consequently, Keiko’s motion failed to establish that Devon and Steven’s efforts to obtain a construction of decedent’s will resulted in their forfeiture of the benefits they receive under it, and summary judgment on such basis was denied.⁷

Turning to the GAL’s motion for summary judgment, the court determined that the GAL failed to establish that Keiko’s litigation tactics, including seeking summary judgment regarding the no contest clause, demonstrated her unfitness to serve as trustee or as executor.⁸ The GAL relies on the decision in *Matter of Duke* (87 NY2d 465 [1996]) for the principle that, where “in-court conduct causes such facts to be within the court’s knowledge” (*id.* at 472), summary removal may be appropriate. *Duke*, however, also cautions that courts are required to exercise the power of removal of fiduciaries nominated by a testator sparingly and “only upon a showing of serious misconduct that endangers the safety of the estate” (*id.* at 473). In view of the litigation tactics employed by all parties in these proceedings and without in any way endorsing such tactics, the court could not conclude that Keiko’s summary judgment motion rose to the level of such egregious misconduct or want of understanding as would warrant summary removal (*see Matter of Bolen*, 166 AD3d 1367 [3d Dept 2018]; *Matter of Mercer*, 119 AD3d 689 [2d Dept 2014]).

As to the GAL’s argument that friction and hostility between the trustee and beneficiaries required Keiko’s summary removal, the GAL failed to establish on this record that such hostility

⁷ In view of this resolution, the court did not reach the other grounds, including laches and estoppel, that Devon and Steven had argued provided a basis to deny Keiko’s summary judgment motion. Nor did it need to reach Keiko’s alternative request for a stay.

⁸ The parties argue about the GAL’s ability to seek Keiko’s removal as executor in the removal and accounting proceedings because they concern only Keiko’s acts as trustee. Although in general removal allegations should be made in pleadings, the court considers the GAL’s motion in respect of Keiko’s continuing service as executor as one bringing to the court’s attention possible malfeasance or unfitness under SCPA 719(10).

threatened to interfere with the administration of the trust as required (*see Matter of Venezia*, 71 AD3d 905 [2d Dept 2010]; *Matter of Rudin*, 15 AD3d 199 [1st Dept 2005]). Consequently, the GAL's motion for summary judgment was denied in its entirety.

Requests for Sanctions

Finally, the cross-motion by the GAL and the request in Devon and Steven's opposition papers for the imposition of sanctions on Keiko was denied in the exercise of the court's discretion (22 NYCRR 130-1.1).

This decision, together with the transcript of the December 2, 2022 proceedings, constitutes the order of the court.

Dated: April 14, 2023



SURROGATE