

Matter of Reuben Hoppenstein 2005 Trust

2023 NY Slip Op 32303(U)

July 11, 2023

Surrogate's Court, New York County

Docket Number: File No. 2015-2918/F

Judge: Rita Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Accounting Proceeding,

THE REUBEN HOPPENSTEIN 2005 TRUST,

DECISION and ORDER

File No.: 2015-2918/F

Dated October 10, 2005.
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M E L L A, S. :

Papers considered in determining these motions: Number

Notice of Motion for Summary Judgment Dismissing Objections and Affirmation of Ross Katz, Esq., in Support of Motion, dated March 2, 2023, with Exhibits A to P (Schlesinger Lazetera & Auchincloss LP).....1, 2

Memorandum of Law in Support of Motion, dated March 2, 2023 (Schlesinger Lazetera & Auchincloss LLP).....3

Notice of Motion for Summary Judgment Dismissing Objections and Affirmation of Katherine Hynes, Esq., in Support of Motion, dated March 2, 2023, with Exhibits A to T (Smith Legacy Law).....4, 5

Memorandum of Law in Support of Motion, dated March 2, 2023 (Smith Legacy Law).....6

Notice of Cross-Motion for Order Granting Summary Judgment Sustaining Objections, Affidavit of Cheryl L. Hoppenstein in Support of Cross-Motion and in Opposition to Motions, Sworn to March 13, 2023, with Exhibits A to P, and Affirmation of Andrew M. La Bella, Esq., in Opposition to Motions and in Support of Cross-Motion, dated March 13, 2023, with Exhibits 1 to 9.....7, 8, 9

Memorandum of Law in Support of Cross-Motion and in Opposition to Motions, dated March 13, 2023.....10

Memorandum of Law in Further Support of Motion and in Opposition to Cross-Motion, dated March 17, 2023 (Schlesinger Lazetera & Auchincloss LLP).....11

Memorandum of Law in Further Support of Motion and in Opposition to Cross-Motion, dated March 20, 2023 (Smith Legacy Law).....12

This is a proceeding for the settlement of the account of Abraham Solomon Hoppenstein, as trustee of the trust created by his brother, Reuben Hoppenstein, dated October 10, 2005 (the 2005 Trust, or Trust). The grantor’s four children—Cheryl Hoppenstein (Cheryl), Ava Hoppenstein Shore (Ava), Charles Hoppenstein (Charles), and Tivia Kramer (Tivia)—along with their children, were discretionary beneficiaries of the Trust. The personal representative of the now deceased trustee and the trustees of trusts that succeeded to the assets of the 2005 Trust have moved for summary judgment dismissing the objections of Cheryl and her five children. Objectants have cross-moved for summary judgment sustaining their objections.¹

The lengthy procedural history of this case is outlined in the court’s August 2021 decision granting movants’ motions for protective orders (*Matter of Hoppenstein*, NYLJ, Aug. 13, 2021, at 17, col 1 [Sur Ct, NY County 2021], *affd Matter of Hoppenstein*, 209 AD3d 492 [1st Dept 2022]) and will not be repeated here in detail. In sum, movants’ position is that Objectants have no standing to assert claims for the Trust’s loss of nearly \$986,000 because Cheryl and her children are no longer beneficiaries. Pursuant to express broad authority in the Trust agreement and as also permitted by EPTL 10-6.6, the trustee in effect terminated the Trust on October 15, 2011, by “decanting” one-third of its total assets to each of three new trusts for the primary benefit of Ava, Charles, and Tivia, respectively. These distributions exhausted the entire Trust and eliminated Cheryl and her children as potential beneficiaries of its assets.

¹ A Note of Issue was filed on October 15, 2021. As a preliminary matter, the court finds “good cause,” as required by CPLR 3212 (a), for allowing these summary judgment motions more than 120 days after the filing of the Note of Issue. An extension of the 120-day period is warranted because of the delay occasioned by Objectants’ motion to vacate the Note of Issue and the court’s determination to hold the motion for vacatur in abeyance pending Objectants’ appeal of certain discovery rulings relevant to the motion. The motion to vacate was denied on January 5, 2023.

In an earlier decision, the court ruled that Objectants had standing to argue in favor of their standing, and were entitled to discovery on the question of whether the transfers constituted a breach of the trustee’s fiduciary duties (*Matter of Hoppenstein*, NYLJ, July 31, 2019 at 25, col 5 [Sur Ct, NY County]).² Objectants proceeded to serve voluminous demands for discovery directed at proving the trustee’s liability for an allegedly improvident loan that became worthless, rather than uncovering an improper, self-serving motive for the transfers. Movants were twice granted protective orders when Objectants violated directions from the court to limit the scope of their discovery to the “bona fides” of the transfers.

In the definitive and often-cited language of the Court of Appeals, to prevail on a motion for summary judgment,

“the proponent . . . must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In this case, the fiduciaries have shown that the 2011 transfers were valid on their face, having complied both with the terms of the Trust, which gave the trustee unlimited discretion to distribute “to such one or more of the Grantor’s descendants . . . and in such

² The ruling determined an earlier motion by the fiduciaries for summary judgment. Objectants argue that the policy discouraging successive motions for summary determination should bar the current motion, but the court disagrees. Because the fiduciaries’ first motion was denied to permit additional discovery, this case does not involve the type of circumstances underlying the policy (*see Freeze Right Refrig. & A.C. Servs., Inc. v New York*, 101 AD2d 175, 181 [1st Dept 1984] [“[T]he policy against multiple summary judgment motions has no application where, as here, the first motion, made before discovery, is denied on the ground of the existence of a factual issue which, through later uncovering of the facts, is resolved or eliminated”]).

shares or proportions, as the Trustee may determine”; and with the “decanting” statute, EPTL 10-6.6.

The firmly established criteria for defeating a motion for summary judgment are stated in *Zuckerman v New York*, 49 NY2d 557, 562 (1980):

“We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; *mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient*” (emphasis added).

Objectants here have not presented any evidence of the trustee’s reason for exercising his discretion in the way that he did. Notwithstanding the ample opportunity to conduct proper discovery over the three and a half years since this court’s 2019 decision, Objectants have failed to offer anything more than speculation to support their claim that the trustee acted in bad faith when he decanted the 2005 Trust. They rely on two letters Cheryl wrote to the trustee in 2011 demanding distributions from a trust or trusts that her father had created for her benefit, and asking for detailed financial information about that trust or trusts.³ Objectants ask the court to infer that her inquiries, coupled with the loss from the failed loan, prompted the trustee to exclude her from the 2005 Trust to hide the loss and shield him from liability.

Ultimately, Objectants offer no more than surmise and unsubstantiated allegations to support their claim. Cheryl’s letters asking for distributions and for financial information about a trust or trusts are insufficient to create a material fact issue regarding the trustee’s motive to decant the assets of the 2005 Trust.

³ It appears that Cheryl was a beneficiary of several trusts created by her father.

Accordingly, the motions for summary judgment are granted and the objections to the account are dismissed for lack of standing. The cross-motion for summary judgment is denied.

This decision constitutes the order of the court.

Settle decree on accounting.

Dated: July 11, 2023



SURROGATE