

Matter of Aoki

2024 NY Slip Op 34483(U)

December 19, 2024

Surrogate's Court, New York County

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

Judge: Rita Mella

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New York County Surrogate's Court
DATA ENTRY DEPT.
DEC 19 2024

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,
Deceased,

File No.: 2008-2604/H/I

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,
Deceased.

File No.: 2008-2604/F

-----X
In the Matter of the Judicial Settlement of the Second
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,
Deceased.

File No.: 2008-2604/K

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M E L L A, S.:

The following papers were considered in determining a motion for pre-decree attachment:

| <u>Documents Considered</u> | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion for Prejudgment Attachment by Devon Aoki and Steven Aoki, with Affirmation of David C. Rose, Esq., attaching Exhibits | 1, 2 |
| Movants' Memorandum of Law in Support | 3 |
| Affirmation of Brian T. Goldman, Esq., in Opposition to Attachment Motion, attaching Exhibits | 4 |
| Affirmation of Keiko Ono Aoki in Opposition to Attachment Motion | 5 |
| Keiko Ono Aoki's Memorandum of Law in Opposition | 6 |
| Devon Aoki and Steven Aoki's Reply Memorandum | 7 |

The following papers were considered in determining a motion to strike the guardian ad litem's submission:

| <u>Documents Considered</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion by Keiko Ono Aoki to Strike Affirmation in Support of Attachment Motion by Guardian ad Litem Jessica M. Baquet, Esq. (GAL) with Affirmation of Brian T. Goldman, Esq., attaching Exhibits | 1,2 |
| GAL's Affirmation in Opposition to Motion to Strike by Keiko Ono Aoki | 3 |

The following papers were considered in determining an application by the GAL in support of prejudgment attachment:

| <u>Documents Considered</u> | <u>Numbered</u> |
|--|-----------------|
| GAL's Affirmation in Support of Attachment Motion – deemed a Separate Motion by the GAL – with Attachments | 1 |
| Keiko Ono Aoki's Opposition to GAL's Attachment Submission | 2 |

At the call of a special calendar on October 31, 2024, the court denied the motion of trust beneficiaries Devon Aoki and Steven Aoki's (Movants or Devon and Steven) for pre-decree attachment under CPLR Article 62. By separate application, the guardian ad litem (GAL) appointed for certain infant trust beneficiaries sought the same relief and the court denied her application as well. The court also denied a motion by Keiko Ono Aoki (Keiko) to strike the submission of the GAL.

Pursuant to CPLR 6212 (a), a party applying for an order of attachment must establish: 1) that there is a cause of action, 2) that it is probable that petitioner will succeed on the merits, 3) that a ground for attachment as provided in CPLR 6201 exists, and 4) "that the amount demanded from the [respondent] exceeds all counterclaims known to the [petitioner]." In turn, under CPLR 6201, as relevant here, an order of attachment may be granted when the respondent, "with intent to defraud [her] creditors or frustrate the enforcement of a judgment that might be rendered in [petitioner]'s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts."

Movants failed to establish a necessary element needed for the court to impose the “drastic” remedy of attachment (*see Ford Motor Credit Co. v Hickey Ford Sales, Inc.*, 62 NY2d 291, 303 [1984]). Specifically, there is not sufficient evidence on this record to conclude that Keiko is selling her personal New York City residence with the intent to defraud Movants as creditors or to frustrate the enforcement of any money judgment that may be entered against her in the event she is surcharged as former Trustee of the at issue Trust in these contested removal and trust accounting proceedings—discovery in which remains on-going (*see CPLR 6201[3]*). Segregating by attachment the proceeds of the sale of the apartment, which are Keiko’s personal assets, has not been demonstrated by Movants to be warranted at this pre-decree juncture in these proceedings (*see CPLR 6212[a]; Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000] [A “general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining judgment”]).

The mere fact of Keiko’s offering the apartment for public sale before the trial and speculation by Movants regarding her possible use or transfer of those funds is insufficient to make the required showing of intent to defraud or to frustrate the enforcement of a judgment that might be rendered in Movants’ favor (*see CPLR 6201[3]; Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1st Dept 1989] [mere removal or assignment or other disposition of property is not a ground for attachment]; *Deutsch v Grunwald*, 165 AD3d 1035 [2d Dept 2018]; *Northeast United Corp. v Lewis*, 137 AD3d 1387 [3d Dept 2016]; *Computer Strategies, Inc. v Commodore Bus. Machines*, 105 AD2d 167 [2d Dept 1984]; *Dickey v Findeisen & Kropf Mfg. Co.*, 177 App Div 861, 862 [1st Dept 1917]; *see Signal Cap. Corp. v Frank*, 895 F Supp 62, 64 [SDNY 1995]; *Dafeng Hengwei Textile Co. v Aceco Ind. & Com. Corp.*, 54 F Supp 3d 287, 294 [EDNY 2014]). On this record, the drastic remedy of a pre-decree attachment is not warranted (*Bich v*

Bich, 78 Misc 3d 1220[A]; 2023 NY Slip Op 50303[U] [Sup Ct, New York County 2023], *affd* 220 AD3d 402 [1st Dept 2023]).

In the exercise of its authority to manage its calendars, the court accepted and considered the two remaining applications – one by the GAL, also seeking in essence, a pre-decree attachment as well as permission to add facts to the record in support of Devon and Steven’s attachment motion, and the other by Keiko to strike the GAL’s submission as improper. Keiko’s motion to strike was denied because, even though the GAL’s application is not a proper cross-motion, technical defects may be disregarded by the court and Keiko has been provided an opportunity to be heard with respect to the GAL’s arguments (*see Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]; *see also* CPLR 2001).

The court denied the GAL’s application because the additional facts described in her affirmation do not provide “badges” or indicia of intent to defraud or frustrate enforcement of the judgment regarding, in particular, the assets to be attached (*see Nat’l Audobon Soc’y v Sonopia Corp.*, 2009 WL 636952 [No. 09 Civ. 975 (PPG) – SDNY, March 6, 2009] [applying NY law]). Therefore, the GAL’s affirmation does not provide any additional basis to grant the motion for pre-decree attachment.

Accordingly, in the exercise of the court’s discretion, the motion to attach certain personal assets of Keiko was denied. Concerning the sale of the apartment, Devon and Steven’s motion also sought related relief which was injunctive in nature. This relief is also denied, but the court notes that at a conference after the call of the calendar, the parties agreed that Keiko would provide to all other parties, including the Successor Trustee, a copy of any contract of sale for the apartment within five days of its execution or as soon as possible, if the closing is scheduled to take place within five days of the contract’s execution.

This decision, together with the transcript of the October 31, 2024 proceedings,
constitutes the order of the court.

Clerk to notify.

Dated: December 19, 2024



SURROGATE