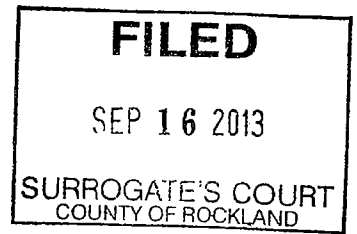


SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND



-----X
Proceeding to Discover Property Withheld
in the Estate of

MILTON J. GOLDSTEIN,

Deceased.

Under SCPA §2103.

-----X
Proceeding to Discover Property Withheld

Milton J. Goldstein Irrevocable Trust dated December 2,
1995,

DECISION & ORDER

File No. 2010-481/E
Motion #1

Under SCPA §2103.

-----X
Proceeding for Relief Against Lisa Goldstein, as Co-Trustee
of Milton J. Goldstein Irrevocable Trust, dated December 2,
1995

To Compel Delivery of Property Under SCPA §2105 and
for Related Relief.

-----X
Hon. Thomas E. Walsh II, Surrogate:

The following papers numbered 1-12 were read on this motion, pursuant to CPLR §3212, by Respondent, Lisa L. Goldstein, for an Order (i) granting Respondent summary judgment; (ii) staying all discovery pending a final determination of this motion, including any appeals; (iii) declaring that Petitioner has violated Article XVII of the trust resulting in Petitioner's forfeiture of any interest under the trust and lack of standing to pursue any action with respect to claims pertaining to the trust; (iv) declaring that Petitioner has filed a vexatious proceeding and directing Petitioner to pay Respondent's legal fees, disbursements and filing fees accrued in this proceeding; and (v) directing Petitioner to make such payment from her personal funds due to her alleged violation of the trust's in terrorem clause and rendering her ineligible to inherit any of the trust assets by virtue of such violation; (vi) and for such other and further relief as the Court deems just and proper.

Notice of Motion/Affidavit in Support (L. Goldstein)/Affirmation
in Support (Bashian)/Exhibits (A-Z & AA-DDD)-1-4

Affirmation in Opposition (Santoro)–5
Affidavit in Opposition (J. Goldstein)/Exhibits (1-23)–6-7
Memorandum of Law (Petitioner’s)–8
Reply Affidavit (L.Goldstein)/Exhibits (A-H)–9-10
Reply Affirmation (Bashian)–11
Reply Memorandum of Law (Respondent’s)–12

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in her favor as a matter of law [CPLR 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); and *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Gonzalez v. 98 Maq Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York University Med. Center*, 64 NY2d 851 (1985)]. The opponent must assemble, lay bare and reveal her proofs, in order to show that the matters set up in her petition are real and are capable of being established upon a trial [*Di Sabato v. Soffes*, 9 A.D.2d 297 (1st Dept., 1959)].

Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2nd Dept., 2000)].

Summary judgment is only appropriate where no material issues of fact exist between the parties [*Schultz v. Von Voight*, 86 NY2d 865 (1995)]. Where material issues of fact exist that cannot be resolved on the papers filed in support of and in opposition to summary judgement the motion must be denied [*Matter of Suffolk County Department of Social Services V. Jams M.*, 83 NY2d 178 (1993)]. The function of the court in summary judgment is issue finding and not issue determination [*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Frutarom, Ltd. V. Flavormatic Industries*, 237 AD2d 487 (2d Dept. 1997)].

This motion record reveals that movant has failed to meet her summary judgment burden

that would entitle her to the relief she requests. In any event respondent's opposition to the motion frames factual issues that require a trial and preclude summary judgment.

In addition, discovery has not yet been completed due, at least in part, to movant's failure to appear for the completion of her examination before trial. This motion should await the completion of discovery and examinations before trial [*Breytman v. Olinville Realty, LLC*, 99 AD3d 651 (2d Dept., 2012); *Wilson v. Yemen*, 74 AD3d 544 (1st Dept., 2010)].

Lastly, petitioner's actions do not assert an interest in the trust other than provided by its terms and does not contest the validity of the trust, it seeks to enforce the duty of undivided loyalty of the respondent co-trustee to the beneficiaries of the trust and therefore does not constitute a violation of its in terrorem clause [*Boles v Lanham*, 55 A.D.3d 647 (2d Dept., 2008); see also *Matter of Robbins*, 144 Misc.2d 510 (N.Y.Sur. Ct., 1989)].

Based upon the foregoing it is Decided and
ORDERED that Respondent's motion is denied in its entirety.

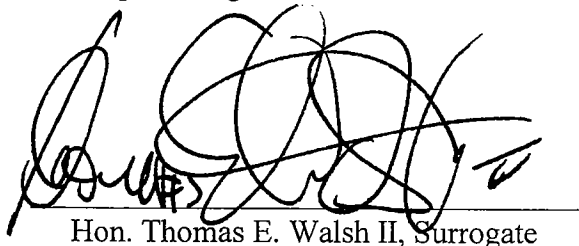
All parties are directed to appear for a conference before the Court on Tuesday, October 29, 2013 at 10:00 a.m. so that an expedited schedule for the completion of discovery can be issued by the Court.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision does not mean that it has not been considered by the Court in light of the appropriate legal authority.

All attorneys are reminded that the Individual Part Rules of this Court require a letter and conference as prerequisites to the submission of any motion [See Judge Walsh's Individual Part Rules §IVA].

Dated: New City, New York
September 16, 2013

To:
Bashian & Faber, LLP
McCarthy Fingar, LLP



Hon. Thomas E. Walsh II, Surrogate