

Bernfeld v Kurilenko
2010 NY Slip Op 34032(U)
November 24, 2010
Supreme Court, Queens County
Docket Number: 14320/2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

ORIGINAL

MADELINE BERNFELD, etc., et al. x

Index
Number 14320 2010

- against -

Motion
Date August 10, 2010

YAKOV KURILENKO x

Motion
Cal. Number 1

Motion Seq. No. 1

QUEENS COUNTY CLERK
FILED
2010 DEC 15 PM 1:47

The following papers numbered 1 to 12 read on this motion by defendant pursuant to CPLR 3211(a) to dismiss plaintiff's complaint and to award defendant sanctions in the form of attorneys' fees and on this cross motion by plaintiff for a mandatory injunction pursuant to CPLR 6301 and BCL § 1005 directing defendant to return the books and records of Michael Bernfeld, D.D.S. and Yakov Kurilenko, D.D.S., P.C. (P.C.) to its accountant, Glass & Blum, P.C.; to vacate the business premises forthwith; to cooperate in the sale of the P.C.'s tangible assets to Fred Cohen, D.D.S.; and to otherwise cooperate in the winding up of the affairs of the P.C., which was dissolved by a vote of 75% of its shareholders on February 16, 2010.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
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Reply Affidavits.....	10-12

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff is the executrix of the estate of Michael Bernfeld, formerly one of two shareholders of the P.C. Michael Bernfeld had held seventy-five percent (75%) of such shares with Kurilenko as shareholder of the remaining twenty-five percent (25%). No shareholder agreement or any other legal instrument has been executed and all rights and

obligations in this action are regulated by the controlling provisions of the Business Corporation Law. While nonprofessionals are prohibited from shareholder status in professional service corporations (*see* BCL §§ 1507; 1511), BCL § 1511 also expressly states, “[n]othing herein contained shall be construed to prohibit the transfer of shares by operation of law or by court decree.” Plaintiff, who is not licensed in the occupation of the P.C., came to be a transferee of such shares by operation of law through the administration of Bernfeld’s estate. BCL § 1511 further states the restriction that a transferee by operation of law may not vote the shares except for the purposes of BCL § 909 (“Sale, lease, exchange or other disposition of assets”) and BCL § 1001 (“Authorization of dissolution”).

On February 16, 2010, despite the objections of defendant Kurilenko, plaintiff held a shareholder meeting at which she voted the decedent Bernfeld’s 75% of the shares to dissolve the P.C., to approve the sale of the P.C. to Fred Cohen, D.D.S. and to appoint Fred Cohen, D.D.S. as business manager of the P.C. Defendant Kurilenko did not vote his shares and opposed the dissolution of the P.C.

Following that February 16, 2010 meeting, a special proceeding was brought by plaintiff for judicial dissolution pursuant to BCL § 1103. The proceeding was dismissed by order of the Honorable Lee A. Mayersohn dated May 20, 2010. The court, in that order, noted that plaintiff has no recourse to judicial dissolution under BCL § 1103, nor the other statutory predicates, found in BCL § §1104 and 1104-a, and instead, the express limitations placed upon nonprofessional transferees of shares by BCL § 1511 restrict voting only to the matters of BCL §§ 909 and 1001, which do not relate to the election of directors. Since plaintiff was not entitled to vote in an election of directors, there was no basis upon which plaintiff could establish the prerequisites necessary to present a petition for dissolution of the subject P.C. (*See Matter of Fromcheck v Brentwood Pain & Medical Services, P.C.*, 254 AD2d 485 [1998].)

Thereafter, defendant offered to redeem plaintiff’s shares on April 30, 2010, within six months of plaintiff’s appointment as executrix of Bernfeld’s estate, albeit at a cost of \$0.00 per share, and plaintiff rejected that offer.¹ On June 7, 2010, plaintiff commenced the

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Pursuant to BCL § 1510, in the absence of a shareholders’ agreement or other documentation specifying the particular method to be employed to value the shares of a deceased shareholder, “[a] professional service corporation shall purchase or redeem the shares of a shareholder in case of his death ... within six months after the appointment of the executor ... at the book value of such shares as of the end of the month immediately preceding the death ... of the shareholder as determined from the books and records of the corporation in accordance with its regular method of accounting... If the corporation shall fail to purchase or redeem such shares within the required period, a successful plaintiff in an action to recover the purchase price of such shares shall also be awarded reasonable

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instant shareholder's derivative action for a money judgment in favor of the P.C. and against defendant in an amount not less than \$300,000, for his alleged failure to repay funds lent to him by the P.C., and to direct defendant to return the P.C.'s books and records to its accountant, Glass & Blum, P.C.

Defendant now moves to dismiss plaintiff's complaint for lack of standing pursuant to CPLR 3211(a)(3), and for sanctions. Plaintiff cross-moves for a preliminary injunction directing defendant to return books and records of the P.C. to its accountant, Glass & Blum, P.C.; to vacate the business premises; and to cooperate in the sale of the P.C.'s assets and winding up of the affairs of the P.C., which allegedly was dissolved by a vote of 75% of its shares on February 16, 2010.

Derivative actions by shareholders brought in the name of the corporation are specifically allowed and are governed by BCL § 626. The statute provides, in pertinent part, that "an action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or *of a beneficial interest in such shares or certificates*," and that "in any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or *that his shares or his interest therein devolved upon him by operation of law*." (Emphasis added.) (BCL § 626[a]; [b].) Thus, a person holding stock in a representative capacity, such as an administrator or executor of an estate, has the right to institute a shareholder's derivative action. (See *Shui Kam Chan v Louis*, 303 AD2d 151 [2003]; see also *Meltzer v Wattles*, 19 AD2d 871 [1963]; *Greenberg v Acme Folding Box Co.*, 84 Misc 2d 181 [1975].)

In this case, plaintiff executrix, the transferee of Bernfeld's shares by operation of law, has the right to institute this shareholder's derivative action. (See *Chan v Louis, supra*.) In addition, contrary to defendant's assertion, this result is not changed by the fact that the subject corporation is a dental professional corporation and plaintiff executrix is not authorized to practice dentistry. Although the executor of an estate containing a professional corporation may not control the professional corporation if the executor is not within that profession, the professionally non-qualified executor may protect the value and integrity of the estate's ownership interest in the professional corporation and facilitate the transference of the assets of an estate to its heirs. (See *Community Burn & Wound Treatment Services, P.C. v Staten Island University Hospital*, 24 Misc 3d 1228A [2009].) Such an executor is a steward of the value of the professional corporation, and while not a shareholder, officer or director, still has limited authority to act on behalf of the professional corporation and to take those ministerial actions necessary to maintain the value of the shares of the professional

attorneys' fees and costs." (BCL § 1510; see *Diamond & Golomb, P. C. v Diamond*, 189 AD2d 722 [1993]; see also *Moroze & Sherman, P.C. v Moroze*, 104 AD2d 70 [1984].)

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corporation for distribution to the heirs of the estate. (*Id.*) Thus, plaintiff executrix has the authority to maintain this shareholder's derivative action on behalf of the P.C. to maintain the value of the shares of the P.C. for distribution to the heirs of Bernfeld's estate.

Accordingly, the branch of defendant's motion to dismiss plaintiff's complaint is denied.

The branch of defendant's motion seeking sanctions is also denied as the conduct of plaintiff in commencing this action was not "frivolous" within the meaning of 22 NYCRR § 130-1.1.

Plaintiff seeks a preliminary injunction directing defendant to return the books and records of the P.C. to its accountant, Glass & Blum, P.C.; to vacate the P.C. business premises forthwith; to cooperate in the sale of the P.C.; and to cooperate in the winding up of the affairs of the P.C. Plaintiff asserts that the P.C. was dissolved by a vote of 75% of its shareholders at the February 16, 2010 meeting. Plaintiff correctly contends that, pursuant to BCL § 1511, she has the authority to vote the shares for purposes of BCL § 1001 ("Authorization of dissolution"). Nevertheless, since neither the certificate of incorporation, nor the bylaws of the P.C. have been submitted, the court does not know whether the February 16, 2010 special meeting, at which such vote for dissolution took place, was properly called by plaintiff under BCL § 602. A failure to properly call a meeting renders the actions taken thereat, such as, a vote for dissolution, void. (*See Trustees of Gallilee Pentecostal Church, Inc. v Williams*, 65 AD3d 1221 [2009]; *see also Board of Managers of Park Regent Condominium v Park Regent Unit Owners Associates*, 58 AD3d 589 [2009]; *Matter of Stile v Antico*, 272 AD2d 403 [2000].) In addition, as noted herein, plaintiff's prior petition for dissolution was dismissed.

Under CPLR § 6301, a preliminary injunction may be granted in an action where it appears that the defendant threatens to do an act which would tend to render the judgment sought by the plaintiff ineffectual or where the plaintiff has demanded a judgment restraining the defendant from the commission of an act which, if committed during the pendency of the action, would produce injury to the plaintiff. In order to be entitled to a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. (*See Aetna Insurance Co. v Capasso*, 75 NY2d 860 [1990]; *see also Cedar Graphics, Inc. v Long Island Power Authority*, 35 AD3d 337 [2006]; *First Franklin Square Associates, LLC v Franklin Square Property Account*, 15 AD3d 529 [2005].)

The purpose of a preliminary injunction is to maintain the status quo and to prevent the dissipation of property that could render a judgment ineffectual. (*See Dixon v Malouf*, 61 AD3d 630 [2009]; *see also Ruiz v Meloney*, 26 AD3d 485 [2006]; *Ying Fung Moy v Hohi*

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Umeki, 10 AD3d 604 [2004].) As such, the granting of a preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted unless a clear right thereto is established. (See *Town of Smithtown v Carlson*, 204 AD2d 537 [1994]; see also *Schneider Leasing Plus, Inc. v Stallone*, 172 AD2d 739 [1991]; *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165 [1986].)

Plaintiff, in this case, failed to demonstrate a clear right to relief under this standard. Plaintiff has not shown a likelihood of success on the merits or that irreparable injury will be sustained absent the granting of the preliminary injunction, which in this context means an injury for which money damages are insufficient. (See *Mar v Liquid Management Partners, LLC*, 62 AD3d 762 [2009]; see also *Matos v City of New York*, 21 AD3d 936 [2005]; *Price Paper & Twine Co. v Miller*, 182 AD2d 748 [1992].) With respect to plaintiff's failure to demonstrate a likelihood of success, the court refers to the aforementioned discussion in which it is noted that, plaintiff has not shown that she properly called the February 16, 2010 special meeting pursuant to BCL § 602. In any event, the circumstances presented in this case are not of such an extraordinary nature as to warrant mandatory injunctive relief pending the resolution of the litigation. (See *Village of Westhampton Beach v Cayea*, 38 AD3d 760 [2007]; see also *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2005]; *Rosa Hair Stylists v Jaber Food Corp.*, 218 AD2d 793 [1995].)

Accordingly, the branch of plaintiff's cross motion seeking a preliminary injunction directing defendant Kurilenko to vacate the business premises forthwith; to cooperate in the sale of the P.C.'s tangible assets to Fred Cohen, D.D.S.; and to otherwise cooperate in the winding up of the affairs of the P.C. is denied.

The branch of plaintiff's cross motion seeking a preliminary injunction directing defendant to return the books and records of the P.C. to its accountant, Glass & Blum, P.C., is also denied without prejudice to plaintiff's making a proper demand upon defendant Kurilenko for an inspection of the P.C.'s books and records pursuant to BCL § 624.

Dated: November 24, 2010

J.S.C.

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