

**Matter of Benincaso**

2012 NY Slip Op 30015(U)

January 9, 2012

Surrogate's Court, Nassau County

Docket Number: 2011-363596

Judge: III., Edward W. McCarty

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

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In the Matter of the Application of Carmille Benincaso,  
as Preliminary Executor of the Estate of

GREGORY CATALANO,  
a/k/a GASPARE G. CATALANO,

Deceased,

For an Order and Relief Pursuant to SCPA 2103  
to Discover Personal Property and Information  
Withheld by Respondents and Belonging to the Decedent.

File No. 2011-363596/A

Dec. No. 27464

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In the Matter of the Application of Carmille Benincaso,  
as Preliminary Executor of the Estate of

GREGORY CATALANO,  
a/k/a GASPARE G. CATALANO,

Deceased,

For an Order and Relief Pursuant to SCPA 2107 or 2108  
to Continue the Business of the Decedent Known as  
Business Network Connections Company.

File No. 2011-363596/B

Dec. No. 27366

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In the Matter of the Application of Carmille Benincaso,  
as Preliminary Executor of the Estate of

GREGORY CATALANO,  
a/k/a GASPARE G. CATALANO,

Deceased,

For an Order and Relief Pursuant to SCPA 2107, 202 and 201,  
to Protect the Assets of the Estate, Enjoin Respondents  
Joseph Catalano, Louis P. Karol and 601 Old Country Road  
from Seeking Vacatur of an Agreement, Vacate Selection  
of a Replacement Member of the Board of Directors, and  
Nullify the 2/28/11 Meeting of the Board of Directors.

File No. 2011-363596/D

Dec. No. 27354

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Motion of Joseph Catalano, a Person  
Interested in the Estate of

GREGORY CATALANO,  
a/k/a GASPARE G. CATALANO,

Deceased,

For an Order Pursuant to CPLR 3211 and 3212  
Dismissing the Application of Carmille Benincaso  
Which Seeks an Order Pursuant to SCPA 2107, 202 and 201,  
to Protect the Assets of the Estate, Enjoin Respondents  
Joseph Catalano, Louis P. Karol and 601 Old Country Road  
from Seeking Vacatur of an Agreement, Vacate Selection  
of a Replacement Member of the Board of Directors, and  
Nullify the 2/28/11 Meeting of the Board of Directors.

File No. 2011-363596/D

Dec. No. 27355  
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Before the court are the following:

(A) A discovery proceeding (2011-363596/A) in which the petitioner, Carmille Benincaso, moves by order to show cause for an order: (1) compelling the respondents, (a) Joseph Catalano, (b) John Catalano and (c) Michael L. Schneider, to make 601 Old Country Road Corp., d/b/a John's Farms (hereinafter, "601 Corp."), immediately available for the cloning of its computers by computer experts retained by the petitioner; (2) restraining Joseph Catalano from tampering with the computers located at John's Farms that are now on the premises or were on the premises within the past six months; (3) compelling Joseph Catalano to provide immediate access to John's Farms by forensic accountants retained by the petitioner; (4) directing Joseph Catalano and his attorney to participate in a discovery conference to allow the court to supervise the course of discovery so that this litigation may be conducted expeditiously and with minimal future motion practice; (5) awarding the petitioner costs and fees associated with this application caused by Joseph Catalano's obstructive conduct, as sanctions pursuant to 22 NYCRR 130-1.1 and CPLR 3126;

(B) A petition (2011-363596/B) by Carmille Benincaso for an order pursuant to SCPA 2107 or 2108 permitting her to continue the business of the decedent known as Business Network Connections Company (hereinafter, "BNC");

(C) A petition (2011-363596/D) by Carmille Benincaso for an order pursuant to SCPA 2107, 202 and 201: (1) enjoining the respondents, (a) Joseph Catalano, (b) Louis P. Karol, and (c) 601 Corp. from seeking vacatur of an agreement by which BNC continues to operate at John's Farms; (2) vacating the selection of a replacement member of the board of directors of 601 Corp.; and (3) nullifying the February 28, 2011 meeting of the board of directors of 601 Corp.; and

(D) A motion (2011-36396/D) by Joseph Catalano for an order pursuant to CPLR 3211 and 3212 dismissing the application of Carmille Benincaso which seeks an order pursuant to SCPA 2107, 202 and 201 to protect the assets of the estate, enjoin the respondents from seeking vacatur of an agreement, vacate selection of a replacement member of the board of directors, and nullify the February 28, 2011 meeting of the board of directors of 601 Corp.

#### BACKGROUND

The decedent, Gregory Catalano, died a resident of Nassau County on December 28, 2010, survived by his sister, Carmille Benincaso, the petitioner; and by his brothers Joseph Catalano, respondent and movant herein, and John Catalano. The decedent's last will and testament dated May 23, 2000 was offered for probate by the petitioner, who is named as the sole beneficiary of the decedent's residuary estate, as well as the executrix in the propounded instrument. Preliminary letters testamentary issued to the petitioner by order of this court on January 13, 2011. John Catalano and Joseph Catalano have filed objections to probate of the will.<sup>1</sup>

The disputes presently before the court all relate to a supermarket known as John's Farms, which was run by the decedent and Joseph Catalano. The supermarket, located at 601 Old Country Road in Plainview, New York, is comprised of three separate closely held corporations: (1) 601 Corp., which operates the grocery and dry goods business within John's Farms, and was owned by decedent and Joseph Catalano as equal 50% shareholders; (2) Captain Joe's Fish Corp. (Captain Joe's), which sells fish and seafood at John's Farms, and was owned by decedent and Joseph Catalano as equal 50% shareholders; and (3) BNC, which operates a meat market within

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<sup>1</sup>John Catalano has appeared in all of these proceedings by counsel but his interest is limited to the probate proceeding in connection with decedent's will.

John's Farms, which was owned wholly by decedent.

The other respondents named in the proceedings brought by Carmille Benincaso are:

(1) Michael L. Schneider (in 2011-363596/A), who was the accountant for decedent, as well as for Joseph Catalano and the various corporate entities involved in these disputes; and (2) Louis P. Karol (in 2011-363596/D), who was named by Joseph Catalano on February 28, 2011 as decedent's replacement on the board of directors of 601 Corp.

#### ANALYSIS

##### (A) **The Discovery Proceeding**

Carmille Benincaso commenced a SCPA 2103 discovery proceeding against respondents Joseph Catalano, John Catalano and Michael L. Schneider, C.P.A., as the accountant for John's Farms, in order to, inter alia, prevent Joseph Catalano's interference with the operation of BNC and to compel him to turn over the cash receipts of BNC from the date of the decedent's death to the present; to prevent Joseph Catalano's interference with the petitioner's right to take part in the management of Captain Joe's and 601 Corp. and to gain full access to the records of those corporations; to compel Joseph Catalano to make available to the petitioner the books and records of the decedent, BNC, 601 Corp. and Captain Joe's; and to compel Joseph Catalano to turn over the computer and other items he took from the decedent's home.

By order of this court dated March 24, 2011, Joseph Catalano and John Catalano were directed to deliver and turn over to the petitioner the computer taken from the decedent's home on the date of his death. While certain computer components were eventually turned over to the petitioner, based on information on a Dell invoice for a computer sold to the decedent on May 26,

2009, the computer components turned over to the petitioner were not part of the home computer taken from the decedent's home. When Joseph Catalano's counsel was advised that the wrong computer had been turned over to the petitioner, he responded that "Joseph Catalano has several computers used in the business and it is now difficult to differentiate." In lieu of turning over the correct computer, he instead rather disingenuously offered to reimburse the estate for the value of the decedent's computer equipment that was not delivered to the petitioner or her counsel. In view of the fact that the reason the petitioner sought the decedent's home computer was to obtain any relevant business records of the decedent thereon, the court would note that an offer to pay for the value of such computer is largely meaningless. The petitioner now seeks to clone all of the computers at John's Farms.

Computer data, electronic documents and computer memory may all be discoverable (*Matter of O. Winston Link Revocable Trust*, 24 Misc 3d 768 [Sur Ct, Westchester County 2009]). "Whether the court is dealing with traditional paper discovery or electronic discovery, the first issue the court must determine is whether the material sought is subject to disclosure as 'material and necessary' in the prosecution or defense of the action" (*Lipco Elec. Corp. v ASG Consulting Corp.*, 4 Misc 3d 1019 [A] [Sup Ct, Nassau County 2004]). Since the decedent owned all or part of each of the three corporations which operated their businesses at John's Farms, the information on the computers at John's Farms is properly discoverable by the petitioner as the preliminary executor of the decedent's estate.

In response to the petitioner's discovery request, Joseph Catalano had the technical director of the company which provides all computer related services for John's Farms clone all of the cash registers at John's Farms. A hard drive containing a clone of the cash registers was provided to the

petitioner's counsel. Petitioner's counsel was also apparently provided with three CD ROM disks, one each for BNC, Captain Joe's and 601 Corp., which purportedly contain each corporation's Quick Books history, including sales and banking records. It is unclear from the papers submitted to the court whether counsel for the petitioner has reviewed the three CD ROMS or the cloned records<sup>2</sup> and whether they contain the material sought by the petitioner. At this juncture, there is no evidence that the cloning performed was improper or incomplete.

In the absence of proof that a party intentionally destroyed or withheld evidence, the court should not direct the cloning of that party's hard drives (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244 [1st Dept 2008]; *see also, Buxbaum v Castro*, 82 AD3d 925 [2d Dept 2011]). Until the petitioner is able to review the cloned computer records and the CD ROMS, and demonstrate that the information provided by the respondents is incomplete, it would be precipitous of this court to order that the computers be cloned again. Therefore, so much of the petitioner's order to show cause in the discovery proceeding as seeks to clone all of the computers at John's Farms is denied at this time, with leave to renew. However, the respondents are ordered to refrain from removing or altering any data contained within the hard drives of the computers at John's Farms, pending further order of this court.

With regard to the petitioner's request that her forensic accountants be given access to John's Farms, such request is also denied at this time, with leave to renew, upon a showing that the respondents have failed to provide the petitioner with the documentation and data requested.

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<sup>2</sup>It appears that the cloned records cannot be accessed without a software license which costs \$1,000.00. The court would note that the CPLR provides that the party seeking discovery should incur the costs incurred in the production of discovery material (*Matter of Maura*, 17 Misc 3d 237 [Sur Ct, Nassau County 2007]).

The petitioner also seeks a discovery conference in this matter, a request which the court deems reasonable, given the difficulties being encountered by the parties in completing discovery herein. A conference is therefore scheduled before a member of the law department on January 26, 2012 at 3:15 p.m. for the purpose of scheduling all further discovery in this matter.

Regarding the petitioner's request for costs and sanctions, the court declines to grant this request at this time. However, the court is disturbed by the cavalier attitude that Joseph Catalano and his counsel have taken with regard to the court-ordered production of the home computer removed from the decedent's home after his death. If after reviewing the information on the Dell invoice provided by the petitioner as "Exhibit B" of her order to show cause and conducting a renewed search for the computer identified therein, Joseph Catalano still cannot produce such computer, then he is ordered to provide the petitioner and this court with a detailed statement, under oath, by someone with direct knowledge of the facts, setting forth the means and methods used to conduct the search for the decedent's home computer (*see WMC Mortg. Corp. v Vandermulen*, 32 Misc 3d 1206 [A] [Sup Ct, Suffolk County 2011]). Such affidavit must be submitted to the court before the date of the conference scheduled herein.

**(B) The Petition to Continue BNC**

Petitioner's application to continue BNC asks the court to provide four types of relief:

- (1) authorize petitioner to continue running BNC for two years pursuant to SCPA 2108 or 2107 and to retain an employee to assist in the management of the business;
- (2) direct Joseph Catalano to stop his interference with the management of BNC;
- (3) direct Joseph Catalano to turn over all BNC cash receipts that are in his possession, and to stop taking, transferring or disposing of BNC cash receipts; and

(4) direct Joseph Catalano to make available, deliver or turn over the books and records of BNC and the decedent to Carmille Benincaso as preliminary executor of decedent's estate. The court will consider the foregoing four requests seriatim.

(1) Authorize Carmille Benincaso to continue BNC

EPTL Article 11 does not expressly allow a fiduciary to continue a decedent's business. Carmille Benincaso asks the court to authorize the continuation of BNC, pursuant to SCPA 2108 or 2107, for a period of two years, and to authorize her to hire someone to supervise the estate's interest in BNC.

In response to this portion of Carmille Benincaso's application, Joseph Catalano raises three affirmative defenses: (a) the court should dismiss the application because it is not in the best interest of the estate to continue BNC; (b) BNC is a licensee at will of 601 Corp., which will terminate the license of BNC to operate within John's Farms, making it futile to continue BNC; and (c) it is not practical to continue BNC within John's Farms. Joseph Catalano points out that he and Carmille Benincaso do not speak to each other and would therefore be unable to work together, and that he will refuse to allow his sister or her agent to operate BNC at John's Farms. Joseph Catalano claims that he has operated and will continue to operate BNC, and to supervise the employees, the administration and the bookkeeping. He threatens to terminate all of the goods and services that John's Farms has provided to BNC if the court authorizes Carmille Benincaso or her agent to continue the operation of BNC, including insurance coverage for BNC, and states that the management of John's Farms will not allow unauthorized individuals to work on its premises.

Affirmative defenses (a) and (c) raised by Joseph Catalano are not relevant to the legal rights of the parties. It is not for Joseph Catalano to decide whether it would be profitable or

practical to continue a corporation of which decedent was the sole shareholder. Affirmative defense (b), in which Joseph Catalano asserts that BNC is merely a licensee at will of 601 Corp., is disputed by Carmille Benincaso.

SCPA 2108 is a proceeding by a fiduciary for the continuation of a business. It permits a fiduciary to “petition for the continuation of a business other than a profession, of which decedent or the person whose estate is being administered was sole owner and it is desired to continue it for the best interests of the estate ...” (SCPA 2108).

“[W]here the business of the decedent is a corporation, authority from the court is unnecessary” (5-66 Warren's Heaton on Surrogate's Court Practice § 66.01 [2011], referring to SCPA 2108 [3]). Carmille Benincaso argues that although BNC is in corporate form, the relief requested is necessary because (i) she does not have full letters testamentary, and (ii) if the propounded will is not admitted to probate, the estate will be shared equally by decedent’s three surviving siblings, which means that Carmille Benincaso would be answerable to her brothers, Joseph Catalano and John Catalano, for her management of this estate asset while serving as preliminary executor. “While SCPA 2108 has been held not to apply to a corporate business, the application may nevertheless be treated as one for advice and direction under SCPA 2107” (*Matter of Morales*, NYLJ, Jan. 11, 2000, at 38, col 2 [Sur Ct, Nassau County] [internal citations omitted]).

Under SCPA 2107, a fiduciary may ask the court for advice and direction regarding the sale of estate property and in other "extraordinary circumstances." In following the advice and direction, the fiduciary will be protected from liability. Generally, the property for which advice and direction is sought would be owned by the estate directly and not through corporate shares,

(*Matter of Pulitzer*, 139 Misc 575 [Sur Ct, New York County 1931], *opinion supplemented*, 140 Misc 572 [Sur Ct, New York County 1931], *affd* 237 App Div 808 [1st Dept 1932]), but in practice, courts will give advice and direction where an estate owns all of the corporate shares, as opposed to owning a partial interest.

“[W]here the fiduciaries, through the medium of ownership of all of the shares of stock, control a close corporation, the Surrogate possesses the equitable power to disregard the corporate entity and may proceed to treat the estate fiduciaries and their corporate problems with respect to disposition of the corporate assets, and its effect upon the estate, upon the realistic basis that the fiduciaries and the management of the corporation are one and the same.”

*Matter of Weinstein*, 25 AD2d 776, 776 [2d Dept 1966], citing *Matter of Tuttle*, 4 NY2d 159, 164 [1958]; *Matter of Hubbell*, 302 NY 246, 254 [1951]; *Matter of Horowitz*, 297 NY 252, 258 [1948]; and *Matter of Stulman*, 146 Misc 861, 865 [Sur Ct, Kings County 1933]). “The doctrine that the Surrogate is differently to treat the problem of rendering advice and direction in instances where the estate owns the entire stock of a corporation and the cases where it owns less than all of the stock ‘seems to be the rule followed by the courts’” (*id.* at 776 [internal citations omitted]). “[W]here the entire stock of the corporation was owned by the estate ... the court, in its equitable powers, might disregard the corporate entity” (*Matter of Pulitzer*, 139 Misc 575, 585 [Sur Ct, New York County 1931], *op supplemented*, 140 Misc 572 [Sur Ct, New York County 1931], *affd* 237 App Div 808 [1st Dept 1932]).

This portion of Carmille Benincaso’s petition is granted to the extent that petitioner is authorized to continue BNC for a period of up to two years from the date of this decision and order. The court refrains, however, from specifically authorizing petitioner to employ someone to supervise the business on her behalf. Petitioner does not need authorization to make what is essentially a business decision in connection with an estate asset. A fiduciary has the power to

employ an agent to act upon her decisions, even though there is no explicit authorization in EPTL 11-1.1. “A fiduciary can employ agents to do work he legitimately can not do himself ... The facts in each estate will determine whether or not the retention of agents is warranted” (5-61 Warren’s Heaton on Surrogate’s Court Practice, §61.01 [5] [2011]).

(2) Direct Joseph Catalano to stop interfering with the operation of BNC

As BNC is indisputably wholly owned by the decedent’s estate, it should not be necessary for the court to direct Joseph Catalano to comply with this request for relief. To the extent that it does appear to be necessary, the court directs Joseph Catalano to cease all interference with the operation of BNC.

(3) Direct Joseph Catalano to turn over to Carmille Benincaso any cash receipts in his possession and stop taking, transferring or disposing of the cash receipts and income of BNC

Again, as BNC is entirely owned by decedent’s estate and not by Joseph Catalano or any other party, Joseph Catalano is ordered to immediately turn over to Carmille Benincaso any cash receipts in his possession and stop taking, transferring or disposing of the cash receipts and income of BNC.

(4) Direct Joseph Catalano to make available, deliver or turn over to Carmille Benincaso the books and records of BNC and of decedent

Carmille Benincaso asserts that she has been unable to obtain information or records from Joseph Catalano or Michael L. Schneider in connection with BNC, which was wholly owned by the decedent. As noted above, subsequent to the filing of this application, petitioner’s counsel was given a CD ROM disk which purportedly contains the Quick Books history of BNC, including the sales and bank records. Joseph Catalano and Michael L. Schneider are ordered to make available,

deliver or turn over to Carmille Benincaso all of the other books and records of decedent and BNC within 45 days of the date of this decision and order.

The respondents are again ordered to refrain from removing or altering any data contained within the hard drives of the computers which contain information pertaining to BNC, pending further order of this court.

**(C) Carmille Benincaso's Application for Order and Relief Pursuant to SCPA 2107, 202 and 201 to Protect the Assets of the Estate, and**

**(D) The Motion for an Order to Dismiss Pursuant to CPLR 3211 and 3212**

In her petition, Carmille Benincaso asks the court to exercise its powers to:

- (1) enjoin the respondents, Joseph Catalano, 601 Corp. and Louis P. Karol, from taking any action as individuals and as directors of 601 Corp. to vacate any agreement by which BNC continues operation at 601 Old Country Road, or interfere with the continued operation of BNC at 601 Old Country Road;
- (2) vacate the selection of a replacement member of the board of directors of 601 Corp.; and
- (3) nullify the February 28, 2011 meeting of the board of directors of 601 Corp., on the grounds that the meeting violated 601 Corp.'s corporate By-Laws.

In response, counsel for respondents filed an answer as well as a motion to dismiss or for summary judgment on the grounds that:

- (i) the petition has no merit and there are no factual disputes;
- (ii) the court lacks subject matter jurisdiction;
- (iii) Carmille Benincaso lacks standing to challenge the conduct of Joseph Catalano in filling the vacancy caused by decedent's death on 601 Corp.'s board of directors;

- (iv) petitioner has unclean hands and her action should be dismissed on the bases of waiver, estoppel and laches;
- (v) the status quo should be preserved; and
- (vi) petitioner's request for relief in connection with BNC should be dismissed because prior actions for the same relief are pending.

### **Respondents' Motion for Summary Judgment or Dismissal**

The court will first address respondents' motion seeking summary judgment or dismissal. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 29 NY2d 557, 562 [1980]).

(i) In support of their motion for summary judgment, respondents claim that the petition has no merit and there are no facts in dispute. However, as noted previously, petitioner disputes Joseph Catalano's assertion that there is no lease or other binding agreement by which BNC operates at 601 Old Country Road. This is an outstanding material issue of fact which will not be resolved until after petitioner obtains the information and documents she is seeking. This precludes granting respondents' motion for summary judgment.

(ii) In support of their motion for dismissal, respondents argue that this court lacks subject

matter jurisdiction over what is essentially a corporate governance dispute, even where 50% of the shares are held by a decedent's estate. The court disagrees. The subject matter jurisdiction of the Surrogate's Court was expanded by the New York Constitution almost 50 years ago, and this expansion was codified five years later by Article 2 of the SCPA. This article grants the court "full and complete jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents" (SCPA 201 [3]). The Court of Appeals affirmed the extent of the court's jurisdiction in *Matter of Piccione*, 57 NY2d 278 (1982).

Respondents argue that the mere fact of stock ownership by an estate may not necessarily be sufficient to confer jurisdiction on the Surrogate's Court to determine a conflict in the management of the corporation. In this proceeding, however, it is not the mere fact of ownership of corporate shares that brings this matter under this court's jurisdiction. Decedent was a 50% shareholder of 601 Corp.; he was also a director, as well as president and treasurer of the corporation. The dispute arose as a result of the death of decedent, and it concerns the rights of decedent's personal representative in connection with the management of 601 Corp., the interaction between 601 Corp. and BNC, and the selection of decedent's replacement on the board of directors of 601 Corp.

(iii) Respondents argue that Carmille Benincaso lacks standing to challenge Joseph Catalano's conduct because she offered to sell the estate's shares in 601 Corp. to Joseph and she therefore lacks an equitable interest in the company. No agreement was reached on the sale of the proffered shares; they remain in decedent's estate. The court finds that Carmille Benincaso, as the personal representative of decedent's estate, has standing to bring these proceedings.

(iv) Respondents assert that the petition should be dismissed due to unclean hands and the

applicability of waiver, estoppel and laches. It is argued that because Carmille Benincaso took no action beyond offering the estate's shares of 601 Corp. for sale to Joseph Catalano during the time period between her appointment as preliminary executor on January 13, 2011 and Joseph Catalano's appointment of Louis P. Karol to fill the board vacancy on February 28, 2011, a period of 46 days, her inaction precludes her from challenging the appointment of Louis P. Karol made by Joseph Catalano.

It is also argued that estoppel applies. "An estoppel ... rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury" (*Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]). There is no indication in the documents filed on behalf of respondents that they changed their position to their detriment based upon their reliance on the word or deed of Carmille Benincaso.

The court finds that Carmille Benincaso's petition is not precluded on the basis of unclean hands, waiver, estoppel or laches.

(v) It is respondents' position that Joseph Catalano has run 601 Corp. for twenty years and there is no reason to upset the status quo. The court notes, however, that the status quo, in which both Joseph Catalano and decedent ran 601 Corp., was altered by the death of Gregory Catalano.

Respondents assert that the by-laws direct that a deceased director's unexpired term should be filled by a vote of the majority of directors then in office, although less than a quorum may exist, and they further note that neither the New York Business Corporation Law (hereinafter "BCL") 705 or Article III paragraph 4 of the by-laws require that an individual appointed to serve the unexpired term of a deceased director must be a shareholder. Carmille Benincaso's position that a director must be a shareholder is not based upon either BCL 705 or Article III paragraph 4 of

the by-laws, but rather on Article III paragraph 1 of the by-laws, which provides: “Subject to any provision in the certificate of incorporation the business of the corporation shall be managed by its board of directors, each of whom shall be at least 18 years of age and shall be shareholders.”

Respondents argue that there is an inconsistency between this section and Article III paragraph 4, cited above, which does not indicate any requirement that a member of the board of directors must be a shareholder, and that in the case of an inconsistency, BCL 705, which has no such requirement, should control. The court does not see any inconsistency. There is no need to repeat every requirement in every section, and BCL 701 specifically provides that corporate by-laws may include additional qualifications for directors. Once the by-laws state a requirement for serving as a director, it need not be restated in each subsection, and a failure to have it restated repeatedly does not create an inconsistency or require reference to the BCL to resolve an inconsistency, as alleged by respondents.

Respondents are correct in their assertion that the by-laws are silent on whether a personal representative of a shareholder’s estate is a shareholder according to the by-laws, but they are incorrect in interpreting that silence to mean that a personal representative of a shareholder’s estate is a not shareholder. In fact, EPTL 11-1.1 (b) (14) specifically gives fiduciaries the power to vote shares of stock held in a fiduciary capacity. “If the shares [of stock] are not specifically bequeathed, ownership thereof will vest in the fiduciary who will then have sole authority to vote for officers and directors ...” (5-66 Warren’s Heaton on Surrogate’s Court § 66.03 [4] [2011]; see also *Matter of Kagan*, 7 Misc 3d 791, 792 (Sur Ct, Dutchess County 2005).

Respondents also assert that Carmille Benincaso is “singularly unqualified to be a director.” They support this by referring to her retention of funds found in decedent’s home, which funds may

belong to 601 Corp. Carmille Benincaso's attorney has agreed to the return of the funds if it is established that they belong to 601 Corp. Joseph Catalano notes also that he and Carmille Benincaso do not get along, so that her appointment as a director could result in a deadlock on the board of directors concerning BNC remaining at 601 Old Country Road, as a result of which Joseph Catalano might seek a corporate dissolution of 601 Corp. Respondents then argue that if Carmille Benincaso is involved in the management of 601 Corp. or serves 601 Corp. in a fiduciary capacity, there will be a "scenario worse than dissolution." None of these points alters the fact that a director of 601 Corp. must be a shareholder, and the personal representative of decedent's estate is the only shareholder aside from Joseph Catalano.

(vi) Respondents assert that the relief sought has been sought by petitioner in prior proceedings, referring to the motion discussed above under SCPA 2108 for the continuation of BNC's business. The relief sought in that motion, which seeks an authorization by the court to continue BNC, is not identical to the relief sought herein to protect the assets of the estate. This portion of the motion is denied.

#### **Petitioner's Application to Protect Estate Assets**

In this petition, Carmille Benincaso asks the court to vacate the selection of Louis P. Karol as a director of 601 Corp.; nullify the board of directors meeting conducted on February 28, 2011; and enjoin respondents from vacating the agreement between 601 Corp. and BNC by which BNC operates out of John's Farms. The court will address each of these requests:

(i) Carmille Benincaso seeks a nullification of the meeting of the board of directors of 601 Corp. which took place on February 28, 2011 on the ground that it violated the corporation's by-laws. The by-laws state:

(a) The annual meeting of the shareholders must be held on the 25 day of February at 11 A.M. in each year if not a legal holiday (By-Laws II.2). *The meeting convened by Joseph Catalano was not held on February 25, even though February 25 was not a legal holiday.*

(b) Written notice of each meeting of shareholders shall state the purpose or purposes for which the meeting is called, and the place, date and hour of the meeting (By-Laws II.5). *Carmille Benincaso was not given advance written notice of the meeting convened by Joseph Catalano, as required by the by-laws.*

The court finds that the meeting convened by Joseph Catalano is a nullity as it was in violation of the corporate by-laws and conducted without notice to a 50% shareholder, Carmille Benincaso, as the preliminary executor of the estate of Gregory Catalano.

(ii) Carmille Benincaso asserts that Joseph Catalano's unilateral selection of Louis P. Karol to replace decedent on the board of directors of 601 Corp. violates the shareholders' agreement and the corporate by-laws and is inconsistent with the New York Business Corporation Law.

Section 3.1 of the shareholders' agreement provides that if there are two shareholders, then there must be two directors, and that to convene a valid meeting there must be a quorum of two. Carmille Benincaso argues that after Gregory Catalano's death, Joseph Catalano, as president, should have called a shareholders' meeting for the election of a replacement director. Carmille Benincaso, as the personal representative of decedent's estate and a 50% shareholder, should have been given written notice; her presence at the meeting would have provided the quorum of two needed in accordance with the shareholders' agreement. Carmille Benincaso acknowledges that under BCL 705 (a), a vacancy on the board of directors may be filled with less than a quorum in attendance at the meeting, but maintains that this section does not override the requirement in

Section 3.3 of the shareholders' agreement that a resolution requires an affirmative vote of two.

Carmille Benincaso points to the preamble of Section 3 of the shareholders' agreement as support for her proposition that its subsections establish how Joseph Catalano and Gregory Catalano should vote as directors, not only how they should vote as shareholders. Upon the death of Gregory Catalano, it is argued, his personal representative should have taken his place on the board of directors, rather than a non-shareholder selected by Joseph Catalano. Further, even if the board votes to fill a vacancy, such replacement director only serves until the end of the term of his predecessor, which is until the next meeting of the board of directors. Gregory Catalano died on December 28, 2010, and Section 2 of the corporate by-laws sets the annual meeting of the board of directors on February 25 of each year. The unexpired term of Gregory Catalano as of the date of his death would thus end on February 25, 2011. Lastly, Carmille Benincaso notes again that the selection of Louis P. Karol to serve as a director, when he is not a shareholder of 601 Corp., is not in compliance with the by-laws which require that each director must be a shareholder (Article III, paragraph 1).

Respondents assert that Article III, paragraph 4 of the by-laws provide that a majority of the directors in office, even if less than a quorum, may elect a director to fill a vacancy caused by the death of a director, and that the director so appointed will serve out the unexpired term of the deceased director. Since Joseph Catalano appointed Louis P. Karol on February 28, 2011, three days after the date on which the annual board of directors meeting should have been held and decedent's term on the board of directors would have expired, respondents argue that decedent's unexpired term now runs until the next annual meeting, to be held on February 25, 2012. Joseph Catalano concedes that Carmille Benincaso was not notified until March 1, 2011 of the meeting

and the actions he took, but he disputes his sister's claim that he intentionally delayed filling the vacancy caused by Gregory Catalano's death until after the date of the annual meeting.

The court finds that the selection of Louis P. Karol as a director of 601 Corp. is in violation of the corporate by-laws and the shareholders' agreement on the following grounds::

- (a) Each director must be a shareholder (By-Laws III.1). *Louis P. Karol is not a shareholder.*
- (b) Directors are to be elected at each annual meeting of the shareholders (By-Laws III.3). *Louis P. Karol was not elected at an annual meeting.*
- (c) At each annual meeting of the shareholders, the shareholders shall elect directors to hold office until the next annual meeting (By-Laws III.3). *The shareholders, Joseph Catalano, and Carmille Benincaso as preliminary executor of the estate of Gregory Catalano, did not elect Louis P. Karol at an annual meeting to serve as a director.*

Even if Joseph Catalano acted in reliance upon that portion of the by-laws which provides that "[i]n the event of the death ... of an officer, the board in its discretion may elect or appoint a successor to fill the unexpired term" his choice of Louis P. Karol is still void in light of the requirement that the director must be a shareholder. Even if Joseph Catalano had selected a shareholder to serve as a successor director, the term of such successor director would, in any event, have ended eleven months ago, on February 25, 2011. One cannot change the plain meaning of the by-laws by skipping the required annual meeting and then convening a meeting three days later without notification to shareholders for the purpose of unilaterally selecting the successor director and then claiming that the unexpired term of the deceased director runs for another full year.

- (iii) Carmille Benincaso also asks that the court enjoin the respondents from interfering

with BNC's operation or vacating any agreement which may exist between 601 Corp. and BNC which allows BNC to operate within John's Farms at 601 Old Country Road. In response, respondents claim that BNC is a licensee-at-will and that 601 Corp. can force BNC to vacate John's Farms at any time. Respondents further indicate that 601 Corp. will exercise this power should the court determine that Carmille Benincaso has the right to operate and control BNC.

Petitioner notes that she still lacks information concerning the agreement between BNC and 601 Corp. which governs their shared space because respondents have not yet delivered all of the records of BNC to her. Without that information, it is impossible to determine petitioner's right to continue to operate BNC as a separate corporation within John's Farms.

This portion of Carmille Benincaso's petition is essentially a request for injunctive relief. In order to establish entitlement to a preliminary injunction, the petitioners must establish: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of injunctive relief; and (3) a balancing of the equities in their favor (*W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]; *First Franklin Square Assocs. LLC v Franklin Square Property Account*, 15 AD3d 529, 533 [2d Dept 2005]). However, petitioner no longer requires injunctive relief because, as noted above, the court finds that the selection of Louis P. Karol by Joseph Catalano to serve as a successor director of 601 Corp. violated the corporate by-laws and the shareholders' agreement, and the meeting of February 28, 2011, conducted without notice to the corporate shareholders, is a nullity. Thus, even if it is ultimately determined that BNC is merely a licensee-at-will, the fact remains that Carmille Benincaso, as preliminary executor of the estate of Gregory Catalano, is a 50% shareholder of 601 Corp.; accordingly, her right to make decisions on behalf of 601 Corp. is equal to that of Joseph Catalano, who is also a 50% shareholder.

## CONCLUSION

(A) So much of the petition of Carmille Benincaso pursuant to SCPA 2103 to permit cloning all of the computers at John's Farms is denied with leave to renew, as is the request that her forensic accountants be given access to John's Farms. Her request for a discovery conference is granted; the request for costs and sanctions is denied.

(B) The petition of Carmille Benincaso seeking authorization to continue BNC is granted; the application for specific authority to hire an employee is denied. The application for an order directing Joseph Catalano to stop interfering with the management of BNC, to turn over all BNC cash receipts that are in his possession, to stop taking, transferring or disposing of BNC cash receipts, and to make available, deliver or turn over the books and records of BNC and the decedent to Carmille Benincaso as preliminary executor of decedent's estate, is granted, except as to those records previously provided to petitioner.

(C) The petition of Carmille Benincaso to protect the assets of the estate is decided as follows:

The request to enjoin respondents from seeking to vacate an agreement between BNC and 601 Corp. is denied as unnecessary, with leave to renew should injunctive relief become necessary.

The request to vacate the selection of a replacement director is granted.

The request to nullify the meeting of the board of directors of 601 Corp., which was held on February 28, 2011, is granted.

(D) The motion of Joseph Catalano, 601 Corp. and Louis P. Karol for summary judgment or dismissal of the petition of Carmille Benincaso is denied.

The court acknowledges the challenges faced by Joseph Catalano, who has made it

absolutely clear that he does not wish to work together with Carmille Benincaso, and by Carmille Benincaso, who until now has been excluded from the management of corporate assets for which she bears full or partial responsibility. It is hoped that the parties will find a way to join forces and that if not, they will find a way to part amicably. If this proves to be impossible, the court will have no choice but to consider the appointment of a temporary receiver pursuant to CPLR 6401 (a), who will manage the business until such time as a buyer can be found. While this is an extreme remedy, the documents filed with the court present a sufficient showing of the necessity for the conservation of the property at issue and the need to protect both parties' interests in that property (*Quick v Quick*, 69 AD3d 828 [2d Dept 2010]).

Counsel for each party is asked to confer with opponent's counsel toward the goal of resolving the multi-faceted business and personal conflicts before the court, and to report back to the court at the discovery hearing scheduled for January 26, 2012 at 3:15 p.m.

This constitutes the decision and order of this court.

Dated: January 9, 2012

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court

