

**Matter of Bernfeld**

2015 NY Slip Op 30341(U)

February 28, 2015

Surr Ct, Nassau County

Docket Number: 358300/B

Judge: Edward W. McCarty III

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This opinion is uncorrected and not selected for official publication.

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

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Application by Madelaine Bernfeld,  
as Executor of the Estate of

MICHAEL BERNFELD,

Deceased,

File No. 358300/B  
Dec. No. 30546

For Discovery and Turnover of Assets  
Pursuant to SCPA 2103  
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In this discovery proceeding by Madelaine Bernfeld as executor of the estate of Michael Bernfeld regarding the decedent's dental practice and his ownership interest in the dental PC (as that term was originally defined by petitioner and thereafter referenced in prior decisions of this court) against respondent Yakov Kurilenko, D.D.S., petitioner moves for an order pursuant to CPLR 6401 and BCL §1202 appointing a temporary receiver for the dental PC; granting a preliminary injunction restraining and enjoining respondent, his agents, servants, etc. from disposing of any property or assets of the dental PC, as well as the "equitable stock" of the PC; ordering, under penalty of contempt, respondent, his agents, servants, etc. who are already in possession or using property of dental PC to cease and desist from such usage and immediately return same to the appointed receiver; or, in the alternative, that respondent post an undertaking under Article 71 of the CPLR in the sum of at least \$1.53 million.

In its decision and order dated August 1, 2014 this court directed an evidentiary hearing on petitioner's requests for relief. That hearing went forward on August 26, October 9, November 6 and concluded on November 10, 2014. The parties were given the opportunity to make post-hearing submissions [after receipt of the transcripts] which petitioner did on December 19, 2014 completing the proceeding. No submission was made by respondent.

Petitioner testified in addition to several members of decedent's family and a CPA retained by the estate. Respondent testified as well. Several documents were received in evidence, all proffered by petitioner.

Some of the history of the underlying probate proceeding and this proceeding are detailed in this court's prior decisions (*Matter of Bernfeld*, 43 Misc 3d 1208 [A]; *Matter of Bernfeld*, 2014 NY Slip Op 51107 [U]; the August 1st decision and order) and are incorporated by reference herein. At the risk of repetition, while the issue in the underlying petition is respondent's ownership interest, if any, in the dental PC, the prime question on this application focuses on the operation of the practice since decedent's death in 2009 and whether there has been actual harm or the potential for material and irreparable damage or loss to the dental PC and thereby a present need to protect the corporation from waste, disappearance or dissipation by granting some or all of the relief sought.

The hearing record established the following.

By way of limited relevant background, for several years prior to his death, decedent, a prosthodontist, was engaged in the practice of dentistry at locations in Brooklyn and Queens and as of 1998 did so in part in the legal format of a professional corporation with another dentist and co-shareholder (Dr. Tony Yehia) as the dental PC at offices located at 156-36 Cross Bay Blvd., Howard Beach. New York. It appears there were other dentists practicing in that space whose precise status [employee, independent contractor, etc.] is unknown. Right out of dental school in 2000 respondent Dr. Kurilenko began professional training with Dr. Bernfeld and became affiliated and then employed with the overall practices part-time and subsequently full-time.

There is a 2002 lease in evidence for that space between the landlord and decedent and Dr. Yehia in their own names as lessees for the dental PC location [Pet. Ex. 5.]. It is missing the initial pages including the paragraph relating to the term of the lease, the rent and the use clause. There is testimony by respondent that this lease expired in or about 2011. Paragraph 37 thereof afforded tenants up to 3 options to extend at 5 year increments.

In 2004 decedent bought out Dr. Yehia's shareholder interest in the dental PC. [Pet. Ex. 3.]. That same year the name of the professional corporation was changed to delete Dr. Yehia's name and added respondent Dr. Kurilenko's name.

The court digresses from this fact recitation to observe parenthetically that the estate seems to have been and remains cognizant of close to nothing of the specifics of the dental PC practice except for the fact that Dr. Bernfeld is said to have made a very good living as a dentist. There were allegations by petitioner that respondent purloined and secreted the books and records of the practice. Any proofs submitted by petitioner were derived from the minimal and incomplete disclosure [CPLR and otherwise] from Dr. Kurilenko, who although admittedly running the practice in its entirety since 2009, himself offered not a single document in evidence.<sup>1</sup>

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<sup>1</sup> These circumstances present the classic example of the application of the concept of drawing the "strongest" negative inference from a party's unexplained failure to produce documents undeniably in their possession or control. (PLI 1:77.)

The CPA Christopher Arato testified [November 6<sup>th</sup> transcript, pp. 52 to 62 with no cross-examination] of his retention by the estate to analyze financial data and supporting backup of the dental PC and his inability to do so as a result of receiving little or none of the documentation requested of respondent. What the accountant did receive and was moved into evidence is a copy of Dr. Kurilenko's W-2 showing gross wages from the corporation in 2012 of \$55,000 [Pet. Ex. 16] and sketchy bank records (statements only) [Pet. Ex. 13] from the apparent operating checking account for the dental PC at Citibank for a ten (10) month period from November of 2012 through the first week of August 2013.<sup>2</sup> Of note tallying up the inflows and outflows from this exhibit they appear to be approximately the same - \$350,000.00 in and \$350,000.00 out. The deposits are consistent with Arato's testimony of the gross receipts from the dental PC practice in earlier years in the high six figures. No documentation of the earlier [presumably pre 2008-2009] gross receipts was submitted.

It is readily apparent that after running the practice for a year or two after Dr. Bernfeld's death, Dr. Kurilenko set upon a goal to take over the practice completely.

During the same time frame as the Citibank statements, in January 2013 respondent caused to be created and filed in this State a business corporation named "Kurilenko Management, Inc." [Pet. Ex. 7.]. The address listed therein for the mailing of process is the address of the dental PC office. The following month, rather than previously reaching out to the estate to preserve the asset of the Cross Bay Blvd. leasehold, respondent entered into a new lease with the landlord for that space dated

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<sup>2</sup> The court uses the word "sketchy" as there are two months missing from this mere snapshot of the time since 2009 and there are no cancelled checks provided, and no other indication of the payees, or what sums were expended and for what reasons.

February 6, 2013 [Pet. Ex. 6.]. The named tenant is “Howard Beach Dental - Kurilenko Management, Inc.” Least there be any doubt, the use clause (¶4) provides, “dental office”. Further, as late as during the hearing time span there was a continued internet presence/advertisement for the practice under the dental PC’s trade name - Howard Beach Dental - at the Cross Bay Blvd. location and there are [6] six doctors listed in the “Meet The Doctors” portion of the website, two without attending photographs and one of whom incredibly, is decedent),

There were a number of issues raised at the hearing, and a substantial number of arguments made by petitioner in her post-hearing submission that simply are beyond the scope of this proceeding and will not be addressed.<sup>3</sup> The crux of the temporary receiver issue is, simply stated, consistent with law cited by this court in its decision and order directing the hearing: has the dental PC been shown to be at such risk of material, irreparable damage or loss that a need exists to appoint a temporary receiver to protect it from waste, disappearance or dissipation?

On the basis of the foregoing the answer to this question is unqualifiedly in the affirmative. The application for a temporary receiver is accordingly granted.

The injunctive relief sought is denied, except to the extent indicated. In many respects it is duplicative or counterproductive to the pending receivership, much too broad in scope and the court is uncertain as to precisely what relief is being sought (“equitable stock”). However, with the backdrop of the Howard Beach leasehold scenario, Dr. Kurilenko should be enjoined from

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<sup>3</sup> The ultimate issue of respondent’s ownership interest, if any, in the dental PC; tortious interference with a potential sale of the practice; the propriety of respondent’s car payments being made by the dental PC; the payment of Dr. Kurilenko’s student loan between 2004 and 2008 from dental PC funds; etc.

disposing of any assets of the dental PC.

Settle order on notice providing for the specific scope of the duties of the receiver and the preliminary injunctive relief and a recommendation of the amount of the requisite undertaking

(CPLR 6312 [b]) and the rationale therefor. The order to be settled should also contain a blank for the court to insert the name of the temporary receiver.

Dated: February 28, 2015

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