

<b>Matter of Bernfeld</b>
2016 NY Slip Op 32639(U)
October 20, 2016
Surrogate's Court, Nassau County
Docket Number: 358300/E
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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**Application by Madelaine Bernfeld individually as a Person  
Interested in the Estate, and Application by Madelaine  
Bernfeld, as Executrix of the Estate of**

**MICHAEL BERNFELD,**

**Deceased,**

**File No. 358300/E  
Dec. No. 31779**

**Pursuant to SCPA § 2110,  
To Fix and Determine Attorney’s Fees and Compensation  
for Services Rendered by the Respondent Law Firm Smith,  
Gambrell & Russell, LLP, Attorneys at Law; and for Refund  
Returning to Petitioners All Sums Paid That are Determined  
to Have Been in Excess of Fair Value, Excessive, Unreasonable,  
and/or Unnecessary, Together With Interest Thereon at the  
Legal Rate From the Date(s) When Paid by Petitioner(s).**

-----X **DECISION**

**Madelaine Bernfeld, as Executrix of the Last Will  
Estate of MICHAEL BERNFELD, Deceased,  
and Madelaine Bernfeld, individually,**

**Plaintiffs,**

**File No. 358300/E  
Dec. No. 31780**

**-against-**

**Smith, Gambrell & Russell, LLP, Attorneys at Law,**

**Defendant.**

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**PRESENT: HON. MARGARET C. REILLY**

The following papers were considered in the preparation of this decision:

<b>As to Motion to Dismiss the Amended Complaint</b>	
Notice of Motion . . . . .	1
Affirmation in Support of Motion with Exhibits. . . . .	2
Affirmation in Opposition to Motion with Exhibits. . . . .	3
Reply Affirmation in Further Support of Motion. . . . .	4
Reply Memorandum of Law in Further Support of Motion. . . . .	5
Supplemental Affirmation in Further Opposition to Motion. . . . .	6

### As to the Motion to Dismiss Affirmative Defenses

Notice of Motion to Strike Affirmative Defenses. . . . .	7
Affirmation in Support of Motion with Exhibits. . . . .	8
Affirmation in Opposition to Motion to Strike with Exhibits. . . . .	9
Memorandum of Law in Opposition to Motion to Strike. . . . .	10
Reply Affirmation in Further Support of Motion to Strike. . . . .	11

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This proceeding by the executor against her former attorneys was originally commenced in Supreme Court, Nassau County, and was subsequently transferred here by order of the Supreme Court. The respondent law firm now moves the court for an order: (1) dismissing the Amended Verified Complaint pursuant to CPLR § 3126 based on the executor's failure to comply with discovery demands; (2) alternatively, if the Amended Verified Complaint is not dismissed, precluding the executor from offering any evidence at trial of those items demanded but not provided or compelling the executor to comply with the discovery demand.

The executor, by separate motion, seeks an order dismissing all of the defendant's nine affirmative defenses and striking the defendant's jury demand.

The executor opposes the defendant's motion on several grounds, but argues that the motion to dismiss must be denied because while the instant motion was *sub judice*, the executor's motion for leave to file a Second Amended Complaint was granted, superceding the Amended Complaint and rendering the defendant law firm's motion moot. The court agrees to the extent that the Second Amended Complaint, filed with leave of the court and without objection by the defendant, supercedes the Amended Complaint and renders the Amended Complaint a nullity (*see Chalasani v Neuman*, 64 NY2d 879 [1985]), leaving the

Second Amended Complaint as the only complaint in the action (*see Preston v APCH, Inc.*, 89 AD3d 65, 69 [4th Dept 2011]). Accordingly, the branch of the defendant's motion seeking an order dismissing the Amended Complaint is denied as moot.

However, the fact that the original complaint has been supplanted does not render all pre-trial disclosure conducted up to that point null and void nor exonerate the plaintiff from any improper conduct in the course of pre-trial disclosure. The general rule is that, absent prejudice, an amendment relates back to service of the original pleading (*see Iacovangelo v Shepherd*, 5 NY3d 184, 187 [2005]) and is not the equivalent of a new action (*see Bernstein v Remington Arms Co.*, 18 AD2d 910 [2d Dept 1963]).

The remaining branch of the defendant's motion is for an order either precluding the executor from offering any evidence at trial of those items demanded in pre-trial discovery but not provided, or compelling the executor to comply with the discovery demand. The affirmation in opposition to the motion filed by the plaintiff's attorney runs 26 pages but the motion itself is not addressed until the middle of page 22, the bulk of the affirmation being a recitation of the allegations of alleged legal malpractice committed by the defendant law firm and the procedural history of the case. The responses to the document discovery demands are largely identical and read as follows:

Response: Plaintiff objects to this demand on the grounds that it is unable to frame a response in the form stated because it is vague and ambiguous, undefined, irrelevant, unduly burdensome and lacks specificity. Without waiving any of the foregoing general responses and objections, which are incorporated herein by reference, further objection is made to this Demand on the grounds that it is outside the scope of permissible discovery, seeks information beyond the permissible scope of Civil Practice Law and Rules section 3101, is not reasonably calculated to lead to the discovery of relevant evidence, is improper as not material and necessary or the prosecution of this

action, and seeks confidential information of Plaintiff.

Response: Without waiving any of the foregoing objections, which are incorporated herein by reference, SGR/Defendant is in possession, custody or control of any documents responsive to this demand other than those documents which may contained [sic] in SGR's Defendants underlying file in this matter. SGR's underlying file in this matter is voluminous, consists of approximately 5 bankers' boxes of records, and is available for Defendant's discovery, inspection and copying at their office at any time without plaintiff being present. Plaintiff reserves the right to amend and/or supplement their response as discovery and investigation continue to accordance with the applicable provisions of the Civil Practice Law and Rules.

New York requires full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101 [a]). Case law has broadly construed the scope of material that is discoverable, ruling that "the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay ... the test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968] [internal citations omitted]). The Court of Appeals' interpretation of "material and necessary" has been understood "to mean nothing more or less than 'relevant'" (Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3101:5). Discovery of documents is permitted even if they are not admissible in evidence, provided that the production of such documents may lead to disclosure of admissible evidence (*see Fell v Presbyterian Hospital in New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]).

The court finds that the plaintiff's responses to the document discovery demand do not satisfy the requirement of CPLR § 3122 (a) (1) that a response to a discovery demand which the recipient of the demand finds objectionable "shall state with reasonable particularity the reasons for each objection." The plaintiff seeks to recover from the

defendant law firm over \$300,000.00 in legal fees already paid plus what appears to be approximately \$2 million in claimed damages. The documents sought in the notice for discovery and inspection and the answers to the interrogatories are directed at the bases of the claims as set forth by the plaintiff in the complaint. While the discovery sought is expansive, it appears to the court that what the notice for discovery and inspection and the interrogatories seek is the disclosure of information that bears on the controversy and will assist in the preparation of the case for trial and is therefore properly discoverable. The plaintiff has failed to establish that any of the material sought is palpably improper and has not provided a privilege log for any material claimed to be privileged.

Accordingly, the court directs that the plaintiff comply with the notice for discovery and inspection to the extent that the documents sought have not already been provided and to do so within 20 days of the date hereof. As to any documents claimed to be privileged, plaintiff is directed to provide a detailed privilege log in compliance with CPLR 3122 (b). Any documents claimed to be privileged will be submitted to the court in unredacted form for *in camera* inspection by the court (*see Stephen v State of New York*, 117 AD3d 820 [2d Dept 2014]).

Contrary to the position taken by the defendant, the cost of copying any responsive documents is to be borne by the defendant as the party seeking the production. “In the case of ‘documents and things . . . ’ a party’s obligation is ‘to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph’ the items produced (*see* CPLR 3120[1] [i]). This section may be satisfied by telling the party seeking the discovery where the materials are and providing a reasonable opportunity for that party to look at

them and make copies . . . .” (*Zegarelli v Hughes*, 3 NY 3d 64, 68-69 [2004]). Furthermore, “each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their [reproduction]” (*Rubin v Alamo Rent-A-Car*, 190 AD2d 661 [2d Dept 1993][internal quotation and citations omitted]).

The plaintiff is also directed to serve a formal response to the Notice for Discovery and Inspection of Electronically Stored Information within twenty (20) days of the date of this Decision.

As to the interrogatories, the court finds that the plaintiff has provided proper responses except to the following numbered interrogatories: 6, 8, 15-21, and 23 and directs the plaintiff to provide proper responses to those interrogatories within twenty (20) days of the date hereof.

As to the plaintiff’s cross motion to dismiss the affirmative defenses raised in the defendant’s answer, the cross motion is denied as moot for the same reason that the defendant’s motion to dismiss the Amended Complaint was denied, i.e., the Second Amended Complaint superceded the Amended Complaint and thus the defendant’s answer to the Amended Complaint has no effect (*see Mendrzycki v Cricchio*, 58 AD3d 171, 174-175 [2d Dept 2008]).

This is the decision and order of the court.

Dated: October 20, 2016  
Mineola, New York

**E N T E R :**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate’s Court**

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