

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MADELAINÉ BERNFELD, as Executrix in
the Estate of MICHAEL BERNFELD, Deceased,
and MADELAINÉ BERNFELD, Individually,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 002729/15

MOTION DATE: May 26, 2015
Motion Sequence # 001

Plaintiffs,

-against-

SMITH, GAMBRELL & RUSSELL, LLP,
Attorneys At Law,

Defendant.

The following papers read on this motion:

Order to Show Cause.....	X
Affirmation in Support.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X
Memorandum of Law.....	X

Motion by defendant Smith, Gambrell & Russell, LLP to remove a related fee proceeding from the Surrogate's Court and consolidate it with the above action is **denied**.

This is an action for attorney malpractice. Plaintiff Madelaine Bernfeld is the executrix and surviving spouse of Michael Bernfeld, a dentist who died on September 29, 2009. On October 22, 2009, Madelaine retained the defendant law firm, Smith, Gambrell & Russell, LLP to probate Michael's will and to provide other legal representation to the estate.

BERNFELD v SMITH, GAMBRELL & RUSSELL, LLP Index no. 002729/15

Michael practiced in a professional corporation with another dentist, Yakov Kurilenko. Michael held 75 % of the shares of the professional corporation, and Kurilenko held the remaining 25 %. Plaintiff alleges that another dentist, Fred Cohen, was willing to purchase the professional corporation for \$530,000, but Kurilenko opposed the sale to Cohen.

On February 23, 2010, Medelaine, represented by Smith, Gambrell, commenced a special proceeding seeking the judicial dissolution of the professional corporation pursuant to Business Corporation Law § 1103, in an effort to overcome Kurilenko's objection (See, *Matter of Bernfeld*, 86 AD3d 244 [2d Dept 2011]). On May 20, 2010, Supreme Court dismissed the dissolution proceeding on the ground that Madelaine, as a non-dentist, was unqualified to hold stock in the professional corporation. Supreme Court's order dismissing the petition was affirmed by the Appellate Division on June 7, 2011. Madelaine retained her current counsel to substitute for Smith, Gambrell on January 29, 2013.

The present action was commenced on March 25, 2015. Madelaine alleges that Smith, Gambrell committed malpractice by failing to investigate Kurilenko's status as a shareholder and allowing him to take control of the professional corporation. Madelaine further alleges that Smith, Gambrell committed malpractice by applying for preliminary letters testamentary, as opposed to full letters testamentary. Madelaine alleges that Smith, Gambrell failed to obtain proper discovery in the Surrogate's Court and failed to keep the creditors and debts of the decedent separate from those of the professional corporation. On May 14, 2015, plaintiff filed an amended complaint, seeking damages as opposed to disgorgement of attorney's fees.

On March 30, 2015, Madelaine filed a petition in the Surrogate's Court, alleging that the legal services provided by Smith, Gambrell were unsuccessful and seeking a refund of fees in the amount of \$295,000 (File No. 358300/E). On April 19, 2015, Surrogate McCarty issued a citation, directing Smith Gambrell to show cause before the Surrogate's Court why an order should not be made determining their legal fees pursuant to Surrogate's Court Procedure Act § 2110.

By order to show cause dated May 11, 2015, Smith, Gambrell moves to remove the legal fee proceeding to this court and to consolidate it with the present action. Smith, Gambrell argues that the fee proceeding and the malpractice action involve common questions of fact and law and there is a risk of inconsistent adjudications. In opposition, plaintiff argues that the issue of the proper amount of attorney's fees for services rendered to the estate is within the jurisdiction of the Surrogate's Court.

Surrogate's Court Procedure Act § 2110(1) provides that, at any time during the administration of an estate, the Surrogate's Court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary. A proceeding under this section shall be instituted by a fiduciary of the estate, or a person interested, or an attorney who has rendered services (SCPA § 2110[2]). The Surrogate's Court's jurisdiction extends to malpractice claims against the attorney which arise in connection with the administration of the estate (*Matter of Tarka*, 293 AD2d 396 [1st Dept 2002]). The Surrogate's Court is the "most appropriate venue" for malpractice claims, where "nearly all of the legal proceedings" involved with administration of the estate took place in Surrogate's Court (Id). See also *Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006]).

In the present case, plaintiff alleges malpractice which took place both in the Surrogate's Court and the Supreme Court in connection with the administration of the estate. While all of the proceedings did not take place in the Surrogate's Court, it is appropriate for that court to determine the amount of legal fees because the legal services were performed for an estate. Accordingly, defendant Smith, Gambrell & Russell, LLP's motion to remove the related fee proceeding File No. 358300/E from the Surrogate's Court and consolidate it with the above action is **denied**.

A Preliminary Conference has been scheduled for July 28, 2015 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated JUN 18 2015


J.S.C.

ENTERED

JUN 22 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE