To be Argued by:
ANDREW J. RYAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

Application of DR. ELIZABETH PLOCHARCZYK,

Petitioner-Respondent,

Docket No.: 534471

For the Judicial Dissolution of
PATHOLOGY ASSOCIATES OF ITHACA, P.C.,

Respondent,

-and-

DR. DANIEL SUDILOVSKY,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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QUESTIONS PRESENTED

Question: Did the Trial Court err in finding that there was sufficient evidence to demonstrate shareholder dissension to warrant dissolution of Pathology Associates of Ithaca ("PAI" or the "Company") under BCL Section 1104(a)(3)?

Answer: Yes. The record makes clear that there was insufficient evidence of shareholder dissension supporting dissolution under BCL Section 1104, and thus the Order dissolving PAI based upon BCL Section 1104(a)(3), was in error.

Question: Did the Trial Court improperly admit and rely upon hearsay evidence?

Answer: Yes. The record establishes that hearsay evidence relating to Plaintiff-Respondent's claims was improperly admitted and relied upon by the Trial Court.

STATEMENT OF FACTS

Respondent-Appellant Dr. Daniel Sudilovsky, M.D. ("Dr. Sudilovsky" or "Respondent-Appellant") is a Board-certified pathologist, who started his medical training at Case Western Reserve University Medical School, followed by his residency at the University of California – San Francisco ("UCSF") (R 457-458). He then had fellowships in surgical pathology, cytopathology and genitourinary pathology (R 458). He began working as a breast and genitourinary pathologist at the UCSF cancer center in 1997, rose to Associate Professor by 2001, then worked at a private cancer center located in Marin County, Ca., focusing on breast and prostate cancer (R 458-459). He was then recruited to be the Director of Cytopathology at the University of Pittsburgh where he worked until 2005 (R 459).

In 2005, Dr. Sudilovsky began working for Pathology Associates of Ithaca, P.C. ("PAI" or the "Company"), and was the sole shareholder of the Company from 2007 to 2018 (R 461). During the time that he was running the Company, Dr. Sudilovsky exponentially increased its scope and success, and he secured the business from the Company's largest clients, including Cayuga Medical Center ("CMC") (R 65, 470).

Petitioner-Respondent Dr. Elizabeth Plocharczyk ("Dr. Plocharczyk" or "Petitioner-Respondent") joined PAI as an employee in 2013, immediately following completion of her medical degree and fellowship (R 183-184). The job

at PAI was Dr. Plocharczyk's first as a working pathologist in private practice, and Dr. Sudilovsky acted as her mentor (R 186, 464). Dr. Plocharczyk testified that she and Dr. Sudilovsky had a cordial and agreeable relationship, and Dr. Sudilovsky was a good mentor and was interested in her development (R 186, 464, 468). Dr. Sudilovsky supported Dr. Plocharczyk in developing a pathology practice focusing on dermatopathology, and in 2018, Dr. Sudilovsky gave Dr. Plocharczyk a fifty percent (50%) ownership interest in PAI at no charge (R 193, 461, 464).

When Dr. Sudilovsky gave Dr. Plocharczyk the 50% ownership interest in PAI, he did not require that she pay for it, but she and Dr. Sudilovsky executed a Shareholder Agreement governing their duties and responsibilities to each other and the Company (R 631-653, the "Shareholder Agreement"). The Shareholder Agreement included a non-competition covenant found in Section 7.5(a), which prohibits the shareholders from engaging in any sort of competitive activity, including interfering in the relationships between PAI and its clients or inducing or attempting to influence any customer to terminate, reduce or adversely alter their business dealings with PAI (R 643).

PAI'S CLIENTS

PAI had contractual relationships with CMC and Schuyler Hospital to provide pathology services and Dr. Sudilovsky acted as Medical Director for both

the CMC and Schuyler Hospital laboratories for several years (R 470). Throughout Dr. Sudilovsky's tenure as Medical Director of the CMC laboratories, he received positive feedback and commendations from CMC, including personal expressions of gratitude and praise from CMC's CEO, Dr. Martin Stallone ("Dr. Stallone"). (R 381, 383, 387, 389, 673-675).

At the time that Dr. Plocharczyk commenced this dissolution proceeding, PAI had three clients: CMC, Schuyler Hospital, and Tompkins County, (R 469), with CMC being by far the largest client, generating approximately 80% of PAI's revenue (R 163). PAI and CMC had a contract for services that did not terminate until December, 2022 (R 471).

THERE WAS NO DEADLOCK OR DISSENSION

Dr. Plocharczyk alleges that the shareholders of PAI are deadlocked, or in the alternative, that there was internal dissention and the shareholders were so divided that dissolution of PAI was beneficial (R 7, 16). In support of this claim, Dr. Plocharczyk pointed to a number of discreet incidents (R 80).

In approximately September, 2019, Dr. Plocharczyk claims that the parties' harmonious working relationship was altered and that Dr. Sudilovsky became "disengaged" as a result of pending divorce proceedings (R 195). No evidence of any disengagement beyond Petitioner-Respondent's own testimony was offered, and the record establishes that Dr. Sudilovsky was not absent beyond the vacation

time allotted in the Shareholder Agreement (R 460, 644). Dr. Plocharczyk accused Dr. Sudilovsky of missing meetings (R 199-200, 230), but she failed to demonstrate that Dr. Sudilovsky had an obligation to attend any of the meetings he purportedly missed (R 487, 515-516, 554). Furthermore, Dr. Plocharczyk failed to invite Dr. Sudilovsky to, or notify him of, several of the meetings she accuses him of missing (R 208-210, 440-441). Dr. Sudilovsky only learned of the meetings after they had concluded (R 475).

Dr. Plocharczyk testified that Dr. Sudilovsky was absent or disengaged for "months" when the Covid-19 pandemic struck in March 2020 (R 206). That assertion is squarely contradicted by the documentary and testimonial evidence demonstrating that Dr. Sudilovsky was intimately involved with PAI's response to the Covid-19 pandemic beginning in March 2020, including ensuring the operation of the normal laboratory functions while Dr. Plocharczyk, who has a degree in public health, was overseeing the collection of Covid samples at remote locations outside of the laboratory (R 379, 473-474). Initially, those samples were being sent to other laboratories to be tested (R 474-475). During this time, Dr. Sudilovsky took on the responsibility of validating the new Covid testing machines at CMC so that CMC could perform "in-house" testing, a process that was completed as early as April 9, 2020, although the FDA did not approve the machines for testing until May 4, 2020 (R 473-479).

Dr. Sudilovsky was commended for his work during this stressful period, when the CMC and Schuyler Hospital laboratories were short-staffed and stretched thin, and he received personal expressions of gratitude from CMC's CEO, Dr. Stallone (R 388-389, 482).

DR. PLOCHARCZYK UNDERMINED DR. SUDILOVSKY

A. The April 17 emails

Dr. Plocharczyk claims that a group of emails dated April 17, 2020 constitute evidence of dissension between the shareholders. (R 670-671). The original email, sent by Dr. Plocharczyk to Dr. Sudilovsky and two laboratory technicians, inquires about the process of "cohorting" or "pooling" of Covid test samples, so that multiple samples could be tested simultaneously, thus increasing the laboratory's capacity (R 671). Dr. Sudilovsky responded by stating that the process had not been approved by New York State or Tompkins County (where the lab is located) and was also not validated by Rheonix, the manufacturer of the testing machines. Thus, it was a "dead issue" (R 670).

Unbeknownst to Dr. Sudilovsky, Dr. Plocharczyk forwarded Dr. Sudilovsky's email to Robert Lawlis, the CEO of Cayuga Medical Partners and an employee of CMC, stating, "Sorry – Did my best but this is not going to happen…I can't think of a single sound science reason why not to and I've been

looking hard for science reasons to say no…unfortunately, we are blocked from even trying." (R 670).

It is undisputed that Dr. Plocharczyk did not raise her displeasure about this email with Dr. Sudilovsky, and instead forwarded it to PAI's largest client (CMC), implying that Dr. Sudilovsky was preventing the expansion of Covid testing. *Id*. (R 325). These communications took place behind Dr. Sudilovsky's back, and he had no idea that this was taking place (R 295-296, 352-355). Dr. Sudilovsky's objection was entirely reasonable, as the pooling process was a novel one, and had never been done at the CMC lab (R 482). In fact, Dr. Plocharczyk's April 17, 2020 email insisting that the CMC lab move forward with pooling of samples pre-dated FDA approval of CMC's machines for even *single sample testing*, which was not granted until May 4, 2020 (R 479). Rather than discuss the issue with Dr. Sudilovsky, Dr. Plocharczyk forwarded Dr. Sudilovsky's response to PAI's largest client, in an obvious attempt to undermine him (R 670).

The suggestion that the parties were deadlocked on this issue is further belied by the fact that it was Dr. Sudilovsky who ultimately validated the testing machines, and then led the effort to validate the pooling of samples in order to increase the volume of in-house tests that could be performed at the lab. (R 356, 483).

B. Partnership with the Cornell Veterinary Laboratory

Dr. Plocharczyk also pointed to the potential partnership between CMC and the Cornell University Veterinary Laboratory to perform testing of human Covid samples as evidence of shareholder dissension (R 233). The evidence propounded by Dr. Plocharczyk did not demonstrate a deadlock, but instead, represented a difference of opinion between professionals, and demonstrated Dr. Sudilovsky's reasoned and responsible approach as the Director of the CMC pathology lab. Dr. Sudilovsky was appropriately cognizant of the fact that the regulations for testing animal samples is far different than the federal and state regulations for testing human samples, and that the Cornell Veterinary Lab personnel would have to receive extensive training in order to comply with the FDA regulations (R 497-498, 502, 570). No personnel from Cornell testified at the hearing, and the only "evidence" that Cornell objected to Dr. Sudilovsky's approach was the hearsay testimony of Dr. Plocharczyk and Dr. Stallone, the CEO of her current client, CMC (R 234, 238, 329). Moreover, Dr. Stallone's hearsay testimony about what he understood Cornell personnel to have expressed is directly contradicted by the fact that he texted Dr. Sudilovsky after the Cornell meeting, stating that the meeting went fine. (R 500)

C. The secret meetings

Dr. Plocharczyk had a number of secret meeting with Dr. Stallone to disparage Dr. Sudilovsky (R 344, 351-354, 397-398). In these meetings, Dr. Plocharczyk threatened to stop work in the middle of the pandemic, and stated that she would leave if CMC did not take some sort of action against Dr. Sudilovsky (R 330-332, 352-353, 391-392). These clandestine meetings took place at various locations, including Dr. Plocharczyk's home, without Dr. Sudilovsky's knowledge (R 344, 351-354, 397-398).

Notwithstanding the fact that during his lengthy relationship with CMC, no issues concerning Dr. Sudilovsky's performance had ever been raised, Dr. Stallone called a meeting and abruptly announced in June of 2020 that he wished Dr. Plocharczyk to step into the laboratory Medical Director role (R 241-242). This announcement came during a meeting between Drs. Stallone, Plocharczyk, and Sudilovsky, during which Dr. Sudilovsky testified that he was "blindsided" with a list of alleged complaints from Dr. Plocharczyk, none of which had previously been made known to him (R 494-495). Unbeknownst to Dr. Sudilovsky, Dr. Plocharczyk had been meeting and communicating with Dr. Stallone for several weeks or months and complaining to Dr. Stallone (the CEO of PAI's largest client) about Dr. Sudilovsky (R 332-352, 391-392). Realizing this, Dr. Sudilovsky agreed to step down as Medical Director of CMC, but noted his surprise and

displeasure with the manner in which the topic was broached (R 676-678) (agreeing to step down but noting "I am disappointed and hurt by how this was handled all around").

Following the June 24, 2020 meeting wherein Dr. Plocharczyk and Dr. Stallone ambushed Dr. Sudilovsky with a litany of grievances never before brought to his attention, Dr. Stallone sent a letter to Dr. Sudilovsky outlining the discussions that took place in the meeting, and expressed praise that his "recent accomplishments related to Covid testing are quite impressive," and that Dr. Stallone "deeply respect[ed] [his] abilities as a pathologist, leader and visionary in our laboratory." (R 673-675). In the letter, Dr. Stallone requested that Dr. Sudilovsky cede the laboratory director position to Dr. Plocharczyk in the spring of 2021 on a rotating three-year basis, and stated that Dr. Stallone "want[ed] [Dr. Sudilovsky] to serve as director again during [Dr. Stallone's] CEO tenure," that "[t]his plan is not meant to 'remove [Dr. Sudilovsky]," and "it would be incorrect for [him] to believe [he] ha[d] done anything wrong." *Id.* (R 673-675).

During the hearing, which took place after CMC terminated its contract with PAI and entered into a new contract for pathology services with Dr. Plocharczyk's new entity, Dr. Stallone attempted to backpedal from those statements and declared that, in fact, he felt exactly the opposite about Dr. Sudilovsky's service and accomplishments. (R 363, 367-368).

In June 2020, Dr. Plocharczyk became Medical Director of the Schuyler Hospital pathology laboratory (R 240-241). Dr. Sudilovsky then agreed to step down from the Medical Director position of the CMC laboratory in October, 2020, so that Dr. Plocharczyk could assume that role (R 256, 347).

D. The self-conducted validation studies

An additional instance which Dr. Plocharczyk claims demonstrates dissension between the PAI shareholders involves reservations expressed by Dr. Sudilovsky toward Dr. Plocharczyk's self-conducted validation study in September 2020 (R 261-263, 505).

In August 2020, the FDA had only approved the testing of nasopharangeal samples (i.e., samples taken from deep inside the nose) (R 503). Dr. Plocharczyk wanted to begin "pool" testing of anterior nares samples (i.e., samples taken from the front of nose) and saliva samples (R 503, 505-506). The FDA guidelines for pooling at that time required that the pooling had to have a 95 percent correlation with the normal (nasopharyngeal) test (R 591).

For the first time in her medical career, Dr. Plocharczyk conducted a validation study herself, tracking her results in a spreadsheet (R 613, 697-698, 699-701). Dr. Plocharczyk eschewed the established process followed by PAI, under which trained lab oratory personnel, and not the medical doctors, were supposed to conduct the testing (R 612-613). At this time, Dr. Sudilovsky was still the

Director of the CMC pathology lab, but Dr. Plocharczyk did not follow the established laboratory protocols for conducting a validation study (R 505). Dr. Plocharczyk failed to provide the data that she produced to Kayla Ramundo, the lab supervisor, who would, under established protocols, review the data prior to submitting to Dr. Sudilovsky, the Laboratory Director. *Id.* (R 506).

Rather than submit the data and summary to Ms. Ramundo and Dr. Sudilovsky for discussion and comment, Dr. Plocharczyk sent her summary—accompanied by a spreadsheet containing some (but not all) of the data relied upon—to both Dr. Sudilovsky *and* CMC representatives (Dr. Stallone, Robert Lawlis and others) at the same time (R 506, 697-698). Even more surprising was Dr. Plocharczyk's decision to take it upon herself to recommend to CMC (without first discussing it with Dr. Sudilovsky, the Laboratory Director), that they move forward with conducting pooled tests of samples of both saliva and anterior nares ("AN") samples based on her study (R 612-613). As a result of these actions by Dr. Plocharczyk, neither Dr. Sudilovsky nor Ms. Ramundo were in possession of the raw data needed to analyze the study results until the morning of September 15, 2020, the same day that PAI was to meet with CMC to discuss the new testing procedures (R 506-508, 533).

Dr. Plocharczyk claims that Dr. Sudilovsky undermined her during the September 15, 2020 meeting with CMC personnel as evidence of shareholder

dissension (R 262). During that meeting, Dr. Sudilovsky expressed his opinion that Dr. Plocharczyk's data did not pass muster and did not meet the 95% accuracy rate that was required by the FDA (R 507, 509-510). Dr. Sudilovsky would have discussed this fact with Dr. Plocharczyk privately (and prior to the results being sent to a client) had he been afforded the opportunity to do so (R 509). Instead, Dr. Sudilovsky reviewed the data just prior to the meeting, and in fact, Dr. Sudilovsky had to delay the meeting so that he could finish his review and analysis of the data (R 508). This incident—no more than a difference of professional opinion between medical professionals—further fails as evidence of dissension or deadlock because CMC elected to move forward with the pooled saliva and AN samples despite Dr. Sudilovsky's recommendation to the contrary (R 510).

DR. PLOCHARCZYK'S MACHINATIONS TO SUPPLANT PAI

Prior to bringing this dissolution petition, Dr. Plocharczyk was exploring the option of leaving PAI in January 2021, and had applied for a number of positions throughout the country (R 271). During her job search, it became apparent that the compensation from any new position was unlikely to approach the approximately $900,000 per year she was earning at PAI (R 273-274). Following this realization, Dr. Plocharczyk attempted to buy Dr. Sudilovsky's shares of PAI (R 691). Dr. Sudilovsky attempted to discuss the buyout offer with Dr. Plocharczyk, but she

refused, instead stating that she would only meet with him if attorneys were present (R 295). Dr. Sudilovsky did not accept the buyout offer, and approximately two months afterward, Dr. Plocharczyk commenced this dissolution proceeding (R 302-303, 16).

Meanwhile, as described above, Dr. Plocharczyk was undermining Dr. Sudilovsky with CMC by secretly disparaging him to CMC without his knowledge (R 344, 351-354, 397-398).

Because Dr. Plocharczyk's objective was to secure PAI's business (and revenues) to herself one way or another, she notified Dr. Stallone that she filed a petition to dissolve PAI (R 357) , and subsequently met with Dr. Stallone (without Dr. Sudilovsky present) and stated to him that PAI was "falling apart" (R 397-398). Dr. Stallone then sent a letter to PAI on March 29, 2021, less than two weeks after the dissolution proceeding was commenced, giving notice to PAI that CMC intended to prematurely terminate the contract with PAI, citing Dr. Plocharczyk's commencement of the dissolution proceeding as the basis for the termination (R 110-111).

CMC and Schuyler Hospital both signed contracts with Dr. Plocharczyk's new company effective immediately upon the termination of the PAI contracts (R 398). This is the end-result toward which Dr. Plocharczyk had long been working for more than a year. For example, following her forwarding of Dr. Sudilovsky's

April 17, 2020 email to CMC, Dr. Plocharczyk had several communications and meetings with Dr. Stallone during which she complained about Dr. Sudilovsky (R 352-353). These communications, including some where Dr. Plocharczyk threatened to stop work in the middle of the pandemic, or stated that she would leave if CMC did not take some sort of action against Dr. Sudilovsky, were intended to—and did—color Dr. Stallone's opinion of Dr. Sudilovsky, which the record demonstrates had theretofore been very high (R 352-353, 330-332, 391-392).

The trial court issued a Decision and Order following the hearing in which it found that there was significant dissention among the PAI shareholders to warrant dissolution under Business Corporation Law § 1104(a)(3) (R 12).

POINTS OF ARGUMENT

The Trial Court erred in granting the dissolution Petition based upon Petitioner-Respondent's First Cause of Action alleging shareholder deadlock and dissension under BCL § 1104, because the evidence does not demonstrate "[t]hat the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained[,] [t]hat the shareholders are so divided that the votes required for the election of directors cannot be obtained," or "[t]hat there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the

shareholders." BCL § 1104(a). Furthermore, the Trial Court erred in granting the dissolution Petition to the extent that the decision was based upon Petitioner-Respondent's Second Cause of Action for common law dissolution, because Petitioner-Respondent presented no evidence of the requisite "egregious" breaches of fiduciary duty by Dr. Sudilovsky to warrant such a remedy. *See In re Dissolution of Quail Aero Serv.*, 300 A.D.2d 800, 802 (3d Dep't 2002) (recognizing that "[a]side from the statutory ground for dissolution, there exists a common law right to dissolution where management breaches its fiduciary duty to its shareholders[,] [y]et, *the conduct must be deemed egregious*." (Emphasis added) ((Internal quotation marks and citations omitted)).

Finally, to the extent the Trial Court relied upon the hearsay evidence propounded at the trial below in determining that dissolution of PAI was warranted under either of Plaintiff's claims, the Order should be reversed, as settled law establishes that the evidence offered did not meet the requirements of any of the exceptions to the hearsay rule. It is undisputed that Petitioner-Respondent bore the burden of demonstrating grounds for dissolution by admissible evidence, and here she failed to make that showing. *See Matter of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1175 (3d Dep't 2012) (finding that "petitioner failed to set forth a prima facie case that the shareholders were deadlocked [because] [a]lthough the

parties were experiencing disagreement . . . petitioner d[id] not assert that an election was held or demonstrate that a deadlock was harming the shareholders").

I. THERE IS NO ABSOLUTE RIGHT TO DISSOLUTION

The Court of Appeals long ago held that "there is no absolute right to dissolution" *In re Radom & Neidorff, Inc.*, 307 N.Y. 1, 7 (1954). Judicial dissolution is considered to be an 'extraordinary step' which is only warranted if the conditions of the statute have been satisfied. *In re Dissolution of Glamorise Foods*, 228 A.D.2d 187, 189 (1st Dep't 1996).

A petition to dissolve a corporation under BCL § 1104 will only be granted if the petitioner can demonstrate that there is "an irreconcilable barrier to the continued functioning and prosperity of the corporation" *In re Kaufmann*, 225 A.D.2d 775 (2d Dep't 1996). "The prime inquiry is, always, as to necessity for dissolution, that is, whether judicially-imposed death 'will be beneficial to the stockholders or members and not injurious to the public'." *In re Radom & Neidorff, Inc.*, *Id.* at 7. Dissolution is to be granted "only when the competing interests 'are so discordant as to prevent efficient management' and the 'object of its corporate existence cannot be attained'[citations omitted]". *Id*.

While the determination of a dissolution petition is within the discretion of the trial court (BCL § 1111(a)), that does not absolve a petitioner (or a Court) from the requisite showing under applicable law. *See In re Clemente Bros. Inc*., 12

A.D.2d 694 (3d Dep't 1960) (recognizing that "before the corporation can be dissolved, the requirements of the statute and those set forth in [the case law], must be met by proof" (citing *In re Seamerlin Operating Co*., 307 N.Y. 407 (1954) and *In re Radom & Neidorff, Inc.*, 307 N.Y. at 7)).

The Petitioner fell far short of proving that the 'judicially-imposed death' of PAI was warranted in this case or that dissolution was in the best interests of the shareholders. *See*, BCL § 1104(a)(3) which requires that "dissolution would be beneficial to the shareholders", meaning *all* shareholders, and not just one of them. It is clear that the dissolution of PAI was only in the interests of one shareholder – Dr. Plocharczyk. Dr. Plocharczyk engaged in a surreptitious campaign to disparage Dr. Sudilovsky to PAI's main client for the purpose of securing that client for herself. The Petitioner's bad faith motive in bringing the petition to dissolve PAI was completely overlooked by the trial court, which actually justified Dr. Plocharcsyk's actions, holding that:

> It is clear from the record that the dissension has impeded the parties' ability to function as partners within the shareholder agreement. In fact, Petitioner has created her own pathology business and taken over PAI's contracts. The exact subject of a sister litigation between these two parties. That alone creates an irreconcilable barrier to the continued function of the partnership.
> Decision at p. 8

The trial court's failure to take Dr. Plocharczyk's obvious bad faith intentions into consideration was an abuse of discretion. A petitioner's bad faith in bringing a

dissolution proceeding is always an issue to be considered. *In re Application of Clemente Bros., Inc.*, 19 A.D.2d 568, 569 (3d Dep't 1963) ("As between contesting stockholders the good faith of petitioner is an issue in the proceeding"); *In re Dissolution of Glamorise Founds*., 228 A.D.2d 187, 189 (1st Dep't 1996), (directing a hearing on the issue of alleged dissension and the bad faith of the petitioner: "It is Rosner's contention that petitioner deliberately created the underlying dispute for the very purpose of securing judicial dissolution and thereafter seizing the corporation for himself, his son and other management personnel. Indeed, despite the posturing of the parties, the corporation continues to flourish.") *Wollman v. Littman*, 316 N.Y.S.2d 526, 527 (1st Dep't 1970) (reversing the trial court's grant of dissolution and directing a hearing because "a dissolution …would actually accomplish the wrongful purpose that defendants (Nierenberg) are charged with in that action. It would not only squeeze the Littmans out of the business but would require the receiver to dispose of the inventory with the Nierenbergs the only interested purchaser financially strong enough to take advantage of the situation. Such a result if supported by the facts, would be intolerable to a court of equity").

Petitioner-Respondent failed to demonstrate the existence of shareholder dissension, and did not establish that "judicially-imposed death w[ould] be beneficial to the stockholders or members and not injurious to the public." *In re*

Radom & Neidorff, Inc., 307 N.Y. 1, 7 (1954). Instead, the Petitioner proved nothing more than her successful scheme to eliminate Dr. Sudilovsky from the relationships with PAI's clients, and to take over those relationships – and the accompanying revenue – for herself.

II. THERE IS NO BASIS FOR DISSOLUTION UNDER BCL § 1104

Petitioner-Respondent alleged in her First Cause of Action that dissolution was warranted pursuant to BCL § 1104(a), which contains three grounds for dissolution:

> (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.
>
> (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.
>
> (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

A. There was no director or shareholder deadlock.

The Petition alleges all three grounds for dissolution found in BCL § 1104(a), but Petitioner utterly failed to demonstrate any evidence of officer or shareholder deadlock, such as a failed attempt to elect officers or directors, or a corporate decision that could not be made as a result of the alleged deadlock. As this Court recognized, "[t]hat statute permits judicial dissolution where shareholders are so divided that the votes required for the election of directors

cannot be obtained, or when there is internal dissension such that dissolution would be beneficial to the shareholders." *Matter Clever Innovations*, 94 A.D.3d at 1175 (internal quotation marks and citations omitted). Here, like in the *Matter Clever Innovations* case, "petitioner failed to set forth a prima facie case that the shareholders were deadlocked," notwithstanding (unilateral) allegations that "the parties were experiencing disagreement." *Id*.

Dr. Plocharczyk could not point to any election of officers or directors that was deadlocked, nor could she point to any decision regarding the management of PAI's affairs in which the PAI shareholders disagreed. The Petitioner clearly did not have evidence to prove that there was any deadlock under BCL § 1104(a)(1) or (2), so she abandoned those grounds at the trial, and relied exclusively on the grounds in BCL § 1104(a)(3), claiming that there was internal dissension among the shareholders such that dissolution would be beneficial to the shareholders.

B. There was no genuine internal dissension.

Pursuant to BCL § 1104(a)(3), a corporation will be dissolved if a shareholder can prove that "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders".

The Appellate Divisions have held that dissolution should only be ordered when the orderly functioning of the corporation has been destroyed due to "intense

strife" which cripples the ability of a corporation to exist *Greer v. Greer,* 124 A.D.2d 707, 708 (2d Dep't 1986) ("the dissention . . . has led to an inability to agree on any corporate decisions including the hiring and firing of employees, the election of officers and the allocation of corporate spending"). Here, there is no evidence of "intense strife" or a "crippled" corporate existence. Instead, there is only evidence of a very few professional disagreements.

Other courts have required proof that the amount of dissension "leaves no doubt that the firm cannot continue to function effectively, and no alternative exists but dissolution" *Molod v. Berkowitz*, 233 A.D.2d 149, 150 (1st Dep't 1996); *see also, Sheridan Construction Corp.*, 22 A.D.2d 390, 392 (4th Dep't 1965) ("There is no hope of reconciliation between these two brothers in the foreseeable future. The can find no common ground of agreement in any respect and a continuation of the corporation could result only in further dissipating of the assets and greater harm than the massive damage already done to all of the corporations.")

The Petitioner's proof in this case did not come close to proving that whatever professional disagreements the shareholders of PAI may have had prevented PAI from continuing to function in an orderly and profitable manner. Instead, Dr. Plocharczyk demonstrated a personal desire to free herself from the obligations she owed to Dr. Sudilovsky and to PAI and to take over PAI's client contracts for herself. This is not a legitimate basis for dissolving a corporation.

In *Fazio Realty Corp. v. Neiss*, 10 A.D.3d 363, 365 (2d Dep't 2004), the Appellate Division reversed the trial court's dissolution of the corporation because the disagreements among shareholders did not rise to the level of dissension required under BCL § 1104(a), holding that "[w]hile it cannot be disputed that there exists considerable and apparently ever-increasing internal corporate conflict, under the circumstances, the petitioners failed to demonstrate that the dissension between them and the appellant resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs".

In the present case, there is no evidence of any dissension that prevented PAI from functioning in a successful and profitable manner. From a corporate perspective, PAI was functioning much as it had for most of its existence, and was prospering. PAI had secure contracts with its three clients (CMC, Schuyler Hospital and Tompkins County), and its contract with its main client, CMC, was not set to expire until December 2022. The work of PAI (providing pathology services to its three clients) was being done to the clients' satisfaction, and the two shareholders of PAI were benefitting greatly from the profits its business operations, each earning approximately $900,000 per year.

While it is true that "dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit" (BCL § 1111(b)(3)), the existence of *some* dissention among the corporation's

principals will not, alone, suffice, as "irreconcilable differences, even among an evenly divided board of directors do not in all cases mandate dissolution" *Wollman v. Littman*, 316 N.Y.S.2d 526, 527 (1st Dep't 1970).

Dr. Plocharczyk propounded no evidence that the business of PAI was being impeded by any disagreements between the shareholders. "The fact that the parties disagree over petitioner's plan for the company's future is not dispositive of the fundamental issue of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted," and furthermore, "the initiation of [a dissolution proceeding] -- or even the existence of multiple lawsuits between the parties -- is similarly insufficient for this purpose." *In re Dissolution of Glamorise Founds.*, 228 A.D.2d 187, 189 (1st Dep't 1996) (internal citations omitted).

In contrast, Dr. Sudilovsky demonstrated—by admissible evidence—that Dr. Plocharczyk engaged in a campaign to disparage and undermine him with respect to PAI's largest client in order to oust Dr. Sudilovsky from a practice that he built over decades. (R 344, 351-354, 397-398) It is black-letter law that denial of dissolution is the proper course "where one shareholder faction intentionally creates a dispute which may not be genuinely irreconcilable." *Matter of Eklund Farm Mach., Inc.,* 40 A.D.3d 1325 (2007) at 1326-27 (citations omitted). *See also Matter of Ades v. A&E Stores, Inc*., Case No. 650267/2017, 2018 N.Y. Misc.

LEXIS 248, *7-8 (Sup. Ct., N.Y. Cty., Jan. 22, 2018) ("[A]llegations that a petitioner acted in bad faith by creating the underlying disputes to justify dissolution constitute a defense to a dissolution proceeding." (internal quotation marks and citations omitted)).

The circumstance here is not dissimilar to that confronted by the Court of Appeals in the *In re Seamerlin* case, where respondents alleged "that the dissolution [wa]s sought in bad faith in order that Merlino may be ousted from Seamerlin and that Merlin Enterprises, Inc., may be evicted and the space rented to [an] amusement arcade at a substantial profit." *In re Seamerlin*, 307 N.Y. at 407. In *Seamerlin*, the Court of Appeals reversed the lower court's order granting dissolution, because the referee had found that although "there were but two directors . . . the contention that the votes of the stockholders are so divided that they cannot elect a Board of Directors fails in view of the fact that a formal meeting and attempt to elect a full Board of Directors was never called by the president although he had the power to call such a meeting." *Id*. The Court also based its reversal on the referee's finding that dissolution was not warranted because "[t]he business of the corporation has been carried on," and "[o]n the whole . . . dissolution would not be beneficial to the stockholders." *Id*.

Moreover, Dr. Sudilovsky demonstrated (by admissible evidence) that Dr. Plocharczyk was colluding with the Company's largest client—in clear

violation of her fiduciary and contractual duties as a shareholder and director of PAI—to divert its business from PAI to her personally, and that the alleged deadlock was manufactured to enable Dr. Plocharczyk to complete this *coup d'état*. Permitting involuntary dissolution under such circumstances runs contrary to the purpose of the Business Corporation Law, as this State's highest Court has recognized in similar circumstances:

> *Therefore, the minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression should be given no quarter in the statutory protection*. [referring to a petition to dissolve a corporation under BCL § 1104-a, but equally applicable here]

In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 74 (1984) (emphasis added) (internal citations omitted). *See also Matter of Eklund Farm Mach., Inc.*, 40 A.D.3d 1325, 1326-27 (3d Dep't 2007) (recognizing that denial of dissolution is the proper course "where one shareholder faction intentionally creates a dispute which may not be genuinely irreconcilable" (citations omitted)).

Since there was no genuine dissension among the PAI shareholders, it was an abuse of discretion of the trial court to order the dissolution of PAI.

C. Dissolution is not beneficial to the shareholders of PAI.

The second prong of BCL § 1104(a) (3) that a petitioner must prove is that dissolution is in the best interests of the shareholders. Here, there is only evidence that it would be in the interests of one shareholder –the Petitioner.

It is undisputed that, prior to Dr. Plocharczyk's instigation of CMC's premature cancellation of its contract with PAI, the Company was thriving. See *Matter of Cellino v. Cellino & Barnes, P.C.*, 175 A.D.3d 1120, 1121-22 (4th Dep't 2019) ("The determination whether a corporation should be dissolved is within the discretion of the court, and the benefit to the shareholders of a dissolution is of paramount importance in making that determination." (internal quotation marks and citations omitted)).

Dr. Plocharczyk made no showing before the Trial Court that the alleged dispute between herself and Dr. Sudilovsky negatively impacted the perpetuation or profitability of PAI. In fact, the basis for the termination of the contract by its largest client, CMC, was the commencement of this proceeding (R 695-696). Dr. Stallone, the CEO of CMC, was made aware of this proceeding because Dr. Plocharczyk's attorney contacted CMC's counsel to notify him of the institution of the proceeding. (R 357). Following this, Dr. Plocharczyk and Dr. Stallone continued to communicate and coordinate—without alerting or including Dr. Sudilovsky—about the supposed disagreements between the PAI

shareholders, in an obvious effort to shift CMC's business away from PAI and to Dr. Plocharczyk's new practice (a plan which has since come to fruition) (R344, 351-354, 397-398).

The fact that PAI continued to prosper also precludes any argument that dissolution is in the best interests of the shareholders. The dissolution of PAI only benefitted one shareholder: Dr. Plocharczyk. A bad-faith dissolution that benefits one shareholder at the expense of the other is not permitted. *See Kavanaugh v. Kavanaugh Knitting Co*., 226 N.Y. 185, 190-191 (1919) (reversing an order that upheld a bad faith dissolution, because when "the individual defendants . . . instituted the proceedings . . . to dissolve the corporation," they "well knew the corporation was exceedingly prosperous and making enormous net profits," and "[t]he board of directors did not adopt the resolution instituting the dissolution proceeding as the result of or through a bona fide and honest consideration of the facts affecting the general interests of the corporation and its stockholders, but in affirmative bad faith and for the sole purpose of permitting the defendants . . . to dissolve the same against the will and desire of the plaintiff and for the purpose of depreciating the value of the corporate property and of the plaintiff's proportional interest therein").

Dr. Plocharczyk admitted to the Trial Court that she sought to be free of PAI and assume its contracts herself (R 303). Dr. Plocharczyk's conduct in colluding

with CMC, and refusing to engage or cooperate with Dr. Sudilovsky further supports the conclusion that she was manufacturing a dispute in an attempt to achieve her goal. But even if Dr. Plocharczyk's allegations concerning Dr. Sudilovsky's performance or failings were accurate—and substantial evidence propounded at the Trial demonstrates that they were not—it is black-letter law that shareholder animosity or desire to leave a corporation, in the absence of demonstrated impact on the business of the corporation, does not suffice to mandate involuntary dissolution. The Court of Appeals has held:

> Even when majority stockholders file a petition because of internal corporate conflicts, *the order is granted only when the competing interests are so discordant as to prevent efficient management and the object of its corporate existence cannot be attained*. The prime inquiry is, always, as to necessity for dissolution, that is, whether judicially-imposed death will be beneficial to the stockholders or members and not injurious to the public.

In re Radom, 307 N.Y. at 7 (internal quotation marks and citations omitted). *See also In re Seamerlin*, 307 N.Y. at 407 (reversing a grant of dissolution where "[t]he business of the corporation has been carried on" despite shareholder disagreement, and so "[o]n the whole, therefore, dissolution would not be beneficial to the stockholders").

In *Radom*, the Court noted that the shareholders, "[a]lthough brother and sister, . . . were unfriendly before Neidorff's death and their estrangement continues." *Id*. at 4. There was a separate lawsuit regarding the ownership of

stock of the corporation, the parties had numerous disagreements, and one party withheld the paychecks for the other party, but even in light of such facts, the Court of Appeals affirmed the dismissal of the dissolution petition, concluding that "[t]here is no absolute right to dissolution under these circumstances". *Id*.

This logic has been consistently reaffirmed by courts across the state in the years since *Radom* was decided: *Fazio Realty Corp. v. Neiss*, 10 A.D.3d 363, 364-65 (2d Dep't 2004) ("considerable and apparently ever-increasing internal corporate conflict" insufficient to grant dissolution); *In re Kagan*, 7 Misc. 3d 1009(A) (N.Y. Sup. Ct., Nassau Cty., 2005) (dissolution petition dismissed because although the shareholders had "significant disagreements," there was no deadlock); *Wollman v. Littman, supra; In Re: Dissolution of Glamorize Foods, supra*.

Likewise, in *In re Dubonnet Scarfs, Inc*., the Court declined to grant dissolution based upon a shareholder's refusal to buy out the petitioners, because "nowhere in the petition do the petitioners allege that [the] control by" that shareholder "resulted in a deadlock over a management decision and/or a stalemate in the election of a director or directors and/or a performance of duty by [that shareholder] that was either oppressive or illegal or fraudulent or breached a fiduciary responsibility." *In re Dubonnet Scarfs, Inc*., 105 A.D.2d 339, 342-43 (1st Dep't 1985).

The *Dubonnet* Court further recognized that a shareholder's personal desire to be free of her corporation, however pitiable, or a belief that she could better perform the work of the corporation, however misguided, does not provide a valid basis for involuntary dissolution. *In re Dubonnet*, 105 A.D.2d at 339 ("the mere fact that a closely held corporation may have substantial liquid assets, and a stockholder has personal financial problems totally unrelated to the corporation do not, in and of themselves, state grounds for judicial dissolution within the meaning of the Business Corporation Law . . . or at common law," and while the fact that petitioners "have a pressing need for cash arouses our sympathy . . . neither sympathy nor a shareholder's need for cash qualify as either a statutory or common-law ground for judicial dissolution" (citations omitted)).

Similarly, in *Application of Cantelmo*, the Court declined to further petitioner's scheme to oust the other shareholder, recognizing that "[t]he entire objective of the petitioner has been to force the respondent out of the business and, in effect, to obtain for himself (the petitioner) the benefits to the corporation built up over the years by the joint efforts of both parties," and finding there to be "no reason why the courts should, under the circumstances here presented, lend themselves to the accomplishment of the purpose sought by the petitioner." *Application of Cantelmo*, 275 A.D. 231, 233 (1st Dep't 1949).

As is demonstrated by the record before this Court, Dr. Plocharczyk failed to meet her burden of demonstrating that dissolution was in the best interests of the shareholders, nor that there was sufficient dissension to warrant involuntary dissolution pursuant to BCL § 1104, and the Trial Court's Order should be reversed.

III. THERE IS NO COMMON LAW BASIS FOR DISSOLUTION

The Petitioner did not pursue the second cause of action in the petition for common law dissolution, and the trial court does not mention that cause of action in its Decision. However, even if it were pursued, Dr. Plocharczyk failed to establish, by admissible evidence, that dissolution of PAI was warranted under common law. It is long-established law that common-law dissolution requires a showing of "egregious" breaches of fiduciary duty, a showing that Dr. Plocharczyk came nowhere close to meeting before the Trial Court. *See In re Dissolution of Quail Aero Serv*., 300 A.D.2d 800, 802 (3d Dep't 2002) (recognizing that "there exists a common law right to dissolution where management breaches its fiduciary duty to its shareholders," but "the conduct must be deemed egregious" (internal quotation marks and citations omitted)). *See also In re Kemp*, 64 N.Y.2d at 69-70 ("Predicated on the majority shareholders' fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with scrupulous good faith, *the courts'*

equitable power can be invoked when it appears that the directors and majority shareholders have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute." (internal quotation marks and citations omitted) (emphasis added)).

As the record demonstrates, Dr. Plocharczyk failed to demonstrate *any* breach of fiduciary duty by Dr. Sudilovsky, let alone conduct that "go[es] far beyond charges of waste, misappropriation and illegal accumulations of surplus, which might be cured by a derivative action for injunctive relief and an accounting." *Leibert v. Clapp*, 13 N.Y.2d 313, 316 (1963). This case is analogous to those cases where dissolution has been denied because "there is no evidence that the directors or those in control of the corporation have looted the assets of the corporation for their own personal benefit," and "there is no evidence that the actions of the directors have been calculated to impair the value of the capital stock so as to coerce the minority shareholders to sell their shares at a depressed or deflated price." *Shapiro v. Rockville Country Club*, 784 N.Y.S.2d 924, 924 (N.Y. Sup. Ct., Nassau Cty., 2004). *See also Kruger v. Gerth*, 22 A.D.2d 916, 917-18 (2d Dep't 1964). (declining to dissolve a corporation based on a "meagre showing" that "rest[ed] only on the fact that the amount of the [disputed] bonus[es] . . . served so to reduce the net profit as to leave an insufficient amount to provide a

fair return to plaintiffs on their stock in the corporation," and noting that "plaintiffs' own motives in prosecuting this action [were] doubtful and suspect" because "their personal business is in competition with the business of the defendant corporation; and . . . would profit should the business of the defendant corporation cease.").

The alleged breaches of fiduciary duty by Dr. Sudilovsky are no more than manufactured scenarios wherein Dr. Plocharczyk excluded Dr. Sudilovsky from meetings or processes so that she could later claim that he was "disengaged" or nonresponsive. Moreover, even if every instance of alleged breach were in fact true—and the record clearly establishes that they are not—they still would not rise to the level of egregious conduct necessary to support involuntary dissolution under the common law. *See Leibert v. Clapp*, 13 N.Y.2d 313, 317 (1963) (establishing that common law dissolution is reserved for those circumstances where "directors and majority shareholders have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute" (internal quotation marks and citations omitted)).

Finally, Dr. Plocharczyk's accusations of breaches of fiduciary duty by Dr. Sudilovsky are entitled to even less credence in light of her own demonstrated (and conceded) disregard for her fiduciary duties to PAI and Dr. Sudilovsky. It is

undisputed that both Dr. Plocharczyk and Dr. Sudilovsky, as co-equal shareholders of a closely held corporation, owe fiduciary duties to one another as directors and shareholders of PAI. *See Sager Spuck Statewide Supply Co. v. Meyer*, 273 A.D.2d 745, 747-48 (3d Dep't 2000) (recognizing that in addition to directors "occupy[ing] a position of partial trust" such that "they may be held accountable in equity for detriment to the corporation caused by their breach of the fiduciary obligation arising from that relationship," there is also "a fiduciary duty between the shareholders of a close corporation" because "the relationship between such shareholders is akin to that between partners." (internal quotation marks and citations omitted)). Dr. Plocharczyk's conduct in colluding with CMC to terminate its contract with PAI and hire her new company directly is a quintessential violation of fiduciary duties. *See Greenberg v. Greenberg*, 206 A.D.2d 963, 964-65 (4th Dep't 1994) (finding a breach of fiduciary duty where a director "derive[s] a personal profit at the expense of the corporation," or "appropriate[s] corporate assets or opportunities to [herself] or to a new corporation formed for that purpose"); *Stavroulakis v. Pelakanos*, Case No. 653478/2018, 2018 N.Y. Misc. LEXIS 429, at *28 (Sup. Ct., N.Y. Cty., Feb. 13, 2018) (holding that "[t]he doctrine of corporate opportunity . . . is violated where . . . a director secretly forms a new entity and transfers the corporation's entire business to that entity" (internal quotation marks and citations omitted)).

Aside from constituting a violation of her fiduciary duties to PAI and Dr. Sudilovsky, Dr. Plocharczyk's conduct in openly competing with PAI and diverting its clients to herself is also a clear breach of her contractual duties as a shareholder. The Shareholder Agreement prohibits a shareholder from engaging in competitive activity and from inducing third parties to adversely alter their relationship with the Company. (R 643-644). The terms of the Shareholder Agreement are unambiguous and thus, enforceable according to their plain meaning. *Ellington v. EMI Music, Inc*., 24 N.Y.3d 239, 244 (2014) (recognizing that "[w]here the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole," and "t]he words and phrases used by the parties must . . . be given their plain meaning"). *See also A. Cappione, Inc. v. Cappione*, 119 A.D.3d 1121, 1122-23 (3d Dep't 2014) ("A shareholders' agreement—like any other contract—should be enforced according to its terms. In so doing, the contract must be read as a whole to determine its purpose and intent, and it should be interpreted in a way that reconciles all its provisions, if possible." (internal quotation marks and citations omitted)).

In sum, Dr. Plocharczyk propounded no admissible evidence of the alleged breaches of fiduciary duty by Dr. Sudilovsky aside from her own self-serving

testimony, and fell far short of establishing the egregious breaches needed to permit the Trial Court to order dissolution based on common law. Dr. Plocharczyk's desire to be free of her fiduciary and contractual obligations to the Company simply do not provide a legitimate basis for dissolution of the Company, and the Order of the Trial Curt should be reversed. *See In re Estate of Falatyn,* 9 A.D.3d 538, 539-40 (3d Dep't 2004) (reiterating that "[i]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity," and finding that the parties "freely set forth their intentions in a clear document and, accordingly, the agreement must be enforced without regard to extrinsic evidence or the fact that the agreement now appears inequitable").

IV. HEARSAY EVIDENCE WAS IMPROPERLY ADMITTED

The Trial Court improperly relied upon the hearsay testimony proffered by the Petitioner in rendering its decision. This improper reliance on inadmissible evidence was central to the trial court's decision, and was error that warrants reversal. For example, the trial court relied upon hearsay statements that "Dr. Stallone confirmed that Respondent is terse and rude to client's essential [*sic*] thwarting an efficient working relationship between the parties" (R 179) (R 324-325, 333, 343-345, 405, 408, 409-410).

During the trial below, these and other "out-of-court statements were offered by [Petitioner-Respondent] for the truth of their content, [so] they constitute hearsay [and] are not admissible unless they satisfy one of the exceptions to the hearsay rule." *Kaufman v. Quickway, Inc*., 64 A.D.3d 978, 980-81 (3d Dep't 2009) (internal citations omitted). *See also* Nucci v. Proper, 95 N.Y.2d 597, 602-03, 721 N.Y.S.2d 593, 595-96, 744 N.E.2d 128, 130-31 (2001) ("Out-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable." (citations omitted)).

As the record herein demonstrates, during the trial below, Dr. Plocharczyk relied upon testimony by herself and by third-party Dr. Stallone regarding alleged out-of-court statements by Dr. Sudilovsky. The Trial Court improperly admitted such hearsay evidence on numerous occasions, over the repeated objections of Dr. Sudilovsky's counsel despite the fact that no exception to the hearsay rule was advanced (R 190, 217, 222, 224, 267, 325, 333, 344-345, 405, 408, 409-410, 450).

At one point the Trial Court (erroneously) declared in response to an objection that "[a]ny statement made by one of the parties here is not going to be hearsay" and "[t]hat's going to be an admission or statement made by the parties [a]nd . . . [objections] will be overruled." (R 222). The Trial Court also (wrongly)

stated during the hearing that the statements were "an exception to the hearsay rule [because] it's an admission by the party as to the proceedings." (R 223). At a later point, when Respondent's counsel objected to hearsay (and double-hearsay) testimony by third-party Dr. Stallone, the Court stated, without referencing a particular hearsay exception, that the objections would be overruled "based on the nature of these proceedings and based on the fact that Dr. Stallone has to run the hospital and make sure that his Pathologists are performing their duties." (R 409).

The apparent misunderstanding by the Trial Court evidenced by the above statements is flatly contradicted by settled law, which makes clear that out-of-court statements by a witness are still hearsay, notwithstanding the nature of the proceeding, or the speaker's status with respect to the litigation, and that such statements do not automatically qualify for an exception to the hearsay rule merely by virtue of their being relevant to the proceeding. *See Borden v. Capital Dist. Transp. Auth*., 307 A.D.2d 1059, 1060 (3d Dep't 2003) ("Supreme Court erred in permitting evidence, over strenuous and repeated defense objections, that Humphrey had pleaded guilty to certain crimes . . . [t]his evidence constituted hearsay which was only admissible against defendant upon plaintiff's showing that it fell within an exception to the hearsay rule, namely, a declaration against Humphrey's penal interest [and] Plaintiff . . . wholly failed to demonstrate that Humphrey was unavailable to testify at trial." (citations omitted); *Edmonds v.*

Quellman, 277 A.D.2d 579, 580-81 (3d Dep't 2000) (rejecting evidence in the form of a third-party deposition "describ[ing] a July 1996 telephone conversation with Quellman" and stating "[w]e do not agree with plaintiffs' contention that this hearsay version of a prior inconsistent statement creates a question of fact since the substance of the telephone conversation was unequivocally contradicted by Quellman's subsequent sworn testimony").

This Court has unequivocally held that hearsay testimony about prior statements does not "fall within the exception for a prior inconsistent written statement where the declarant is available to testify and there is no reason to believe that the declarant's words were incorrectly reported" (*Kaufman*, 64 A.D.3d at 980-81). *See also Edmonds*, 277 A.D.2d at 580-81 ("As inadmissible hearsay, Edwards' statements could be considered in opposition to defendants' motion for summary judgment only if there were an acceptable excuse for plaintiffs' failure to present the evidence in admissible form or other competent evidence in the record supporting their claim. Here, plaintiffs could not present the relevant statements in admissible form because Edwards repudiated them. Repudiation is not an acceptable excuse, however, because plaintiffs had the opportunity to, and did, obtain Edwards' sworn testimony describing the sale at her examination before trial." (internal citations omitted)).

Furthermore, this Court recognizes the importance of evaluating the indicia of reliability with respect to hearsay evidence. *See Nucci v. Proper*, 95 N.Y.2d 597, 602-03 (2001) (rejecting hearsay statements as lacking "indicia of reliability" when "[t]he proffered statements were not made in writing or under oath . . . and they were reported by [someone who] may have had a strong motive to shade her testimony"). It is undisputed that Dr. Plocharczyk coordinated with Dr. Stallone in diverting CMC's business from PAI to her personally. This fact, along with the admissible documentary evidence contradicting Dr. Stallone's trial testimony (R 673-675), undermines any finding that the offered hearsay testimony contains the requisite indicia of reliability.

As established above, the Trial Court improperly admitted and relied on hearsay evidence of statements allegedly made by unknown persons at the Cornell Veterinary lab and Dr. Sudilovsky during the trial, and therefore to the extent the Order is based upon such evidence, it must be reversed.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Order of the Trial Court be reversed, and the Petition for dissolution be dismissed in its entirety.

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