

To be argued by: **Charles W. Marino**

*Time Requested for Argument: 15 Minutes*

*Appellate Division Docket No.: 2019-09315*

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**New York Supreme Court**  
APPELLATE DIVISION – SECOND DEPARTMENT

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In the Matter of the Application of  
YC MD, P.C. d/b/a New York Urologic Institute,

*Petitioner-Respondent,*

-against-

DAVID SHUSTERMAN, M.D.,

*Respondent-Appellant.*

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**APPELLANT'S BRIEF**

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*Kings County Clerk's Index No. 500138/2017*

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## **PRELIMINARY STATEMENT**

This is an appeal from a Judgment (R17-27) after oral argument in favor of the Petitioner-Respondent YC M.D. P.C. (hereinafter YCMDPC) in a special proceeding to confirm an arbitration award. Judgment was awarded after a prior order (R279) and oral argument of which no transcript was made.

The core of the objections to the underlying judgment against the Appellant Dr. David Shusterman, M.D. (hereinafter Dr. Shusterman) is that while at arbitration both parties had the vast majority of the claims against them dismissed and found to be without merit (R 28-37), the Appellant was found to be responsible for his adversary's "prevailing party" fees and costs, which are approximately sixty-five times the underlying damages award. (R 39)

Dr. Shusterman sought to set aside the underlying award and objected to confirmation thereof as violative of public policy due to the massive disparity between the small damages award against him and the proportionally massive costs and expenses awarded to a party whose claims were overwhelmingly set aside. (R319-320)

Dr. Shusterman also objected to the status of the YCMDPC as the correct party in interest, as it had been formally dissolved before the commencement of the underlying special proceeding. (R467)

### **QUESTIONS PRESENTED**

i) Whether the Trial Court Erred in Confirming the Arbitration Award for Attorney Fees in Favor of Respondent when Respondent YCMDPC is not a prevailing party entitled to such an Award?

Answer: YES

ii) Whether the Trial Court Erred in Confirming the Arbitration Award When Respondent did not Establish Standing to Sue in the Court Below?

Answer: YES

iii) Whether the Trial Court Erred in Confirming the Arbitration Award and Issuing Judgment Without any Evidentiary Affidavits in Violation of Relevant Statutes?

Answer: YES

## STATEMENT OF FACTS

This is an appeal from a final judgment in favor of the petitioner YCMDPC and against the Respondent Dr. Shusterman. The award consists overwhelmingly of fees, costs, and interest, and less than \$7,000.00 in principal damages (R39). This Judgment confirmed the December 16 arbitration award, and was entered without any party testimony, after oral argument.

Dr. Shusterman objected at all times to the Petitioner's standing to sue, and to the evidence submitted in support of the petition. After off the record oral argument, without any party affidavit being filed, judgment was entered in favor of the Petitioner. This appeal ensues.

## ARGUMENTS

### POINT I

TRIAL COURT ERRED IN CONFIRMING THE ARBITRATION AWARD FOR ATTORNEY FEES IN FAVOR OF RESPONDENT AS RESPONDENT YCMDPC IS NOT A PREVAILING PARTY ENTITLED TO SUCH AN AWARD.

YCMDPC brought the underlying action seeking to confirm an Arbitration Award in its favor of \$441,106.52, which consisted of \$6,925.00 in damages, \$386,265.73 in attorney's fees, and \$47,915.79 in arbitration costs (R##39). Both YCMDPC and Dr. Shusterman were denied the

overwhelming majority of the relief demanded at arbitration. Dr. Shusterman sought \$7,845,891 in damages in the underlying arbitration, while YCMDPC sought approximately \$250,000.00 in damages, and received under \$7,000.00 thereof. Various equitable and declaratory claims by the Respondent-Appellant were also found to be without merit by the Arbitrator.

A party can only be said to “prevail” under the law if that party obtains the central relief sought. See: *Nestor v. McDowell*, 81 N.Y.2d 410 (Ct. App. 1993) where it was found that a landlord was required to prevail in the claim to recover possession of the premises at issue in order to be considered the “prevailing party”.

While it is true that a party can prevail in an action by defeating a claim against it, (see generally: *25 East 83 Corp. v. 83<sup>rd</sup> Street Associates*, 1995 N.Y. App.Div. LEXIS 3011) the Court of Appeals has held that where a party receives a mixed result, that party cannot be considered a “prevailing party” and is not entitled to fees and costs. See: *433 Sutton Corp. v. Broder*, 22 N.Y.3d 1161 (Ct. App. 2014); reversing *433 Sutton Corp. v. Broder*, 107 A.D.3d 623 (1<sup>st</sup> Dep’t 2013).

Here, after eight days of trial, with a total amount claimed exceeding \$8,000,000.00, YCMDPC was awarded under \$7,000.00, together with

nearly a half million dollars in fees and costs payable to the “prevailing party” who only recovered a small fraction of the amount demanded. (R29-36) Under these circumstances, the arbitration was a mixed result, and no fees or costs should have been awarded to any party.

## POINT II

TRIAL COURT ERRED IN CONFIRMING THE ARBITRATION AWARD FOR RESPONDENT DID NOT ESTABLISH STANDING TO SUE, DUE TO THE ASSIGNMENT OF ITS ASSETS TO A THIRD PARTY PRIOR TO THE FILING OF THE UNDERLYING ACTION.

YCMDPC contends that it was able to maintain an action against Dr. Shusterman despite its assets being assigned to another entity which was not specifically identified. (R##18) The entire action proceeded without any testimony from a representative of YCMDPC regarding the circumstances and time of the transfer of the assets.

It is not the Petitioner’s position that the defunct entity YCMDPC is the nominal Petitioner who is not a party to this action. (R##467). Under these circumstances, where a separate entity is the alleged holder of the cause of action, evidence of the assignment is needed in order to prove standing to sue. See: *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318 (Ct. App. 2007), where the court reviewed the underlying documents granting certain entities authority to sue.



By contrast, the trial court record shows that the entire underlying special proceeding relied upon affirmations of counsel to establish standing to sue. Ordinarily, the proponent of an assigned claim shows proof of assignment or merger outlining the nature of the transfer, all in evidentiary form. See generally: *Wells Fargo Bank, N.A. v. Bedell*, 186 A.D.3d 1291 (2<sup>nd</sup> Dep't 2020).

Here, Dr. Shusterman has objected to the Petitioner's standing to sue at every opportunity and a Judgment was nevertheless entered against him without an affidavit being submitted by YCMDPC in support of its claims that another entity owned the claim and was entitled to prosecute this action on its behalf. Because it is the petitioner's burden to show standing to sue, it was improper for judgment to be entered in petitioner's favor without evidence being submitted in support of its standing. *U.S. Bank N.A. v. Nelson*, 169 A.D.3d 110 (2<sup>nd</sup> Dep't 2019).

At a minimum, the affirmations of counsel setting forth the basis of YCMDPC's standing to sue are not evidence of the underlying facts and circumstances, which should be set forth in an affidavit of the party. See generally: *Zuckerman v. New York*, 49 N.Y.2d 557 (Ct. App. 1980) where an affirmation of counsel was found to be inadmissible hearsay and insufficient evidence of the facts contained therein.

As a result of the foregoing, it was improper for the trial court to determine that YCMDPC continued to have standing to sue after it transferred the underlying arbitration award to a nonparty. This matter is not simply one where the defunct business entity continues to prosecute an indebtedness in its own name, but rather one where an improperly identified assignee is prosecuting the action in the name of the original party.

### Point III

TRIAL COURT ERRED IN CONFIRMING THE ARBITRATION AWARD FOR UNDERLYING ARTICLE 75 PROCEEDINGS WAS REDUCED TO A JUDGMENT WITHOUT ANY EVIDENTIARY AFFIDAVITS IN VIOLATION OF BOTH CPLR 409(B) AND CPLR 3212

The underlying Petition is verified by counsel. (R##17-255).

Similarly, the motion sequence leading to the prior award contains no testimony from any party, relying entirely on attorney affirmations. CPLR 409(b) establishes a summary judgment standard for special proceedings. In fact, the courts of this state have found that the proponent of a petition made under either CPLR Article 4 or CPLR Article 78 must be accompanied by evidence in admissible form in order to prevail. *Worldwide Asset Purch., LLC v. Karafotias*, 9 Misc. 3d 390 (Kings County Civil Court July 21, 2005).

Here, only attorney affirmations were submitted from each side. Attorney affirmations, without more, are legally insufficient to award a moving party summary judgment. *Zuckerman v. New York*, 49 N.Y.2d 557 (Ct. App. 1980). Because the underlying Article 75 proceedings seeking confirmation of an arbitration award was reduced to judgment relying entirely on attorney affirmations in violation of both CPLR 409(b) and CPLR 3212, which require an affidavit in order to award summary judgment, said judgment was devoid of any evidentiary predicate to support the conclusions of the court, and must be reversed.

### **CONCLUSION**

The underlying arbitration award was clearly made in violation of public policy, awarding sixty times the damages award in costs and fees where both parties were largely unsuccessful in prosecuting their claims. After this mixed outcome – which includes large scale eve of trial abandonment of claims by YCMDPC – it was an abuse of the trial court’s discretion to confirm the arbitration award of attorney’s fees to Respondent.

It should also be noted that the Appellant objected to Respondent YCMDPC’s standing to sue because it was admittedly not the holder of the debt, as the debt had been assigned to another entity. This matter is not one where a wound down LLC resolved its debts in its own name, but rather one

where a wound down LLC transferred its debt to another existing entity. Under those circumstances, the petitioner did not have standing to sue, and this matter should have been dismissed.

Finally, the underlying proceedings were not preserved; no trial transcript exists, and there is no indication of what happened t oral argument of the issues in the case, however it is clear that a judgment was entered against Dr. Shusterman, without any party testimony being submitted. For these reasons, the judgment entered against Dr. Shusterman must be vacated as a matter of law.

Dated: Brooklyn, New York  
March 16, 2021

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Marino', written over a horizontal line.

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## **PRINTING SPECIFICATIONS STATEMENT**

*Pursuant to Rule 1250.8(j)*

I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing was prepared in Microsoft Word 2013.

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New York Supreme Court  
Appellate Division – Second Department  
DOCKET NOS. 2020-

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In the Matter of the Application of  
YC MD, P.C. d/b/a New York Urologic Institute,

*Petitioner-Respondent,*

-against-

DAVID SHUSTERMAN, M.D.,

*Respondent-Appellant.*

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***STATEMENT PURSUANT TO CPLR §5531***

1. The action in the Supreme Court, Kings County was indexed as 500138/2017.
2. The names of the parties are stated in full in the above caption and there have been no changes therein.
3. This appeal is brought by the Respondent-Appellant David Shusterman, M.D. (Appellant) against the Petitioner-Respondent (Respondent) upon the June 25, 2019 Judgment of \$648,245.57 against Appellant as entered in the Kings County Clerk's Office; said Judgment filed pursuant to the May 21, 2018 Order by the Supreme Court, Kings County, Hon. Peter P. Sweeney, as entered in the Office of the Kings County Clerk on May 23, 2018
4. The underlying CPLR Article 75 proceeding in Supreme Court was brought by petition on behalf of Petitioner Respondent to confirm a final arbitration award made against Appellant. The arbitration award was rendered on December 6, 2016. Respondent sought confirmation of the arbitration award in the amount of \$648, 245. 57. Appellant objected to the Petitioner-Respondent's standing to sue, and to the evidence submitted in support of the petition. After off the record oral argument, without any party affidavit being filed, judgment was entered in favor of Respondent.
5. The paper appealed from is the June 25, 2019 Judgment of \$648,245.57 against Appellant as entered in the Kings County Clerk's Office.
6. This appeal is perfected on the Full Record method.

*Affirmation of Service*

STATE OF NEW YORK    )  
  : ss.:  
COUNTY OF NASSAU    )

Jeffrey Benjamin, an attorney at law duly licensed to practice law in the courts of the State of New York, affirms the truth of the following under penalties of perjury:

I am not a party to this action and am over the age of 18 years old. On August 31, 2021, I served one (1) true copy of the within BRIEF BY APPELLANT and RECORD ON APPEAL by:

depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State,

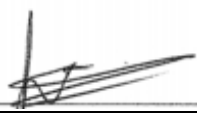
via UPS NEXT DAY COURIER

via Email

addressed to each of the following persons at the last known address set forth after each name:

Garfunkel Wild, P.C.  
111 Great Neck Road  
Great Neck, New York 11021  
spuccio@garfunkelwild.com

Dated: August 31, 2021

  
\_\_\_\_\_  
Jeffrey Benjamin