

**Barouh v Barouh**

2011 NY Slip Op 32141(U)

July 21, 2011

Sup Ct, Nassau County

Docket Number: 021154/2008

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER****SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,****Justice.****TRIAL/IAS PART 7**

DR. GAIL BAROUH, on behalf of herself as a  
shareholder of BAROUH EATON ALLEN CORP.,  
and in the right of BAROUH EATON ALLEN  
CORP., and on behalf of all other shareholders of  
BAROUH EATON ALLEN CORP.,

Plaintiffs,

INDEX NO.: 021154/2008

-against-

RICHARD BAROUH, individually and as Executor  
of the Estate of VICTOR BAROUH, ROBERT  
BAROUH, KATHLEEN CICCHETTI, ZOILA  
MOREIRA, RICARDO RODRIGO, BAROUH  
EATON ALLEN CORP., and "JOHN DOE #1"  
through "JOHN DOE #10", the last ten names  
being fictitious and unknown to the plaintiff,

Defendants.

This matter is before this court on the serious charge that plaintiff, through her attorneys Debra Wabnik and James Abelove, has elicited the confidences and secrets learned by Abelove as attorney for Barouh Eaton Allen Corp in order to pursue adverse legal action against the corporation and other defendants. Such a charge brings into the fore Rule 1.6 of the Rules of Professional Conduct<sup>1</sup> and an affront to the very integrity of the adversary judicial process.

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<sup>1</sup> Rule 1.6 provides:

- a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

After a review of the documents submitted in relation with defendants' motion for dismissal pursuant to *Lipin v Bender* (84 NY2d 562 [1994]) and after hearing oral argument, the court will schedule this matter for an evidentiary hearing and *in camera* inspection of Abelove's potentially privileged case files as attorney for the plaintiff, while leaving open the possibility of an *in camera* inspection of Wabnik's privileged files if further evidence would support a good faith belief by a reasonable person that the crime-fraud exception applies. (Cf. *Madanes v. Madanes*, 199 F.R.D. 135 [SDNY 2001], *U.S. v. Zolin*, 491 U.S. 554, 572 [1989]). The evidentiary hearing and *in camera* inspection will be conducted to address credibility issues surrounding an oral waiver for Abelove's representation in this matter, the corporation's alleged surreptitious hiring of Abelove without the plaintiff's knowledge, and whether any corporate confidences or secrets obtained by Abelove by virtue of his representation of the corporation were shared with Wabnik or the plaintiff. Finally, the evidentiary hearing must address facts that are necessary to determine an appropriate remedy which is tailored to an attorney's higher ethical standards of conduct as an officer of the court, or to the general standards of conduct to which the plaintiff is subject, including obedience to orders of the court and respect for the adversary judicial process.

Applying the analytic framework suggested by *U.S. v. Zolin* (491 U.S. 554 [1989]), the court concludes that the defendants have presented a sufficient factual basis to support a good faith belief by a reasonable person that an evidentiary hearing and an *in camera* inspection of Abelove's case files will reveal evidence to support a prima facie charge that Abelove has revealed confidences or secrets of the corporation. In particular, there is no written waiver in which the corporation acknowledged full disclosure and consented to Abelove's representation in

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- (1) the client gives informed consent, as defined in Rule 1.0(j);
  - (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
  - (3) the disclosure is permitted by paragraph (b).
- "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

this matter. Next, Abelove's deposition has revealed that during his representation of the corporation, Abelove learned generally of the corporation's holdings in Canada (Wabnik Aff., Ex. 1, Tr. at 178), in Ireland (*id.* at 180), the Swalm Street property in Westbury (*id.* at 182), various properties in Brooklyn (*id.* at 189), properties related to the Morales (*id.*), and Abelove had some involvement with the health of the corporation's finances when he was concerned with whether the corporation could sustain "a catastrophic hit" from Superfund litigation (*id.* at 193). The defendants charge that Abelove has shared of the information he learned as the corporation's representative with the plaintiff, and that this detailed knowledge is reflected in the Verified Complaint, despite the plaintiff's allegations that she was shut out of the corporation's affairs entirely. For example, the Verified Complaint details particular allegations surrounding certain properties, including properties in Brooklyn, Long Island, properties transferred to the Morales, and disposal of a Canadian holding. The Verified Complaint merely alleges that "Plaintiffs recently learned" of these transfers and plaintiff's interrogatories have provided no source for such knowledge. These facts support a good faith belief by a reasonable person that certain information learned during Abelove's relationship with the corporation may have been shared with the plaintiff, particularly in light of the fact that no written waiver exists to permit Abelove's representation in this matter.

The court notes that a disclosure of confidences or secrets is not excused by a waiver that consents merely to *representation* despite the attorney's conflict of interests. Therefore, while lack of a waiver is certainly evidence of Abelove's breach of his duty of loyalty, the existence of a waiver to Abelove's representation despite a conflict of interest does not end the court's inquiry. The evidentiary hearing must as much as possible into whether Abelove divulged any information that he learned as counsel for the corporation. In anticipation of privilege objections, the court addresses the attorney-client privilege as it may apply to Abelove's communications.

Before the court considers the applicability of the attorney-client privilege in general to Abelove's representation in this matter, the court finds that the privilege would not attach to any testimony regarding only whether Abelove discussed, provided advice on, or otherwise divulged the corporation's secrets or confidences as to particular transactions, financial statements, or other information. (*See Paul Rice, 1 Attorney-Client Privilege in the U.S. § 2:3*). Indeed, there is

[\* 4]

little dispute that the attorney-client privilege would not attach to testimony disclosing only whether confidences or secrets were divulged. However, before questions can be asked regarding the contents of Abelove's communications or advice, the presumption that the attorney-client privilege applies must be overcome.

The federal courts in New York have taken the approach that "when a second client induces a lawyer to breach his fiduciary duty to a prior client [by eliciting secrets or confidences], the second client's communications with the lawyer are not privileged." (*Madanes*, 199 F.R.D. at 145). This is so because the subsequent client has retained the attorney with the purpose or effect of eliciting such confidences and secrets, and therefore there is no legitimate attorney-client relationship. (*Id.* at 144). Therefore, there can be no privilege asserted with regard to any communications surrounding Abelove's involvement in this case, if a sufficient showing is made that confidences or secrets of the corporation were shared by Abelove or elicited by Wabnik or the plaintiff. However, before the privilege is denied under this doctrine, the evidentiary hearing or *in camera* inspection will need to reveal that this is not merely a case "where an attorney simply represents simultaneously two clients whose interests have become adverse," and rather, there must be some quantum of proof that confidences or secrets of the corporation were actually shared between Abelove and Wabnik or between Abelove and the corporation.<sup>2</sup>

Alternatively, the evidentiary hearing and *in camera* inspection may reveal that the crime-fraud exception, in its modern form, applies to some or all of Abelove's communications with the plaintiff or Wabnik. As a starting point, "a breach of fiduciary duty by an attorney may constitute a fraud" sufficient to invoke the crime-fraud exception in some circumstances. (*Madanes*, 199 F.R.D. at 148). The Southern District of New York cited from Dean Wigmore's example: "'A consults X as his attorney, with the express purpose of inducing him, while B's attorney to act adversely to B.' This constitutes a fraud because the attorney is concealing from B the material fact that he is simultaneously representing A" (citations omitted). (*Id.*) A finding

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<sup>2</sup> The quantum of proof required to make this showing is suggested by the U.S. Supreme Court's discussion in *Clark v United States* (289 US 1, 15 [1933]): "To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.' O'Rourke v. Darbishire, loc. cit., supra; also pp. 614, 622, 631, 633 of (1920) A.C. When that evidence is supplied, the seal of secrecy is broken."

[\* 5]

that no waiver exists even to permit Ablove's representation on this matter and his concealment of this fact could be evidence of such a fraud. Beyond such fraud, "the attorney-client privilege does not protect communications in furtherance of an intentional tort that undermines the adversary system itself." (*Id.* at 149). Thus, a conspiracy to elicit confidences or secrets in violation of Rule 1.6 of the Rules of Professional Responsibility (after receipt of an informed consent to the conflict-of-interest situation), could support a finding that such a tort would pierce the attorney-client privilege.

Finally, the court notes that the remedy for any disclosure of the corporation's secrets by Ablove must be tailored to any wrongdoing by the plaintiff herself or her attorneys, who are only themselves held to the standards of the Rules of Professional Conduct. In *Lipin v Bender* (84 NY2d 562 [1994]), the plaintiff personally stole files from the defendants' attorney files, wrongfully concealed them despite a court order to the contrary, read them thoroughly, and copied their contents by hand. Thus, *Lipin* is a case where the plaintiff displayed an utter disregard and contempt for the court and the integrity of the adversary judicial process. While the Court of Appeals did rely in part on its observation that plaintiff's personal knowledge would infect any subsequent attorney-client relationship, such that disqualification was not an appropriate remedy, the Court of Appeals was also concerned with the party's egregious and intolerable conduct which merited the extreme sanction of dismissal. It is not clear that a party's conduct which is merely contrary to the Rules of Professional Conduct *for attorneys*, would warrant dismissal if the party herself is not held to those Rules of Professional Conduct and should not expect to be familiar with the laws regulating attorneys. Indeed, Dean Wigmore's commentary notes that such conduct in knowingly representing adverse parties without consent is a fraud *by the attorney*. Therefore, the evidentiary hearing will need to establish the plaintiff's own conduct in encouraging or eliciting Ablove's disclosure of the corporation's confidences or secrets, and whether the such conduct rises to the level of intolerable conduct by a party which undermines the adversary judicial process. Alternatively, the evidentiary hearing must reveal whether particular information that is the basis of certain causes of action was fed by Ablove without any independent source of information, and that such causes of action must thus be stricken because of their improper source.

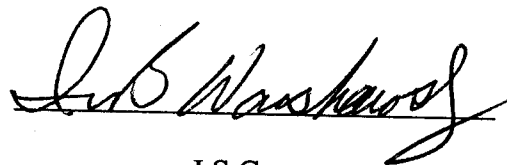
[\* 6]

The court notes that as an officer of the court, Wabnik is held to the Rules of Professional Conduct. “[A]n attorney... may not seek to obtain... information that might be protected under the attorney-client privilege or the work-product doctrine.” (NYSBA Opinion 700 5/7/98 at 3). Even though such conduct is not specifically addressed by Rule 1.6, this prohibition is a necessary corollary to the rule that an attorney may not share secrets or confidences of a client. Thus, Abelove could not encourage Abelove to share secrets or confidences of the corporation. Because of the high standards attached to attorneys as officers of the court, Wabnik may not simply rest on her alleged ignorance of Abelove’s prior representation of the corporation. If Wabnik did in fact acquire confidences or secrets of the corporation through Abelove, such acquisition, even if inadvertent, would be wrongful if the acquired confidences were then used to help her client. (*See MMR/Wallace Poer & Indus., Inc. v. Thames Assocs.*, 764 F.Supp. 712, 718-19 [D.Conn. 1991]; ABA Opinion 382 [1994], N.Y. City Opinion 1989-1). If plaintiff’s own conduct was otherwise innocent, disqualification of Wabnik for her improper acquisition of privileged or confidential information may also be an appropriate remedy. (*Matter of Weinberg*, 129 AD2d 126 [1987], *rearg denied* 132 AD2d 190, *lv dismissed sub nom. Matter of Beiny*, 71 NY2d 994 [1988]).

The court hereby ORDERS that an evidentiary hearing be held on August 17, 2011 at 9:30 A.M. where the court shall hear the testimony of James Abelove, Dr. Gail Barouh, and Robert Barouh. The court reserves the right to also call Debra Wabnik. The court may order that the transcript be sealed upon an application of the parties.

The court further ORDERS that James Abelove appear with all papers and other materials in his possession that regard the instant litigation for the court’s *in camera* inspection of the same. The court also reserves the right to call Debra Wabnik to appear with all papers and other materials in her possession that regard the instant litigation for the court’s *in camera* inspection.

DATED: July 21, 2011



J.S.C.

**ENTERED**  
JUL 28 2011  
NASSAU COUNTY  
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