

Rohan v Barasch & McGarry, P.C.

2012 NY Slip Op 31702(U)

June 21, 2012

Supreme Court, New York County

Docket Number: 104763/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART _____

Index Number : 104763/2010
ROHAN, ROBERT
vs.
BARASCH
SEQUENCE NUMBER : 003
COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

JUN 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUN 21 2012

_____, J.S.C.
HON. JUDITH J. GISCHE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York: IAS 10

-----x

Robert Rohan,
Plaintiff,

Decision/Order

-against-

Index#104763/10
Mot. Seq. # 003

Barasch & McGarry, P.C. d/b/a Barasch
McGarry Salzman & Penson, and Michael
Barasch, Esq.,

FILED

Defendants

JUN 28 2012

-----x

Gische, J:

NEW YORK
COUNTY CLERK'S OFFICE

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBER
Notice of Motion, KJG affirm., exhibits.....	1
ILN affirm. in opp.....	2
KJG reply affirm.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff brought this malpractice action against defendants. Plaintiff alleges that on or about May 15, 2009, he retained defendants (sometimes "BMSP"), as attorneys, to represent him in connection with personal injuries he sustained on March 2, 2009, after a step stool he was standing on collapsed. The location where the injuries took place, 16 Hopper Street, Brooklyn, New York, is was owned by plaintiff's employer, the New York City Fire Department and the City of New York (collectively "the City"). The basis for the malpractice claim is that although the deadline for the Notice of Claim was June 1, 2009, the defendants failed to timely file such Notice.

It is further alleged that defendants advised plaintiff that they would no longer represent him on June 17, 2009. Plaintiff thereafter, on September 21, 2009, retained

Baron Associates P.C., ("Baron") to pursue a personal injury case against the City, based on the March 2, 2009 incident. He alleges that upon the retention of Baron he first learned that the time to file a Notice of Claim had passed. Baron brought a motion to file a late Notice of Claim, which was denied on February 17, 2010.

Plaintiff appeared for deposition in this case on November 14, 2011. During the deposition plaintiff asserted attorney client privilege when asked questions about Baron's legal representation of him in connection with the underlying personal injury claim and related motion to file a late Notice of Claim.

In this motion, defendants seek an order compelling plaintiff to answer questions "regarding plaintiff's legal representation by [Baron] in the underlying personal injury matter; the circumstances surrounding the motion by Order to Show Cause filed by Baron seeking leave to file a late notice of claim against the New York City Fire Department and City of New York... in the underlying personal injury matter; any discussion and/or correspondence between plaintiff and Baron regarding the content, arguments and/or evidence used in the underlying Order to Show Cause motion, any discussion and/or correspondence between plaintiff and Baron regarding the likelihood of success of the underlying Order to Show Cause motion, any discussion and/or correspondence between plaintiff and Baron regarding the subject step stool, its location and/or condition, and photographs of same; [and] any discussion and/or correspondence concerning an appeal of the underlying decision denying leave to file a late Notice of Claim." (See: Glenn 1/30/12 affirm. ¶12).

Defendants claim that while the information they seek involves plaintiff's communications with counsel, which would otherwise be protected by the attorney

client privilege, the privilege has been waived because the subject matter has been put "at issue" in this malpractice action against them. For the reasons that follow, the court rejects this argument and denies the motion to compel disclosure.

"At issue" waiver of a privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in the litigation, so that the invasion of the privilege is required to determine the validity of the claim or defense of the party asserting the privilege, and the application of the privilege would deprive the adversary of vital information. Deutsche Bank Trust Company of Americas v. Tri-Links Investment Trust, 43 AD3d 56 (1st dept. 2007). The fact that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself "at issue" in the lawsuit. Rather, "at issue" waiver occurs when a party has asserted a claim or defense that he intends to prove by use of the privileged conversations and/or materials. AMBAC Assurance Corporation v. DLJ Mortgage Capital, Inc., 92 AD3d 451 (1st dept. 2012); Deutsche Bank Trust Company of Americas v. Tri-Links Investment Trust, *supra*. Generally, no "at issue" waiver will be found where the party asserting the privilege does not need the privileged documents to sustain its cause of action. AMBAC Assurance Corporation v. DLJ Mortgage Capital, Inc., *supra*.

In this regard, plaintiff's lawsuit against defendants rests primarily on his claim that when they were still acting as his attorneys, they failed to timely file a Notice of Claim on his behalf. In order to prove his case against defendants, plaintiff does not need to rely on any advice he was later given by Baron about the personal injury claim. Plaintiff does not claim that any part of any advice Baron provided to him regarding the

personal injury matter is necessary to prove that defendants committed malpractice.

Although plaintiff alleges that it was Baron that first told him that the Notice of Claim had not been timely filed, those statements are irrelevant to the causes of action asserted, because the time for filing the Notice of Claim had allegedly passed before defendants ceased their representation of plaintiff. Defendants' argument, that plaintiff has put the otherwise privileged communications with successor counsel "at issue" simply because plaintiff claims defendants committed malpractice, is not an accurate statement of the law. Jackobleff v. Cerrato, Sweeny and Cohn, 97 AD2d 834 (2nd dept. 1983). The fact that defendants think the information will be useful to them is not a sufficient reason to make it discoverable or to find that there has been a waiver of the privilege.


In accordance herewith it is hereby

ORDERED that the motion for an order compelling plaintiff to appear for a second deposition is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
June 21, 2012

SO ORDERED:



J.G. J.S.C.

FILED

JUN 28 2012

NEW YORK
COUNTY CLERK'S OFFICE