

<b>Betz v Blatt</b>
2015 NY Slip Op 33003(U)
October 27, 2015
Supreme Court, Westchester County
Docket Number: Index No. 58938/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
DEBRA BETZ, Administratrix of the Estate of  
Carmelo Carbone aka Mel Carbone,

Plaintiff,

-against-

ARNOLD W. BLATT, ANTHONY J. PIERAGOSTINI,  
GEORGE A. SIRIGNANO, JR., and  
Enea, SCANLAN & SIRIGNANO, LLP,

Defendants  
-----X

LEFKOWITZ, J.

**DECISION and ORDER**

**Index # 58938/2011**  
**Seq. No. 16**  
**Motion Date: Oct. 26, 2015**

The following papers were read on the motion of defendant Anthony J. Pieragostini (hereinafter "Pieragostini") for an order compelling non-party witness Lawrence A. Codispoti (hereinafter "Codispoti") to appear for a continued examination before trial and directing him to produce all outstanding document discovery requested in the non-party witness subpoena dated June 15, 2015 and for such other and further relief as this court deems just and proper.

Order to Show Cause dated September 15, 2015; Affirmation in Support; Exhibits A-L  
Affirmation in Support; Memorandum of Law  
Affirmation in Opposition; Exhibits A-F

Upon the foregoing papers and proceedings held on October 26, 2015 this motion is determined as follows:

**Factual and Procedural Background**

Carmelo Carbone died testate on May 13, 2004. His will, drafted by defendant Arnold W. Blatt, Esq. (hereinafter "Blatt"), named his brother Michael Carbone as executor of his estate. Carmelo Carbone's two daughters, Debra Betz (hereinafter to be referred to as plaintiff in her capacity as executor of the estate of Carmelo Carbone and as "Betz" in her capacity as beneficiary of the estate) and Kristin Carbone-Lopez, were the named beneficiaries thereunder. The estimated gross value of the estate at the time of Carmelo Carbone's death was \$2 million.

Defendants are all attorneys who represented the estate and/or Michael Carbone

sequentially throughout the probate process. On or about August 15, 2004, Blatt filed a petition for probate on behalf of Michael Carbone. After letters testamentary were awarded to Michael Carbone, Blatt became the estate's attorney and he represented the estate from August 15, 2004 until the summer of 2006. Betz hired Codispoti in the fall of 2004 to protect the beneficiaries' rights.

In or about February 2009 Pieragostini was retained to prepare and file an estate accounting. Pieragostini filed an estate accounting to which Codispoti filed objections. The accounting was found to be inadequate and insufficient by the Surrogate. Defendants Sirignano (hereinafter Sirignano), and his firm, Enea, Scanlan & Sirignano, LLP (hereinafter Enea), were retained in or about November, 2009.

Betz terminated Codispoti's legal services on March 5, 2010. Codispoti referred her to present counsel (Bashian & Farber) and on March 10, 2010 it appeared on behalf of Betz in the accounting proceeding. At that time, there were outstanding invoices of about \$49,000 for legal services Codispoti rendered for which he has a charging lien.

The surrogate court suspended Michael Carbone's letters testamentary on April 13, 2011 at which time the value of the estate was depleted to about \$110,000. Judgments against Michael Carbone and others have been entered and there is a bench warrant for the arrest of Michael Carbone who, it is believed, is presently beyond this court's jurisdiction, in Italy. In or about June, 2011, the Surrogate Court ordered Michael Carbone to pay the estate a sum over \$700,000. The Surrogate Court gave limited letters to Betz in November 2011. Plaintiff hired Bashian & Farber to represent the estate.

The present action was commenced on or about November 21, 2011. The verified complaint referenced letters written by Codispoti to Blatt (in paragraphs 21, 22, 24), and one letter and a portion of a letter written by Blatt to Codispoti (paragraph 23, 31).

Defendants moved for an order directing a more definite statement of plaintiff's allegations. The motion was granted and the Court (Smith, J.), by decision and order dated March 6, 2012 directed plaintiff to serve an amended complaint. In her amended complaint dated April 4, 2012 plaintiff asserted five causes of action against all defendants: (1) legal malpractice; (2) breach of fiduciary duty; (3) fraud and breach of trust; (4) disgorgement and restitution of attorneys' fees and expenses; and (5) breach of Judiciary Law § 487. The amended verified complaint referenced letters written by Codispoti to Blatt (in paragraphs 33, 34, 37), and letters and a portion of a letter written by Blatt to Codispoti (paragraph 35, 51).

In the second amended complaint dated December 24, 2014 plaintiff asserted: (1) negligence and legal malpractice against Blatt; (2) breach of Judiciary Law § 487 against Blatt; (3) negligence and legal malpractice against Pieragostini; (4) breach of Judiciary Law § 487 against Pieragostini; (5) fraud against Sirignano and Enea; (6) disgorgement and restitution of attorneys' fees and expenses against Sirignano and Enea; and (7) breach of Judiciary Law § 487

against Sirignano and Enea. The amended verified complaint referenced letters written by Codispoti to Blatt (in paragraphs 34, 35, 38 ), and letters and a portion of a letter written by Blatt to Codispoti (paragraph 36, 56).

In his answer dated January 23, 2015 Pieragostini denied the essential allegations asserted against him and asserted several affirmative defenses including the culpable conduct of plaintiff and her agents in contributing to her damages and her failure to mitigate damages.

In their answer dated January 23, 2015 Sirignano and Enea denied the essential allegations asserted against them and asserted several affirmative defenses including the culpable conduct of plaintiff and her agents in contributing to her damages and her failure to mitigate damages. They also asserted cross claims against Blatt for contribution and indemnification.

The Compliance Conference Referee Report & Order dated March 19, 2015 and so-ordered by the Court (Lefkowitz, J.), provided for additional disclosure and directed the parties to appear again on May 6, 2015 for a certification conference.

The Compliance Conference Referee Report & Order dated April 23, 2015 and so-ordered by the Court (Lefkowitz, J.), provided for additional disclosure, including plaintiff's deposition on May 21, 2015 and directed the parties to appear again on June 17, 2015 for a certification conference.

Plaintiff's deposition was conducted on March 11, 2014 and March 12, 2014. She testified that she did not recall seeing an accounting in May 2007 (related to the estate) (28). She hired Codispoti in the fall of 2004 (30; 140). Plaintiff testified that although Codispoti asked Blatt, in writing, to obtain a formal appraisal of machinery/equipment she could not remember if he asked Blatt for formal appraisals of the real property (53). When Pieragostini's counsel attempted to ask plaintiff if Codispoti offered her any explanation as to why there was a discrepancy in the numbers between what she expected to be in the gross estate versus what was reported in the papers, plaintiff's counsel objected (147-48). Plaintiff's counsel stated "so she gets a lawyer to try to unearth this stuff" (148). Plaintiff testified that she and her sister confided and spoke to Codispoti about their concerns (152). When Pieragostini's counsel asked, "[y]ou get the will. The will is probated, you consult Mr. Codispoti about your legal options. He inquires of Mr. Blatt", she answered "yes" (152-53). She testified that Codispoti received a response from Blatt and that the complaint contained some examples of that (153). She further testified that she received drafts of the correspondence Codispoti sent Blatt before Codispoti sent the letter to Blatt (154). She also testified that she and her sister filed a motion to compel an accounting in 2007 because there was correspondence from Codispoti (159). Plaintiff testified that Codispoti told her that the estate had retained Pieragostini as counsel (169). She and Codispoti spoke with John Muller, a CPA and attorney who was retained to review the 2009 estate accounting (181-82; 186).

Plaintiff continued her deposition testimony on May 21, 2015. She testified that the

numbers on an accounting prepared in 2007 did not add up (9-10). She also testified that she did not know if there was a proposed accounting in 2007 but she knew that Codispoti received an accounting in connection with the estate (12-13). Plaintiff stated that she received a copy of the probate papers from Blatt but could not recall if she received any other mail from him (20-21). Other than discussing a Corvette (that wasn't listed as an asset), she could not remember any other conversations with Blatt (22-23). Plaintiff stated that Codispoti told her that Pieragostini was representing the estate (24). Plaintiff testified that Codispoti gave her an accounting document that she believed Pieragostini prepared and which was filed with the courts at the time that Pieragostini represented her uncle as executor of her father's estate (27; 31). Plaintiff also testified that Codispoti reviewed the document with her (28). Her counsel objected to a line of inquiry asking her if she recalled seeing any inaccuracies in the accounting document based upon her own personal knowledge (30-35) or if she personally had any documents in her possession that proved that the information in the accounting was inaccurate (37-38). Plaintiff stated that her interaction with the underlying Surrogate's Court procedure and litigation was first through Codispoti and then through her present counsel (49). Plaintiff testified that she did not have any personal knowledge of how Sirginano concealed her uncle's fraud (55).

On June 17, 2015 Pieragostini served Codispoti with a non-party subpoena seeking his testimony and the following documents: (1) all documents, correspondence and/or communications exchanged by and/or between you and "plaintiff Debra Betz"; (2) all documents, correspondence and/or communications exchanged by and/or between you and the estate of Carmelo Carbone; (3) all documents, correspondence and/or communications exchanged by and/or between you and Bashian and Farber; (4) all documents, correspondence and/or communications exchanged by and/or between you and Mike Carbone; and (5) all documents exchanged regarding allegations of any purported wrongdoing set forth against defendants.

By letter dated June 18, 2015 Bashian & Farber, plaintiff's counsel, notified Pieragostini that it had been retained to represent Codispoti for purposes of the non-party deposition. Bashian & Farber stated that although it had strong objections to continued discovery in this matter in light of the fact that a trial certification in this matter had been scheduled for June 17, 2015 it would not move to quash the subpoena.

Codispoti's deposition was conducted on June 30, 2015. Codispoti testified that he did not review the schedule of documents requested prior to the deposition (22; 37) but after reviewing the document request schedule at his deposition, Codispoti testified that he had documents responsive to the request. He further testified that the file regarding his representation of Betz and her sister as beneficiaries of the estate was turned over to Bashian & Farber when it was substituted as counsel. He stated that he retained a small number of documents that he believed were attorney work product and that he had some fax and e-mail communications between him and Bashian & Farber prepared after Bashian & Farber was substituted as counsel for Betz, prior to receiving a copy of the subpoena (37-38).

Codispoti further testified that he reviewed the second amended complaint and that he reviewed certain electronic correspondence related to the present lawsuit that he had in his electronic files (25).

Codispoti also testified that an attorney from Bashian & Farber advised him that there was a conspiracy between Mike Carbone and his lawyers. Prior to that Codispoti had not formed an independent belief that the named defendants were involved in a conspiracy (108-09).

During his deposition several objections were made. Codispoti testified that he spoke to Pieragostini's counsel twice before the subject subpoena was served (7). Plaintiff's counsel objected when Pieragostini's counsel asked Codispoti if he had a recollection about what they discussed during their first phone call and what they discussed during their second phone call (14; 15). Codispoti further testified that on the day he was served with the subject subpoena he retained plaintiff's counsel to represent him (16). Plaintiff's counsel objected, as plaintiff's counsel and as the witness' counsel, when Pieragostini's counsel asked Codispoti what his counsel said to him regarding the claims that were being brought against Pieragostini (17). Codispoti was also asked if there was a settlement offer at the time his representation ceased from anyone to the beneficiaries (88). He answered that he believed there was but plaintiff's counsel objected when Pieragostini's counsel asked whether one of the beneficiaries was willing to take the offer but the other one was not (87-89). Plaintiff's counsel also objected when Codispoti was asked whether plaintiff's counsel had expressed to him its theory of the claims in this case (90) and whether he believed that communications with plaintiff's counsel from the time he referred the case until service of the subpoena, were protected by attorney-client privilege (90-91). When Codispoti was asked if he had formed an opinion about whether Michael Carbone was involved with defendants in a conspiracy, another objection was lodged (92). Codispoti testified that during his representation of the beneficiaries he did not form an opinion regarding any fraud or collusion because he was not in possession of any information to lead him to that conclusion (94-95). Plaintiff's counsel again objected when Pieragostini's counsel asked Codispoti if, in his opinion, he was misled by Blatt (118-119).

By letter dated July 10, 2015 Pieragostini requested a pre-motion conference relating to Codispoti's deposition and Codispoti's failure to provide the requested documents. Conferences were conducted on July 15, 2015 and July 24, 2015.

Plaintiff's counsel provided a privilege log on August 21, 2015. By letter dated August 28, 2015 plaintiff's counsel stated that upon its review of Codispoti's deposition transcript it was withdrawing its objections on pages 10, 22, 58, 99 and 107.

#### Parties' Contentions

Presently Pieragostini seeks an order compelling Codispoti to appear for a continued examination before trial and to produce all outstanding document discovery requested in the subpoena dated June 15, 2015. Pieragostini asserts that Bashian & Farber impeded his ability to

depose the witness by directing Codispoti not to answer questions and objecting to questions without specifying if it was doing so on plaintiff's behalf or on Codispoti's behalf in contravention of the Uniform Rules for New York State Courts.

Pieragostini asserts that upon the conclusion of plaintiff's deposition it was confirmed that she lacked personal knowledge to support the Judiciary Law claims and that Codispoti's unimpeded testimony is relevant to his defense of plaintiff's allegation of legal malpractice and Judiciary Law violations. Pieragostini asserts that plaintiff filed claims against him based upon what her prior counsel told her, but not necessarily confirmed through prior counsel.

Pieragostini contends that the necessary disclosure can be separated into three time periods. The first time period is when Betz was represented by Codispoti from the fall of 2004 through March 5, 2010. Pieragostini asserts that the attorney-client privilege is waived because plaintiff has asserted claims that have placed the privileged matter at issue. In her second amended complaint plaintiff stated she relied on Codispoti's alleged observation thereby placing his observations and communications at issue. Plaintiff offered testimony as to privileged matters at her deposition and plaintiff's selective disclosure acts as a waiver to privilege. The second time period is when Betz terminated Codispoti's legal services. Pieragostini states that no privilege existed between Betz and Codispoti after he was terminated on March 5, 2010. The third time period is when Codispoti retained plaintiff's counsel after receipt of the subpoena. Pieragostini asserts that the representation of Codispoti by plaintiff's counsel improperly attempts to manufacture a privilege and create a tactical advantage.

This motion is supported by Sirignano and Enea. They assert that plaintiff alleged in her second amended complaint, and testified at her deposition, that the communications between Codispoti and all the defendants serve as the basis for her claims. They note that the second amended complaint directly references and quotes communications allegedly referable to Codispoti. Sirignano and Enea contend that Pieragostini served Codispoti with the subject non-party subpoena based upon plaintiff's allegations and deposition testimony.

Sirignano and Enea assert that insofar as plaintiff advised defendants she would not move to quash the subpoena, any objections thereto have been waived.

Sirignano and Enea further assert that plaintiff has not met her burden of demonstrating the applicability of the attorney-client privilege in this matter. They note that Betz's relationship with Codispoti terminated on March 5, 2010 so that no privilege applies to any communications Codispoti had with Betz after that date. Also, the earliest that Codispoti retained plaintiff's counsel in this matter is June 15, 2015. Therefore, no privilege is applicable to communications between Codispoti and plaintiff's counsel prior to June 15, 2015.

Sirignano and Enea further contend that based upon commencement of this action, any claimed attorney-client and work-product privileges relating to Codispoti's representation of her from the fall of 2004 through March 5, 2010 have been waived. These defendants state that the

basis of plaintiff's claim that defendants aided and abetted Mike Carbone's fraud and/or allegedly committed a deceit upon the court dealing with the underlying contested accounting proceeding is based upon her communications with Codispoti. They assert that plaintiff should not be permitted to assert fraud by selectively disclosing portions of Codispoti's file while withholding other portions of his file since this prevents a fair opportunity for defendants to review all documents that are material and necessary to their defense.

Plaintiff opposes this motion. She notes that Pieragostini waited about three and one-half years before serving Codispoti with the subpoena, on the same day that the parties were directed to appear for a certification conference. It was after he was served with this subpoena that Codispoti retained Basian & Farber to represent him. Plaintiff also asserts that although the subpoena was defective on its face, in an effort to move this matter to trial as quickly as possible Codispoti appeared for a deposition on June 30, 2015. Plaintiff asserts that the documents and testimony Pieragostini seeks from Codispoti are protected from disclosure by, inter alia, the attorney-client privilege, which, contrary to defendants' assertions, has not been waived.

Plaintiff states that during the time that defendants were engaged in negligent and fraudulent acts, Betz and her sister, as beneficiaries of their father's estate, were represented by Codispoti and that Codispoti made significant efforts on their behalf to get defendants to protect the estate and its assets. Plaintiff further states that when Codispoti questioned defendants about their administration of the estate, they misled him.

Plaintiff asserts that she has not waived the attorney-client privilege and defendants' assertion to the contrary is based on a misunderstanding of who the parties are in this action. Plaintiff states that Codispoti never represented the estate but only represented Betz in her individual capacity. The communications between Betz and Codispoti are limited to protecting her individual interests as beneficiary. Plaintiff asserts that the estate, as represented by Betz, is suing defendants, its former attorneys. Therefore, discovery of defendants' files is proper. However, this lawsuit does not implicate the relationship and privilege between Codispoti and Betz, in her capacity as beneficiary of the estate.

Plaintiff further asserts that, contrary to defendants' assertions, she has not placed any privileged information at issue. The only communications at issue in this lawsuit are those made by defendants and they are in possession of the information and documents which evidence the fraud. Plaintiff asserts that everything in her complaint is based either on public records or documents from defendants' own files and not from Codispoti's files. Plaintiff asserts that there is no evidence indicating that protected documents in Codispoti's file or privileged communications between Codispoti and Betz were the basis for the allegations in the estate's complaint.

Plaintiff also contends the following: (1) the objections at Codispoti's deposition were not specifically addressed by Pieragostini and in any event, the objections were proper in that defendants sought to improperly obtain the production of information protected by the attorney-

client privilege; and (2) Bashian & Farber's representation of Codispoti was undertaken in good faith. Plaintiff concedes that there were limited communications regarding confidential and privileged information pertaining to the underlying Surrogate's Court matter between Betz and Codispoti, after he was substituted as counsel by Bashian & Farber, but maintains that these communications should remain confidential. Lastly plaintiff asserts that the communications between Bashian & Farber and Codispoti, after the firm was substituted as counsel for Codispoti, should not be subject to disclosure.

### Analysis

Plaintiff has alleged legal malpractice and the violation of Judiciary Law § 487 against Pieragostini and she has alleged fraud and the violation of Judiciary Law § 487 against Sirignano and Enea. Legal malpractice consists of the failure of an attorney to employ that degree of skill commonly exercised by an ordinary member of the legal profession, proximately resulting in damages to the client. The elements are: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney or some other conduct in breach of the professional relationship; (3) proof that the attorney's conduct was the proximate cause of the injury to the plaintiff; and (4) proof that but for the alleged malpractice, the plaintiff would have been successful in the underlying action (*Antonelli v Guastamacchia*, 131 AD3d 1078 [2d Dept 2015]; 1B Carmody-Wait 2d § 3:453 [database updated June 2015]). Judiciary Law § 487 provides, in relevant part, that an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party, is guilty of a misdemeanor and he forfeits to the party injured treble damages in a civil action. The elements of a cause of action based on fraud are a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by plaintiff and resulting injury (*Lebovits v Bassman*, 120 AD3d 1198 [2d Dept 2014]).

Pieragostini, Sirignano and Enea seek Codispoti's continued deposition and all the documents requested in the non-party subpoena. Plaintiff claims that the discovery now sought is protected by the attorney-client privilege. Confidential communications made between an attorney and a client during the course of professional employment are generally privileged unless waived (CPLR 4503(a)). In addition, any attorney's work product is also immune from disclosure (CPLR 3101 (c)). The burden of establishing any right to protection is on the party asserting the privilege. The protection must be narrowly construed and its scope is to be determined on a case by case basis (*Willis v Willis*, 79 AD3d 1029 [2d Dept 2010]).

However, the attorney-client privilege is waived where the client places the subject matter of the privileged communication "at issue" or where the invasion of the privilege is required to determine the validity of the client's claim and application of the privilege would deprive the adversary of vital information. The "at issue" waiver is also applicable to the work-product privilege (see *Bolton v Weil, Gotshal & Manges*, 4 Misc3d 1029[A] [Supreme Court, New York County 2004]). The "at issue" waiver occurs when the party has asserted a claim that she intends to prove by use of the privileged material and needs the privileged documents to sustain her

claims. Also, a client waives the attorney client privilege by placing the subject matter of a counsel's advice in issue and by making selective disclosure of such advice (*see generally Jakobleff v Cerrato, Sweeney and Cohn*, 97 AD2d 834 [2d Dept 1983]; *Sossis v Lazer*, 2010 WL 427192 [Supreme Court, Nassau County 2010] *affd*, 91 AD3d 753 [2d Dept 2012]). The holder of a privilege arguably waives it when she produces a non-party witness thereby constituting a waiver of the privilege as to all communications on the same subject (*compare AMBAC Indem. Corp. v Bankers Trust Co.*, 151 Misc2d 334 [Supreme Court, New York County 1991]).

In light of plaintiff's claims in this matter the court finds that plaintiff has placed "at issue" the discovery she asserts is privileged. Plaintiff states in her opposition to this motion and in her complaints that defendants misled Codispoti, in both oral and written communications, when he questioned their administration of the estate and when he objected to their accountings. In paragraph 52 of the second amended verified complaint plaintiff alleges that "defendants Pieragostini, Sirignano and Enea also failed to take remedial measures to correct the depletion and waste of the estate's assets which Codispoti warned against". At the time the 2009 accounting was prepared by Pieragostini and for a part of the time that Sirignano and Enea represented the estate, at which times the events giving rise to plaintiff's claims arose, Codispoti represented the beneficiaries of the estate and was involved in protecting their rights. Plaintiff is not permitted to selectively disclose certain portions of Codispoti's files and communications to support the claims in her second amended verified complaint while withholding other portions. The court notes that insofar as plaintiff has already voluntarily produced Codispoti for a deposition she has waived her right to claim privilege as to further information regarding the same subject matter.

A review of the 23 page privilege log provided by plaintiff reveals that some of the documents contained therein do not need to be provided by plaintiff to defendants since they are a matter of "public record" and/or "already in possession of defendants". Additionally, some other documents contained therein do not need to be provided since they do not pertain to information that is material and necessary to the defense of this action (CPLR 3101 [a]). They are documents that are Bates numbered P2-10; P15; P16-17; P20; P29; P30; P31; P39; P40-42; P53; P56; P475; P478; P701; P752; P753-754; P944-946; P962; P996-1001; P1002; P1008-1010; P1102; P1103-1104; P1105-1107; P1122; P1123-1130; P1170-1171; P1313; P1315; P1334; P1354; P1447-1448; P1454; P1648-1656; and P1662-1713.

Pursuant to the Uniform Rules of the Trial Courts [22 NYCRR] § 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (*see Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts [22 NYCRR] § 221.1(b) provides that "[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a

clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.” “[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115” (*Walter Karl, Inc. v Wood*, 161 AD2d 704, 706 [2d Dept 1990]).

With these principles in mind, and in light of the specific claims in this lawsuit, at the continued deposition of Codispoti, defense counsels may pursue a line of inquiry as to the following to which plaintiff’s counsel objected previously: (1) the conversations between Cosidpoti and Pieragostini’s counsel (14-15); (2) the nature of the settlement offer (87-89); (3) whether Codispoti believed Michael Carbone was involved with defendants in a conspiracy (92); and whether he was misled by Blatt (118-19).

The court notes that the right to choose one’s own counsel is a valued right (*Magdeleydis v Davidov*, 119 AD3d 911 [2d Dept 2014]). Furthermore, a non-party has the right to be represented by counsel at a deposition (*Grech v HRC Corp.*, 48 Misc3d 859 [Supreme Court, Queens County 2015]). However, in this matter, the dual representation of plaintiff’s counsel as counsel for the non-party can easily lead to a tactical advantage for plaintiff during Codispoti’s deposition insofar as counsel can make objections at Codispoti’s deposition that counsel for a non-party is not otherwise entitled to make (*Thomson v Mather*, 70 AD3d 1436 [3d Dept 2010]). The Court cautions plaintiffs’ counsel and defendants’ counsel to carefully review Part 221 of the Uniform Rules of the Trial Courts and to refrain from improper conduct at Codispoti’s continued examination before trial except in the limited circumstances enumerated in those rules.

Finally, in light of the fact that defendant waited about three and one-half years before serving the non-party subpoena upon Codispoti, despite the fact that all parties knew of Codispoti’s role in this matter, the court cautions the parties to move forward expeditiously in resolving the outstanding discovery issues.

In light of the foregoing it is:

ORDERED that motion of defendant Anthony J. Pieragostini is granted as follows: (1) on or before November 4, 2015 plaintiff shall provide to the defendants the documents sought in the subpoena dated June 15, 2015 (excluding documents, correspondence and/or communications exchanged by and/or between Codispoti and Bashian and Farber after June 15, 2015), including those identified in her privilege log dated August 2, 2015 but excluding documents contained in the privilege log that are marked as “public record” and/or “already in possession of defendants” and excluding those that are Bates numbered P2-10; P15; P16-17; P20; P29; P30; P31; P39; P40-42; P53; P56; P475; P478; P701; P752; P753-754; P944-946; P962; P996-1001; P1002; P1008-1010; P1102; P1103-1104; P1105-1107; P1122; P1123-1130; P1170-1171; P1313; P1315; P1334; P1354; P1447-1448; P1454; P1648-1656; and P1662-1713; and (2) after November 4, 2015 but before November 13, 2015 at a specific time and date to be mutually

agreed to by all parties, Codispoti is directed to appear for a continued examination before trial at the office of Bashian and Farber, LLP and, among other lines of inquiry, those herein above ruled proper may be pursued ; and it is further,

ORDERED that defendant Pieragostini serve all parties in this action with a copy of this order with notice of entry within three days of entry; and it is further,

ORDERED that the parties appear for a conference in the Compliance Part, Room 800 on November 20, 2015 at 9:30 A.M. at which time the court anticipates this matter will be certified as trial ready.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
October 27, 2015



HON. JOAN B. LEFKOWITZ, JSC

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