

Barouh v Barouh

2011 NY Slip Op 33536(U)

December 23, 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.,

Plaintiff,

INDEX NO.: 021154/2008
MOTION DATE: 9/29/2010
MOTION SEQUENCE: 007, 010

-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,

Defendant.

The following papers read on this motion:

Order to Show Cause/Motion Seq. No. 7 by Defendants to Dismiss Complaint under a Poisoning Theory	1.
Affirmation in Support	2.
Memorandum of Law in Support of Defendant's Motion to Dismiss	3.
Table of Exhibits	4.
Plaintiff's Cross-Motion for Sanction/Motion Seq. No. 10 (including Opposition to Motion Seq. No. 7)	5.
Memorandum of Law in Support of Cross-Motion	6.

Defendant’s Reply Affirmation to Plaintiff’s Opposition to Motion to Dismiss / Combined Document Re: Motion Seq. 7 & 10	7.
Defendants Memorandum of Law in Support of their Opposition to Plaintiffs Motion for Sanction	8.
Defendants Memorandum of Law in Support of its Reply to Plaintiffs Opposition to Motion to Dismiss	9.
Plaintiff’s Reply Affirmation in further Support of Plaintiff’s Cross-Motion for Costs and Sanctions and for Leave to Renew	10.
Plaintiff’s Reply Memorandum of Law in Further Support of its Cross-Motion for Costs, Sanctions and Leave to Renew	11.
The court also reviewed documents produced for in camera review	12.

The defendants have moved to dismiss this action under a theory of “poisoning.” That Jason Abelow, Esq. provided plaintiff with information gleaned during his representation of defendants without the permission of defendants.

The defendants have argued that their former attorney, Jason Abelow, Esq. who had previously been Gail Barouh’s attorney worked for plaintiff when she bought this current action in 2008.

It is clear that the defendants knew that Abelow represented the plaintiff in a prior action against them in 2001 which settled in 2002; that they knowingly hired him to represent them in diverse civil litigation manners in 2004, when Andrea Barouh brought an action against the defendants, and then at later times (2006)¹ until a stock holders meeting in 2008. Abelow was, and had been, voting Gail Barouh’s proxy at diverse shareholders meetings even prior to 2000.

On March 18, 2010, Mr. Costello, a former counsel of defendant, first raised the issue in open court that the prosecution of the case had been poisoned by their former lawyer having provided plaintiff and her counsel with information about the defendant corporation’s internal affairs, which was then used in the instant complaint, and also formed answers to interrogatories; information which they contend could not have been known to plaintiff without the insider information allegedly provided by their former lawyer, Abelow.

It is clear to the court that Abelow worked initially for Dr. Gail Barouh (2000), that he

¹ \$40,000 Retainer

also worked for defendants after that; that they met with him when he represented Gail in 2000-2001; and that he then assisted plaintiff in the prosecution of this matter. I am convinced that Dr. Barouh was unaware of Abelove's working for defendants. I am not as convinced that the defendants were unaware of Abelove's continued involvement with Dr. Barouh, both before and after she initiated the instant law suit.

The court also questioned why BEA (Barouh Eaton Allen) chose to hire Abelove of all the attorneys in the NY area. The answer given is that Vic (Victor Barouh, the founder of the corporations and the patriarch of the family) wanted to hire him. "We thought he was a good lawyer." (Robert Barouh's testimony)

Plaintiff's counsel argues that defendants hired Abelove for the purpose of conflicting him from working for Gail at some later time.

Abelove was the perfect patsy for their plan. He'd work for anyone who paid him and didn't consider any ethical problems. He knew Dr. Barouh would object to his working for BEA, as he did in 2004 in the Andrea Barouh litigation. His two retainer agreements reflect his desire to:

a). represent BEA and b.) also represent Gail Barouh.

Exhibit "T" is the 2006 retainer agreement between Abelove and BEA. The document originally was signed by Victor for O.S. Eaton, but it was for the representation of BEA. It ran from February 6, 2006 through February 5, 2007 for \$40,000. The hourly rate was \$150.00 per hour. It refers to no specific litigation. If any of the \$40,000 remained unused at the end of the year it would carry over into the following year and a new agreement would be executed.

Exhibit "X" is the retainer agreement from November 1, 2004. It is executed by Victor Barouh for O.S. Eaton (Not BEA). Then his hourly rate was \$300.00 per hour.

The language of the agreement is interesting.

It is formally between O.S. Eaton and Abelove yet it refers to BEA litigation.

Specifically it states;

"2. [Abelove is retained to] consult with OS Eaton regarding corporate or litigation matters which may arise; (2) to represent Dr. Gail Barouh with respect to any matter which may arise from BEA's defense in a suit brought by Andrea Barouh and Courtney Dinsky; and (3)

advice regarding estate and trust planning. The Corporation understands and waives any potential conflict of interest caused by law firms representation of Dr. Gail Barouh.”

Thus OS Eaton pays Abelove the lawyer for their former adversary, to represent her (the former adversary) in an action her sister Andrea brings against BEA two years after Gail’s 2001 action settled. They also formally state: (Para 4 of Ex. X)

“4. This agreement does not engage law firm as primary litigation counsel for BEA.”

So we have retainer with a lawyer that allows the lawyer to represent not only another client but one that formerly sued the current client.

This case is unusual enough, but when you add plaintiffs’ theory that Jason Abelove was a Manchurian Candidate just waiting to be activated by the evil defense, it starts to reach the level of Grisham fiction.

Thus the scenario created by plaintiffs counsel would have Victor Barouh and his nephew Robert Barouh using Abelove, who it appears missed the ethics course in law school, to victimize Gail Barouh.

They hired Abelove in 2004 to secure Gail’s stock certificate(s) so they could be exchanged as part of the Andrea litigation. So Abelove again represents Gail but he is paid by defendants to obtain her stock certificates. Gail believed he was not charging for his representing her on the stock issue. So not only was Gail not paying for Abelove’s representation of her in relationship to her dealings with BEA, but Abelove was not even paid by BEA but by OS Eaton, a company solely owned by Victor Barouh.

Numerous documents were placed in evidence and also referred to by Robert Barouh in his affidavits of May 15, 2010 (pg. 3) and September 7, 2010 (p. 3).

These were both meant to support defendants’ case. The May 15, 2010 affidavit was in response to Abelove’s motion to quash a subpoena and the September 7, 2010 affidavit was in support of the current application. What mostly interests the court is Robert Barouh’s argument that Abelove, who was hired to represent BEA in the Andrea Barouh litigation, (but not to be an attorney of record (and why not?) told BEA (Robert) that he had spoken to Gail about the litigation and conveys her theories about the litigation. (Par. 7&8 of Ex. 3) And this, Robert

contends shows, he communicated with Gail. Of course it does. He told them he did and they continued to use him as their lawyer? Knowing he was talking to Gail? Their argument is that this shows Gail knew Abelove represented BEA. Perhaps it does, in 2004-2005.

Then they gave him a \$40,000, one year retainer in 2006. But there is no indication she knew he was their lawyer. But more importantly, in the courts opinion, it shows that BEA knew that their lawyer was communicating with their arch enemy Dr. Gail Barouh. Either Barouh Eaton Allen is the most ignorant corporation in the State of NY, or the most Machiavellian.

The 5 factors presented by Robert Barouh which he contends prove defendant's position of the poisoning of the prosecution are:

1. The Andrigal Enterprise

Andrigal is a combination of the names of three children of Victor Barouh, Andrea Richard and Gail. It is not a legal entity such as an LLC, LLP or a Corp. The complaint stated that it was a d/b/a of BEA and that it fraudulently converted certain property.

Robert Barouh contended that plaintiff could not have known that Andrigal was a d/b/a unless she had been given this information by Jason Abelove. Plaintiff argues that the failure of routine searches to reveal Andrigal was an entity of any kind, left only, by inference, that it was a d/b/a.

2. Zoila Moreira

Ms. Moreira is a long time employee of defendants (1971). It is alleged that Moreira was living rent free in a defense owned building near their offices in Brooklyn.

Robert testified that Gail must have learned this from Abelove. He didn't believe Moreira would have told Gail. Moreira has been living there since 2002.

The issue of her living there rent free is not in the complaint but was needed in plaintiffs response to an interrogatory in June, 2010 and during oral argument by Ms. Wabnik.

Robert Barouh affirmatively stated that Zoila Moreira didn't tell Gail about the apartment nor that it was rent free. He didn't say how he could testify to this. It is interesting how the

witness testified to what a third-party didn't say, and also what Victor Barouh, who is deceased, would not have or could not have said..

3. Employees of Barouh Eaton Allen (BEA) -

It is alleged that certain employees of BEA who were also relatives of Victor Barouh earned certain high salaries. (Neil & Allen Sobel et al).

Robert testified that Jason Abelow had to be the source of this information, that Vic would not have told Gail about these people and their salaries because Victor told him he would not have. Though defense claimed plaintiff had argued these were no show jobs, plaintiff never made this argument.

4. Another Employee - The Forklift Operator

It is alleged that a Mr. Mankowski - another relative, received a \$90,000 annual salary as a Forklift Operator.

Robert makes the same argument here that he made as to the other employees.

[There were discovery demands for payroll records of all employee, salaries and addresses which would have produced all information of items 2-4].

5. The Canadian Subsidiary - \$100,000 a month to Victor.

Plaintiff has alleged that Victor Barouh received \$100,000 a month from their Canadian Subsidiary. Robert initially say it isn't true and in any event this information could only have come from Jason Abelow. [Does that mean they fed Abelow invalid information intentionally knowing that it would get back to Gail?]

Plaintiff says she was told this by Victor on more than one occasion. Robert testified Victor would never have told her about this. (If it was true.) They argue, after she had sued them in 2000-2002 and settled for a million dollars, why would Victor tell his daughter anything?

Plaintiff argues that even if plaintiff received this information from Abelow what is the advantage to plaintiff? What is the disadvantage to BEA? What evidence is their that Abelow was the conduit of this information or that Plaintiff's counsel, Debra Wabnik, received it?

For a year Robert Barouh says he couldn't contact his lawyer Jason Abelow (essentially

2009). Had he left the country? What efforts were expended? Was he really BEA's lawyer or not at this time?

The Andrigal issue. It was a non-issue, and defendant knows it. Abelove billed for work done as of November 2008 (nothing after that). Nothing stopped him from working for Gail after that, assuming you buy into the lack of ethical strictures under which Abelove operated.

As for names and salary of relative employees -Robert Barouh testified that he gave a copy of employees payroll record to Abelove and Abelove gave it to Dr. Barouh. He has failed to produce a copy of that payroll record despite being given ample opportunity to do so.

There is no evidence Victor didn't provide Gail with some information. Robert said he would not have. Is Robert Barouh a credible individual?

Robert Barouh's confidence that Abelove provided plaintiff with information about any of the five items is essentially based upon his own belief and nothing more. It is purely circumstantial evidence, if that.

Facts must be proved by evidence. They may be proved by direct or circumstantiated evidence. In this case defendants have presented no direct evidence of Abelove providing to Plaintiffs what they contend is evidence, only available to defendants of their then lawyer, Abelove. No direct testimony from any witness that Abelove provided any of Robert Barouh's "points" to plaintiff. However, that does not mean defendants cannot still prove their case through other evidence - documents or some other circumstances from which a reasonable inference could be drawn that a disputed fact or facts exist.

Of course the facts which form the basis of an inference must be proved and the inference to be drawn must be one that may be reasonably drawn.

Therefore, the circumstantial evidence, if accepted by the court, must be of such nature that allows the court to conclude that the fact or facts in dispute have been proved.

Robert essentially testified to the state of mind of Victor - he was not capable of doing this.

He argues that Victor Barouh would not have revealed these matters to Gail; that he

would not have said these things to Gail.

Defendants' Counsel, not unexpectedly, attacks the credibility of Dr. Barouh. He argues about the incredibility of her testimony as to her conversations with her father which allegedly revealed the Canadian payments and employee/relative issues. He points out, and the court agrees, that he may prove his case by circumstantial evidence. However he still must prove his case.

Counsel argues that it doesn't matter if any of the items allegedly transmitted to plaintiff by Abelove would have eventually been produced by discovery; rather, it is the transmission that forms the basis for the poisoning motion.

Defendant counsel also argues that Dr. Barouh wanted to keep Abelove invisible as her attorney. There is no evidence of this.

Rather, what we have seen, repeatedly, is Abelove's pattern of keeping himself invisible as BEA's attorney from Dr. Barouh (2004 and 2006 Retainer agreements with O.S Eaton and BEA as examples).

The language of Ms. Wabnik on March 18, 2010 is a concern to the court. It is clear to the court that, by March 2010, Jason Abelove had assisted plaintiff in reviewing the complaint.

Ms. Wabnik referred to Abelove as "prior counsel." We don't know if that referred to the prior matter, or that he no longer represented plaintiff in this matter. She also stated that he was not part of her firm.

The court is not comfortable with whatever Ms. Wabnik was doing at the time. She could have answered that he was co-counsel rather than he was not a member of the firm. However, it is not relevant to our paramount issue of poisoning.

Abelove was clearly not working for defendant by March 2010.

Defense counsel argues that the claim that Dr. Barouh was in the dark about Abelove's representation of BEA is belied by the fact that she kept him on the board of the not for profit organizations in which they were involved. The court rejects this theory out of hand. There is no such logical connection; also, Dr. Barouh apparently had no independent authority to so act.

The court also rejects defendants' theory that Dr. Barouh controlled the scheme that put Abelove in place as the employee of defendant (Reverse Manchurian Candidate). There is no

evidence to even create an inference that would lead to such a conclusion.

The court notes that neither attorney has commented on the credibility of Jason Ablove, Esq. They comment on his e-mails, his memory in light of certain e-mails, the two retainer agreements with surgical cut outs as it relates to his ability to represent Gail Barouh, but they never comment formally on his credibility. The court will not withdraw from such comments.

Ablove's testimony was sculpted to protect Ablove's license to practice law. He clearly was credible at times, but less so at other terms. He cannot be relied upon by the court to be a truth teller.

Gail Barouh appears to be a credible witness on most issues, but with memory problems on some old e-mails.

Robert Barouh testified to what he thinks he knows, but when pressed he retracts from his position, frequently resulting in an admission that he "doesn't know." He literally could not present to the court any direct evidence to support his five points. However direct evidence is not required to prove these points; they can be proved circumstantially.

CONCLUSION OF LAW

The defense relies on *Lipin v. Bender*, 84 NY2d 562 (1994), to support their motion to dismiss the case under a "poisoning" theory. The facts in *Bender* are extreme. (Short version-plaintiff stealing of a defendants privileged documents left on the conference table concealing documents, photocopying them, keeping them accessible at the office of her lawyer/employer, retaining a set at her home, and disobeying court order to return "everything in her possession" giving them to counsel.) The court has considered the extensive evidentiary presentation of defendants, the evidence of plaintiffs, the testimony of Robert Barouh, Dr. Gail Barouh and Jason Ablove.

The evidence in this case, as pointed out, is circumstantial. If it equally could support the position of the defense as well as the plaintiff then the court would rule, it would have to rule for plaintiff. However the question is not that difficult. The proof presented by the defendant is not only circumstantial, it is speculative.

Allegedly there were documents provided to Abelove; Abelove denies it, and Robert Barouh cannot locate them.


There are reasons given by the plaintiff for each and every one of Robert Barouh's 5 points. They are not necessarily the strongest, most convincing reasons, but they are sufficient to at least balance the scales, if not tip them in plaintiff's favor, in this circumstantial evidence case.

Defendant's motion to dismiss the case under the poisoning theory (see *Lipin v. Bender*, 84NY2d 562 (1994), and CPLR 3103 (c) is denied.

Plaintiff's cross motion for sanctions has been given serious consideration by the court. However there is insufficient evidence to support a claim that defendants had no basis in law or fact to make the accusations they have brought before the court. The cross motion is also denied.

So Ordered.

Dated: December 23, 2011


J.S.C.

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