

Betz v Blatt
2013 NY Slip Op 33634(U)
June 17, 2013
Supreme Court, Westchester County
Docket Number: 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

DECISION and ORDER

Index # 58938/2011

Seq. No. 9

Motion Date: June 17, 2013

-against-

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

Defendants
-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order compelling the production of documents claimed to be privileged, and itemized in the respective privilege logs of defendants George A. Sirignano, Jr., Esq., Enea, Scanlan & Sirignano, LLP, and Anthony J. Pieragostini, Esq. or, in the alternative, compelling defendants George A. Sirignano, Jr., Esq., Enea, Scanlan & Sirignano, LLP, and Anthony J. Pieragostini, Esq. to produce these documents to the Court for an in camera review.

- Order to Show Cause dated May 22, 2013
- Affirmation in Support
- Exhibits A-H
- Affirmation in Opposition
- Exhibits A-C
- Memo of Law
- Affirmation in Opposition
- Memo of Law

Upon the foregoing papers and upon oral argument heard on June 17, 2013, this motion is determined as follows:

Carmelo Carbone died testate on May 13, 2004. His will, drafted by defendant Arnold W. Blatt, Esq. (hereinafter to be referred to as Blatt), named his brother Michael Carbone as executor of his estate. Carmelo Carbone's two daughters, Debra Betz (hereinafter to be

referred to as Betz and who, in her capacity as executor of the estate of Carmelo Carbone, is plaintiff herein), 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 allegedly represented the estate and/or Michael Carbone sequentially throughout the probate process. On or about August 15, 2014, 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.

In or about February 2009, defendant Anthony J. Pieragostini (hereinafter to be referred to as Pieragostini), was retained to prepare and file an estate accounting. Pieragostini filed an estate accounting which was initially found to be inadequate and insufficient by the Surrogate.

Defendants/third-party plaintiffs, Sirignano, and his firm, Enea, Scanlan & Sirignano, LLP (hereinafter to be referred to as the Sirignano defendants), were retained in or about November, 2009. Surrogate Scarpino suspended the letters testamentary of Michael Carbone, 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. It is believed that he is presently beyond this court's jurisdiction, in Italy. In or about June, 2011, the Surrogate ordered Michael Carbone to pay to the estate a sum over \$ 700,000.

In March, 2012, Betz retained third-party defendants, Gary E. Bashian, Esq., and his firm, Bashian & Farber, LLP, (hereinafter to be referred to as the Bashian third-party defendants) to represent her interests in the estate. When the Surrogate's Court suspended the letters testamentary of Michael Carbone and gave limited letters to Betz, she hired defendants Bashian to represent the estate. Betz was named executor of the estate in November 2011.

The present action was commenced on or about November 21, 2011. At that time, 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 replead and serve an amended complaint. In her amended complaint, plaintiff asserted five causes of action: (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 Sirignano defendants moved to dismiss the complaint. By decision and order dated August 1, 2012, the Court (Smith, J.), dismissed all the claims except for the claim sounding in legal malpractice.

The Sirignano defendants commenced the third-party action against the Bashian third-party defendants alleging claims for common law contribution and common law indemnification under the doctrine of respondeat superior, arguing that if the Sirignano

defendants were found to have committed legal malpractice, then said damages were due in whole or in part to the negligence and legal malpractice of the Bashian third-party defendants who represented Betz first in her individual, and then in her representative, capacities. By decision and order dated May 9, 2013 the Court (Smith, J.), dismissed the third-party action.

Presently, plaintiff is moving for an order compelling the production of documents claimed to be privileged and itemized in the respective privilege logs of the Sirignano defendants and Pieragostini. Plaintiff asserts that the information contained in the files of both the Sirignano defendants and Pieragostini are inextricably linked with the causes of action presented in this matter. Plaintiff also asserts that these files contain direct evidence of these defendants' negligence and legal malpractice and include documentation establishing when and to what extent plaintiff has been damaged. Plaintiff further asserts that these files contain information about what these defendants did, or failed to do, to prevent and or report these damages as was their fiduciary and professional ethical duty to do. Plaintiff asserts that the documents she now seeks are material and necessary in the prosecution of this action and notes that defendants Sirignano and Pieragostini bear the burden of establishing that her requests are improper.

Regarding the Sirignano defendants, plaintiff notes that although she properly has made demands for their file regarding the estate of Carmelo Carbone, they have produced only a privilege log which itemizes nearly every non-public document in their possession as subject to either attorney-client privilege, attorney work product, communications in preparation for litigation or as personal and confidential information. Plaintiff notes that she is the current fiduciary of the estate of Carmelo Carbone and that the estate file, inclusive of any attorney work product, is the property of the estate. Moreover, plaintiff states that counsel to an executor is as much a fiduciary of the estate as the executor himself. Plaintiff also notes that the attorney-client privilege may give way to strong public policy considerations and may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or accusation of some other wrongful conduct.

Plaintiff acknowledges that Pieragostini has disclosed the large portions of his files relating to the estate of Carmelo Carbone, but notes that he has refused to produce the estate planning file of Michael Carbone, the estate's former fiduciary, who was judicially removed. Plaintiff asserts that this file includes documentation regarding the fraudulent deeds drafted by Pieragostini in December, 2009, wherein he facilitated the transfer of sole ownership from that of Michael Carbone to his wife as part of a scheme to render Michael Carbone judgment proof and to deny plaintiff future recovery on any money judgment she might obtain. Plaintiff notes that in a decision and order of this Court (Smith, J.), filed and entered February 27, 2012, in a separate matter wherein plaintiff herein commenced an action against Michael Carbone and others, the Court granted plaintiff's unopposed motion for a default judgment against defendants in that action for aiding and abetting breaches of fiduciary duty and unjust enrichment and granted to plaintiff a rescission of the deeds pertaining to various real estate transfers.

This motion is opposed by the Sirignano defendants. They note that the Court erred in its earlier determination not to dismiss plaintiff's amended complaint. They have appealed the Court's earlier decision and have raised numerous issues at the appellate level including whether an attorney-client relationship existed between them and the estate. The Sirignano defendants assert that they only represented Michael Carbone as executor of the estate in an underlying contested accounting proceeding relating to the estate, asserted by Betz in her capacity as a beneficiary of the estate. The Sirignano defendants state they were not retained by, nor did they represent, the Estate. Lastly, the Sirignano defendants state that should this Court find any portion of the contested file to be material and necessary to plaintiff's prosecution of this action, the Court should direct that the file be submitted to it for an initial in camera inspection.

This motion is also opposed by Pieragostini. He states that he has responded to all of plaintiff's discovery demands relating to the Estate of Carmelo Carbone. Pieragostini objects to providing his file relating to the estate planning of non-parties Michael Carbone and his wife, Concetta. He asserts that the file is subject to attorney-client privilege and the work product privilege. He states that the file contains personal, non-party information of a financial nature that should also remain undisclosed. Lastly, Pieragostini states that should this Court find that the estate file of Michael and Concetta Carbone is important to the instant case, the Court should direct that the file be submitted to it for an initial in camera review.

The Court first notes that in this action, plaintiff has alleged a legal malpractice claim stating that each defendant, during its respective representation of the estate of Carmelo Carbone negligently performed its duty and breached its duty to the estate and its beneficiaries resulting in, among other things, financial damages due to the depletion of assets in the estate. Therefore, the files plaintiff now seeks from the Sirignano defendants and Pieragostini may contain evidence that is material and relevant to the prosecution of plaintiff's case (*cf Surgical Design Corp. v Correa*, 21 Ad3d 409 [2d Dept 2005]). Although the Sirignano defendants assert that they did not represent the estate of Carmelo Carbone but only Michael Carbone (thereby making the file requested from them protected by attorney-client privilege), this Court already has found that indeed the Sirignano defendants represented the estate. Moreover, contrary to the assertion of the Sirignano defendants, an attorney retained by an estate is not just the attorney for the fiduciary who hired him but rather he is the attorney for the estate (*compare Heaven v McGowan*, 40 Ad3d 583 [2d Dept 2007; an attorney for a trustee is liable for breach of a fiduciary duty to third-party beneficiaries of the trust when the attorney has placed his or her trust above that of the trustee]). Lastly, as to the both the Sirignano defendants and Pieragostini, the Court finds that plaintiff has articulated a sufficient factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the files in question were in furtherance of such fraud or crime (*see Superintendent of Ins. of the State of New York v Chase Manhattan Bank*, 43 AD3d 514 [3rd Dept 2007]; *Surgical Design Corp. v Correa*, 21 AD3d 409 [2d Dept 2005]). The Court further notes that the attorney-client privilege may give way to strong policy considerations and may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct (*Art Capital Group LLC v Rose*, 54 AD3d 276 [1st

Dept 2008]). Accordingly, it is,

ORDERED that the branch of plaintiff's motion seeking an order compelling the Sirignano defendants to produce for an in camera review the documents itemized in their privilege log dated March 26, 2013 and compelling Pieragostini to produce for an in camera review the estate planning file for Concetta Carbone and Mike Carbone, as set forth in his privilege log submitted to plaintiff pursuant to letter dated March 20, 2013, is GRANTED, and in all other respects the motion is denied; and it is further,

ORDERED that the Sirignano defendants and Pieragostini are directed to provide to the Compliance Part Clerk on or before July 22, 2013, the documents described in their respective privilege logs as herein above described for an in camera review; and it is further,

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Room 800 on August 20, 2013, at 9:30 AM; and it is further,

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Handwritten number: 26

ORDERED that plaintiff is directed to serve a copy of the order with notice of entry on all parties within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 17, 2013

Handwritten signature of Joan B. Lefkowitz
HON. JOAN B. LEFKOWITZ, JSC

To:

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