

Civil Conspiracy Claims Involving Attorney's

Lane v. Sharp Packaging Systems

In the case at bar, attorney encouraged business owner to start transferring money out of the business, as to avoid making a 25% stock option sale available for their employee. Harold Lane brought an action alleging fraud and conspiracy, against his former employer Sharp Packaging Systems, and its owners. Lane entered into an employment agreement with Sharp. The agreement specified that Lane would act as President and Chief Operating Officer. Additionally, Lane entered into another agreement with his employer, whereby Lane would be provided with a 25% interest in the value of the company. The Stock Option Agreement provided that if Lane were to be terminated prior to the exercise of his option, he would have the choice of either exercising his option or receiving his 25% share of the company as stock appreciation rights. Lane had the right to veto or discharge any professional providing services to Sharp, if that professional was not performing to Lane's satisfaction. Per that right, Lane replaced Sharp's corporate counsel, Neibler. In his complaint, Lane alleges that Neibler harbored deep resentment toward Lane. He claims that Neibler continued to provide services to Sharp, without Lane's knowledge or consent. Lane contends

that Neibler conspired with Sharp's owners to transfer assets out of the company, thereby reducing Lane's 25% vested interest in Sharp.

The first issue the court discussed was whether an attorney can be liable to a third-party non client, for acts committed within the attorney-client relationship, where the attorney does not have direct contact with the third-party. Secondly, the court discusses whether a lawyer and a client can engage in a conspiracy, as a matter of law. Regarding the first issue, the court found that an attorney might be liable to a third-party non-client for fraudulent acts committed within the attorney-client relationship. The Wisconsin Supreme Court set forth this general statement concerning the liability of attorney's to third parties:

“While an attorney is not liable to a third person for acts performed in good faith, and mere negligence on the part of an attorney is insufficient to give a right of action to a third-party injured thereby, an attorney is personally liable to a third-party who sustains injury in consequence of his wrongful act or improper exercise of authority where the attorney has been guilty of fraud or collusion, or of a malicious or tortuous act.”

Under this standard, the court finds that Neibler can be liable to Lane for acts committed at his post of general counsel.

The next issue for the court to determine is whether or not Neibler acted in a conspiracy with Sharp's owners. The court discusses the following elements required to prove civil conspiracy. They are:

- 1) the formation and operation of the conspiracy
- 2) wrongful act or acts done pursuant thereto
- 3) damage resulting from such act or acts

To form a conspiracy there must be an actual agreement to violate or disregard the law, and the persons involved must knowingly be members of the conspiracy. The court found that an attorney and a client could conspire with one another. The court held that Neibler might be held liable to Lane, third party non-client for fraudulent acts committed within an attorney-client relationship.

Although the behavior of the attorney in Lane may seem deplorable, it is by no means as egregious as the next case. The Morganroth case, really illustrates how overt a civil conspiracy involving an attorney can be. Morganroth is really an extreme case. But it does clearly show that courts are willing to impose some severe sanctions on misbehaving attorneys.

Morganroth & Morganroth v. Norris, McLaughlin & Marcus

This is by far the most egregious case of civil conspiracy in the body of law.

This case really illustrates the fine line between an attorney giving counsel to a client, and the attorney's outright illegal and unethical participation. In the case at bar, the plaintiffs, Morganroth & Morganroth, a Michigan law firm, and Mayer Morganroth, sued John DeLorean in a federal court in

Michigan for legal services rendered over approximately ten years. The plaintiffs brought the instant suit against Norris, McLaughlin & Marcus, P.C., a New Jersey law firm, as well as Victor S. Elgort and Daniel R. Guadalupe its employees or affiliates, who represent DeLorean. Plaintiff's complaint alleges that they actively, knowingly, and intentionally participated in their client's unlawful efforts to avoid execution on his property. In order to be successful under a claim for civil conspiracy one must look to see if there is an underlying tort to support the conspiracy claim. Mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime. However, the court in this case held that the behavior of defendant law firm was so egregious that it did rise to the level of conspiracy.

Banco Popular North America v. Gandhi

In the case at bar, debtor defaulted on a loan. Prior to the default he transferred title of his properties into his wife's name. Debtor claims his lawyer encouraged him to transfer the titles. Suresh Gandhi owned and operated several fast food restaurants, such as Arby's and Burger King, through separate corporations known as Echelon Fast Food Inc., and Priya Fast Foods II, Inc. Madhu Gandhi is Suresh's wife. Richard Freedman is the attorney who represented Suresh on several different matters. Suresh

and Madhu owned two homes, one in which they lived and one in which they rented out. They also owned various securities in mutual funds.

During the course of his business dealings, Suresh became involved in a dispute with Arby's. Banco Popular, who provided business loans to Suresh, alleges that Suresh consulted with Freedman in connection with that dispute, and that Freedman advised him to transfer title of the two houses and the securities into Madhu's name. Banco Popular brought an action against Suresh and Madhu, in an effort to collect on the defaulted loan. After Suresh testified that Freedman encouraged him to transfer his assets, Banco joined Freedman as a defendant.

The issue in this case then becomes whether the attorney participated in the conspiracy by the very fact that he offered them legal advice, or whether it takes a more constructive act to be implicated in the conspiracy. In general a lawyer is not liable for a client's tort unless the lawyer assisted the client through conduct itself tortious or gave substantial assistance to the client knowing the client's conduct to be tortious. A lawyer may not become an active participant in the client's unlawful activity, and doesn't have immunity if the lawyer becomes the aider and abettor of unlawful conduct. The court finds it difficult to determine when a lawyer is just providing accurate, truthful information about the law, a core function of lawyering, and when that can be considered active assistance in violation

of the law in situations in which the lawyer knows the information may lead to or facilitate client's unlawful conduct. Restatement Second, Torts § 876, states that "in general, a lawyer is not liable for a client's tort unless the lawyer assisted the client through conduct itself tortious or gave substantial assistance to the client knowing the client's conduct to be tortious; whether a more onerous standard applies to a lawyer who assists a client's conduct depends on applicable law, which in general requires negligent or intentional misconduct for civil liability to attach to a principal and often requires a higher level of awareness for a lawyer than for a principal."

The court held that there was enough evidence in this case to pursue a claim of civil conspiracy against Freedman, and the case was remanded.

The evidentiary requirements of a civil conspiracy claim seem to vary from jurisdiction to jurisdiction. While the Banco Popular court held that there was enough evidence to show the lawyer participated in the conspiracy, the next case, *Mark VII v. Barthol*, holds that there is no separate tort for civil conspiracy, but rather there must be an underlying unlawful action that supports a claim for civil conspiracy.

Mark VII v. Stephen M. and Sherry E. Barthol

Appellants appeal from an order sustaining respondent's motion to dismiss appellants' claim for civil conspiracy. This case arises out of a claim for civil conspiracy filed by appellants, Mark VII, Inc. and Missouri-Nebraska Express, Inc., against respondent, Jeffrey B. Tonkin, an attorney practicing in Kansas City. Missouri-Nebraska executed a contract with American Financial Services. Under the terms of the agreement, AFS agreed to secure the necessary financing for Tractor leasing to obtain 100 semi-tractors. In exchange, Missouri-Nebraska paid AFS over \$140,000. This money was to be held by AFS as a security deposit in the leasing arrangement. The money would be returned to Missouri-Nebraska if AFS could not procure the appropriate financing at the rate and terms specified in the original agreement. AFS defaulted on the agreement and refused to repay the security deposit. Missouri-Nebraska brought suit against AFS, when it failed to procure the financing and return the "commitment fee", as agreed upon. Appellants allege that respondent and the principals of AFS conspired or entered into a common plan or scheme designed to hinder, delay and defraud appellants by draining AFS of all its assets, thus making it impossible for appellants to collect their judgment against AFS.

Appellants' claim for civil conspiracy is predicated on a series of alleged fraudulent conveyances and acts of corporate subterfuge that took place less than three months after obtaining their 1990 judgment.

The court found that appellants did not allege the elements of a cause of action for civil conspiracy with the specificity required under Missouri law, and that dismissal was appropriate for that alternative reason as well. The court found that "a 'civil conspiracy' is an agreement or understanding between two or more persons to do an unlawful act, or to use unlawful means to do an act which is lawful." Civil conspiracy is not a cause of action in and of itself; rather, it extends liability based on an underlying wrongful act. The court upheld the lower court's decision.

Again, we see that courts seem to be willing to accept civil conspiracy claims, if they are based on an unlawful underlying claim. However, it seems that the underlying conduct must be tortious enough in nature to allow a claim for civil conspiracy. In the next case we see that mere involvement in a fraud does not constitute being an active participant in the conspiracy.

McKibben v. Chubb

Ula McKibben died on October 21, 1983. His surviving brother, Fred McKibben, brought the current action. It concerns two related occurrences: (1) the drafting and execution of Ula McKibben's will, and (2) an alleged gift of stock that Ula owned shortly before his death. Before his death, Ula was living at his home in Topeka, Kansas with Leland Morris. Morris phoned defendant Janet A. Chubb and told her that Ula was ill and asked that she

prepare a will for him. Chubb brought a will to Ula's home, where it was executed and witnessed. The will left substantially all of Ula McKibben's assets to Morris. Shortly thereafter Ula died. After Ula's death, the Kansas court admitted the will to probate. Fred contested the validity of the will, but was unsuccessful.

The district court granted summary judgment for Chubb on the claim of civil conspiracy. The necessary elements for a civil conspiracy claim in Kansas are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate cause thereof. The court held there was absolutely no evidence in the record to suggest that Chubb was anything more than a casual acquaintance of Morris and Ula McKibben retained to draft Ula's will. The court found there was no cause for a finding of civil conspiracy.

The Chubb case really illustrates how strong the evidence for the underlying tort must be. Just because the attorney in Chubb was involved in the conspiracy, doesn't mean she was a voluntary participant. One has to know that actions of the other participants in the conspiracy, to be involved in the conspiracy.

McElhanon v. Hing

Appellee Harvey McElhanon, John Greer, and Charles Harris purchased stock in several different corporations which operated restaurants. The parties acquired a group of restaurant through the acquisition of stock corporations that owned the restaurants. The corporation's stock was placed in escrow as security for payment of the purchase price.

McElhanon, Greer and Harris each contributed \$85,000 and formed a new corporation. They received one-third stock ownership. In return for receiving his stock ownership, Harris agreed to forego dividends from the restaurants until McElhanon and Greer repaid the initial down payment. Harris would waive his \$250,000 in dividends and after that sum was reached, he would be able to participate equally in the dividend disbursements. This was done because Harris was not able to pay his one-third of the original purchase price. Additionally, as part of this agreement, if there were no dividends than Harris would not owe anything.

As is the case with most parties who end up in litigation, a dispute arose among the parties. Due to the dispute, the attorney for the corporations, who was also Greer's attorney, wrote to McElhanon's attorney requesting that McElhanon sell his interest in the corporations to Greer and Harris. McElhanon declined. Shortly thereafter, at a corporate meeting, McElhanon wasn't re-elected as a corporate officer. Around the same

time, McElhanon filed suit against Harris, Greer, and the corporations. It was at that time that appellant Hing was hired as counsel for Harris, Greer and the corporations.

After an arbitration proceeding, the parties find themselves in the present court. Although the record is confused, the main allegation is that, after being informed of the verdict, Greer and Harris went to Hing's office to discuss the matter. During the course of the meeting they apparently expressed a desire to have Greer purchase Harris's stock in the corporations. Hing prepared a sale agreement to that effect.

The case at bar raises the issue of whether there is a cause of action against an attorney who, while acting in his capacity as an attorney, engages in a conspiracy to defraud a judgment creditor of his client. In *McElhanon*, the court recognized the cause of action for judgment creditors, applying the Uniform Fraudulent Conveyance Act. The court held that the cause of action is recognizable for those who are general creditors at the time of the fraudulent conveyance, noting that, general creditors must reduce their claims to judgment before asserting this cause of action. Prior to judgment, general creditors have no legal right to the property fraudulently conveyed.