

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY , FLORIDA

CASE NO.: 502012CP004391XXXXSB

IN RE:

ESTATE OF SIMON L. BERNSTEIN,
Deceased.

ELIOT IVAN BERNSTEIN, PRO SE

Petitioner(s),

vs.

TESCHER & SPALLINA, P.A., (and all
parties associated and of counsel);
ROBERT L. SPALLINA (both personally
and professionally); DONALD R. TESCHER
(both personally and professionally);
THEODORE STUART BERNSTEIN (as alleged
personal representative, trustee, successor
trustee) (both personally and professionally);
et al.,

Respondent(s).

EXCERPT OF PROCEEDINGS BEFORE
HONORABLE MARTIN COLIN

DATE: July 11, 2014

TIME: 1:35 p.m. - 4:22 p.m.

1 APPEARING ON BEHALF OF WILLIAM E. STANSBURY:

2 PETER M. FEAMAN, P.A.
3 3615 W. BOYNTON BEACH BOULEVARD
4 BOYNTON BEACH, FL 33436
By: PETER M. FEAMAN, ESQ.
JEFFREY ROYER, ESQ.

5 APPEARING ON BEHALF OF TED BERNSTEIN:

6 PAGE, MRACHEK, FITZGERALD ROSE
7 KONOPKA & DOW, P.A.
8 505 SOUTH FLAGLER DRIVE, SUITE 600
WEST PALM BEACH, FL 33401
By: ALAN B. ROSE, ESQ.

9 JOHN J. PANKAUSKI, ESQ.
10 PANKAUSKI LAW FIRM, PLLC
11 120 South Olive Avenue, Suite 701
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13 MATWICZYK & BROWN
14 625 N. FLALGER DRIVE, SUITE 401
WEST PALM BEACH, FL 33401
By: BENJAMIN P. BROWN, ESQ. (CURATOR)

15 JOHN P. MORRISSEY, ESQ.
16 330 CLEMATIS STREET, SUITE 213
WEST PALM BEACH, FL 33401

17 ELIOT I. BERNSTEIN, Pro se

18 ALSO PRESENT: CANDICE BERNSTEIN

19

20 BE IT REMEMBERED, that the following
21 proceedings were taken in the above-styled cause before
22 the Honorable MARTIN COLIN, at the Palm Beach County
23 Courthouse, 200 West Atlantic Avenue, Room 8, in the City
24 of Delray Beach, County of Palm Beach, State of Florida,
25 on July 11, 2014, to wit:

1 P-R-O-C-E-E-D-I-N-G-S

2 * * * *

3 THE COURT: Okay. All right. Okay. So
4 listen to my ruling.

5 The rule is pretty clear on the procedure.
6 And I think you folks have done substantially
7 what the rule requires. So we're at the point
8 where Eliot has challenged the assertion of
9 privilege. It's uncontradicted that Ted wrote
10 a letter -- an e-mail -- that actually went to
11 Eliot. That's uncontradicted. One issue is
12 did Ted intend that letter to go not to Eliot
13 but to Alan, meaning Alan Rose, his lawyer.
14 That's a finding of fact that I have to make.
15 Ted said yes to that. There is no other
16 testimonial evidence as to whom that letter was
17 intended, but there is documentary evidence by
18 looking at the content of the letter.

19 So I've read the letter and it's pretty
20 easy to see that that letter was intended to go
21 to Ted's lawyer, Alan. In the beginning of the
22 letter it says, Alan. And then the discussion
23 in the letter is clearly directed to that which
24 is part of the subject of the letter, which is
25 this case, it's either the Shirley or the Simon

1 case.

2 So I make a finding of fact that this
3 letter was intended to go to Alan.

4 That finding is supported easily by the
5 fact that shortly before that letter was sent
6 from Eliot -- from Ted to Eliot -- Eliot has
7 sent a letter, or a document, by e-mail, to,
8 among others, Ted. And so Ted's version is
9 instead of sending a clean letter from him to
10 Alan, he hit forward, I think he said, and it
11 wound up -- or reply -- and it wound up getting
12 sent to Eliot. That is the essence of an
13 inadvertent disclosure.

14 So I find that the matters were intended
15 to go from Ted to Alan, his lawyer.

16 Eliot then says, notwithstanding, the
17 materials in question should not be deemed
18 privileged because of Florida Statute 90.502,
19 subsection 4, that basically stands for the
20 proposition that even if there is a
21 communication between a client and a lawyer,
22 the lawyer-client privilege doesn't apply when
23 the services of the lawyer are sought -- that
24 is that Ted is seeking the services of the
25 lawyer -- or obtained to enable or aid anyone

1 to commit or plan to commit what the client --
2 that's Ted in this case -- knew -- knew was a
3 crime or fraud.

4 The other assertion is as to subsection 4
5 (c) that this is -- that a privilege shouldn't
6 apply because it's a communication relevant to
7 an issue of breach of duty by the lawyer to the
8 client. That is that it shouldn't be
9 privileged or not allowed to be privileged
10 because it deals with the subject for another
11 hearing in which Ted would say that his lawyer
12 breached the duty to the client.

13 Okay. So 4 (c) clearly doesn't apply to
14 this letter.

15 So Eliot's assertion is that words within
16 this e-mail, in which Ted writes intended to
17 Alan, that if John -- and I haven't heard who
18 that is, but I assume that's John Pankauski, is
19 his other lawyer -- does not want to tangle
20 with Eliot. It then says he wants, that is
21 Ted, wants John to be aggressive and forceful,
22 if need be, with Eliot and remove him -- and
23 remove him as counsel -- if not, remove him as
24 counsel.

25 So the issue is, in reading that language,

1 either on its four corners or through parol
2 evidence, which I've heard a little bit about,
3 are those words in which Ted is soliciting Alan
4 to commit, or plan to commit, what Ted knew was
5 a crime or fraud.

6 Eliot's assertion is that when Ted seeks
7 of Alan assistance in compelling John, his
8 other lawyer, to tangle with Eliot, as written,
9 and to be aggressive and forceful, is that
10 tantamount of Ted soliciting Alan to try to get
11 Alan to, in essence, commit a crime -- which
12 Eliot says is a crime -- meaning, threatening
13 him with some force or harm, or the like.

14 So the court has to make that decision in
15 the context of the letter. And so when I read
16 this letter, the question is, what do I read --
17 because I have no other evidence about what was
18 intended, other than what I heard so far, which
19 really doesn't speak to this, is language from
20 a client to one lawyer telling that lawyer that
21 he wants to basically remove the other lawyer
22 or consider removing him if that lawyer doesn't
23 want to tangle with Eliot, and be aggressive
24 with him. Does that mean that he is requesting
25 the lawyer that he's writing to to be

1 physically assaultive or batter -- or a
2 batterer -- or is he telling his lawyer -- Ted
3 telling Alan -- that he wants John, John
4 Pankauski, to legally tangle with Eliot. And
5 legally tangle -- legally be aggressive and
6 forceful.

7 I rule it's clearly the latter.

8 I know, Eliot, that throughout many
9 appearances before me -- and I wasn't sure what
10 it was at first -- you've told me that you,
11 your family, and others, are being threatened
12 with bodily harm, and I wasn't sure what the
13 nature of that threat is. But if what is in
14 the Paragraph 1 of Exhibit 1 is deemed by you
15 to fall in that category, there's nothing that
16 I can do about you reading it that way, but
17 it's clearly not the case. I mean, that's --
18 it's not necessarily standard language -- I
19 don't know if there is such a thing as standard
20 language -- but lawyers -- clients directing
21 lawyers to toughen up, be aggressive, be
22 forceful, be willing to tangle with the
23 opponent, is common in litigation. And there
24 is nothing in this writing that seems to
25 indicate that that means physical, like beat

1 you up on the street, because that's not the
2 way this is written. It's clear that this is
3 written in the context of the case.

4 Okay. So I find that the lawyer-client
5 privilege does apply. Because this was not
6 requesting perpetration of a crime of assault
7 or battery against -- against Eliot.

8 So the next question then becomes whether
9 there remains grounds to challenge the
10 assertion of privilege. The court says no.
11 This document was as privileged as could be.
12 And it's intended -- it is -- the court rules
13 that it is allowed to be treated as an
14 inadvertent disclosed document, to which
15 privilege applies pursuant to the rule. And
16 the remedy -- what's the specific remedy
17 Mr. Rose -- because the way the rule reads, if
18 I enter an order determining that the materials
19 are privileged, which I'm finding. I'm not
20 finding that the right to challenge was waived.
21 I don't think Eliot waived it. He asserted it
22 correctly. Then I can direct what shall be
23 done with the materials. So you folks are
24 telling me that things have happened already.
25 What is it that you are seeking in the order I

1 do about the materials, which I assume is this
2 one page -- hold on -- I'm asking Alan first,
3 then I'll entertain you.

4 MR. ELIOT BERNSTEIN: Okay.

5 MR. ROSE: I think you could find that he
6 violated the rule because he did not sequester it.
7 We're not here for that purpose. I would ask you
8 that --

9 THE COURT: I didn't even hear evidence on
10 that yet, so I'm not going there yet.

11 MR. ROSE: I would ask that he delete all
12 copies, notify people --

13 THE COURT: Okay. Slow down. Hold on. Hold
14 on. One -- you got to go slow.

15 One, delete all copies in his possession
16 and control?

17 MR. ROSE: Correct. Including electronic.

18 THE COURT: Well, okay. Hold on. All right.

19 MR. ROSE: He should notify the recipients
20 and then provide us with a copy of his
21 notification to them, and request them --

22 THE COURT: Notify recipients of what?

23 MR. ROSE: The people that he forwarded the
24 e-mail to. He should notify them of Your Honor's
25 ruling and that he's been ordered to have them

1 destroy all copies. And I would ask that he
2 provide -- or file with the court -- proof that
3 he's done that.

4 THE COURT: Okay. Go ahead.

5 MR. ROSE: And then at this point, number
6 three, I would like you to order that he's not to
7 ever use the privileged material, or republish it,
8 even if he's republishing Crystal Cox's web site,
9 where she published this --

10 THE COURT: I got it.

11 MR. ROSE: -- at his request.

12 THE COURT: Okay.

13 MR. ROSE: And then we would reserve ruling
14 on any sanctions and, hopefully, we won't have to
15 come back.

16 And then reserve on fees and sanctions for
17 his violating the order.

18 THE COURT: Where is there a fee provision?

19 MR. ROSE: We would have to file a motion and
20 that would be on the basis of his violating Rule
21 1.285. We have not filed that motion.

22 THE COURT: Where is there a -- where's the
23 rule about fees?

24 MR. ROSE: 1.375. I mean, I don't have my
25 rule book -- the rule on sanctions for discovery

1 violations and also the inherent authority of the
2 court. But we haven't raised that motion yet
3 because Your Honor just today ruled that the
4 document was privileged.

5 THE COURT: Okay. All right. Okay. So do
6 you want to be heard on the scope of the order?

7 MR. ELIOT BERNSTEIN: Yeah.

8 THE COURT: What -- go ahead. First thing is
9 that you be ordered to delete --

10 MR. ELIOT BERNSTEIN: No, I've got all that.

11 THE COURT: Well, that's what I'm getting at.

12 MR. ELIOT BERNSTEIN: Okay. I wanted to
13 oppose that.

14 THE COURT: Okay. All right. That's a
15 purported remedy that I'm being asked to do.

16 MR. ELIOT BERNSTEIN: Okay.

17 THE COURT: So what's your basis for opposing
18 that?

19 MR. ELIOT BERNSTEIN: I appreciate your
20 interpretation of that letter. The word forceful
21 is --

22 THE COURT: Again, you can't re-question --
23 I've already ruled.

24 MR. ELIOT BERNSTEIN: Okay.

25 THE COURT: Here's the question. There's

1 going to be an order entered.

2 MR. ELIOT BERNSTEIN: Okay.

3 THE COURT: The wording of the order, is the
4 way the rule is, is that I have to determine and
5 direct what shall be done with the materials,
6 that's this e-mail. The first thing they want is
7 an order that tells you, you, to delete this
8 e-mail from anything that's -- any document,
9 including any electronic storage place, that's in
10 your possession and control.

11 MR. ELIOT BERNSTEIN: Well, I want to give it
12 to the police departments and --

13 THE COURT: Okay. Well, if you do that --
14 well, okay, so let's --

15 MR. ELIOT BERNSTEIN: I mean, my life's in
16 danger. I know you didn't --

17 THE COURT: All right. So --

18 MR. ELIOT BERNSTEIN: -- read that.

19 THE COURT: Listen to me carefully.

20 MR. ELIOT BERNSTEIN: Okay.

21 THE COURT: I'm going to order you to delete.
22 Okay. I'm going to order you -- this is all
23 appropriate -- to notify the recipient of
24 everybody that you sent this to, of the ruling,
25 meaning you're going to send them a copy of the

1 order, and direct that they shall also delete and
2 not transmit.

3 Listen to me carefully. I order you not
4 to disseminate this document from this moment
5 forward to anybody. If you violate my order,
6 you're going to be in contempt of court.

7 Anybody, any agency, no one, because it's
8 privileged. And there is a rule that says
9 you're not allowed to do that.

10 MR. ELIOT BERNSTEIN: Do I have the right to
11 appeal this decision?

12 THE COURT: Yeah. Sure.

13 MR. ELIOT BERNSTEIN: Okay.

14 THE COURT: But you have to obey my decision
15 pending the appeal.

16 MR. ELIOT BERNSTEIN: Yeah.

17 THE COURT: Sure, you can do that. All
18 right. Write it up.

19 MR. ROSE: Yes, sir.

20 THE COURT: If you want to write that up now
21 you can, or you can get my transcript and write
22 that up.

23 MR. ROSE: I would prefer to get the
24 transcript and write it up from the transcript,
25 Your Honor, for clarity.

1 THE COURT: Mr. Eliot, pending me writing the
2 written order, because electronics move quickly,
3 okay, this order is binding on you as of right
4 now.

5 MR. ELIOT BERNSTEIN: Okay. I got it.

6 THE COURT: So play by the rules.

7 MR. ELIOT BERNSTEIN: I will.

8 THE COURT: Okay. You have a right to
9 appeal. If the appellate court disagrees with me,
10 you and I will both do what they say.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: All right. Okay. So now for
13 Wednesday, Eliot's request is we defer on having
14 hearings on the issue of Ted as successor trustee
15 and -- so he can talk to his lawyers and see
16 whether there's some way of dealing with that
17 subject. I'll start on this side. What do you
18 say about that?

19 MR. ROSE: We're fine with that, Your Honor.

20 MR. FEAMAN: Yes, Your Honor.

21 THE COURT: Okay. All right. Okay. I'll
22 cancel the hearing in view of that.

23 Okay. Now, what I need you to do is at
24 some point, because, Eliot, the way this is
25 going to be triggered, is no one is going to

1 know what you're doing on your end. You and/or
2 your lawyers should say to the other side, you
3 know, if you hire the lawyer and they engage,
4 they can make an appearance and start to tell
5 them we're the spokespersons for you. Because
6 they either talk to you or they talk to your
7 lawyer, but to make that decision they need a
8 notice of appearance or something from the
9 lawyer. Okay.

10 MR. ELIOT BERNSTEIN: And they've explained
11 that to me.

12 THE COURT: Okay. And so -- but at some
13 point you can have a status check if you need to
14 have this reset.

15 MR. ELIOT BERNSTEIN: Okay.

16 THE COURT: Meaning, if you don't agree upon
17 or work out this issue, just come back in at an
18 8:45, and if you need another hearing, I'll give
19 you another hearing date.

20 MR. ELIOT BERNSTEIN: Okay. Beautiful.

21 Thank you, sir.

22 THE COURT: Hold on. Mr. Feaman gave you --
23 there's something else here.

24 MR. ELIOT BERNSTEIN: Is the court going to
25 retain a copy of this once I destroy it, just in

1 case we are --

2 THE COURT: Okay. So that's a good question.
3 All right. So I have it for ID purposes. All
4 right. And Eliot is correct, to preserve the
5 integrity of this, I'm going to keep it, and I'm
6 going to put it in a sealed envelope in the court
7 file subject to being reopened by the court
8 pursuant to order.

9 MR. ELIOT BERNSTEIN: And I can tell the
10 appeal court that?

11 THE COURT: Yeah.

12 MR. ELIOT BERNSTEIN: Okay. Got it.

13 THE COURT: Yeah, that's fair. Okay. And
14 then this says -- the next thing was status
15 conference to discuss other pending motions and
16 petitions, including Eliot's petition for
17 construction of trust and accounting.

18 Are we going --

19 MR. ELIOT BERNSTEIN: Put it off.

20 THE COURT: -- to defer on that until the
21 lawyers can deal with that?

22 MR. ELIOT BERNSTEIN: Yeah.

23 MR. ROSE: Just as a heads up, we're going to
24 be filing a trust construction action in the
25 Shirley side. He's filed a trust construction on

1 this side, but that will be moot when we file our
2 action and serve it on everybody. That will be
3 its own adversary proceeding.

4 THE COURT: Okay. Fine. I'll wait to sign
5 the order. And no hearing subject to what you
6 folks tell me is going on next. Somebody will
7 send me up orders and letters on Mr. O'Connell.
8 Go ahead.

9 MR. O'CONNELL: I will, Your Honor.

10 MR. ROSE: I have two orders from the
11 first -- the motion to disqualify orders.

12 THE COURT: Okay. I'll deal with those.
13 Go ahead, while I'm signing, you can
14 speak.

15 MR. FEAMAN: I have an order on Ted
16 Bernstein's petition for appointment of successor
17 personal representative. It says denied.

18 MR. ROSE: Technically withdrawn, I think.

19 THE COURT: Hold on. Let me just see.

20 Are these the same that you just gave me?

21 MR. ROSE: One is for Mr. Pankauski and one
22 is from my firm.

23 THE COURT: Let me just do this first. Hold
24 on. I'll make some copies of this. All right.
25 Let me see the order that you want.

1 MR. ROSE: We don't think it was denied, we
2 believe it was withdrawn.

3 THE COURT: It was withdrawn. Because you
4 folks comprised, so I didn't actually make a
5 ruling on the merits. Okay. So that's fair.

6 MR. FEAMAN: Okay. There is envelopes.

7 THE COURT: No, I'm going to make the copies
8 and let you --

9 MR. FEAMAN: All right. Very good. We'll
10 save the stamp.

11 THE COURT: All right. So, folks, final
12 word, you made progress when you cooperated. So
13 use that as a bell weather to try to achieve just
14 what you did. Listen to me, everyone. Eliot, you
15 too. You know, when you go outside here, you did
16 some things that I think are good for the estate.
17 Let's not only wait for you to come to court to be
18 able to do that, accomplish that on your own.
19 Okay. That's the whole idea.

20 Okay. Thanks. Court is in recess. Wait
21 for copies.

22

23 (Thereupon, the proceedings were
24 concluded at 4:22 p.m.)

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C E R T I F I C A T E

THE STATE OF FLORIDA
COUNTY OF PALM BEACH.

I, DAVID L. MARSAA, Professional Reporter,
State of Florida at large, certify that I was
authorized to and did stenographically report the
foregoing proceedings and that the transcript is a
true and complete record of my stenographic notes.

Dated this 12th day of July, 2014.

DAVID L. MARSAA, COURT REPORTER

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