COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1088

KELLY BARNES

vs.

JOYCE JOHNSTON-NEESER & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This interlocutory appeal[2] addresses whether the so-called litigation privilege applies to claims brought by the plaintiff against the defendants' lawyers, based upon the lawyers' statements and actions while involved in prelitigation commercial negotiations. The underlying dispute is between two long-time, fifty percent shareholders of a dental practice, formed as a professional corporation and known as Sudbury Endodontics, P.C. (the corporation, or SE). The gist of the dispute is that the plaintiff, Dr. Kelly Barnes, wished to cease practicing and demanded that the corporation buy back her shares

[1] Sudbury Endodontics, P.C., Charles M. Waters, Sheehan Phinney Bass & Green PA, and Johnston Endodontics, LLC.

[2] This appeal was consolidated with the defendants' appeal of the single justice's denial of their motion to stay.

-- claiming that such a buyout was required under the corporation's Articles of Organization. The defendant, Dr. Joyce Johnston-Neeser, disagreed, and communicated same through her counsel. The corporation never purchased Barnes's shares. Rather, Barnes ceased practicing and Johnston-Neeser eventually set up a practice on her own, leaving the corporation in existence, but with no ongoing operations.

Barnes's twelve count amended complaint alleges breach of contract, breach of fiduciary duty, and conversion claims (among others) against Johnston-Neeser and the corporation; however, for the present appeal we will address only two of the twelve counts -- Barnes's claims against Johnston-Neeser's lawyers (Charles Waters and Sheehan Phinney Bass & Green PA, hereafter the lawyer defendants), which allege that the lawyer defendants aided and abetted and conspired with Johnston-Neeser in her breaches of fiduciary duty and conversion of corporate assets. The lawyer defendants argue that the counts against them allege no more than they made statements to opposing counsel -- that is, an exchange of positions between lawyers for the parties, in contemplation of litigation -- and that such actions are subject to the litigation privilege and cannot be the basis for suit. The plaintiff counters that her claims against the lawyers are based upon their conduct, of which the statements are only evidence, and upon the lawyers' business advice, which is not

protected. Under the circumstances alleged here we agree with the defendants, and accordingly remand with instructions to dismiss the counts against the lawyer defendants.

Background. Distilled to their essence,[3] the facts alleged are as follows.

In 2005, Barnes and Johnston-Neeser set up a dental practice, SE, specializing in endodontics. They established SE as a professional corporation, and Barnes and Johnston-Neeser each held fifty percent of the shares.

The practice operated until 2020, when Barnes became concerned about her elderly father's health during the COVID-19 pandemic. In June of 2020, Barnes informed Johnston-Neeser that she intended to stop treating patients, and proposed to Johnston-Neeser that they should consider selling the corporation. When Johnston-Neeser did not agree to sell, Barnes demanded that the corporation buy back Barnes's shares.

By this point Barnes was represented by counsel, John Morrissey, who was also her husband. In a June 25, 2020 email to Johnston-Neeser, Morrissey stated, among other things, that if the parties followed the corporation's Articles of

[3] The facts are taken from the well-pleaded allegations of plaintiff's amended complaint. We note, however, that the amended complaint, which is thirty-three pages without the attached exhibits, hardly qualifies as the "short and plain statement of the claim" contemplated by Mass. R. Civ. P. 8 (a), 365 Mass. 749 (1974).

Organization (the Articles), this "[i]n [his] opinion . . . would require SE to buy back [Barnes's] shares, at the fair market value determined by the arbitrators." In July 2020, Barnes delivered a notice to the corporation, offering her shares for $400,000.[4]

Johnston-Neeser eventually retained her own counsel -- Charles Waters of Sheehan Phinney -- in late July of 2020. Negotiations ensued between Morrissey, on behalf of Barnes, and Waters, on behalf of Johnston-Neeser. The negotiations occurred over several months and involved many written communications, which are quoted or summarized in the amended complaint.

In pertinent part, the negotiations proceeded as follows. After Morrissey advanced the position that the corporation would be required to purchase Barnes's shares, defendant Waters disagreed. In a July 2020 letter to Morrissey, Waters contended that the corporate documents provided the corporation with a right of first refusal over a proposed transfer, but did not require a buyout. Waters instead proposed that the parties divide the corporation's assets, and then sell or dissolve the corporation.[5] When Morrissey rejected that offer, Waters then

[4] Although the parties have extensively litigated the meaning of the corporation's governing documents, for reasons discussed herein we do not resolve that dispute on this appeal.

[5] Waters also stated that "Dr. Barnes appears to be in the midst of breaching her fiduciary duties" by no longer seeing patients while continuing to use corporate funds.

stated that Johnston-Neeser intended to terminate her employment with the corporation. Morrissey responded that Johnston-Neeser could not quit the corporation, because doing so and "taking with her the patient and referral base that she and Dr. Barnes have cultivated" would constitute a breach of fiduciary duty. Waters then announced that Johnston-Neeser would begin the steps to dissolve the corporation. He also sent an email that offered $275,000 for Barnes's shares, to which Barnes did not reply. At one point or another, both parties threatened to sue and to pursue sanctions.

The parties never reached agreement. Barnes formally resigned as a director and corporate officer in September of 2020. Johnston-Neeser stopped seeing patients as of October 2020, and in December 2020 established a new dental practice, Johnston Endodontics, LLC (JE).

Barnes sued Johnston-Neeser and the corporation in October of 2020. At that time, Barnes served a request to inspect SE's premises. Waters responded with a motion for a protective order, which was denied in an order dated February 10, 2021. According to the amended complaint, however, "Neeser and SE continued to refuse and delay the request for inspection." Eventually, Barnes inspected the corporation's office space in April 2021, and discovered that "dental equipment, office

equipment, electronic databases, and medical and office supplies had been removed."

After discovering that the corporation's equipment was no longer in its office space, Barnes amended her complaint to add several more claims, including a conversion claim against Johnston-Neeser and JE. Most importantly for present purposes, the amended complaint for the first time made claims against the lawyer defendants -- counts 9 and 10 -- alleging that they aided and abetted and conspired with Johnston-Neeser to breach her fiduciary duties and to convert corporate assets. The complaint alleged that:

> "Neeser with the advice and participation of [the lawyer defendants], devised a scheme by which they misrepresented law and fact, made threats of legal action, threats of unilateral dissolution and liquidation of SE and . . . without authority or right, dissolved and liquidated SE and misappropriated its assets."

The defendants moved to dismiss all counts of the amended complaint. Their motion argued, among other things, that the claims against the lawyer defendants were barred by the litigation privilege. The judge granted the motion in part, but denied the motion to dismiss as to counts 9 and 10, the only remaining counts against the lawyer defendants. The judge did not address the defendants' arguments regarding the litigation privilege. The defendants appealed, arguing (among other

things) that their appeal is proper pursuant to the doctrine of present execution.

Discussion. 1. Appealability. We first address the scope of our appellate jurisdiction. Ordinarily, of course, a denial of a Rule 12 (b) (6) motion to dismiss is a non-appealable interlocutory order. Mooney v. Warren, 87 Mass. App. Ct. 137, 138 (2015). The doctrine of present execution provides an exception to this rule where "the [interlocutory] order will interfere with rights in a way that cannot be remedied on appeal from the final judgment." Fabre v. Walton, 436 Mass. 517, 521 (2002). And, we have held that orders denying motions to dismiss based upon the litigation privilege fall within the doctrine of present execution. Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 140 (2017). Accordingly, the portion of the judge's order that refused to dismiss the two counts against the lawyer defendants was immediately appealable, and is properly before us.

Before this court the defendants have sought to expand this appeal, asking us to address additional issues raised by their motion to dismiss. The defendants urge in particular that the claims against the lawyer defendants are dependent upon the viability of the breach of fiduciary duty claims against Johnston-Neeser, and accordingly that we should address whether the claims for breach of fiduciary duty (and contract) are

legally deficient. We decline to do so. Whereas the claims subject to the litigation privilege defense are properly before us, we generally will not address the denial of ordinary Rule 12 (b) (6) arguments on an interlocutory basis, even where the doctrine of present execution provides us with jurisdiction over certain of the arguments advanced in the motion to dismiss. See Slavin v. American Med. Response of Mass., Inc., 99 Mass. App. Ct. 55, 56 n.4 (2021). See also Mooney, 87 Mass. App. Ct. at 138-140. The policy against piecemeal appeals is a strong one, and reaching out to decide issues not subject to the doctrine of present execution will undermine that policy, even when that doctrine has been properly invoked to bring part of the case before us.[6] See CP 200 State, LLC v. CIEE, Inc., 488 Mass. 847, 848-849 (2022).

2. The litigation privilege. We accordingly turn to the litigation privilege issue. We have said that "[t]he litigation privilege generally precludes civil liability based on statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding, as well as statements preliminary to litigation that relate to the

[6] We do not foreclose the possibility that in some circumstances efficiency and economy may speak in favor of our addressing additional 12 (b) (6) arguments that were raised at the same time as the appealable defenses. Fisher v. Lint, 69 Mass. App. Ct. 360, 361 n.3 (2007). This is not such a circumstance, however.

contemplated proceeding" (quotations and citation omitted). Gillette, 91 Mass. App. Ct. at 140. As the Supreme Judicial Court noted recently in Bassichis v. Flores, 490 Mass. 143, 149-151 (2022), the privilege has particularly strong roots where it is applied, as here, to the actions of attorneys. The purpose of the privilege is to "permit[] attorneys complete freedom of expression and candor in communications in their efforts to secure justice for their clients." Sriberg v. Raymond, 370 Mass. 105, 108 (1976), citing Hoar v. Wood, 3 Met. 193, 197-198 (1841).

As the Court explained in Bassichis, while the privilege had its genesis as a defense to claims of defamation, it is now "well established that '[t]he privilege applies not only to defamation claims brought against [an] attorney, but to civil liability generally'" (citation omitted). 490 Mass. at 151. Moreover, where the privilege applies it protects counsel from suit regardless of whether they acted with bad faith or malice. Id. at 150. And importantly for present purposes, the privilege "extends beyond statements that are made in the court room itself," to statements by an attorney "engaged in his [or her] function as an attorney[,] whether in the institution or conduct of litigation or in conferences or other communications preliminary to litigation." Id., quoting Sriberg, 370 Mass. at

108-109 (applying privilege to statements in a demand letter). See Gillette, 91 Mass. App. Ct. at 142.[7]

Here the plaintiff's claims are based upon just such communications by lawyers, "preliminary to litigation." Indeed, the amended complaint sets forth many statements of the defendant lawyers verbatim. The lawyers' statements were made (as they should be) to opposing counsel, as part of an ongoing negotiation in an effort to resolve a legal dispute involving their clients. Furthermore, the referenced statements were predominantly statements of the defendants' legal positions -- that is, what they maintained was required by the corporate documents, and what were the rights of the parties as officers, directors, and shareholders of the company. For example, Barnes's counsel argued that under the corporate documents, the company was required to purchase Barnes's shares upon tender; the lawyer defendants disagreed, and pointed to language in the corporate bylaws that seemed to say otherwise. The lawyer defendants then stated that if Barnes insisted on her position that she could leave the company and force a buyout, Johnston-Neeser also would cease seeing patients through the company, leaving it without operations. And so on.

[7] For statements to be protected, they must "relate[] to a proceeding which is contemplated in good faith and which is under serious consideration." Sriberg, 370 Mass. at 109.

In light of Bassichis, the statements of the lawyer defendants set forth in the amended complaint are plainly privileged, and cannot provide the basis for civil liability. Bassichis adopts very strong protections for statements of counsel during the course of litigation. Bassichis involved a claim that a lawyer for the wife in a divorce proceeding had fraudulently orchestrated a divorce judgment, in order to effect a transfer of the husband's assets to the wife and thereby to defraud the husband's judgment creditors. Bassichis, 490 Mass. at 144. In ruling that the suit by the judgment creditors against the wife's lawyer was properly dismissed, the Court held that the wife's lawyer was protected from civil liability even if he had made fraudulent statements to the judge to procure the judgment. Id. at 156.

Although in this case much of the alleged misconduct occurred before litigation, rather than during it, the allegations of lawyer misconduct here are tame by contrast to Bassichis, and no less privileged. Rather, the statements at issue are a paradigm of privileged conduct -- statements by a lawyer, to another lawyer, advancing the legal positions of the client in the midst of a legal dispute. Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 141 (1996) (privilege applies to attorney's response to demand letter). See Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 243

(2008) (privilege applies to demand letter from non-lawyer to opposing counsel). Such statements fall comfortably within the zone in which the privilege provides "complete freedom of expression and candor" (citation omitted). Gillette, 91 Mass. App. Ct. at 141. We note, moreover, that here the recipient of the defendants' statements was another lawyer, trained in the law, and trained to evaluate, on his own, the strengths or weaknesses of the arguments advanced. There is less call for a tort remedy in those circumstances, and other remedies against the lawyer are of course available. Bassichis, 490 Mass. at 159-160 (improper conduct between attorneys punishable by disciplinary action rather than civil liability).

The plaintiff argues, however, that her claims of aiding and abetting and conspiracy are not based upon the defendant lawyers' statements, but rather upon the lawyers' "conduct" -- of which the statements are only evidence. She argues:

> "The gravamen of these claims are revealed in Waters' letters and emails from which may reasonably be inferred the existence of a scheme hatched by Waters and Neeser to initially browbeat Barnes into selling her stock to Neeser at a vastly discounted price utilizing, in part, false accusations of theft on the part of Barnes and Morrissey, threats that Neeser would terminate her own employment and effectively destroy SE rather than paying Barnes a fair value for her stock."

The Court in Bassichis rejected a very similar argument, where the plaintiff contended that its claim was based not just upon the defendant lawyer's statements, but upon his "conduct"

in "orchestrating" the "scheme." 490 Mass. at 148. The Court reasoned:

> "The acts of preparing and advancing a litigation strategy are as integral to the duties of a lawyer as is advocating in the court room. The strategic decisions a lawyer makes in an effort to serve his or her client warrant protection from civil liability, regardless of whether those decisions require the lawyer to speak or to act on the client's behalf . . . Accordingly, we conclude that the litigation privilege applies to an attorney's actions during the course of a judicial proceeding, just as it does to the attorney's communications."

Id. at 158.

The above reasoning disposes of Barnes's argument that in this case, her claim is based upon the lawyers' "conduct." Even assuming that Barnes were truly challenging conduct rather than communications,[8] it is readily evident that the gist of Barnes's complaint is directed at the defendants' actions in "preparing and advancing a litigation strategy." Id. Under Bassichis, the defendant lawyers cannot be liable for formulating their client's legal position as to the Articles, or for advising their client as to what she might do if Barnes decided to leave

[8] Contrary to Barnes's argument, the focus of her claims is what the defendant lawyers said. Barnes contends that the lawyers' communications "browbeat" her, and that the communications misrepresented, to Barnes herself, actions that Barnes had previously taken. Passing the points that the statements were not made to Barnes, but to Barnes's lawyer, and that Barnes of course had knowledge of the actual facts, it is in any event evident that such claims are about speech, not conduct.

the organization.[9] Id. And this holds true even if the clients' resulting actions constituted breaches of fiduciary duty or contract, for which the clients could be sued.

Finally, Barnes argues that the holding in Bassichis is limited to conduct during litigation, and does not "encompass attorneys' conduct in counselling and assisting their clients in business matters generally" (citation omitted). The Patriot Group, LLC v. Edmands, 96 Mass. App. Ct. 478, 484 (2019). But while it is true that in applying the litigation privilege, courts draw a line between actions preliminary to litigation (which generally are protected), and ordinary counselling on business matters (which is not), Bassichis, 490 Mass. at 158-159, the distinction does not aid Barnes in the circumstances here. As indicated, here the statements and actions set forth

[9] Although Barnes also alleges that Johnston-Neeser "with the . . . participation of [the defendant lawyers] . . . misappropriated [the corporation's] assets," the underlying allegations in the complaint do not detail any involvement by the defendant lawyers in the alleged conversion of corporate assets. Such conclusory allegations are inadequate, even if the alleged conversion might be deemed a tort that is independent of the litigation. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The amended complaint does suggest that the defendant lawyers unlawfully aided Johnston-Neeser by objecting to and delaying the inspection of the corporate premises; advancing such objections, however, was plainly privileged litigation conduct. Bassichis, 490 Mass. at 158.

in the amended complaint were plainly "preliminary to litigation"; they were not the ordinary counselling of clients.[10]

The portion of the judge's order denying the defendants' motion to dismiss counts 9 and 10 is reversed. In view of this disposition, the appeal from the single justice order is dismissed as moot.

So ordered.

By the Court (Desmond, Englander & Hershfang, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: August 12, 2022.

[10] This case evidences yet another, practical problem resulting from lawsuits against lawyers such as the one at issue. By suing counsel, the plaintiff will have rendered counsel witnesses in the case, and quite possibly, subject to disqualification under the rules of professional responsibility. Mass. R. Prof. Conduct 1.7, as appearing in 471 Mass. 1335 (2015). Indeed, Barnes has taken precisely that position in this case, arguing that the defendant lawyers must be disqualified. Allowing such "aiding and abetting" claims to go forward under these circumstances accordingly opens the door to the possibility of unfair strategic maneuvering.

[11] The panelists are listed in order of seniority.