



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

CHANGES MADE BY COURT

<p>In re</p> <p>CLARK WARREN BAKER</p> <p>Debtor</p>	<p>Case No. 2:15-BK-20351-BB</p> <p>Chapter 7</p> <p>Adv. 2:15-ap-01535-BB</p>
<p>JAMES MURTAGH, M.D.</p> <p>Plaintiff</p> <p>vs.</p> <p>CLARK WARREN BAKER</p> <p>Defendant</p>	<p>Before the Honorable Sheri Bluebond</p> <p>ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS AGAINST BARUCH C. COHEN, ESQ. AND D. DAVID STEELE, ESQ.</p> <p>Date: June 21, 2022 Time: 2:00 pm Place: 255 E. Temple Street Courtroom 1475</p>

A hearing on the November 23, 2021 motion of Plaintiff James Murtagh, M.D. ("Murtagh" or "Plaintiff") for Sanctions against Baruch C. Cohen, Esq. and D. David Steele, Esq (the "Motion") [Doc. 812], came on for before the Honorable Sheri Bluebond, United States Bankruptcy Judge, presiding, on June 21, 2022 at 2:00 p.m. Appearing on behalf of Murtagh were Derek Linke of Newman Du Wors LLP and Dr. Murtagh himself. Baruch C. Cohen, Esq. ("Cohen") and D. David Steele, Esq. ("Steele") appeared on their own behalves. Leslie Cohen appeared on behalf of Robert Leppo ("Leppo"). After having considered the Motion and all

1 relevant documentation and argument in support of and opposing the Motion, the objection of
2 Murtagh to the proposed form of order lodged by Cohen in connection with the Motion (the
3 “Objection”), and Murtagh’s alternate proposed form of order, for all the reasons stated on the
4 record of the proceedings and such other matters as the Court deemed appropriate, the Court’s
5 hereby makes the following findings of fact and conclusions of law:

6 1. On November 23, 2021, Dr. Murtagh filed his Motion, seeking sanctions against
7 Cohen and Steele under the Court’s inherent authority.

8 2. On December 14, 2021, the Court held a hearing on the Motion at which the
9 Court made various preliminary findings and rulings, including that:

10 a) The Court needs to focus separately on whether each individual met the applicable
11 standard for sanctions to be imposed, and if so, in what amounts.

12 b) The Court directed the parties to submit briefing on two preliminary issues:

13 i) First, the legal standards applicable to Steele, including when and under what
14 circumstances may a court impose sanctions on an attorney who is not a party
15 or counsel of record for a party; and

16 ii) Second, whether there is a timeliness issue with respect to Dr. Murtagh’s
17 Motion—whether it was brought in a sufficiently timely manner.

18 c) The Court also found that, should it conclude that it was appropriate to impose
19 sanctions against either or both of Cohen and Steele, it would be required to
20 calculate the amount of any such award. (Court would not include in the amount of
21 any award, for example, fees for any services rendered by counsel for Plaintiff that
22 the Court considered unnecessary or wasteful.)

23 3. On January 25, 2022 at 2:00 p.m. the Court conducted a continued hearing on the
24 Motion, following which the Court entered its January 26, 2022 Interim Order on Motion for
25 Sanctions Against Baruch C. Cohen and D. David Steele (“Interim Order”) (Dkt. 849).

26 4. In the Interim Order, the Court set forth the legal standards applicable to the
27 Motion, addressed various preliminary issues, and established a schedule for completing various
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1 pretrial activities in advance of an evidentiary hearing to be held on the Motion.
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3 5. Additionally, the Interim Order set forth a schedule for discovery and pretrial
4 events, including that:

5 a) The parties shall complete any discovery that they may wish to conduct under Fed.
6 R. Bankr. Proc. 9014 not later than March 31, 2022. In addition to such other
7 limitations as may be imposed by the Federal Rules of Bankruptcy Procedure and
8 the Local Rules of this Court, the parties shall limit their discovery to requests or
9 examinations (either written or oral) that are likely to lead to the discovery of
10 admissible evidence in connection with the evidentiary hearing(s) to be conducted
11 in this contested matter. (Interim Order ¶ 14)

12 b) In addition, to avoid unnecessary expenditures of time and resources, the Court
13 hereby bifurcates the issues of liability and damages. Stated differently, absent
14 further order of the Court, the parties shall not conduct discovery at this phase as to
15 the amount or reasonableness of any attorneys' fees or expenses paid or incurred by
16 Plaintiff in the underlying adversary proceeding. If and when the Court determines
17 that Cohen and/or Steele engaged in conduct of the kind for which sanctions or
18 disgorgement should be imposed, the parties will be given a further opportunity to
19 conduct discovery concerning the fees and costs attributable to such conduct and
20 the extent to which any fees and costs incurred were reasonable. (*Id.* ¶ 15)

21 c) Not later than April 19, 2022, Steele, Cohen, and Plaintiff shall lodge/upload a
22 proposed form of joint pretrial order containing the information described in Local
23 Bankruptcy Rule 7016-1(b)(2). In articulating the issues of law that remain to be
24 litigated pursuant to LBR 7016(b)(2)(C), they shall not include any issues of law
25 that have already been or were intended to be resolved by the terms of this interim
26 order. (Interim Order ¶ 16).

27 d) Finally, the Court set a pretrial conference for May 3, 2022 at 2:00 p.m. (*Id.* ¶ 17).
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2 6. Pursuant to the parties' stipulated request for an extension, the Court granted until
3 April 26, 2022 for lodging their proposed form of joint pretrial order. (*See* Dkts. 872, 875, 876,
4 879).

5 7. On April 26, 2022, the parties lodged their joint pretrial proposed order, which
6 they relogged on April 27, 2022, with updates based on instructions from the Court. (Dkt. 881).

7 8. On May 3, 2022 at 2:00 p.m. the Court conducted the scheduled pretrial
8 conference.

9 9. At the May 3, 2022 pretrial conference, Cohen persuaded the Court to conduct a
10 hearing on the laches defense prior to proceeding with remaining pretrial preparations based on
11 the representation that it could be decided based solely on the parties' undisputed facts. (June 21,
12 2022, Hrg. Tr. at 2:10–16)

13 10. The Court stated that any further laches briefing would need to be based on
14 undisputed facts so that the Court could decide laches as a matter of law because if anyone
15 wanted to rely on disputed facts, there would need to be an evidentiary hearing on the issue.
16 (May 3, 2022, Hrg. Tr. at 51:2–6)

17 11. The Court agreed to permit additional supplemental briefing to decide the issue of
18 laches based on the undisputed facts, without an evidentiary hearing.

19 12. The Court authorized Steele and Cohen to file and serve by May 24, 2022, briefs
20 on their laches defenses as well as a briefing schedule for Dr. Murtagh's supplemental response
21 briefing and replies by Steele and Cohen. (June 21, 2022, Hrg. Tr. at 2:17–20)

22 13. On May 22, 2022, Cohen filed his supplemental brief on the issue of laches, along
23 with declaration testimony and multiple exhibits. (Dkts. 890, 890-1, 890-2, 890-3)

24 14. On May 24, 2022, Steele filed his separate supplemental brief re laches along
25 with declaration testimony, and multiple exhibits. (Dkts. 895, 896, 897, 897-1, 897-2, 897-3,
26 897-4)

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2 15. On June 7, 2022, Dr. Murtagh filed his response to Cohen’s supplemental brief re
3 laches (Dkt. 900), along with a supporting declaration (Dkt. 901). Dr. Murtagh also filed his
4 response to Steele’s supplemental brief re laches. (Dkt. 902)

5 16. On June 14, 2022, Cohen filed a supplemental reply brief re laches (Dkt. 903).

6 17. On June 14, 2022, Steele filed a supplemental reply brief re laches, along with
7 additional declaration testimony. (Dkt. 905)

8 18. Murtagh’s Motion is not a “disguised motion for reconsideration” of the Court’s
9 earlier ruling in March 22, 2017 imposing sanctions on Baker but declining to impose sanctions
10 on Cohen in connection with Bender. (Dkt. 890 at p. 56) In March 2017, the Court refused to
11 sanction Cohen at that time it because the record before it did not contain evidence sufficient to
12 establish that Cohen had knowledge of, or participated in, the witness tampering. The Court
13 invited Dr. Murtagh to file a new motion if he wished to put before the court evidence of Cohen’s
14 knowledge or participation in the witness tampering. Thus, the Court invited Murtagh to file
15 another motion with regard to Cohen. (June 21, 2022, Hrg. Tr. at 4:3–4)

16 19. Similarly, although the Court previously sanctioned Steele in December 2020
17 based on findings of bad faith or conduct tantamount to bad faith in connection with discovery in
18 this adversary proceeding (Dkt. 750), that earlier ruling did not raise any of the issues addressed
19 in the Motion has no preclusive effect with respect to the Motion. (June 21, 2022, Hrg. Tr. at
20 4:21–5:5)

21 20. This Court’s jurisdiction over, and authority to police, the conduct of Messrs.
22 Cohen and Steele in this action is in their capacity as attorneys for Mr. Baker. However, the
23 Motion does not contain a sufficient level of specificity for the Court to identify any violations of
24 the Rules of Professional Conduct with the exception of the two areas of alleged misconduct
25 discussed in the briefs filed by Messrs. Cohen and Steele on the laches issues. (June 21, 2022,
26 Hrg. Tr. at 14:20–15:8)

1 21. Plaintiff has known about the existence of a declaration from Mr. Bender
2 containing damaging testimony for Dr. Murtagh and the possibility that Baker
3 threatened/extorted Bender into providing this testimony since before this adversary proceeding
4 was filed and wrote to Steele concerning this matter in 2015. (June 21, 2022, Hrg. Tr. at 15:19–
5 25)

6 22. Aside from any earlier events that may have tipped Plaintiff off to the idea that
7 there was witness tampering, on January 28, 2017, this Court referred Baker to the U.S.
8 Attorney’s Office for investigation for witness tampering. [See Dkt. 200.] By that point in time,
9 all parties were well aware of Plaintiff’s contention that Baker had threatened Bender in order to
10 obtain the declaration.

11 23. Plaintiff claims that its Motion, Docket 812, filed November 23, 2021, was timely
12 because it was not until “early 2021” that plaintiff obtained the tens of thousands of files which
13 revealed the scope of their, namely, Cohen and Steele’s, misconduct in connection with their
14 representation of Baker in this proceeding.

15 24. To successfully establish laches, a party must show that (1) there was an
16 inexcusable delay in the assertion of a known right and (2) the party asserting laches has been
17 prejudiced. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002.) The
18 relevant delay is the period from when the plaintiff knew (or should have known) of the potential
19 claim at issue. *Danjaq, LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001), citing *Kling v.*
20 *Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000.) (“any delay is to be measured from
21 the time that the plaintiff knew or should have known about the potential claim at issue”)

22 25. Once a plaintiff is on inquiry notice that there might be a problem or suspects or
23 believes that someone may have engaged in wrongdoing, he is not required to immediately bring
24 a motion any evidence to support this position, but he must proceed diligently thereafter to
25 investigate in an effort to obtain that evidence and must act upon evidence obtained thereby with
26 reasonable promptness once he obtains it.
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1 26. The Court finds that Cohen and Steele did suffer prejudice as a result of the length
2 of time it took for plaintiff to bring the Motion. The passage of time has made it more difficult to
3 obtain the recollections of witnesses and locate relevant documents. As an example, Dr.
4 Murtagh's former counsel Lisa Hiraide testified in March of 2022 that she had no independent
5 recollection of a call with Bender in September 2015 and had destroyed handwritten notes from
6 the telephone call.

7 27. Although Dr. Murtagh long suspected that Cohen had known about or participated
8 in witness tampering or that he knew that Baker's denials of responsibility for the baddocjm.com
9 website were false, Cohen repeatedly denied having any role in the alleged witness tampering
10 and has testified that he believed Baker's denials until immediately prior to his withdrawal in
11 September of 2018:

- 12 a) Cohen prepared declarations for Baker that he filed in September and October of
13 2017, Docket Numbers 287 and 289, and April of 2018, Docket Number 338, in
14 which Baker denied creating or playing any role in connection with the
15 administration of the baddocjm.com web site.
16 b) "Long before these declarations were filed, plaintiff believed that Baker was
17 responsible for the creation of this web site and wrote various letters to Cohen
18 warning him not to rely blindly on what his client was telling him."
19 c) In 2017, Cohen categorically denied Dr. Murtagh's counsel's accusations with
20 respect to the baddocjm.com website. (June 21, 2022, Hrg. Tr. at 53:18–23)

21 28. Cohen submitted sworn declaration testimony in October 2017 claiming that he
22 believed all of Baker's perjurious declarations were true at the time Cohen filed them. Because
23 of Cohen's denials, at that time, Dr. Murtagh did not have evidence sufficient to proceed with
24 respect to seeking sanctions against Cohen, as opposed to seeking sanctions against Baker as he
25 had already done. (June 21, 2022, Hrg. Tr. at 54:9–55:11)

26 29. However, Dr. Murtagh did not proceed diligently to conduct investigation with
27 regard to the allegations he is currently making against Messrs. Cohen and Steele and failed to
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1 identify, despite being given multiple opportunities to do so, any document or information that he
2 first discovered in early 2021 that shows either Cohen or Steele either participated in witness
3 tampering or that either was aware that Baker's testimony concerning the baddocjm.com
4 website was false. Thus, it cannot be said that it was appropriate for Dr. Murtagh to wait to bring
5 the Motion until he received the documents he obtained in early 2021. None of that information
6 or documentation shows that either Cohen or Steele had condoned or participated in witness
7 tampering or that either of them knew that Baker was indeed responsible for the baddocjm.com
8 website until Baker disclosed this information to Cohen in September of 2018.

9 30. Cohen and Steele met their burden to prove the defense of laches to the claims
10 asserted against them in Dr. Murtagh's Motion. Dr. Murtagh had actual knowledge of
11 witness David Bender's claim of extortion prior to the beginning of this action, nearly seven
12 years ago, which put Murtagh on inquiry notice as to the claims asserted in the Motion about
13 Cohen's and Steele's knowledge of or participation in witness tampering. Similarly, Dr. Murtagh
14 had knowledge of the claims asserted in the Motion relating to Cohen's and Steele's knowledge
15 of Baker's involvement with baddocjm.com website by no later than the time of Cohen's
16 withdrawal in September of 2018. Despite this inquiry notice, Dr. Murtagh failed to proceed
17 diligently with the conduct of discovery as against Cohen and Steele on these issues. Although
18 Dr. Murtagh knew of Steele's involvement prior to the commencement of this action, Dr.
19 Murtagh did not schedule his deposition and withdrew the subpoena that he had served upon
20 him.

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22 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 23 1. The Motion is DENIED on the ground of laches.
24 2. To the extent changes proposed by Plaintiff have not been expressly incorporated into
25 the form of this Order, the Objection is OVERRULED.
26 3. Dr. Murtagh failed to produce in his declaration or in any deposition testimony any
27 evidence obtained in early 2021 of specific acts of misconduct on the part of Cohen and Steele.
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1 4. Murtagh presented no evidence to support his claim of unclean hands and concealment
2 to counter the asserted defense of laches.

3 5. The Court will conduct a continued status conference in the above adversary proceeding
4 on August 16, 2022 at 2:00 p.m. for any post-judgment issues dealing with Plaintiff and
5 Defendant. The parties need not file a joint status report in advance of that conference.

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24 Date: July 11, 2022



25 Sheri Bluebond
26 United States Bankruptcy Judge
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