

Polidori v Societe Generale Group

2006 NY Slip Op 30005(U)

November 27, 2006

Supreme Court, New York County

Docket Number: 0113960/2005

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PAR

POLIDORI, KRISTIN,

113960/05¹⁷
INDEX NO. #

Plaintiff,

-against-

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

SOCIETE GENERALE GROUP, SOCIETE GENERALE CORPORATE & INVESTMENT BANKING, SOCIETE GENERALE NORTH AMERICA, INC., SOCIETE GENERALE INVESTMENT CORPORATION, SG AMERICAS SECURITIES, LLC, SG ASSET MANAGEMENT INC., SG COWEN & CO., LLC, DANIEL BOUTON, JACQUES BOUHET, KIM FENNEBRESQUE, JEAN-PHILLIPE COULIER, MARK COMMENDER, JACK ENGLISH, ALAIN JOYET and STEVEN SCHIRALDI

Defendants

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided per attached.

Dated: 11/27/06

[Signature]
J.S.P.

FILED
DEC 11 2006
NEW YORK COUNTY CLERK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
POLIDORI, KRISTIN,

Plaintiff,

Index No. 113960/05

-against-

SOCIETE GENERALE GROUP, SOCIETE GENERALE
CORPORATE & INVESTMENT BANKING, SOCIETE
GENERALE NORTH AMERICA, INC., SOCIETE
GENERALE INVESTMENT CORPORATION, SG
AMERICAS SECURITIES, LLC, SG ASSET
MANAGEMENT INC., SG COWEN & CO., LLC,
DANIEL BOUTON, JACQUES BOUHET, KIM
FENNEBRESQUE, JEAN-PHILLIPE COULIER,
MARK COMMENDER, JACK ENGLISH, ALAIN
JOYET and STEVEN SCHIRALDI,

Defendants.

-----X
Emily Jane Goodman, J.S.C.:

Plaintiff Kristin Polidori moves to compel production of (1) her employer's investigation file, regarding her complaints of sexual harassment, (2) the personnel file of Steven Schiraldi and (3) her employer's file regarding its investigation of plaintiff. Schiraldi submits an affirmation in support of plaintiff's request for production of the employer's investigation file. The latter two requests are granted as unopposed.

With respect to production of the employer's investigation file, defendants Societe Generale Group, Societe Generale Corporate & Investment Banking, Societe Generale North America, Inc., Societe Generale Investment Corporation, SG Americas Securities, LLC, SG Asset Management Inc., SG Cowen & Co., LLC,

Jacques Bouhet, Kim Fennebresque, Jean-Phillipe Coulier, Mark Commender and Jack English (hereafter the "SG defendants") maintain that the file is protected as work product because it was compiled by Andrea Stemple, Esq., the employer's in-house counsel. Plaintiff argues that the privilege was waived because the SG defendants placed the adequacy of the investigation at issue.¹ The SG defendants also maintain that the file is irrelevant because plaintiff cannot make out a case against her employer, and has not demonstrated that she cannot obtain the substantial equivalent of the material by other means, citing, CPLR 3101(d)(2).

The SG defendants incorrectly argue that the file is irrelevant because they took immediate and adequate measures to ensure that the harassing behavior would cease.² This argument was rejected in a decision of same date, in connection with the

¹The SG defendants argue that they have not raised a Faragher defense, as plaintiff maintains. The fact that they did or did not raise a Faragher defense, however, is irrelevant. What is relevant, is that in a sexual harassment case, waiver may arise when an employer places the adequacy of its response at issue. Although the SG defendants claim not to have placed the adequacy of their response at issue, because they moved to dismiss plaintiff's complaint for failure to establish a prima facie case, their request for dismissal solely hinges on the claim that they took immediate and adequate corrective measures and therefore, are immune from liability.

²The SG defendants argue that the employer's investigation file is not relevant because the plaintiff cannot prevail. This argument does not address the issue of relevancy. It rather is an argument that discovery is unnecessary.

SG defendants' motion to dismiss. For the reasons stated in that decision, it remains to be proven that defendants took immediate and adequate corrective measures. The SG defendants also incorrectly maintain that plaintiff has not demonstrated that she can obtain the substantial equivalent of the material by other means, including by deposing Andrea Stemple, other co-employees, and the human resources representative. Presumably, Stemple will not answer any questions posed to her which implicate the attorney-client privilege or work product. It would be unreasonable to assume Stemple would provide information at her deposition, when the SG defendants object to providing it now. It is also conceivable that the investigation file may contain relevant information regarding co-workers, the nature of which plaintiff is unaware. Accordingly, plaintiff has met her burden under CPLR 3101(d)(2).

Assuming for purposes of this motion that the investigation file was compiled by Andrea Stemple, and, is therefore work product, the privilege was waived. The work product privilege may be waived by reason of the at-issue doctrine (see Searle & Co. v Penne & Edmonds L.L.P., 308 AD2d 404 [1st Dept 2003]). The at-issue doctrine is based on the idea that where a party places the subject matter of a normally privileged communication at issue, or, where invasion of the privilege is required to determine the validity of the claim or defense and the

application of the privilege would deprive the adversary of vital information, fairness requires the finding of waiver (see New York TRW Title Ins. Inc. v Wade's Canadian Inn and Cocktail Lounge, Inc., 225 AD2d 863 [3d Dept 1996]; Bank Brussels Lambert v Credit Lyonnais (Suisse SA), 210 FRD 506 [SDNY 2002]). Thus, for instance, where party affirmatively places his or her mental state at issue in an action, the physician-client privilege is waived (see Bobrowsky v Toyota Motor Sales USA, Inc., 261 AD2d 349 [2d Dept 1999]). Although the Court has not found any state precedent, in the context of this type of action, federal cases provide guidance (see Worthington v Endee, 177 FRD 113 [NDNY 1998] [defendants may not use the work product doctrine as a shield and a sword; employer's investigation report was ordered to be produced in full as a result of employer asserting an affirmative defense maintaining that it took appropriate remedial actions in response to plaintiff's harassment complaint]; see also McGrath v Nassau Co. Health Care Corp., 204 FRD 240 [EDNY 2001] [plaintiffs' motion to compel production of the defendants' investigation file was granted; neither the attorney client nor the work product privilege applied since the reasonableness of the investigation into allegations of harassment was placed at issue by the employer]; Brownell v Roadway Packaging System, 185

FRD 19 [NDNY 1999] [same]).³ Even a cursory review of the SG defendants' memorandum of law in opposition to this motion indicates the SG defendants' position is that plaintiff's case must fail because they took "immediate and adequate measures to ensure that the behavior would cease." (Defendants' Memorandum of Law In Opposition to Plaintiff's Motion to Compel The Investigation File at 2). Accordingly, because the SG defendants placed the investigation at issue, and defends themselves on that basis, fairness requires a finding of waiver. It is hereby

ORDERED that the motion is granted in its entirety and the SG defendants are directed to turn over the requested documents within 10 days of receipt of a copy of this Decision and Order, with Notice of Entry.⁴

This Constitutes the Decision and Order of the Court.

Dated: November 27, 2006

ENTER:

Curt J. Good
 J.S.C.
 FILED
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 COURT REPORTER

³Although the SG defendants argue that production of the investigation file is premature because they have not yet answered, review of defendants' motion to dismiss evidences that the reasonableness of the investigation is a central defense in the case and has been placed at issue by them.

⁴The SG defendants are directed to redact any social security numbers and residential addresses prior to production.