STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARK KOWALCZYK,

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 0106085762
INDEX NO.:2106-06

BONNIE L. MCCULLOUGH, RANDY MCCULLOUGH, AND, NEW YORK STATE FUNERAL DIRECTORS ASSOCIATION, INC.,

Defendants.

Albany County Supreme County All Purpose Term, July 11, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff brings this motion to compel discovery pursuant to CPLR § 3124 of Defendant,

Bonnie McCullough's medical records and the investigative report, attachments and findings of Lois Schlissel, Esq. (hereinafter the Schlissel Report). Defendant, Bonnie McCullough opposes the motion as to her medical records and takes no position as to the Schlissel Report. Defendant, New York State Funeral Directors Association, Inc.(hereinafter the Association), opposes the motion as to the Schlissel Report and takes no position as to Ms. McCullough's medical records.

After fully reviewing the record, this Court denies both of Plaintiff's motions.

On April 1, 2005, Defendant, Bonnie McCullough, who was employed as the New York State Funeral Directors Association's Executive Director provided the members of the Association's Executive Committee with a three page letter complaining that Plaintiff, Mark Kowalczyk, a member of the Board of Directors, had continually harassed her for almost a year regarding their prior sexual relationship, her employment and her new marriage. Anticipating that Ms. Mcullough's allegation could lead to litigation on any number of fronts, the Executive Committee had its attorney, Lois Schlissel, Esq., prepare a report in which she investigated the allegations and made a legal recommendation as to how the Committee should proceed. Plaintiff was subsequently removed as a member of the Board of Directors on May 1, 2006 via a special board meeting for reason of his having harassed Ms. McCullough and has brought the above action alleging that statements by Ms. McCullough and member of the Executive Committee amounted to libel and defamation.

This Court notes initially that Plaintiff's motions to compel disclosure must fail as procedurally defective. Instead of complying this Court's protocol for resolving discovery disputes (established by stipulation on August 26, 2006 at a preliminary conference), Plaintiff waited to until the last day of discovery to file a motion to compel discovery of items that were

the subject of controversy.

Moreover, Plaintiff's motion to compel discovery of Ms. McCullough's medical records constitutes an improper motion to reargue this Court's April 3, 2006 Decision denying discovery of Ms. McCullough's medical records on the grounds that "Defendant has neither asserted the condition through a counter-claim nor as an excuse for any conduct." Although, Plaintiff's motion to compel discovery of the medical records is not couched in the terms of reargument, it does assert a change in circumstance in that Ms. McCullough has acknowledged seeking medical attention to deal with the trauma of prolonged harassment at her workplace when directly questioned about such medical treatment by Plaintiff's attorneys during deposition. This Court notes that Plaintiff had conducted the referenced deposition prior to his original motion.

Nonetheless, Plaintiff's contention that Ms. McCullough placed her medical history at issue in this litigation merely by mentioning it when she complained to her employer about Plaintiff's harassing her and then by answering questions about it honestly is without merit (*Dillenbeck v. Hess*, 73 N.Y.2d 278 [1989]). The health ramifications of the alleged harassment are immaterial to any affirmative defense raised by Ms. McCullough, namely that Plaintiff did harass her as an employee and that she was within her rights to complain about the harassment.

Further, Plaintiff's procedurally barred motion to compel disclosure of the Schlissel Report also fails on the merits because it is shielded pursuant to CPLR § 3101(c) as attorney work product and also by attorney-client privilege. Despite Plaintiff's contention that the Schlissel Report is a multi-purpose document and accordingly not shielded as attorney work product (*Vandenburgh v. Columbia Memorial Hosp.*, 91 A.D.2d 710 [3d Dept 1982]), the report was not prepared in the course of regular business, but instead was compiled after an event that

would reasonably cause the Executive Committee to fear litigation and was prepared for the purpose of making legal decisions to avoid and minimize such litigation (*Gavigan v. Otis Elevator Co.*, 117 A.D.2d 941 [3d Dept 1986]). Plaintiff also claims that to the extent that the Schlissel report is privileged communication between the Executive Committee and its attorney, Lois Schlissel, Esq., that privilege has been waived via disclosure to unidentified third parties. Yet, Plaintiff presents no evidence of disclosure. Although, the findings were summarized for the Board of Directors, there is no evidence that the Board was ever shown the report. Likewise, the fact that individual interviewees signed their interviews to certify accuracy does not qualify as disclosure. Lastly, use of the report by a former member of the Executive Committee to prepare for her deposition cannot be considered disclosure since she comprised part of the body protected by attorney-client privilege. Even if these events had constituted disclosure, disclosure of a privileged document does not operate to waive privilege where, as here, the client intended to maintain the confidentiality of the document, took reasonable steps to prevent disclosure, and acted promptly to remedy disclosure, in this case, by objecting to use of the report during depositions (*New York Times Newspaper Div. of New York Times Co. v. Lehrer* ,300 A.D.2d 169 [1st Dept 2002]).

Despite his claims to the contrary, Plaintiff suffers no prejudice from the application of privilege in this case. Plaintiff's attempts to access a document which was prepared solely to deal with the legal fallout and potential liability stemming from a sexual harassment complaint against him amounts to a fishing expedition and runs contrary to the intent of attorney-client privilege, which is to foster an open dialogue between attorneys and clients as to legal rights and liabilities (*Id*). Plaintiff claims that the Association has waived its attorney-client privilege

merely by acting on legal advice, where normally such a waiver would require partial disclosure of content (*Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390 [1st Dept 1992]).

Accordingly, this Court denies Plaintiff's motions.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!
Dated: ~~July 2007~~ August 1, 2007
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Plaintiff's Notice of Motion, dated June 1, 2007.
2. Plaintiff's Affirmation, dated June 1, 2007 with Attached Exhibits A-X.
3. Defendants', Bonnie & Randy McCullough, Affirmation, dated June 20, 2007 with Attached Exhibits A-D.
4. Defendant, New York state Funeral Directors association, Inc, Affirmation, dated June 26, 2007 with Attached Exhibits A-H.
5. Plaintiff's Reply, dated July 9, 2007 with Attached Exhibits Y-FF.