

Bogota v University Club

2007 NY Slip Op 33336(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0114951/2005

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

Index Number : 114951/2005

PART 12

BOGOTA, SANDRA

114951/05

vs
UNIVERSITY CLUB

INDEX NO.

Sequence Number : 004

MOTION DATE

QS

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/12/07



BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

SANDRA BOGOTA, MARILYN RIVAS,
GLADYS VILLANUEVA, RUTH CUEVAS,
EMELINA APORTELA and CLAUDIA
CRISTANCHO,

DECISION/ORDER
Index No. 114951/05
Motions Seq. Nos.
004 and 005

Plaintiffs,

-against-

THE UNIVERSITY CLUB and MELQUISEDEC
GUZMAN,

Defendants.

BARBARA R. KAPNICK, J.:

Motions sequence numbers 004 and 005 are consolidated for disposition.

In this action, plaintiffs seek to recover damages against defendants The University Club and Melquisedec Guzman arising out of an alleged hostile work environment resulting from sexual harassment (first cause of action) and quid pro quo sexual harassment (second cause of action), against defendant Guzman for sexual assault and battery (third cause of action) and against defendant The University Club for negligent retention of Guzman (fourth cause of action).

Plaintiffs' allegations also gave rise to a criminal investigation by the Manhattan District Attorney's Office.¹ In response to the commencement of this action and the initiation of the criminal investigation, The University Club retained Thomas J. Curran, Esq. to conduct an internal investigation of the allegations and to render legal advice to the Club. As part of this investigation, Mr. Curran and his investigator, Evrard Williams, interviewed several employees of The University Club and others.

Plaintiffs' counsel then served a Subpoena *Duces Tecum* dated January 21, 2007 upon Mr. Curran seeking the production of

[a]ll notes (including typed or word processed versions of such notes and summaries) and recordings (including transcripts and summaries of such recordings) of interviews conducted by you or Evrard Williams of employees of The University Club from October 26, 2005 to June 16, 2006.²

¹ By letter dated March 8, 2006, Lisa M. Friel, Unit Chief of the Sex Crimes Unit of the Manhattan District Attorney's Office notified plaintiffs' counsel that "after doing an extensive investigation of your clients' allegations against Melquisedec Guzman, the District Attorney's Office has decided based on all the facts and circumstances, not to bring criminal charges against Mr. Guzman. This investigation is now closed."

² Plaintiffs' counsel represented on the record on May 16, 2007 that plaintiffs are solely seeking the production of documents and are not seeking to depose either Mr. Curran or Mr. Williams.

Curran and Williams now move for an order:

(1) pursuant to CPLR §§ 2304, 3101, 3122 and 4503 quashing the subpoena; or

(2) in the alternative, pursuant to CPLR § 3103, granting a protective order, on the grounds that (a) plaintiffs are attempting to obtain information expressly protected by the attorney-client privilege and work product immunity doctrine,³ and (b) the substance of the notes sought can be obtained through sworn testimony from employees of the University Club in the course of discovery.

Defendant The University Club also moves (under motion sequence number 005) for an order pursuant to CPLR § 2304 quashing the subpoena served on Thomas J. Curran, Esq.

The Court of Appeals has held that

an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer (citation omitted). Yet it is also the case that, while information received from third persons may not itself be

³ Curran contends that the choice as to who, when, what order, why and what questions to ask at the interviews reflected his conversations with his client, as well as his mental impressions and analysis of the situation, as reflected in his handwritten notes of the interviews.

* 5]
privileged (citation omitted), a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.

Spectrum Systems International Corporation v. Chemical Bank, 78 N.Y.2d 371, 379 (1991). See also, Brooklyn Union Gas Co. v. American Home Assurance Co., 23 A.D.3d 190 (1st Dep't 2005).

Plaintiffs argue that neither Curran and Williams nor The University Club have met their burden of proving the existence of a privilege in this case because: (i) Mr. Curran conducted the interviews in his capacity as an investigator and not as an attorney performing legal work (see, Civil Service Employees Association, Inc. v. Ontario County Health Facility, 103 A.D.2d 1000 [4th Dep't 1984], mot. for lv. to app. dismiss'd, 64 N.Y.2d 816 [1985]); and (ii) neither the Club nor Curran have identified through a privilege log the specific communications which are privileged and the basis for the assertion of that privilege.

Plaintiffs further argue that the movants have not established that the materials sought are protected under the attorney work product doctrine because they have not shown that the notes contain either Mr. Curran's legal analysis and/or trial strategy and have

[* 6]

not demonstrated that the information is available from other sources.⁴

Based on the papers submitted and the oral argument held on the record on May 16, 2007, this Court finds that Mr. Curran was not hired in order to render business or personal advice, or to do the work of a nonlawyer. Rather, the interviews in question were conducted in the context of the internal investigation and inquiry undertaken by Mr. Curran in order to render legal advice and counsel to his client, The University Club. See, Carone v. Venator Group, Inc., 289 A.D.2d 185 (1st Dep't 2001).

Accordingly, this Court finds that the disclosure sought by plaintiffs is protected by the attorney-client privilege and the attorney work product doctrine. See, Upjohn Co. v. United States, 449 U.S. 383 (1981).

Plaintiffs alternatively argue that The University Club has waived its privilege with respect to the communications in question (see, McGrath v. Nassau County Health Care, 204 F.R.D. 240 [E.D.N.Y. 2001]) because The University Club alleged in its fourth affirmative defense as follows:

⁴ According to plaintiffs' counsel, the information is not otherwise available because none of the witnesses are willing to sign an affidavit or testify in this case.

The Club has established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, including but not limited to:

- (i) a meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, and for taking appropriate action against who are found to have engaged in such practices;

* * *

However, the investigation at issue was not conducted in response to the filing of an internal complaint, but rather the commencement of the instant action and the initiation of a formal criminal investigation. Thus, this Court finds that The University Club has not placed Mr. Curran's participation in the investigation at issue in this case and has not otherwise waived its attorney-client privilege. See, Carone v. Venator Group, Inc., supra at 186.

The motions by Curran and Williams and by defendant The University Club are, therefore, granted and the subject subpoena is hereby quashed.

This constitutes the decision and order of this Court.

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Date: October 12, 2007


Barbara R. Kapnick
J.S.C.

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J.S.C.