

Schlisserman v PA Consulting Group, Inc.

2011 NY Slip Op 32912(U)

October 28, 2011

Supreme Court, New York County

Docket Number: 601631/04

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

Index Number : 601631/2004

SCHLISSERMAN, NEIL T.

VS.

PA CONSULTING GROUP

SEQUENCE NUMBER : 011

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

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Dated: 10/28/11


BARBARA R. KAPNICK
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
NEIL T. SCHLISSERMAN, RHEA A. COOK, and
MICHAEL A. PEREIRA

Plaintiffs,

- against -

PA CONSULTING GROUP, INC. and PA
HOLDINGS LIMITED,

Defendants.
-----X

BARBARA R. KAPNICK, J.:

Plaintiff, Rhea A. Cook ("Cook" or "plaintiff")
Notice of Motion for an Order compelling defendant PA Consulting
Group, Inc. ("PA" or "defendant") to respond to plaintiff's Notice
to Admit, dated February 18, 2011.

The Notice to Admit contains forty (40) sub-parts, which
pertain to Mr. David Ganesh, a former employee of defendant PA, who
allegedly engaged in inappropriate conduct towards female co-
workers.

The Notice to Admit requests that defendant admit the truth
of a number of matters, including, but not limited to, whether:

- Mr. Ganesh, during his employment with PA, was a "British subject," held a British passport or was a citizen of the United Kingdom;
- Mr. Ganesh was a consultant with PA and whether he served

DECISION/ORDER
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as a senior partner at PA during 2000;

- Complaints related to sexual harassment or the mistreatment of female employees were filed with PA regarding Mr. Ganesh during his employment and such complaints were contained in Mr. Ganesh's personnel file;
- Mr. Ganesh took explicit photos of himself and a female employee with a PA digital camera, other employees viewed such photos and found them offensive, there was a company investigation into such photos and there is reference to such photos in Mr. Ganesh's personnel file;
- a Court protective or restraining order was obtained in Massachusetts by a female PA employee against Mr. Ganesh;
- Mr. Ganesh was taken into custody by the Police based on an allegation made by a Ms. Sharon Els;
- Mr. Ganesh urinated in a cubicle of a former PA Human Resources employee;
- Mr. Ganesh was terminated for cause or transferred by PA to the United Kingdom;
- Mr. Ganesh's transfer enabled him to avoid prosecution in the United States; and
- Mr. Ganesh currently resides in England, is employed by another international consulting firm and resigned from PA.

[* 4]

Plaintiff contends that the information sought in the Notice to Admit is "important, if not vital, to plaintiff's cause of action for disparate treatment" (Vaneria Affirmation, dated April 25, 2011, ¶ 9) and argues that this information could substantiate her allegations of disparate treatment, by comparing the way she, an American employee, was treated to that of Mr. Ganesh, who she describes as a "British employee[]." *Id.*

In the first instance, the Court notes that PA did in fact respond to plaintiff's Notice to Admit when it served the "Defendant's Objections and Responses to Plaintiff's Notice to Admit," dated March 15, 2011.¹ Defendant asserts the following general objection:

PA objects to Plaintiff's Notice to Admit in its entirety on the grounds that the information sought is not material and necessary in the prosecution or defense of this action. (CPLR § 3101). To that point, by Order dated July 12, 2010, Judge Kapnick previously held that the subject matter of all requests in the Notice - personnel information relating to Mr. David Ganesh - is 'not material and necessary in the prosecution of this action' under CPLR § 3101. (7/12/2010 Order).

¹ The Court notes that, notwithstanding the fact that an Order, dated January 19, 2011, permitted plaintiff to serve a Notice to Admit on defendant regarding Mr. Ganesh, said Order also reflects defendant's reservation of its right to make any objections to such a Notice.

During oral argument held on the record on August 8, 2011, counsel for defendant argued that the information sought in the Notice to Admit will not result in the disclosure of evidence relevant to plaintiff's disparate treatment claim because Mr. Ganesh was not "similarly situated" to plaintiff, rendering the information sought non-discoverable. See e.g., *Mazella v. RCA Global Communications, Inc.*, 642 F. Supp. 1531, 1546 (SDNY 1986) ("[F]or evidence relating to other employees to be relevant, those employees must be similarly situated to plaintiff. Employees are not 'similarly situated' merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it." (internal citations omitted)).

The law is well settled that ". . . it is incumbent on the party seeking disclosure (here, [plaintiff]) to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on . . . [his or her] claims" *Herbst v. Bruhn*, 106 AD2d 546, 549 (2nd Dep't 1984).

Here, plaintiff has not met her burden of demonstrating that the information sought in the Notice to Admit will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the disparate treatment claim. There are no allegations that Mr. Ganesh reported to the same supervisor as plaintiff, was subject to the same standards governing discipline or engaged in conduct similar to plaintiff's. In fact, the allegations indicate that plaintiff was involved in an outside business venture and was terminated when she declined to follow PA's directive to shut the venture down.

Even if plaintiff did demonstrate that the information sought was relevant, the use of the Notice to Admit as a disclosure device for such extensive discovery of personal information regarding a non-party is not consistent with the device's prescribed use. It is well settled that a notice to admit

may be used only when the seeking party 'reasonably believes there can be no substantial dispute' about the matter and when it is within the knowledge of the other party or ascertainable by him 'upon reasonable inquiry.' The notice does not work, and even if ignored will not invoke a sanction, if the matters as to which admissions are sought are not attuned to any reasonable belief that they [are] free from substantial dispute. . . . It may not be used, in other words, for matters 'which constitute the very dispute of the lawsuit.'

Siegel, NY Prac., § 364 (internal citations omitted).

Accordingly, plaintiff's motion for an Order compelling defendant to respond to her Notice to Admit, dated February 18, 2011 is denied.

As discussed on the record on August 8, 2011, defendant's time to move for summary judgment is extended thirty (30) days from the date of service of this Order with Notice of Entry.

This constitutes the decision and order of this Court.

Date: *Oct 28*, 2011



Barbara R. Kapnick

J.S.C.

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