

Doe v Yeshiva Univ.

2025 NY Slip Op 31698(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 950012/2020

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART 18
Justice

JOHN DOE,
Plaintiff,

- v -

YESHIVA UNIVERSITY, MARSHA STERN TALMUDICAL
ACADEMY - YESHIVA UNIVERSITY HIGH SCHOOL FOR
BOYS,
Defendants.

INDEX NO. 950012/2020
MOTION DATE 03/06/2025
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73-86, 90-96,
were read on this motion to/for DISCOVERY

This is a case brought pursuant to the Child Victims Act. Plaintiff alleges he was
sexually abused by multiple employees of defendant Yeshiva University High School for Boys
(YUHS) when he was a student there in 1976-77, and that YUHS was managed, directed, and
controlled by Yeshiva University (Yeshiva). Plaintiff seeks discovery from non-party law firm
Sullivan & Cromwell LLP (Sullivan).

Yeshiva engaged Sullivan after public allegations regarding sexual abuse at YUHS were
made in December 2012. The scope of Sullivan’s engagement is disputed, but it is not disputed
that Yeshiva tasked Sullivan with performing an investigation and preparing a report about the
alleged abuse, among other tasks. According to its report, Sullivan described its engagement as
having two aspects:

“(1) perform a full and complete independent investigation into these reports and any
other reports of sexual or physical abuse of University students by University faculty or
employees, and the University’s response to any such reports; and

(2) review current policies and procedures, and make recommendations as to how those policies may be improved to prevent and respond to reports of abuse in the future.”

(Sullivan Report, attached as Exhibit A to Aaron D. Fine Aff., NYSCEF Doc. No. 75, at 2

[“University” is a defined term in the Sullivan Report referring to Yeshiva, YUHSB, and the

Samuel H. Wang Yeshiva University High School for Girls, which is not a party to this action]).

In the course of its investigation, Sullivan reviewed electronic and hard copy documents obtained from defendants and interviewed over 145 people, including

“every individual who was identified publicly or privately as a victim of sexual or physical abuse at the University, or who was otherwise identified as an individual who may have knowledge of such abuse (or reports thereof to the University). The Investigative Team [who] requested an interview with every former University employee who was identified as a perpetrator of sexual or physical abuse at the University, many of whom agreed to be interviewed.”

(Sullivan Report at 5). Sullivan also provided ways for people with knowledge of abuse at defendant institutions to contact them by email and telephone. “The Investigative Team requested an interview with every individual who contacted the Investigative Team through the above-referenced email and/or phone number who reported that he or she had any direct or indirect knowledge of any abuse at the University” (*id.* at 6).

As a result, in this action, plaintiff sent a subpoena which had been so ordered by this Court to Sullivan seeking its investigation file, including copies of reports of abuse, reports of defendants’ responses, the names of individuals interviewed during the investigation, copies of their statements or recordings of those interviews, documents reviewed by Sullivan during the investigation, and other materials from the investigation. According to Sullivan, the investigators reviewed defendants’ paper documents where they were stored, copied a selection of those documents, and took the copies for the investigation. Sullivan states that another copy set was made and provided to Yeshiva, which reviewed that copy set in searching for documents

responsive to the disclosure demands in this case. The electronic documents were collected into a review database, in which Sullivan ran various searches for relevant information, and to which Sullivan states it no longer has access. Sullivan also objected to the demands in the subpoena on a wide variety of grounds, including attorney-client privilege and the attorney work product doctrine, but produced an audio recording and transcript of one interview and approximately 37 various documents.

Now, in Motion Sequence Number 004, plaintiff moves to compel Sullivan to produce its file from the 2012-2013 investigation and to provide any portions of the file for which Sullivan asserts attorney-client privilege or attorney work product protection to the Court for *in camera* review. Sullivan opposes, claiming the materials it is withholding are protected either by the attorney-client privilege or as attorney work product, and contends an *in camera* review of the documents is unnecessary, because plaintiff's argument for disclosure is not based on their individual content.

Plaintiff takes the position that the interviews were not performed by Sullivan in its role as counsel, but in its role as independent investigator, which could be performed by a non-attorney and does not generate attorney work product. Sullivan contends that all the interviews were conducted and notes made in its role as counsel, as information-gathering was required in order to make recommendations to Yeshiva on policies and procedures, or for "other related services" that may be requested later, pursuant to their December 17, 2012, engagement letter (attached as Exhibit B to Affirmation of Julia M. Jordan, NYSCEF Doc. No. 94), and the original Yeshiva-Sullivan engagement letter dated December 14, 2008, in which Sullivan noted it

"anticipate[s] that we will be providing advice and assistance in connection with issues related to (i) Yeshiva University's governance policies, committees and

procedures and (ii) Yeshiva University's direct or indirect investments or accounts with, and potential claims against. Ascot Partners, L.P., Bernard L. Madoff Investment Securities LLC, their respective principals and/or related entities, as well as related services with respect to each of the foregoing that may be called for or requested as the work progresses”

(attached as Exhibit A to Jordan Aff., NYSCEF Doc. No. 93). At oral argument, plaintiff stated it would withdraw its other requests if Sullivan provided the names of individuals interviewed or spoken with during the investigation and any notes, statements, or recordings from those interviews.

CPLR 310(a) provides “[there] shall be full disclosure of all evidence material and necessary to the prosecution or defense of an action.” This provision has been accorded a liberal interpretation in favor of disclosure (*see Nitz v Prudential – Bache Secs.*, 102 AD2d 914, 915 [1st Dept 1984]). The Court of Appeals has declared that exceptions to the rule are to be interpreted narrowly (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). Sullivan contends that all notes or memoranda from the witness interviews are not trial preparation material but attorney work product, protected pursuant to CPLR § 3101(c), which simply states that “work product of an attorney shall not be obtainable.”

As the work product privilege is absolute, the doctrine is “narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy” (*Competitive Enter. Inst. v Attorney Gen. of New York*, 161 AD3d 1283, 1286 [3d Dept 2018]). “[A]ttorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy” (*Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 23 AD3d 190, 190 [1st Dept 2005] citing *ACWOO Intl.*

Steel Corp. v Frenkel & Co., 165 AD2d 752 [1st Dept 1990], *Hoffman v Ro-San Manor*, 73 AD2d 207 [1st Dept 1980]).

Sullivan contends it was acting as the institution's attorney in all its work for Yeshiva, based on the December 2008 engagement letter which hired Sullivan to work on the university's governance policies and procedures and provide "advice and assistance" with the university's financial entanglements with and possible claims against, Ascot Partners, L.P., and Bernard L. Madoff Investment Securities, LLC, and other related services (December 2008 Engagement Letter), and based on the December 2012 retention letter engaging Sullivan to make recommendations as to Yeshiva's policies and procedures related to sexual abuse. However, in its report, Sullivan noted the report was the product of an "independent investigation" (Sullivan Report at 1). Further, as quoted above, the Sullivan Report depicts the investigative function and the recommendation function as separated, indicating the investigation materials may not be the work product of lawyers acting in an advisory capacity.

Further, Sullivan argues everything in the interview notes reflects the authors' thinking as lawyers, so should be protected. However, as the Court of Appeals explained, "the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement 'work product'" (*People v Kozlowski*, 11 NY3d 223, 245 [2008] ; citing *People v Consolazio*, 40 NY2d 446, 453 [1976], see also Siegel, NY Prac § 347 ["The fact that a lawyer has taken a statement from a witness . . . does not transmute the statement into a 'work product': a lay person could have taken it"]; Weinstein-Korn-Miller, NY Civ Prac ¶ 3101.47 ["Where . . . statements of witnesses could not reveal legal analysis or strategy by their disclosure, and legal training might have been used but was not required for their creation, the courts should consider them trial preparations covered by CPLR 3101 (d)" rather than attorney work product covered by

CPLR 3101(c)). Questions asked during interviews, for example, “are not protected as attorney work product [if] those questions are not uniquely the product of a lawyer's learning and professional skills (*BDO USA, LLP v Franz*, 208 AD3d 1088, 1089 [1st Dept 2022]; *citing Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005] [“a review of the documents in question reveals that appellants' attorneys were acting as claims investigators, not attorneys”].

The Court must review the contents of the documents to evaluate whether they reflect legal analysis and/or research and whether they represent the product of a person acting as an attorney or if they could have been done by a non-lawyer in the capacity of investigator or scrivener. Sullivan bears the burden of showing the notes, memoranda, and other interview materials contain “elements of opinion, analysis, theory, or strategy” (*Geffner v Mercy Med. Ctr.*, 125 AD3d 802 [2d Dept 2015]).

If the documents are not found to be attorney work product, they are not subject to any privilege, as Sullivan has disclaimed any possibility that they are trial preparation materials. Even if they were, such materials are not absolutely privileged pursuant to CPLR 3101 (d), and can be ordered produced “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means” (CPLR 3101[d][2]; *People v Kozlowski*, 11 NY3d at 245). Plaintiff has diligently attempted to obtain the information he seeks about the defendants’ prior notice of the alleged abusers’ predilections from other sources to no avail and has established he would suffer undue hardship preventing him from obtaining his own interviews with these witnesses. If the Court determines the documents are not attorney work product but contain elements of “the mental impressions, conclusions, opinions or legal theories

of an attorney or other representative of a party concerning the litigation,” the Court will redact those elements (CPLR 3101[d][2]). The Court notes that the identities of the witnesses are not work product, as the Sullivan Report states the firm sought interviews with everyone “who was identified publicly or privately as a victim of sexual or physical abuse at the University, or who was otherwise identified as an individual who may have knowledge of such abuse” (Sullivan Report at 5). No discretion, analysis, or strategy is indicated the choice of whom to interview.

Plaintiff also complains that Sullivan has not produced a privilege log. Sullivan points to its responses and objections to the subpoena, in which Sullivan stated it would not produce broad categories of documents, such as “internal S&C communications and/or communications among S&C and T&M” (attached as Exhibit F to Fine Aff., NYSCEF Doc. No. 74, at 6). The section of Sullivan’s objections and responses to the subpoena in which it states objections based on privilege does not satisfy the requirements of a privilege log required by CPLR § 3122, which states:

“where [the recipient of a subpoena] withholds one or more documents that appear to be within the category of the documents required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.”

Sullivan's objection to the subpoena does not provide key features of a privilege log, as it does not notify the requesting party that responsive documents exist and are being withheld or provide sufficient information so that plaintiff can evaluate the claim of privilege. Sullivan attempts to cast its objection as a categorical privilege log, such as those allowed in the Commercial

Division, pursuant to NYCRR 202.70.11-b. That rule does not apply in this Court, which is not part of the Commercial Division. Even if that rule applied here, the objection does not contain all of the information required by NYCRR 202.70.11-b, such as a description of “the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted” (NYCRR 202.70.11-b[1]). Even if Sullivan had provided a categorical privilege log which had all the information required by NYCRR 202.70.11-b(1), as plaintiff objects to a categorical privilege log, NYCRR 202.70.11-b(2) provides that the requirements for a document by document privilege log in CPLR 3122 shall be followed, “unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3102 based upon the facts and circumstances before it.” This Court does not deem a protective order appropriate at this time. As plaintiff has stated his interest at this time is in the notes, memoranda, statements, or recordings from the interviews, Sullivan will be ordered to provide an item-by-item privilege log of any notes, memoranda, statements, or recordings from those interviews only. To provide complete information and to aid the Court in its *in camera* review, the Court clarifies that “the general subject matter of the document” included in the privilege log shall include the name of the interviewee and, if the logged document includes information about abuse at the defendant institutions, the years of the alleged abuse, as far as that information is included in the document.


Accordingly, it is hereby

ORDERED that plaintiff’s motion to compel is GRANTED IN PART in that on or before May 2, 2025, Sullivan shall provide an item by item privilege log of any notes, memoranda, statements, or recordings from the interviews it conducted during its investigation of allegations

of abuse at Yeshiva, including on the log the names of the interviewees and the years of any abuse noted in the logged documents; and it is further

ORDERED that on or before May 2, 2025, Sullivan shall provide the Court with a single-sided hard copy and a flash drive with a digital copy of the privilege log and any notes, memoranda, statements, or recordings from the interviews it conducted during its investigation of allegations of abuse at Yeshiva, for *in camera* review.

This constitutes the decision and order of the Court.

4/10/2025					
DATE			ALEXANDER M. TISCH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE