Moynihan v City of New York
2012 NY Slip Op 33078(U)
December 21, 2012
Sup Ct, New York County
Docket Number: 108817/10
Judge: Arthur F. Engoron
Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/3/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron, Justice

PART 52

Index Number ~~100757/2010~~ 108817/10
MOYNIHAN, NANCY
vs.
HEALTH AND HOSPITALS
SEQUENCE NUMBER : ~~002~~ 001
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. ______
MOTION DATE 9/12/12
MOTION SEQ. NO. ~~002~~ 001

The following papers, numbered 1 to ____, were read on this motion to/for quash subpoenas & cross-mot. to compel compliance

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). ______

Answering Affidavits — Exhibits ______ No(s). ______

Replying Affidavits ______ No(s). ______

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are decided in accordance with the attached memorandum decision.

FILED
JAN 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 26 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 12/21/12

______, J.S.C.
ARTHUR F. ENGORON
J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

NANCY MOYNIHAN,

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

Index Number: ~~108757/10~~ 108817/10

Motion Sequence Numbers: ~~002 & 003~~ 001 & 002

Submitted 9/12/12

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on motion ~~002~~ 001 to quash non-party subpoenas and cross-motion to compel compliance therewith; and on motion ~~003~~ 002 to compel disclosure:

Papers Numbered:

Moving Papers (~~002~~ 001) (Non-Parties' Motion to Quash)	1
Cross-Moving Papers (~~002~~ 001) (Plaintiff's Cross-Motion to Compel Non-Party Disclosure)	2
Opposing Papers to Motion (~~002~~ 001) (City of New York)	3
Moving Papers (~~003~~ 002) (Plaintiff's Motion to Compel Disclosure from Defendants)	4
Opposing Papers (~~003~~ 002) (City of New York)	5
Reply Papers (~~003~~ 002) (Plaintiff)	6

Upon the foregoing papers, the motion to quash is granted and the cross-motion to compel compliance with subpoenas is denied; and plaintiff's motion to compel disclosure from defendants is granted solely to the extent set forth below.

General Background and Motion ~~002~~ 001

A good summary of the basic background of the instant litigation (at least from plaintiff's point of view) is set forth in the Preliminary Statement of plaintiff's Opposition Memorandum of Law of 6/15/12:

> Plaintiff Nancy Moynihan is a licensed registered nurse who was employed by the New York City Health and Hospitals Corporation (HHC) in the Office of Clinical and Health Services Research . . . . Her job responsibilities included securing compliance on the part of HHC personnel and facilities with federal, state and city regulations relating to human subject research conducted in HHC facilities. Her employment was abruptly terminated while she was in the process of securing compliance by Columbia University researchers conducting human subject research

FILED
JAN 02 2013
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
DEC 26 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

> at HHC's Harlem Hospital. Shortly before her termination, her compliance concerns were determined to be valid by two of the movant attorneys who prepared a Memorandum dated March 20, 2009 which, according to defendant Richard Levy, "substantially supported" plaintiff's concerns. Shortly after that, movant attorneys attended a March 24, 2009 meeting at Harlem Hospital at which plaintiff was specifically told that the compliance concerns were valid. When she . . . attempted to follow up, within two weeks, her employment was terminated . . . . * * *

Relying on Labor Law §§ 740 and 741, and other provisions of law, plaintiff has commenced the instant "whistleblower" action. Not surprisingly, she has subpoenaed the attorneys, Linda Malek and Jill Anderson, of the firm Moses & Singer, who prepared the March 20, 2009 memorandum (denominated in a privilege log as "Memorandum from Linda Malek and Jill E. Anderson to Richard Levy re Regulatory and Compliance Issues) to produce the memorandum and other documents, and to testify about the March 24, 2009 meeting and other matters. She has also subpoenaed a third, long-term, outside HHC attorney, Peter Nadel, of the firm Katten Muchin Rosenman, to produce documents and to testify.

Malek, Anderson and Nadel now move to quash the subpoenas on the grounds that they are procedurally defective, overly broad and burdensome, and seek material protected by the attorney-client privilege, the attorney work-product doctrine, and the privilege covering "the self-review of medical institutions" set forth in Education Law § 6527(3). In support of their motion, movants state that they were not at all involved in plaintiff's termination from employment; that HHC's retention of them "was a classic consultation of counsel by a client seeking legal advice" and that "[t]he advice [they] gave was purely legal"; and that plaintiff has not exhausted her attempt to obtain some of the same material from HHC and the other defendants.

Whatever the exact current standard one must satisfy in order to obtain disclosure from a non-party, it is much higher than the liberal standard for obtaining disclosure from a party. Indeed, the general presumption is that non-parties are not required to disclose, and the burden is on the movant to demonstrate that they should.

An even higher burden is imposed upon a litigant seeking disclosure from non-party attorneys. Most materials they would have are privileged. Plus, there is a more philosophical reluctance to compel disclosure from attorneys. If the Court can be permitted a sports metaphor, football players know that they are subject to rough treatment, to being pummeled and brutalized and can expect to be "black and blue" on Monday. That comes with the territory (and the enormous salaries). On the other hand, coaches (like lawyers) and referees (like judges), do not sign up for that kind of treatment. In this Court's view, above and beyond the various privileges that attach to attorney-generated documents, they should not be haled into court, or into depositions, and they should not have to rummage through their files for the benefit of a third-party, without particularly good cause, such as acting affirmatively in the events at issue, which this Court finds lacking here.

According to plaintiff, citing Scholtisek v Eldre Corp., 441 F Supp 2d 459, 462 (WDNY 2006), a party invoking the attorney-client privilege has the burden of showing that there was "(1) a communication between client and counsel, which (2) was intended to be and was kept confidential, and (3) made for the purpose of obtaining or providing legal advice." The only aspect of this formula that is at issue here is whether the communications at issue were kept confidential.

Defendant Richard Levy was a Vice President and the General Counsel of HHC during the events here in issue. On August 4, 2011, some time after his retirement (which he denies was related to said events), plaintiff deposed him. As here relevant, he stated that the March 20 report "substantially supported" plaintiff's claims that HHC and/or its affiliates failed to comply with all laws, regulations, etc. Plaintiff argues that this waived the privilege attaching to the March 20 Report.

This argument is unavailing for several reasons. First and foremost, it is hornbook law that a former employee may not waive the former employer's privilege. See generally, Radovic v City of New York, 168 Misc 2d 58, 60 (Sup Ct, NY County 1996). Second, Levy's testimony was not a "selective tactical" disclosure; indeed, it apparently ran against his and his former employer's legal interests. Finally, it did not evince the casual revelation to outsiders that often vitiates a privilege. Deeming Levy's testimony a waiver would dampen the free and open communication that the attorney-client privilege is designed to foster and protect, with minimal value to this single lawsuit.

Plaintiff argues that the March 20, 2009 memo and related documents should be discoverable because they are "material and necessary to the prosecution of this action" and "matter[s] of public concern." They are and they are, but they are still privileged. This Court believes that "The Whistleblower Law" embodies a strong, admirable public policy; but the legislature did not junk the attorney-client privilege in the process of promulgating it. Communications about illegal (and/or immoral) acts are still subject to the attorney-client privilege, as long as the communications were not in furtherance of such acts (which is not alleged here).

Plaintiff relies on the general principle that the attorney-client privilege is waived "when persons collectively seeking counsel, allied in a common legal cause, and sharing confidential communications, become adversaries." That makes sense; but that is not what happened here. Plaintiff was not seeking legal counsel from Katten Muchin Rosenman and from Moses & Singer; only defendants were.

Plaintiff argues (Reply Affirmation ¶ 36) that parties "cannot produce part but not all of the documents on the subject matter at issue." This overly-broad statement would not apply to a situation such as the instant one, in which there are a variety of e-mails, some in-house and having no connection to legal advice, and some to counsel for that exact purpose, even though all are on the same "subject matter."

Plaintiff argues that defendants, particularly Levy, viewed plaintiff's concerns as raising "compliance," as opposed to "legal," issues. However, the "compliance" at issue was with "law";

plaintiff states (Cross-Moving Memo at 12) that "the communications at issue ... were made for the purpose of securing compliance with applicable laws." Assuming that plaintiff has delineated a valid distinction, there is no difference as far as the attorney-client privilege goes.

Plaintiff has failed to demonstrate that the meeting of March 24, 2009 was not covered by the attorney-client privilege, or that any "outsiders" were present so as to constitute a waiver of the privilege. Plaintiff states that "Moynihan, Pegoraro, HHC and Moses & Singer were present" at the March 24, 2009 meeting; in other words, a law firm and its client, including, of necessity, its client's employees. Note that Columbia University, a subject of the meeting, was not present.

Plaintiff's cross-motion seeks to compel movants to comply with the subpoenas. It is hornbook law that neither parties nor a court must cull through a request for information that seeks a host of non-discoverable materials to find some that are. Here, most of the materials sought are privileged and thus, the instant cross-motion is denied without prejudice to serving subpoenas that do not seek material that is largely protected by the attorney-client, attorney work-product, and Education Law § 6527(3) privileges, as discussed herein.

At this time, and without prejudice, the Court rejects plaintiff's request for an *in camera* inspection, on the grounds that it is unwarranted and unnecessary.

The Court notes in passing that earlier, non-prejudicial defects as to form in the subpoenas have been cured.

Motion ~~003~~ 002

Defendants are hereby directed to produce, by 1/31/13, the following documents (listed in no particular order):

1. Electronically Stored Information generated by a proper electronic search using the agreed upon search terms (if the parties cannot agree on the search terms defendants will use [see Moving Exh. M], they are to consult with each other and, if necessary, the Court (646-386-3181);

2. Audits prepared by plaintiff, and/or Pegoraro, of human subject research protocols conducted by Columbia University researchers at Harlem Hospital;

3. A December 17, 2008 letter to Columbia University from the Office of Clinical and Health Services Research ("OCHSR") suspending human subject research by Columbia researchers at Harlem Hospital;

4. A March 9, 2009 e-mail from respondent Nadel to Columbia rescinding the OCHSR determination to suspend human subject research at Harlem Hospital;

5. An e-mail from Columbia researcher Wafaa El-Sadr opposing the suspension of her human subject research at Harlem Hospital;

6. An affidavit of compliance, as set forth in the parties' 4/18/12 stipulation (Moving Exh. S).

Defendants are hereby directed to produce the following persons for depositions:

A. Sal Russo or Wayne McNulty;

B. Alan Aviles.

Defendants have apparently already agreed to Items 1, 6, A, and B. Russo, and/or McNulty, and Aviles may, at their depositions, invoke any appropriate privilege(s). Aviles may know some relevant facts, as Pegoraro e-mailed him on 2/4/09 (Moving Exh. W) that "We need help. No one is taking the research suspensions seriously at Harlem." If, as defendants claim, he knows little then the deposition should be relatively brief, and he can quickly return to his many duties. The Court notes in passing that plaintiff's claim that in her 5/25/11 Preliminary Conference Order Justice Kern ordered defendants to produce Aviles for a deposition is problematic given that he is not mentioned by name (at least as best as this Court can read the in-places-hardly-legible photocopy thereof).

Items 3, 4, and 5 were to or from Columbia, a non-party, defeating any potential (there does not appear to be any actual) claim of privilege.

If defendants do not have any copies of plaintiff's "audit reports," and if the non-party, attorney respondents do, then defendants shall either obtain and produce them or have respondents produce them; or, alternatively, respondents shall produce them of their own accord. These reports do not appear privileged (and defendants do not appear to be claiming that they are), and it is hornbook law that non-privileged documents do not become privileged just by being shipped off to counsel.

Based on the foregoing, Motion ~~002~~ 001, seeking to quash the subpoenas, is granted; the cross-motion thereto is denied; and Motion ~~003~~ 002 is granted to the extent set forth herein.

Dated: 12/21/12

FILED
JAN 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

Arthur F. Engoron, J.S.C.