

**Ford v Rector, Church-Wardens, Vestrymen of
Trinity Church in the City of N.Y.**

2013 NY Slip Op 33215(U)

February 13, 2013

Sup Ct, Bronx County

Docket Number: 301747/09

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

* 1]

2-19-13

PART 11

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

FORD, BARBARA

Index No. 0301747/2009

-against-

Hon. ~~ALBERT T. TUTT~~ Laura G. Douglas

RECTOR, CHURCH-WARDENS

Justice.

The following papers numbered 1 to _____ Read on this motion, REARGUE/RENEW/RESETTLE/RECONSIDER
Noticed on September 27 2012 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the attached memorandum Decision/Order.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 2 / 13 / 13

Hon. LGD
~~ALBERT T. TUTT~~
JUDGE LAURA G. DOUGLAS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 301747/09
Motion Calendar No.
Motion Date:

BARBARA FORD,

Plaintiff,

-against-

RECTOR, CHURCH-WARDENS, VESTRYMEN OF
TRINITY CHURCH IN THE CITY OF NEW YORK,
THE PARISH OF TRINITY CHURCH,
TRINITY REAL ESTATE, and JENNIFER CAMPBELL,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to reargue and/or renew:

<u>Papers</u>	<u>Numbered</u>
Defendants' Notice of Motion to Reargue and/or Renew, Affidavit of Michael A. Kalish, Esq. dated August 15, 2012 in Support of Motion, and Affidavit of Kenneth Cummings dated August 15, 2012 in Support of Motion.....	1
Defendants' Memorandum of Law in Support of Motion by Carrie Corcoran, Esq. dated August 15, 2012.....	2
Affirmation of Carrie Corcoran, Esq. dated August 15, 2012 in Support of Motion and Exhibits ("A" through "L").....	3
Affirmation of Mahima Joishy, Esq. dated September 9, 2012 in Opposition to Motion and Exhibits ("1" through "8").....	4
Plaintiff's Memorandum of Law in Opposition to Motion by Denise K. Bonnaig, Esq. dated September 9, 2012.....	5
Affidavit of Denise K. Bonnaig, Esq. dated September 9, 2012 in Opposition to Motion.....	6
Supplemental (Reply) Affirmation of Carrie Corcoran, Esq. dated September 26, 2012 in Support of Motion and Exhibits ("L" through "Q").....	7
Defendants' Reply Memorandum of Law in Support of Motion by Carrie	

Corcoran, Esq. dated September 26, 2012..... 8

After due deliberation upon an in camera inspection, the Decision/Order is as follows:

The defendants move to reargue and renew their application that certain items are shielded from discovery. That motion was denied by this Court’s Decision and Order dated July 3, 2012. The defendants object only to the ruling that these items are not privileged as material prepared in anticipation of litigation. The motion to reargue is granted. Upon reargument, the Court adheres to its initial decision. The motion to renew is granted. Upon renewal, the Court adheres to its initial decision.

The contested material consists of documents to and from an investigator’s office (“Gryphon”) retained by the defendants to look into certain scurrilous anonymous facsimiles received by defendant Trinity Church in January 2009. The plaintiff had filed a charge with the New York State Division of Human Rights (“SDHR”) on July 16, 2008 and instituted the instant lawsuit on March 4, 2009. After her termination, the plaintiff amended her complaint to allege that defendant Trinity Church harassed her during this investigation and fired her in retaliation for prosecuting these claims. The defendants argue that the investigative material was compiled in furtherance of and during the pendency of the plaintiff’s litigation at the SDHR, and need not be disclosed.

Reargument is hereby granted solely on the issue of the appropriate standard to assess whether documents with multiple purposes deserve to be immune from discovery by way of the privilege attached to material created in anticipation of litigation. The defendants contend that this Court applied too stringent a standard in making this determination. In addition, they submit that this Court overlooked or misapprehended the significance of the litigation pending before the SDHR. The defendants argue that the similarities between the content of the faxes and the allegations made in the plaintiff’s complaint spurred the investigation.

According to the defendants, the investigation revealed that the plaintiff was implicated in transmitting the faxes. They acknowledge that the plaintiff was terminated “for her involvement in sending the anonymous faxes and for her dishonesty during the fax investigation.” Of course, the plaintiff alleges that this was merely the pretextual reason for her termination. While the information unearthed by the investigation “fulfilled the business function of terminating the plaintiff’s employment”, the defendants contend that the material remains shielded from discovery since this was not the primary purpose for creating those documents. The defendants contend that the “key reason” for involving defense counsel (and counsel’s formal retention of the investigator) in uncovering the source of the faxes was that the

plaintiff was the “prime suspect”, and was embroiled in litigation against Trinity at that time. If the defendants’ suspicions were correct (which the defendants claim they were), they believed that the information gathered could impact the litigation pending at the SDHR. That is, “Trinity Church and its attorneys more generally wanted to understand how the fax related to the litigation, explore the tactics of its litigation opponent, and potentially uncover other useful information for its litigation defense.”

The defendants wish to distinguish that while the investigation led to the plaintiff’s termination, the principal motivation for the investigation was not related to employee discipline. They argue that they pursued the investigation “to determine whether their litigation opponent [the plaintiff] had engaged in a scurrilous attack on Trinity Church and Jennifer Campbell and to understand everything about that situation to provide the best defense in the pending litigation.” At most, the defendants allow that employee discipline was a secondary purpose of the investigation.

This Court’s decision cited the case of *Zampatori v. United Parcel Service*, 94 A.D.2d 974 [4th Dept. 1983], which held that items not solely created in anticipation of litigation do not get the benefit of the privilege. The defendants submit that the privilege applies where the primary purpose, not necessarily the sole purpose, for preparing the documents is in anticipation of litigation. (see *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 93 A.D.3d 574 [1st Dept. 2012] (privilege attached where documents primarily prepared in anticipation of litigation), *Sands v. News America Publishing, Inc.*, 161 A.D.2d 30 [1st Dept. 1990] (privilege attaches where the “primary motivating force for the gathering of the information was the impending litigation”, regardless of its other uses in the future), and *Hoening v. Westphal*, 52 N.Y.2d 605 [NY 1981])

However, the court in MBIA Insurance Corp. specifically noted that the documents sought were created by consultants retained by the party asserting the privilege to help provide legal advice. Such is not the case here. With respect to counsel’s involvement, the defendants contend that Trinity Church “reached out” to its attorneys about how to get to the bottom of the fax before it reached out to Gryphon. However, Kenneth Cummings (“Cummings”), who held various director-level positions in the human resources department for Trinity Church, testified that it was his suggestion to hire private investigators and that Gryphon was already a vendor for the Church. Moreover, Cummings admitted speaking with Gryphon outside of the presence of counsel to discuss how to go about finding the source of the fax. There is no indication that defense counsel played an essential role in the decision to investigate the anonymous faxes.

The defendants' attempt to distinguish *Zampatori* is unavailing. As in *Zampatori*, it is inconceivable that the primary purpose of this investigation was not to identify and discipline the employee(s) responsible for the bad act. Cummings testified that certain of the allegations contained in the faxes were known to him as scuttlebutt prior to receiving the faxes. In fact, the defendants had received a similar fax some six years earlier. Determining the source of the faxes was a business decision made by the defendants.

Even under the more lenient standard urged by the defendants, this Court concludes that the material here was not covered by this privilege. The defendants must show that they were motivated to gather the information primarily by the need to defend themselves from the plaintiff's claims at the SDHR. The critical period to examine is the time when the information was gathered in the first instance.

If the defendants launched the investigation primarily to assist their defense before the SDHR, some link between the plaintiff and the faxes would have been indicated. While defendants' counsel claims that Trinity Church tied the faxes to that litigation at the outset, the defendants' own witnesses made no such connection when deposed. Instead, they testified that the faxes did not tip off the sender, who was simply targeted as the "source" and not as any particular individual. The defendants made no mention that the plaintiff was more of a "prime suspect" than any other person.

Defendant Jennifer Campbell testified that when she first saw or learned about the fax, she did not suspect any individual of having been behind it, even though the plaintiff had by then made the accusations against her at the SDHR. Cummings testified that the only purpose for hiring Gryphon was to "find the source of the fax", since Trinity Church did not have the skills or resources to do so itself. He did not state that the investigation's purpose, primary or otherwise, was to counter the plaintiff's pending charges at the SDHR. At the time of Gryphon's retention, the source of the anonymous faxes had not been linked to the plaintiff. This belies the defendants' contention that the plaintiff was a prime suspect from the outset.

Cummings also testified that before Gryphon began its investigation, he gave them a road map indicating the information or evidence they should be seeking. Included in this road map were pictures of everyone in the finance department, not just the plaintiff. This is consistent with Cummings' testimony that he requested a list of all calls made from all extensions within Trinity from the point that the fax was received to as far back as possible. This included telephone records covering 186 employees at Trinity Church. Moreover, Cummings testified that he did not recommend that Gryphon delve into the plaintiff's family history as part of their investigation; rather, it was Gryphon's idea to do so. These actions are

inconsistent with the claim that the primary purpose of the investigation was in contemplation of litigation with this particular plaintiff.

Furthermore, in a letter to the Court dated April 29, 2010, defendants' counsel stated that the documents in Gryphon's file were not generated to provide a defense to the plaintiff's retaliation claim. Instead, the documents were generated as a result of Gryphon's efforts to trace the source of the anonymous faxes. In its letter to this Court dated March 31, 2010 accompanying the documents submitted for *in camera* review, defendants' counsel stated that Gryphon was not retained "to investigate plaintiff, but to identify the origin of a scurrilous anonymous fax". These representations also show that the link between the plaintiff and these faxes was not made at the time the investigation was launched.

If the defendants launched the investigation primarily to assist their defense before the SDHR, it would reason that the focus of the investigation would have somehow countered or rebutted the charges filed by the plaintiff with the SDHR. That complaint alleged that the defendants discriminated against the plaintiff on the basis of her race and age. The defendants do not explain how the authorship or transmittal of the scurrilous fax by the plaintiff would vindicate them or serve as a defense to these claims, which were based upon actions that took place some time before the fax was circulated.

The motion seeking renewal is hereby granted. The new items that the defendants submit are affidavits of Michael A. Kalish, Esq. ("Kalish affidavit") and Kenneth Cummings ("Cummings affidavit"). The defendants contend that there was no need to submit such affidavit(s) setting forth the litigation strategy underlying the investigation of the anonymous faxes since the plaintiff never disputed the "in anticipation of litigation" privilege. The defendants charge that this Court *sua sponte* raised this issue. However, the plaintiff served a discovery notice demanding production of these items. In response, the defendants had the burden to assert any privilege. In addition, in its letter to this Court accompanying the documents submitted for *in camera* review, defendants' counsel argued that the investigation was conducted "in anticipation of litigation". Accordingly, it should have been clear to the defendants that they had to defend their choice to assert this privilege. In any event, these new items do not lead to a different result.

The Kalish affidavit sets forth that defense counsel represented Trinity Church in connection with the plaintiff's administrative charge before the SDHR. Kalish avers that Cummings contacted defense counsel on or about January 5, 2009 after receiving the first set of scurrilous faxes on January 4, 2009. Kalish notes that they suspected that these faxes originated with the plaintiff, given the similarity between

certain allegations made in the faxes and those made by the plaintiff to Trinity Church and the SDHR. Kalish contends that a decision was made to investigate the source of these faxes in order to mount a defense to the claims pending in the administrative forum.

Cummings' affidavit states that he also suspected that the plaintiff was the source of the faxes based upon similarities between the contents of the faxes and that of the plaintiff's complaints. Cummings states that the investigator was retained to investigate the source of the faxes. Cummings concedes that the information uncovered in the investigation ultimately led to the plaintiff's termination. However, Cummings argues that the principal motivation for the investigation was not related to employee discipline; rather, the defendants' aim was to follow its attorneys' advice regarding litigation defense strategy. In support of this contention, Cummings avers that Trinity Church treated the information uncovered as confidential and did not share any of it with persons not involved in making decisions relating to the ongoing litigation with the plaintiff.

The Court acknowledges the defendants' dilemma in supporting their contentions on the original motion by disclosing their litigation strategy through discussion of the contents of the *in camera* documents. Since the defendants have now elected to support their argument in more detail, the Court will delve deeper into the contents of the material submitted to justify its holding that the purpose of the investigation was to discipline the responsible employee, rendering the privilege inapplicable.

The first correspondence from the defendants to Gryphon contained in the documents submitted for *in camera* review appears to be a facsimile dated January 6, 2009 from Cummings. While Cummings did forward the plaintiff's SDHR complaint to Gryphon on that same date, this investigative proposal specifically lists as a goal "to ascertain if there are other parties who should be considered as possible authors of this letter. Likewise, if there are others identified by Trinity management or human resources as possible authors, those individuals should also be looked at with closer scrutiny." In fact, Gryphon was given the names and photographs of over 50 employees in the Finance Department to assist in the investigation. Even some time later, Gryphon was still requesting the names, addresses, and ages of all of Trinity's African-American female employees who were Bronx residents. Also included in the materials provided to Gryphon were several employment applications for different employees, which Gryphon was still using to compare with the handwriting on the anonymous fax almost two months into the investigation. Gryphon's own documents reveal that over a month into the investigation, an employee other than the plaintiff was still being considered as the author of the anonymous fax.


By relying on the results of the investigation to terminate the plaintiff, the defendants negated the privilege by placing these items at issue, perhaps as a pretext for the termination (as alleged by the plaintiff) and on matters of credibility. No other reason is given for the plaintiff's termination. The defendants acknowledge that they would have waived the privilege had they asserted a defense that they intend to prove by use of the privileged material, since the plaintiff would then be deprived of vital information. The defendants concede that they relied upon the findings of the Gryphon investigation to terminate the plaintiff's employment, but have not relied, and do not intend to rely, on any particular document, witness, or privileged material to defend themselves in this action. This is contradicted by the defendants' multiple affirmative defenses that contend that their actions were appropriate: that any unlawful acts were not committed intentionally, with malice, and/or with reckless indifference to the plaintiff's protected rights; that all of the defendants' actions towards the plaintiff were nondiscriminatory, based on sound business judgment, and undertaken in good faith; and that the defendants established and complied with policies, programs, and procedures for the prevention and detection of unlawful discriminatory practices. While the defendants insist that they understood and respected the need for the investigation to be conducted in a fair, thorough, and objective manner to avoid any real or perceived retaliation against the plaintiff for petitioning the SDHR, their assertions of such good behavior cannot simply be taken at face value. Rather, they are to be tested through disclosure, and, perhaps, through the trier of fact. Of course, the plaintiff claims that the investigation was anything but fair, thorough, and objective, and that it did not conclusively tie the plaintiff to the anonymous faxes. She points out that the faxes contained several allegations that were not similar at all to the complaints she filed. The plaintiff may conduct her own investigation to challenge the sincerity of the reason given for her termination, but the motives and actions actually undertaken by the defendants' in terminating the plaintiff are clearly at issue.

Accordingly, this Court adheres to the determinations made in its decision and order dated July 3, 2012.

The foregoing constitutes the Decision and Order of this Court.

DATED:

2-13-13
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.