

<b>Haesler v New York Athletic Club of the City of N.Y.</b>
2016 NY Slip Op 32336(U)
November 28, 2016
Supreme Court, New York County
Docket Number: 153176/2013
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

ANDREW HAESLER

Plaintiff,

-against-

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

153176/2013

10/19/2016

002

NEW YORK ATHLETIC CLUB OF THE CITY OF NEW YORK,  
PETER DORAN, MATTHEW O'GRADY, and  
COLIN DROWICA,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to compel.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to compel and/or strike Defendant New York Athletic Club of the City of New York's (herein "NYAC") Answer, is granted to the extent of compelling discovery.

Plaintiff commenced this action for personal injuries he sustained during a fight that broke out at NYAC in the late evening/early morning hours of April 12 and April 13, 2012. (NYSCEF Doc #46). The Complaint alleges that on the night of the incident NYAC was negligent in overserving alcohol to the other Defendants who came down to the Tap Room where the fight took place, after attending a Mercury Society party on another floor of NYAC. Issue was joined and the parties proceeded with discovery.

On May 2, 2016, Plaintiff served NYAC with a post-deposition Notice for Discovery and Inspection regarding information disclosed during the depositions of Mr. Roger Simon, NYAC's general manager (who was assistant manager at the time of the incident), and Mr. Louis Machin, the bartender that worked the night of the incident. (NYSCEF DOC #51). Plaintiff states that NYAC responded on May 13, 2016, largely objecting to the demands as either privileged, not likely to lead to discoverable information, or overly broad and burdensome. (NYSCEF Doc #52). On May 25, 2016, Plaintiff sent a letter to NYAC requesting it consider the objections (NYSCEF Doc #53),

to which NYAC has failed to supplement its responses or produce the items requested.

Plaintiff now moves for an Order:

- (1) compelling NYAC to produce
  - (a) any complaints of any intoxicated persons at Mercury Society events from April 13, 2009 through April 13, 2012;
  - (b) any complaints of any prior fights at Mercury Society events from April 13, 2009 to April 13, 2012;
  - (c) the names and mailing addresses of Mercury Society Presidents from April 13, 2009 to April 13, 2012;
  - (d) a full and complete copy of the NYAC file for the April 13, 2012 fight as testified to by Roger Simon;
  - (e) copies of any meeting minutes from any board of governors meetings held from April 1, 2011 to April 1, 2013;
  - (f) a copy of Roger Simon's outlook schedule from April 1, 2011 to April 1, 2014, and;
  - (g) copies of any meeting minutes from any board of governors meetings from April 13, 2009 to April 13, 2012 referring to the Mercury Society or Mercury Society individual members; or in the alternative;
- (2) compelling NYAC to produce the items not objected to as privileged:
  - (a) complaints of intoxicated persons; (ii) complaints of fights; and board meeting minutes referencing the Mercury Society, and;
- (3) for the items that are objected to as privileged, compelling NYAC to provide a privilege log for such privileged items
  - (a) identifying the type of document objected to; (b) the subject matter of the document; (c) the date of the document, and; (d) the author and recipient of the document, and;
- (4) limiting the time for NYAC to provide the discovery sought within thirty days, and if the discovery is not provided within that time, striking NYAC's Answer.

Plaintiff contends that the discovery sought is material and necessary in preparing its case against NYAC. Plaintiff argues that NYAC's witnesses testified that incident reports were prepared in the ordinary course of its business, and that any incident reports noting accidents/occurrences involving drunk patrons/members should be produced because this goes to the element of "notice", and NYAC having notice of over serving or over consuming of alcohol on its premises. That prior incidents of intoxicated persons or fighting is relevant because the subject matter of the lawsuit involves fighting, intoxicated persons.

Plaintiff also contends that the Mercury Society was known as a partying interclub of NYAC, and that Mr. Simon testified that if there were any prior issues regarding the Mercury Society, it would be reflected in the Board of Governors meeting minutes. Plaintiff argues that this information would also be relevant to the issue of "notice", and that NYAC is inaccurately classifying this information as attorney-client privilege because an attorney was on the board of governors. Plaintiff also argues that NYAC's witnesses testified that a specific file pertaining to the fight was maintained by NYAC, that this information is relevant and discoverable, and that NYAC is preventing full disclosure of the circumstances that occurred leading up to, and during, the fight by claiming attorney-client privilege. To the extent that there is no information showing that NYAC had notice of prior fights and/or of intoxicated persons fighting, then NYAC should provide an affidavit attesting to the fact that there were no prior complaints of drunken patrons or of prior fights.

Plaintiff argues that interviews took place outside of the presence of any attorney, that Mr. Padian, the attorney in question, is a member of the club and a governor on the board, that any involvement Mr. Padian had was in his capacity as a member, that there is no retainer agreement or payments made to Mr. Padian reflecting he was retained by NYAC in defense of this litigation or to resolve the claims, and that no professional relationship exists between Mr. Padian and NYAC.

To the extent this Court finds there exists a privilege, Plaintiff argues that NYAC should provide a privilege log because NYAC has failed to identify any document, subject matter or date of any board of governors meeting minutes, or of any documents contained in the fight file, and has failed to provide an explanation as to its claims of privilege in divulging the names of Mercury Society presidents, and its employee's calendar. Plaintiff argues that past Mercury Society presidents would have information regarding any prior fights or intoxicated persons, that Mr. Simon's calendar would show the investigation of the fight and whether there was notice prior to the fight that there was any risk of a fight, and that the meeting minutes would show if there were any prior complaints of Mercury Society events.

NYAC opposes the motion arguing that Mr. Padian, a member of the club, was engaged as an attorney to provide legal advice to NYAC in preparation for litigation as a result of the incident, and that Plaintiff's overbroad demand for discovery seeks information that is either proprietary to NYAC, and/or privileged regarding NYAC's investigation in anticipation of litigation.

NYAC contends that the demands for any complaints of intoxicated or fighting persons at Mercury Society events for three years prior to the date of the incident are overbroad, irrelevant to the nature of the claims in this action, and are unlikely to lead to admissible evidence. That a demand limited to complaints of intoxicated persons at the Mercury Society event for the night of the incident may be relevant, however, NYAC did provide a response, despite the objection to the three year period, stating that there were no such records kept in the regular course of business.

**NYAC also contends that the request for the identity of the three Mercury Society presidents for the three years prior to the fight is proprietary in that NYAC is a private club and its membership is protected. That, however, NYAC did provide the identity of the president during the year of the incident and the year prior thereto, but anything beyond that is irrelevant.**

**As to the demand for the fight file maintained by Mr. Simon, NYAC argues that it contains significant privileged information that was prepared for this litigation, and that the demand for the entire file is overbroad without indicating what exactly Plaintiff is seeking. That a demand for Mr. Simon's Outlook schedule from April 1, 2011 to April 1, 2014 is overbroad, has no relevancy to the claims in this case, and would subject Mr. Simon to revealing personal and professional information which Plaintiff has not shown to be material and necessary to its case. That the demand for any board meeting minutes referencing the Mercury Society for three years prior to the incident is overbroad and seeks information that would include financial information, formation of the society or scheduled events that have no relevance to this litigation. That the demand for the Board of Governors meeting minutes from April 1, 2011 to April 1, 2013, is also an overbroad demand that does not limit the scope of the information sought, and that a response to such a demand would reveal private NYAC information that has no relevance to the litigation.**

**Plaintiff argues that the Board of Governors meeting minutes are relevant as to prior notice of careless management, the need for additional staffing at events, the careless service of alcohol, or the handling of intoxicated persons, and that redactions could be made to prevent the disclosure of financial information or a member's social security number. That NYAC's own witness testified at the deposition to a file being produced as a result of the incident, that claiming this file is privileged does not provide sufficient particularity that all of the materials should not be disclosed, and that at a minimum a privilege log for this "fight file", and/or any other discovery that NYAC claims as privileged, must be produced. Plaintiff also argues that if the information sought is privileged, NYAC has failed to move for a protective order, and therefore has waived any protections of the discovery sought.**

**CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.**

**Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D. 2d 257,**

608 N.Y.S. 2d 647 [1<sup>st</sup> Dept., 1994]. “The words ‘material and necessary’ as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity” (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, Allen v. Crowell–Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

Plaintiff’s demand for copies of any minutes from the Board of Governors meetings held from April 1, 2011 to April 1, 2013 is overly broad as it is not limited to a specific topic of information prior to the incident and would result in the disclosure of irrelevant and/or confidential information. Also, any Board of Governors meeting minutes which took place after the date of the incident is irrelevant to this litigation, and the Plaintiff does not provide any reasoning for it to be disclosed otherwise.

Plaintiff’s demand for copies of any minutes from the Board of Governors meetings held from April 13, 2009 to April 13, 2012 referring to the Mercury Society or Mercury Society individual members is also overly broad in that it is not limited to a specific topic of information. Plaintiff makes the argument that it goes to the issue of “notice” of any incidences of fights or of intoxicated persons, however that was not the specific demand made. Requiring the disclosure of all meeting minutes referring to the Mercury Society or its individual members would result in the disclosure of irrelevant and/or confidential information.

Plaintiff is entitled to the discovery of any complaints of fighting or intoxicated persons at Mercury Society events as this information would go directly to the issue of “notice”. However, to the extent that NYAC responded to this demand stating that no such records exists, and to the extent that Plaintiff is not satisfied with this response because of NYAC’s witness’ testimony that a “fight file” was produced as a result of this incident, Plaintiff is then entitled either to a Search Affidavit attesting to the fact that a search was conducted and no such records were found, or to an Affidavit from an individual with personal knowledge attesting to the fact that no such records are kept within the ordinary course of business at NYAC.

As for copies of Mr. Simon’s Outlook schedule from April 1, 2011 to April 1, 2014, this demand is also overly broad as it is not limited to a specific topic of information and would result in the disclosure of irrelevant and/or confidential information. Further, requesting disclosure of Mr. Simon’s Outlook schedule for a time period after the date of the incident would result in the disclosure of irrelevant information, and Plaintiff does not provide any reasoning for it to be disclosed otherwise.

As for the names and mailing addresses of Mercury Society Presidents from April 13, 2009 to April 13, 2012, NYAC contends that it has already provided the identity of the president during the year of the incident and the year prior thereto. The demand for the President’s information for the years 2009 and 2010 is irrelevant, and



**Plaintiff does not provide any reasoning for it to be disclosed otherwise.**

**As for a complete and full copy of the “fight file” produced as a result of the incident, Plaintiff is entitled to it as this information is discoverable and relevant to this litigation as it was developed as a direct response to the incident. NYAC has only broadly asserted attorney-client privilege to the “fight file” in that the file was prepared for this litigation. This is not sufficient to assert the entire file as being protected by attorney-client privilege. The burden of establishing privilege is on the party asserting it. Privilege must be narrowly construed and applied so that it is consistent with the asserted basis. (Spectrum Systems Intern. v. Chemical Bank, 78 N.Y. 2d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991] and John Blair Communications, Inc. v. Reliance Capital Group, LP, 182 A.D. 2d 578, 582 N.Y.S. 2d 720 [N.Y.A.D. 1<sup>st</sup> Dept, 1992]).**

**Attorney work product is privileged pursuant to CPLR §3101[c]. Attorney work product includes, “lawyer’s interviews, mental impressions and personal beliefs procured in the course of litigation...,” and they are absolutely exempt (Cocoran v. Peat Marwick Mitchell and Co., 151 A.D. 2d 443, 542 N.Y.S.2d 642 [1<sup>st</sup> Dept. 1989]). Attorney work product “is generally limited to materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or strategy.” Geffner v. Mercy Medical Center 125 A.D.3d 802, 4 N.Y.S.3d 283 [2<sup>nd</sup> Dept. 2015], citing Matter of New York City Asbestos Litig., 109 A.D.3d 7, 966 N.Y.S.2d 420 [1<sup>st</sup> Dept. 2013]). However, “the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement ‘work product.’” (Geffner, Supra, citing People v. Kozlowski, 11 N.Y.3d 223, 869 N.Y.S.2d 848 [2008]). Further, “the mere assertion that items constitute attorney’s work product or material prepared for litigation will not suffice.” (Graf v. Aldrich, 94 A.D.2d 823, 463 N.Y.S.2d 124 [3<sup>rd</sup> Dept. 1983]).**

**To the extent that NYAC claims that the entire file is protected as attorney-work product, then it must provide Plaintiff with a privilege log in response to its objection for disclosing it. CPLR §3120 provides in part that “...any party may serve on any other party a notice... (i) to produce and permit the party seeking discovery...to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served...” CPLR §3122(b) provides in part that “[w]henver a person is required pursuant to such a notice...to produce documents for inspection, and where such person withholds one or more documents...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.” Otherwise, NYAC must produce any non-privileged documents contained within the file.**

Plaintiff has not stated a basis to strike NYAC's Answer in the event that the discovery ordered to be produced is not provided to Plaintiff within thirty days, therefore this requested relief is denied.

Accordingly, it is ORDERED, that Plaintiff's motions pursuant to CPLR 3124 for an Order compelling Defendant NYAC to respond to Plaintiff's Notice for Discovery and Inspection dated May 2, 2016, to provide a privilege log, or upon failure of NYAC to provide the discovery ordered in this Order to strike NYAC's Answer, is granted to the extent of compelling Defendant NYAC to provide discovery, and it is further,

ORDERED, that Defendant NYAC provide Plaintiff the following within thirty (30) days of the service of a copy of this Order with Notice of Entry:

-Any documents related to complaints of fighting or intoxicated persons at Mercury Society events, or to the extent that no such records exist, then NYAC is to provide either a Search Affidavit attesting to the fact that a search was conducted and no such records were found, or an Affidavit from an individual with personal knowledge attesting to the fact that no such records are kept within the ordinary course of business at NYAC;

- A complete and full copy of the "fight file" produced as a result of the incident, and to the extent that NYAC claims that the file contains documents protected by attorney-client privilege, then NYAC must provide a privilege log for the items that are objected to as privileged (a) identifying the type of document objected to; (b) the subject matter of the document; (c) the date of the document, and (d) such other information as is sufficient to identify the document for a subpoena duces tecum, otherwise, NYAC must produce any non-privileged documents contained within the file,

and it is further,

ORDERED, that the remainder of the relief sought is denied, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on February 22, 2017, at 9:30 a.m.

ENTER:

Dated: November 28, 2016

  
\_\_\_\_\_  
MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST                       REFERENCE