In re Nieri

United States District Court for the Southern District of New York

January 20, 2000, Decided ; January 24, 2000, Filed

Civil Action No. M12-329

Reporter

2000 U.S. Dist. LEXIS 540 *; 2000 WL 60214

In the Matter of the Application of VINCENZO NIERI, for subpoenas pursuant to 28 U.S.C. § 1782

Disposition: [*1] Requests denied.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > Foreign Discovery

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

International Law > Dispute Resolution > Evidence > Assistance Obtaining Evidence

HN1[] **Methods of Discovery, Foreign Discovery**

A district court is vested with discretion to tailor discovery orders and to prescribe procedure for requests sought under *28 U.S.C.S. § 1782*. For example, the limits found in *Fed. R. Civ. P. 26(b)* on unduly burdensome discovery apply to *§ 1782* requests. The materials sought need not be discoverable under the laws of the foreign jurisdiction, although preventing circumvention of foreign restrictions on discovery constitutes one valid policy for the district court to consider in exercising its discretion.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > Self-Critical Analysis Privilege

HN2[] **Discovery, Privileged Communications**

Courts have formulated the "self-critical analysis" or "self-evaluative" privilege in order to protect a party's confidential analysis of its own performance when such analysis tries to correct problems or otherwise to serve the public interest. It assumes that disclosure of the analysis during litigation may deter future candid reviews.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > Self-Critical Analysis Privilege

Evidence > Privileges > General Overview

HN3[] **Discovery, Privileged Communications**

Federal courts can develop common-law privileges under the authority of *Fed. R. Evid. 501*.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Education Law > Discrimination in Schools > Employment Discrimination > Tenure Decisions

HN4[] **Discovery, Privileged Communications**

Except as otherwise required by the United States Constitution, as provided by Act of Congress, or in rules prescribed by the United States Supreme Court, the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. *Fed. R. Evid. 501*.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > General Overview

HN5[] **Discovery, Privileged Communications**

The judicial authority to create privileges must be exercised narrowly, given the competing and fundamental principle that probative evidence is generally entitled to disclosure at a public trial.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Education Law > Immunities From Liability > Official & Qualified Immunity

HN6[] **Discovery, Privileged Communications**

Courts are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN7[] **Discovery, Privileged Communications**

The party resisting discovery must make a detailed and convincing showing of the harm to be anticipated from the disclosure at issue in the particular case. Where a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate its need for the information, and the harm it would suffer from the denial of such information would outweigh the injury that disclosure would cause the other party or the interest cited by it.

Counsel: For Vincenzo Nieri, Plaintiff: Victor Genecin, Pavia & Harcourt, New York, NY.

For Bristol-Myers Squibb, Defendant: Bettina Plevan, Proskauer Rose LLP, New York, NY.

Judges: WHITMAN KNAPP, SENIOR U.S.D.J., UNITED STATES DISTRICT COURT (PART I).

Opinion by: WHITMAN KNAPP

Opinion

MEMORANDUM & ORDER

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Before us is the motion of Vincenzo Nieri to compel the production of documents by Bristol-Myers Squibb Company (hereinafter "BMS") in furtherance of lawsuits pending and another soon to be brought before Italian tribunals. Nieri claims that BMS subsidiaries fired him in retaliation for whistleblowing.

By Order dated July 9, 1999, the Hon. Deborah Batts of this Court granted Nieri's application for judicial assistance before a foreign tribunal, pursuant to 28 U.S.C. § 1782. Nieri served a subpoena on July 19, 1999, and document production ensued, but ten discovery requests remain in dispute.

I. Legal Standard

HN1[] A district court is vested with discretion to tailor discovery orders and to prescribe procedure for requests sought under 28 U.S.C. § 1782. For example, the limits **[*2]** found in *Federal Rule of Civil Procedure 26(b)* on unduly burdensome discovery apply to § 1782 requests. In re Application of Malev Hungarian Airlines, 964 F.2d 97, 102 (2d Cir.), *cert. denied*, *506 U.S. 861, 121 L. Ed. 2d 125, 113 S. Ct. 179 (1992)*. The materials sought need not be discoverable under the laws of the foreign jurisdiction, although preventing circumvention of foreign restrictions on discovery constitutes one valid policy for the district court to consider in exercising its discretion. *See* In re Metallgesellschaft AG, 121 F.3d 77, 79-80 (2d Cir. 1997) (*explaining* In re Application of G. Aldunate, 3 F.3d 54, 60 (2d Cir.), *cert. denied*, *510 U.S. 965 (1993))*.

II. The Specific Document Requests

At the outset, we note that -- as both parties concede -- BMS need only produce documents located within the United States.

A. Organizational Charts

BMS seeks limits on Nieri's Document Production Requests Nos. 1-6 for organizational charts. We agree that these requests as written are overly broad and would require the production of

perhaps dozens of irrelevant charts. We therefore limit production to charts (1) reflecting **[*3]** the positions of the individuals who participated in the decision to terminate Nieri's employment or those having information regarding his termination; and (2) charts reflecting those people to whom Nieri claims to have spoken or given information, and their superiors.

B. Certificates of Familiarity

Request No. 9 seeks production of all "Certificates of Familiarity and Compliance with the BMS Standards of Business Conduct" signed by Nieri and twenty other individuals, as well as certificates for "any person having executive responsibility for any activity of BMS in the Republic of Italy." We strike as vague and overly broad the last clause of this request. We find, however, that the Italian courts might attach legal significance to the signing or not signing of the certificates by employees, and therefore we order the production of these certificates stored in the United States for individuals specifically listed in Request No. 9.

C. Compliance Reports

BMS's Standards of Business Conduct purport to regulate employee conduct to conform it to various laws. The Standards promise that whistleblowers will not suffer retaliation. Nieri asserts that BMS subsidiaries have **[*4]** investigated and documented the manner in which they and their employees abide by these Standards. He demands any such documents in Request No. 15. Although we agree with BMS that such documents might be inadmissible at trial, they might well lead to the discovery of admissible evidence. Therefore, we order production relating to this request.

Requests Nos. 16-17 call for documents concerning violations of the law or the BMS Standards (1) by Nieri, (2) by those whose alleged misconduct Nieri reported, and (3) by those who initially told Nieri of such alleged misconduct. Again, we believe that such documents might lead to admissible evidence. The extent and circumstances of any wrongdoing, and the use to which BMS put information of such wrongdoing, might help to explain why the company fired Nieri. We order production relating to these requests.

Finally, we consider whether BMS should be required to deliver an in-house investigative report generated by its international director of security. BMS asserts two reasons why we should not compel such delivery: (1) The report is subject to the attorney-client privilege; and (2) it is subject to the self-evaluative privilege.

BMS's claim **[*5]** for attorney-client privilege is supported by the following assertions in the Declaration of John Glover, BMS's vice president of corporate security:

> The report was undertaken to determine whether BMS's Standards of Conduct or Italian law had been violated, in order to assess what steps, if any, were necessary to correct the situation and avoid future violations. The report was… provided only to select high level executives and corporate legal counsel. The report was prepared with the expectation that it would remain confidential, and at all times during the investigation and after, was, in fact, kept confidential.

This Declaration omits more than it asserts. It does not suggest that the international director of security ever asked BMS's general counsel for advice as to whether or how it should proceed in making the report, or that counsel had proffered such advice. Indeed, it does not suggest that counsel had even been aware that a report was being prepared until -- along with other BMS officers -- he received a copy of the final report. Our research has failed to disclose an authority even suggesting that the attorney-client privilege could apply to such facts. **[*6]** *See, e.g., In re Grand Jury Subpoena (2d Cir. 1979) 599 F.2d 504, 510-11* (even participation of the general counsel "does not automatically cloak the investigation with legal garb").

With respect to BMS's claim that the report fell within the "self-critical analysis" or "self-evaluative" privilege, we note that while neither the Supreme Court nor any circuit court has yet recognized such a privilege, several judges of this Court have done so. We do not have enough information before us, however, to determine whether we should apply the privilege in this case.

HN2[] Courts have formulated this privilege in order to protect a party's confidential analysis of its own performance when such analysis tries to correct problems or otherwise to serve the public interest. It assumes that disclosure of the analysis during litigation may deter future candid reviews. *See, e.g., Trezza v. The Hartford, Inc.* (S.D.N.Y. July 20, 1999) *No. 98 Civ. 2205, 1999 U.S. Dist. LEXIS 10925*, *2.

HN3[] Federal courts can develop common-law privileges under the authority of *Federal Rule of Evidence 501*. [1] The self-critical analysis privilege was first invoked in *Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970)*, **[*7]** *aff'd mem.*, *479*

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[1] ***HN4***[] Except as otherwise required by the Constitution… as provided by Act of Congress or in rules prescribed by the Supreme Court…, the privilege of a witness… shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

F.2d 920 (D.C. Cir. 1973), which protected from discovery in a malpractice suit the minutes of hospital staff meetings concerning ways to improve patient care. The *Bredice* court reasoned that an important public interest is advanced by allowing hospitals critically to evaluate the quality of care they provide without fear of enhancing future liability. This Court soon followed *Bredice* (the only available precedent) and recognized the privilege in a similar factual setting. *Gillman v. United States (S.D.N.Y. 1971) 53 F.R.D. 316*. In decisions over the next twenty years, some judges in this District extended the doctrine. *See, e.g., Mazzella v. RCA Global Communications, 1984 U.S. Dist. LEXIS 18166 (S.D.N.Y. 1984) No. 83 Civ. 3716, 1984 WL 55541*; *but see, e.g., Hardy v. New York News Inc. (S.D.N.Y. 1987) 114 F.R.D. 633, 640-41* (rejecting the privilege).

[*8] Since 1990, some doubt about the doctrine's continuing viability has arisen in light of the Supreme Court's analysis in *University of Pennsylvania v. EEOC (1990) 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571*. In that case, a professor argued that the university refused him tenure based on racial discrimination, and he demanded access to confidential peer reviews written during his application process. The university argued that if the materials were discoverable, peers would not give completely candid evaluations, compromising the integrity of the academic community. The Supreme Court rejected any peer review privilege in this context. The Court stated that ***HN5***[] the judicial authority to create privileges must be exercised narrowly, given the competing and fundamental principle that probative evidence is generally entitled to disclosure at a public trial. *493 U.S. at 189*.

Several subsequent decisions in this District continued to accept the self-critical analysis privilege but invoked it in a limited fashion, given the Supreme Court's pronouncements. *See, e.g., Troupin v. Metropolitan Life Ins. Co. (S.D.N.Y. 1996) 169 F.R.D. 546, 547-550* **[*9]** (Sweet, J.); *Chemical Bank v. Affiliated FM Ins. Co., 1994 U.S. Dist. LEXIS 2956*, at *5 (S.D.N.Y. Mar. 16, 1994) No. 87 Civ. 0150 *et al.*, *1994 WL 89292*, *2-4 & n.2 (Roberts, Mag. J.) (noting that the peer review privilege is "based largely on the same policy considerations as the self-critical analysis privilege"); *Abbott v. Harris Publications, 1999 U.S. Dist. LEXIS 11410* (S.D.N.Y. July 28, 1999) No. 97 Civ. 7648 (Martin, J.) (declining to extend privilege to kennel club's internal investigation of the processing of plaintiff's application to serve as a dog show judge since club's claim is "far less substantial" than the university's need for confidentiality in peer reviews); *Spencer v. Sea-Land Svc., Inc., 1999 U.S. Dist. LEXIS 12608*, at *4-6 (S.D.N.Y. Aug. 16, 1999) No. 98 Civ. 2817 (Dolinger, Mag. J). [2]

[*10] These opinions did not consider that the Supreme Court concentrated on a factor not present in many other cases, namely, Congressional preemption. Thus, the *University of Pennsylvania* case is further distinguishable. The Court found significant Congress's failure to establish a general medical peer review privilege when it enacted a 1986 statute which created qualified immunity for officials conducting such review. Congress apparently considered and rejected the assumption that the delivery of competent health care necessitates strict confidentiality of the review process. *See University of Penn., 493 U.S. at 189-92*. The Court concluded that, "We ***HN6***[] are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Id. at 189*. [3]

[*11] Perhaps the most cogent statement of a possible test emerging from these various decisions is found in Magistrate Judge Fox's opinion in *Trezza, supra*, at *2 (citations and internal quotation marks omitted):

> ***HN7***[] The party resisting discovery must make a detailed and convincing showing of the harm to be anticipated from the disclosure at issue in the particular case…. Where a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate its need for the information, and the harm it would suffer from the denial of such information would outweigh the injury that disclosure would cause the other party or the interest cited by it.

As above indicated, we do not feel that the record now before us is sufficient to permit us to decide whether the privilege should be recognized as here applicable and, if so, what limits we should place on it. As the next step, we order BMS within five days to deliver to chambers a copy of the report for *in camera* inspection.

III. Costs

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[2] Other post-1990 cases have applied the privilege without reference to *University of Pennsylvania. See, e.g., Flynn v. Goldman, Sachs & Co.* (S.D.N.Y. Sept. 16, 1993) *No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801* (Wood, J.); *UBS Asset Mgt. Inc. v. Wood Gundy Corp.* (S.D.N.Y. May 11, 1999) *No. 95 Civ. 5157, 1999 U.S. Dist. LEXIS 6786* (Stanton, J.); *Trezza, 1999 U.S. Dist. LEXIS 10925*, at *3-6 (Fox, Mag. J.).

[3] In *Roberts v. Hunt, 187 F.R.D. 71, 74-76 (W.D.N.Y. 1999)*, Magistrate Judge Foschio canvassed the Southern District of New York cases in favor of the self-evaluation privilege but concluded that the Supreme Court in *University of Pennsylvania* "implicitly rejected the rationale" for such a privilege. Although Magistrate Judge Foschio considered the Congressional preemption argument in a recent medical peer-review case, she did not do so in *Roberts. Cf. Syposs v. United States, 63 F. Supp. 2d 301 (W.D.N.Y. 1999)*.

Each side seeks costs related to this motion. *See* *Fed.* ***[*12]*** *R. Civ. P. 37(a)(4)*. Since Nieri made some attempt in good faith informally to resolve this dispute, and since BMS's objections to this motion are in some respects meritorious, we deny both requests.

SO ORDERED.

January 20, 2000

New York, New York

WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES DISTRICT COURT (PART I)

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