

People ex rel. Qui Tam v Bayrock Group LLC

2017 NY Slip Op 30358(U)

February 24, 2017

Supreme Court, New York County

Docket Number: 101478/2015

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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THE PEOPLE OF THE STATE OF NEW YORK
ex rel. Qui Tam "The Bayrock Qui Tam Litigation
partnership,"

DECISION AND
ORDER

Plaintiff,

Index No.
101478/2015

-against-

BAYROCK GROUP LLC, et al.,

Defendants.

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HON. ANIL C. SINGH, J.:

Defendants Julius Schwarz, Brian Halberg, Israel J. Weinreich (s/h/a Jerry Weinrich), Elliot Pisem and Adam Gilbert move for an order pursuant to 22 NYCRR 216.1: a) permitting (i) the moving defendants to file tax return documents (and/or supplemental affidavits or other documents giving specific income numbers and similar data derived from those tax returns) under seal and (ii) the parties to file papers referring to such tax returns under seal, with redacted copies to be publicly filed, and b) barring plaintiff/relator and its counsel from publicly disclosing the contents of the sealed documents. Plaintiff/relator opposes the motion and cross-moves for an order allowing the defendants to file tax returns under temporary seal so that plaintiff/relator could then move for unsealing,

including by redaction.

Separately, the New York Attorney General's Office has submitted a letter application asking the court to strike plaintiff/relator's affirmation dated February 10, 2017, contending that the relator's attorney – who represents relator and not the State of New York – improperly claims to represent that State itself and purports, without authorization, to express the positions of the State. Plaintiff opposes the State's letter application by letters dated February 15, 2017, and February 20, 2017.

Sealing

The moving defendants contend that their personal financial information will be subject to misuse if it is not protected by sealing and redaction.

In response, Frederick M. Oberlander, counsel for plaintiff/relator, states, "I ... represent the People of the State of New York in suing defendants, pursuant to the New York False Claims Act section 190, for damages arising from their tax fraud" (Oberlander Affirm., p. 1, para. 1). Counsel argues that defendants should not be permitted to seal their personal income tax returns as it would hinder the public from engaging in citizens' constitutional oversight over courts.

In New York, there is a strong presumption favoring public legal proceedings and against sealing files without good cause shown (Matter of

Twentieth Century Fox Film Corp., 190 A.D.2d 483 [1st Dept., 1993]). The First Department summarized the principles regarding the sealing of records in Applehead Pictures LLC v. Perelman, 80 A.D.3d 181 [1st Dept., 2010]. The Court wrote:

Uniform Rules for Trial Courts (22 NYCRR) section 216.1(a) provides that “a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof,” and requires the court to “consider the interest of the public as well as of the parties.” The presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public’s right to access, e.g., in the case of trade secrets. Thus, the court is required to make its own inquiry to determine whether sealing is warranted, and the court will not approve wholesale sealing of motion papers, even when both sides to the litigation request sealing. Since there is no absolute definition, a finding of good cause, in essence, boils down to the prudent exercise of the court’s discretion.

(Applehead, 80 A.D.3d at 191-92) (internal quotation marks and citations omitted).

“Although the term ‘good cause’ is not defined, a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action” (Mosallem v. Berenson, 76 A.D.3d 345, 349 [1st Dept., 2010]) (internal quotation marks and citation omitted). “A finding of ‘good cause’ presupposes that public access to the documents will likely result in harm to a compelling interest of the

movant” (id.).

Courts have consistently granted sealing orders when the information sought to be sealed touches on a matter traditionally treated confidentially, such as personal medical records (see, for example, John C. v. Martha A., 156 Misc.2d 222, 230-32 [N.Y. City Civ. Ct., 1992] (sealing the entire court file in a landlord/tenant matter because information about respondent’s HIV status was interspersed throughout the record)).

Like medical records, tax returns contain confidential, sensitive information. Medical records contain private information about our personal health. Likewise, tax records contain private information about our personal finances.

Here, defendants maintain that: a) many of the underlying tax return documents are jointly-filed returns; and b) the privacy interests of spouses who are not parties to this litigation are in jeopardy. Accordingly, we find that defendants have a legitimate expectation of privacy.

By contrast, the plaintiff/relator has not adequately identified any genuine, substantial public interest that would be served by public access to the non-public information of the defendants.

Where, as here, a sealing order preserves the confidentiality of materials involving the internal finances of a party and are of minimal public interest, good

cause has been shown for documents to be filed under seal (D'Amour v. Ohrenstein & Brown, LLP, 17 Misc.3d 1130(A) [Sup. Ct., N.Y. Co., 2007] (permitting defendants to file income tax returns under seal where returns included schedules pertaining to individuals who were not parties to the litigation)).

Relator/Counsel's Representation

The New York State False Claims Act allows a private person to bring a qui tam action to recover damages on behalf of such person and the State of New York. Here, the State by notice dated December 21, 2015, declined to intervene. Plaintiff by statute has the right and "responsibility" to prosecute the action (State Finance Law section 190(5)(a)).

The dictionary defines "attorney general" as "the chief law officer and legal counsel of the government of a state or nation" (American Heritage Dictionary, 3rd ed., p. 120). "The Attorney General of New York is the chief law enforcement officer of the state of New York" (In re Vargas, 131 A.D.3d 4, 28 [2nd Dept., 2015]). As such, the Attorney General represents the State in actions and proceedings, presents legal arguments on behalf for the State, and speaks for the State (see, for example, Gomez v. Evangelista, 290 A.D.2d 351, 352 [1st Dept., 2002]; U.S. ex rel. Lu v. Ou, 368 F.3d 773, 775 [7th Cir., 2004] ("The relator is technically not the government's lawyer"))).

While New York's False Claims Act permits plaintiff to bring this action "on behalf ... of the people of the State of New York" (State Finance Law section 190(2)(a)), plaintiff's counsel does not represent the State as only the Attorney General can represent the State, which has declined to intervene. In short, the relator's contention that he represents the State itself clearly conflicts with the definition and function of the Attorney General's Office. Accordingly, the relator has no authority to express the positions of the State in this matter.

Accordingly, it is

ORDERED that the motion to seal is granted, and the cross-motion for a temporary sealing order is denied; and it is further

ORDERED that the defendants are permitted to file copies of their confidential tax documents under seal (and other documents disclosing the contents of such tax documents), provided such redacted copies are served upon counsel for the plaintiff/relator; and it is further

ORDERED that thereafter, or until further order of this Court, the County Clerk shall deny access to such sealed documents to anyone (other than the staff of the Court or the County Clerk); and it is further

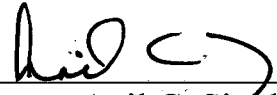
ORDERED that the plaintiff/relator and its counsel shall not reference the contents of the sealed tax documents in any public filing, or otherwise disclose

such contents, and shall file any documents so referencing such information under seal; and it is further

ORDERED that Frederick M. Oberlander is directed to file an amended affirmation (NYSCEF Doc. No. 83) within five business days identifying himself as counsel for the Relator and not the State.

The foregoing constitutes the decision and order of the court.

Date: February 24, 2017
New York, New York



Anil C. Singh