UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAFFLANE HOLDINGS, LTD. and ROBERT WYLDE,

Plaintiffs,

-against-

GAGOSIAN GALLERY, INC. and CHARLES COWLES,

Defendants.

ORDER

11 Civ. 1679 (DLC)(MHD)

THE METROPOLITAN MUSEUM and JAN COWLES,

Plaintiffs,

-against-

SAFFLANE HOLDINGS, LTD. and ROBERT WYLDE,

Defendants.

11 Civ. 3143 (DLC)(MHD)

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

By letter to the Court dated November 3, 2011, counsel for the defendant Gagosian Gallery in the Safflane Holdings v. Gagosian Gallery case, 11 Civ. 1679 ("the Safflane case"), requested, inter alia, two forms of relief: (1) that we expunge "from the record" all references in correspondence by the attorney for Ms. Jan Cowles, a plaintiff in the Metropolitan Museum v. Safflane Holdings case, 11 Civ. 3143 ("the Museum case"), purportedly specifying the

terms of a confidential settlement agreement between plaintiffs and the Gagosian Gallery in the Safflane case, and (2) that we issue an order prohibiting "any party or their respective counsel" from disclosing those terms in the future. The apparent focus of this request was to avoid disclosure by Ms. Cowles's counsel of the amount of money that the Gagosian Gallery had agreed to pay to settle the Safflane case.

By Order dated November 7, 2011 we denied this request. In doing so, we first observed that there was no "record" of any statements by counsel that could be subject to an expungement order, since the only written reference to settlement terms was in a letter to the court, which was not part of the court file. (Nov. 7, 2011 Order at 4). We further held that neither form of relief, including a gag order, had been justified:

> In any event Gagosian's application, insofar as it targets either prior correspondence or future statements by Ms. Cowles's attorney, fails because it is necessarily premised on the contention that Ms. Cowles's lawyer is bound by a confidentiality agreement between the parties in the Safflane case. Gagosian fails, however, to offer any basis for the implication that Ms. Cowles's counsel is bound by the terms of such an agreement. In this respect we note that the settlement agreement in question was between the litigants in the Safflane case, to which Ms. Cowles was not a party, and Gagosian proffers no evidence that Ms. Cowles (by her attorney-in-fact) or her counsel was a signatory to that agreement or was otherwise bound by a separate confidentiality requirement.

(Id. at 4-5). We further specified that "[i]f this gap in evidence is attributable to inadvertence by counsel, Gagosian will be free to make a more substantial application to keep any description of the settlement terms under seal." (Id. at 5 n.4).

Two weeks later, counsel for Gagosian applied by letter for reconsideration, citing footnote four of our November 7 Order. In substance, she asserted, "upon information and belief," that during a public joint conference with the court in both the Safflane and the Museum cases ("the October 7 conference"), Ms. Cowles's attorney had learned of the settlement terms in the Safflane case "by reading a memorandum summarizing the settlement over the shoulder of the Met's counsel, who was provided with that memorandum by counsel for the Safflane Plaintiffs on a confidential basis." (Nov. 21, 2011 Letter to the Court from Hollis Gonerka Bart, Esq. at 2). She went on to assert that "court-ordered mediations are confidential," and hence that Ms. Cowles and her lawyer were bound to keep these terms secret. (Id.). In her submission, she did not proffer any evidence pertinent to any issue raised by her initial request, including the obligation, if any, of Ms. Cowles and her attorney to be bound by a confidentiality provision in the Safflane case settlement agreement.

In response, Ms. Cowles's counsel noted, inter alia, that the October 7 conference was not a private mediation session, and he denied that he had improperly sought out the terms in question. (Nov. 23, 2011 Letter to the Court from David R. Baum, Esq. at 2-3). Rather, he represented that even before the conference and afterwards as well -- before Safflane and Gagosian entered into a binding agreement -- Safflane's attorney had kept him abreast of the negotiation between those two parties. (Id. at 2). He also represented that he had made clear to counsel for both negotiating parties that he and his client were not agreeing to confidentiality unless Gagosian resolved an entirely separate claim that Ms. Cowles had against the Gallery -- one not asserted in either of these cases and which she intended to pursue in state court. (Id.). That claim was not settled, and we understand that Ms. Cowles has recently filed suit in state court on that claim.

As for the events of the October 7 conference, Ms. Cowles's counsel reports that Safflane's attorney gave a copy of the settlement terms from the Safflane case to the Museum's attorney, and that he also asked Safflane's lawyer for a copy. According to Ms. Cowles's counsel, plaintiffs' counsel in the Safflane case, Mr. Golub, did not respond to this request. He then advised Mr. Golub that he would read the terms on the Museum attorney's copy, a

representation to which Mr. Golub did not respond. (Id.).

We have now received a further exchange of letters regarding this issue. Counsel for Gagosian Gallery reiterates her application in light of the fact that Ms. Cowles has filed suit in state court against her client on a separate claim, and in the course of the complaint has mentioned the amount that the Gallery paid to settle the Safflane case. (Jan. 19, 2012 Letter to the Court from Hollis Gonerka Bart, Esq. at 1). In response, apart from referring to the previous letter briefing, Ms. Cowles's attorney notes that the Gallery recently publicly filed in this court inquest papers related to a default judgment against defendant Charles Cowles that appended a copy of the purportedly confidential settlement agreement, and that Mr. Cowles subsequently provided a copy of that non-confidential document to him. (Jan. 20, 2012 Letter to the Court from David R. Baum, Esq.).

Gagosian's request for reconsideration and vacatur of our November 7, 2011 order is denied, substantially for the reasons that underlay its initial issuance. Seeking a protective order, Gagosian never demonstrated good cause since it failed to establish a legal basis for enforcing against Ms. Cowles or her attorney a confidentiality provision to which neither of them was a party.

Although in our November 7 order we offered counsel an opportunity to fill the evidentiary gap in her original application, she did not even attempt to do so. Rather, she argued in general terms that mediation sessions are confidential -- a proposition with which we do not disagree -- and asserted "on information and belief" that the Museum counsel had received a copy of the settlement terms in confidence and that Ms. Cowles's attorney had surreptitiously sought them out. (Jan. 19, 2012 Letter to the Court from Hollis Gonerka Bart, Esq. at 1-2). Were these the proven facts, a protective order might well be justified, but Gagosian has proffered no evidence to support that speculation.

In contrast, counsel for Ms. Cowles represents, without contradiction, that the parties negotiating a settlement of the Safflane case did not seek a confidentiality promise from him or his client and that Mr. Golub freely volunteered throughout the process the amounts that Gagosian was offering to pay for a settlement. He further represents, again without contradiction, that before reviewing the term sheet that the negotiating parties had given to the Museum attorney -- whether with or without a confidentiality promise is undocumented -- he advised Mr. Golub that he would be doing so, and neither party asked for a confidentiality agreement from him.

Finally, we note that Gagosian's public filing of the settlement agreement, and its service of the same document on Mr. Cowles without a prior confidentiality order to bind that gentleman not to disclose it, has apparently led to the public disclosure of the payment terms well beyond Ms. Cowles and her lawyer. Indeed, Mr. Cowles gave a copy to Ms. Cowles's lawyer, who apparently referred to it in his recently filed state-court complaint. As a result, according to the Gallery, that detail has been published in the local press.

Given all of these circumstances,[1] we conclude once again that Gagosian Gallery has not met its burden to demonstrate that Ms. Cowles or her attorney are bound to confidentiality by contract or court order. They were not parties to the settlement agreement, which is the only cited source of a contractual confidentiality requirement, and we never imposed such an obligation on them.

As for the Gallery's argument that Ms. Cowles and her attorney

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[1] We do not rely on the public filing by Gagosian Gallery of a copy of the settlement agreement as an independent basis to find waiver of any confidentiality claim because it is conceivable that that the filing was an oversight. Nonetheless it is evidence at least of both sloppiness and a less-than-serious approach to protecting the secrecy of the settlement terms, an approach that seems further reflected in the uncontradicted version of events offered by Ms. Cowles's attorney.

are bound by the general rule of confidentiality of mediation sessions, that argument too misses the mark. Representations made to the court or to court-appointed mediators during closed sessions are subject to a presumption of confidentiality, although representations made by an attorney to opposing counsel in the course of direct negotiations may well be not only not confidential -- unless confidentiality is otherwise agreed to -- but potentially even admissible at trial. See Fed. R. Evid. 408 (allowing introduction of settlement discussions for purposes other than to establish liability or the amount of damages, or for impeachment by inconsistent statement). In any event, the October 7 conference was not a mediation session, and the disclosure of the payment terms to Ms. Cowles's attorney at that session has not been shown to have been accompanied by any demand, much less agreement, that it would be confidential.

The conference was conducted in open court and involved no negotiations at which the court was present. Rather, counsel for the Safflane case litigants -- that is, Safflane, Mr. Wylde, and the Gallery -- asked for the conference to announce to the court that they had reached an agreement to settle the claims between them. The conference was then adjourned without disclosure of the terms because the court found no basis to seal the courtroom.

Moreover, as we have noted, whatever went on between the lawyers at that time or subsequently has not been shown to have involved a commitment by Ms. Cowles to keep confidential the terms of a settlement agreement to which she was not a party. In short, there is no indication that anything communicated on that occasion was protected by any general principle that court-supervised mediation discussion are confidential.

CONCLUSION

For the reasons stated, the application of Gagosian Gallery for reconsideration and vacatur of our November 7, 2011 order is denied.

Dated: New York, New York
January 20, 2012

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Order have been mailed today to:

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