Brummer v Wey
2019 NY Slip Op 31922(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 153583/2015
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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CHRISTOPHER BRUMMER, Index No. 153583/2015

Plaintiff

- against - DECISION AND ORDER

BENJAMIN WEY, FNL MEDIA LLC, and NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP,

Defendants

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APPEARANCES:

For Plaintiff
Nicole Gueron Esq. and Ashleigh Hunt Esq.
Clarick Gueron Reisbaum LLP
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For Defendants Wey and NYG Capital LLC
Jonathan D. Lupkin Esq. and Nathaniel E. Marmon Esq.
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LUCY BILLINGS, J.S.C.:

Defendants Wey and NYG Capital LLC move to declassify plaintiff's deposition transcript dated January 31, 2019, except for page 270, lines 2 through 9, all of which plaintiff designated confidential pursuant to the parties' confidentiality stipulation. For the reasons explained below, the court grants defendants' motion.

I. THE CONFIDENTIALITY STIPULATION

The parties entered a confidentiality stipulation, which the court also ordered May 2, 2019. The stipulation allows a party to "designate Documents produced, or Testimony given, in

connection with this action as 'confidential.'" Stipulation & Order for Production & Exchange of Confidential Information (Stipulation) ¶ 2. Paragraph 3(a) of the Stipulation provides:

> "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

As the party "asserting the confidentiality privilege," plaintiff is the "Producing Party" under the stipulation. Stipulation ¶ 3(b). Defendants are the "Receiving Party" under the stipulation, as they received the confidential information. Id.

As provided in ¶ 4 of the Stipulation:

> The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials.

The Producing Party then "bears the burden of establishing the propriety of its designation of documents or information as Confidential Information." Stipulation ¶ 4.

II. THE STANDARDS TO BE APPLIED

The public is entitled to access to judicial proceedings and court records. Norddeutsche Landesbank Girozentrale v. Tilton, 165 A.D.3d 447, 448 (1st Dep't 2018); Maxim Inc. v. Feifer, 145

A.D.3d 516, 517 (1st Dep't 2016); Mosallem v. Berenson, 76 A.D.3d 345, 348 (1st Dep't 2010); Danco Labs. v. Chemical Works of Gedeon Richter, 274 A.D.2d 1, 6 (1st Dep't 2000). See Schulte Roth & Zabel, LLP v. Kassover, 80 A.D.3d 500, 501 (1st Dep't 2011). Restrictions on access to court proceedings and records must be narrowly tailored to serve compelling interests. Maxim Inc. v. Feifer, 145 A.D.3d at 517; Applehead Pictures LLC v. Perelman, 80 A.D.3d 181, 191 (1st Dep't 2010); Mosallem v. Berenson, 76 A.D.3d 354, 349-50 (1st Dep't 2010); Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V., 28 A.D.3d 322, 324 (1st Dep't 2006). The court will enforce a confidentiality stipulation restricting public access to documents or testimony in an action before the court according to these principles and the stipulation's terms. MSCI Inc. v. Jacob, 120 A.D.3d 1072, 1075-76 (1st Dep't 2014); REDF-Organic Recovery, LLC v. Rainbow Disposal Co., Inc., 116 A.D.3d 621, 622 (1st Dep't 2014); Oxxford Info. Tech., Ltd. v. Novantas LLC, 78 A.D.3d 499, 499-500 (1st Dep't 2010); Spence v. Bear Stearns & Co., 288 A.D.2d 111, 112 (1st Dep't 2001). See Calastri v. Overlock, 125 A.D.3d 554, 555 (1st Dep't 2015).

III. PLAINTIFF'S BURDEN TO SHOW THAT HIS DEPOSITION IS CONFIDENTIAL INFORMATION

In correspondence dated March 4, 2019, defendants notified plaintiff of their disagreement with plaintiff's designation of his deposition January 31, 2019, as confidential. In an email dated March 7, 2017, plaintiff refused to de-designate the deposition.

Pursuant to the stipulation, to maintain the confidentiality of plaintiff's deposition, plaintiff bears the burden to show that the deposition contains trade secrets, proprietary business information, competitively sensitive information, or information detrimental to the conduct of his, his client's, or his customer's business if the deposition contents are released. While the stipulation itself does not define a trade secret, New York law defines a trade secret as a "formula, pattern, device, or compilation of information" used in a business that gives a business "an opportunity to obtain an advantage over competitors who do not know or use it." E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 453 (2018); Ashland Mgt. v. Janien, 82 N.Y.2d 395, 407 (1993); Schroeder v. Pinterest Inc., 133 A.D.3d 12, 27 (1st Dep't 2015). See JPMorgan Chase Funding Inc. v. Cohan, 134 A.D.3d 455, 455 (1st Dep't 2015). Trade secrets must be sufficiently novel to merit protection. Schroeder v. Cohen, 169 A.D.3d 412, 413 (1st Dep't 2019); Schroeder v. Pinterest Inc., 133 A.D.3d at 30.

The confidentiality stipulation does not define proprietary business information or competitively sensitive information either, but the two categories are essentially synonymous and treated as closely related to or a subset of trade secrets. Proprietary business information, as the label suggests, is considered to be information owned by and beneficial to a business, the dissemination or use of which by competitors would be detrimental to the business. Second Source Funding, LLC v.

Yellowstone Capital, LLC, 144 A.D.3d 445, 446 (1st Dep't 2016); Dorfman v. Reffkin, 144 A.D.3d 10, 13 (1st Dep't 2016).

IV. PLAINTIFF'S FAILURE TO MEET HIS BURDEN

A review of plaintiff's deposition January 31, 2019, discloses no testimony that falls into any of the categories required for maintaining its confidentiality under the stipulation. Plaintiff testified about his work with the Financial Industry Regulatory Authority (FINRA) National Adjudicatory Council, how FINRA selects members and assigns disciplinary cases, and the FINRA personnel who participate in and assist with disciplinary determinations. Although he claims his testimony regarding FINRA's inner workings is privileged, he testified only about his experiences at FINRA and about one specific case on which he worked, without revealing the deliberations regarding any case that would subject the testimony to the deliberative process privilege. Department of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 8-9 (2008); New York Times Co. v. City of N.Y. Fire Dept., 4 N.Y.3d 477, 488 (2005).

Plaintiff also alluded to articles he authored in which he expressed scholarly legal opinions, but did not testify about the internal processes for creating that work product or even about the contents. Since plaintiff ultimately published these articles, their contents in any event are publicly available and thus distinctly not confidential. Schroeder v. Cohen, 169 A.D.3d at 413; Schroeder v. Pinterest Inc., 133 A.D.3d at 29; 1 Model

Mgt., LLC v. Kavoussi, 82 A.D.3d 502, 503 (1st Dep't 2011).

Nor has plaintiff shown that dissemination of his deposition testimony would be detrimental to his business. Plaintiff was terminated from a compensated position as a senior fellow at an organization, but attributed that termination to budget cuts, not to the publication of any facts related to this action. Plaintiff could not ascertain that invitations to speaking engagements or any other opportunities that enhance his reputation decreased after publication of facts related to this action.

The stipulation also protects the confidentiality of information detrimental to the business of plaintiff's clients or customers. Plaintiff testified about financial services clients during his work at a law firm, but, because he did not identify them, release of his testimony would not possibly harm them. Plaintiff did identify FINRA's chairman and general counsel, but nowhere indicates those persons are his clients or customers, nor demonstrates how disclosure of their identity is detrimental to FINRA or how his testimony implicates any FINRA employees in any wrongdoing or portrays them unfavorably. Plaintiff also identified colleagues who inquired about the facts related to this action, but does not claim they are clients or customers, nor show how disclosure of their identity is detrimental to their business.

Plaintiff thus has failed to meet his burden of demonstrating that his deposition January 31, 2019, contained

confidential information. Maxim, Inc. v. Feifer, 161 A.D.3d 551, 554 (1st Dep't 2018); JPMorgan Chase Funding Inc. v. Cohan, 134 A.D.3d at 455; 1 Model Mgt., LLC v. Kavoussi, 82 A.D.3d at 503. See West Harlem Bus. Group v. Empire State Dev. Corp., 13 N.Y.3d 882, 886 (2009). The absence of any trade secret, proprietary business information, or competitively sensitive information removes any basis for maintaining the confidentiality of the deposition transcript. Norddeutsche Landesbank Girozentrale v. Tilton, 165 A.D.3d at 448-49; Maxim Inc. v. Feifer, 145 A.D.3d at 517; JPMorgan Chase Funding Inc. v. Cohan, 134 A.D.3d at 455. While plaintiff contended that defendants' request to declassify the deposition was overbroad, and he is entitled to hold defendants to a confidentiality designation until declassification, the confidentiality stipulation does not allow blanket designations of information as confidential without support in the first instance. Maxim, Inc. v. Feifer, 161 A.D.3d at 554.

V. CONCLUSION

Plaintiff's concern is defendants' misuse of his deposition to inflict harm on plaintiff, his colleagues, FINRA, and its employees. Unwanted publicity is not a basis for keeping documents or testimony in an action before the court confidential and inaccessible to the public. Maxim Inc. v. Feifer, 145 A.D.3d at 518. Plaintiff may seek to remedy any such misuse of the deposition through claims for emotional distress, see Chanko v. American Broadcasting Companies Inc., 27 N.Y.3d 46, 56 (2016);

Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993), and defamation. See Davis v. Boeheim, 24 N.Y.3d 262, 268 (2014); Thomas H. v. Paul B., 18 N.Y.3d 580, 584 (2012); Geraci v. Probst, 15 N.Y.3d 336, 344 (2010).

Consequently, the court grants defendants' motion to declassify plaintiff's deposition testimony January 31, 2019, except for page 270, lines 2 through 9, all of which plaintiff previously designated confidential. Pursuant to ¶ 12(c) of the parties' confidentiality stipulation, plaintiff shall publish a copy of the deposition transcript, unredacted except for page 270, lines 2 through 9, on the court's e-filing system. This decision constitutes the court's order.

DATED: June 28, 2019

LUCY BILLINGS, J.S.C.

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