

Tirschwell v TCW Group, Inc.
2019 NY Slip Op 33470(U)
November 22, 2019
Supreme Court, New York County
Docket Number: 150777/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 150777/2018

SARA TIRSCHWELL,

MOTION DATE 11/19/19

Plaintiff,

MOTION SEQ. NO. 007

- v -

TCW GROUP INC., TCW LLC, DAVID LIPPMAN and JESS RAVICH,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 387

were read on this motion to/for SEAL

Motion, brought by order to show cause, by Defendants TCW Group Inc., TCW LLC and David Lippman (collectively, "TCW Defendants") for leave to file certain documents under seal, pursuant to 22 NYCRR § 216.1, is granted in part and denied in part, for the reasons stated herein.

BACKGROUND

In the instant action, Plaintiff Sara Tirschwell ("Tirschwell") seeks \$30 million in damages for, inter alia, gender discrimination and retaliation in violation New York City Human Rights Law ("NYCHRL") § 8-107. In sum and substance, Tirschwell alleges that shortly after she began working as the Managing Director of the Distressed Fund at TCW LLC ("TCW"), her direct supervisor Defendant Jess Ravich ("Ravich") coerced her into multiple sexual encounters by threatening to withhold firm resources and investor access that were necessary to build the Distressed Fund. Tirschwell further alleges that Ravich cut-off these resources after she ended the sexual relationship; and that several days after complaining about Ravich's conduct to TCW's Human Resources Department, she was informed that "she was being fired for gross negligence during a meeting with Defendant David Lippman ("Lippman") - the CEO of TCW Group, Inc. (Complaint ¶ 83.)

TCW Defendants, in their motion for summary judgment (Seq. 006), assert in sum and substance that the decision to terminate Tirschwell's employment was based on her allegedly poor track record as an employee, including repeated compliance violations, the failure to meet a \$100 million investment goal for the Distressed Fund, and her derisive treatment of other employees.

In his motion for summary judgment (Seq. 008), Ravich argues that he had no role in TCW's decision to terminate Tirschwell's employment. Further, Ravich asserts that no "sexual conduct of any kind" ever occurred between Tirschwell and himself during Tirschwell's tenure at TCW. (Ravich Aff. in Supp. of MSJ [Seq. 008] ¶ 5.) Ravich further argues that he could not have retaliated against Tirschwell for ending any alleged sexual relationship since, according to Tirschwell's testimony, she never communicated to him that she was ending the alleged sexual relationship. (Ravich Memo in Supp. of MSJ at 14-15.)

On this motion, TCW Defendants seek leave of this Court to file certain documents—mainly exhibits that include deposition transcripts, emails, and other internal TCW work-product—in redacted format, so that certain information contained therein is withheld from public view. Unredacted versions would be filed under seal and constitute the full court record.

As put forth by TCW Defendants, there are essentially six categories of documents for which they seek to seal some portion of information. The Court will discuss each category of information in turn in the "Discussion" section.

DISCUSSION

"Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records." (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010].) This presumption is based on the understanding that public access is necessary to ensure that judicial proceedings are "conducted efficiently, honestly, and fairly." (*Matter of Conservatorship of Brownstone*, 191 AD2d 167, 168 [1st Dept 1993].) In addition, Judiciary Law § 4 codifies this recognition, stating:

"The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

(Judiciary Law § 4; *see also* Judiciary Law § 255-b [stating that all docket books "must be kept open, during the business hours fixed by law, for search and examination by any person"].) Moreover, courts have long recognized the "broad constitutional presumption, arising from the First and Sixth Amendments, as applied to the states by the Fourteenth Amendment, that both the public and the press are generally entitled to have access to court proceedings." (*Mosallem v Berenson*, 76 AD3d 345, 348–49 [1st Dept 2010].)

"Among the values of access in civil cases is that the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness."

(*Danco Labs., Ltd. v Chem. Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 7 [1st Dept 2000].)

Plainly, courts must not grant a motion to seal lightly, but rather must thoroughly probe the application while keeping in mind the longstanding preference that judicial proceedings be open to the public.

Nonetheless, the right of public access to judicial proceedings and records is not absolute. A court is empowered to seal court records pursuant to section 216.1 (a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1 [a]). Rule 216.1 (a) states as follows:

“Except where otherwise provided by statute or rule, 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. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.”

“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 AD3d 345, 349 [1st Dept 2010].) As the Second Department explains:

“Since confidentiality is the exception, the court must make an independent determination of whether to seal court records in whole or in part for good cause. This task involves weighing the interests of the public against the interests of the parties. The party seeking to seal documents must demonstrate compelling circumstances. A finding of good cause presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant, and that no alternative to sealing can adequately protect the threatened interest. However, since there is no absolute definition, good cause, in essence, boils down to the prudent exercise of the court’s discretion, and thus a case-by-case analysis is warranted.”

(*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007] [internal citations and quotation marks omitted].)

Lastly, the Court notes that neither Tirschwell nor Ravich have submitted papers in opposition to the instant motion; nor did either voice objection to sealing at the oral argument. However, that no party opposes an order or that parties may stipulate to a sealing order does not obviate the need for the motion court to conduct its own review and make its own written finding of good cause. (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].)

On this particular application, this Court must consider the public’s interest in having sufficient access to the court records so that the public can understand and evaluate the Court’s adjudication of the issues. Against that public interest, the Court must weigh TCW Defendants’ interest in preventing disclosure of information that might harm their competitive advantage and business relationships. In addition, this Court must also consider the potential harm that public disclosure might cause to certain non-parties who are not seeking any relief from this Court and may not even be aware of their being potentially exposed to public scrutiny.

The Court will now analyze the instant sealing application as it pertains to each of the six categories of documents.

A. Materials Sought to Be Sealed

1. Names of Actual and Prospective Non-Party Clients of TCW in Deposition Transcripts (Affirm. in Supp. of Sealing, Exs. A, D, E, G [Deposition Transcripts].)

Here, the Court finds that, at this stage, sufficient good cause exists to withhold the names of certain entities and individuals that actually invested or were solicited to invest in the Distressed Fund. The Court finds that significant harm could occur to TCW's competitive advantage and business relationships if the identities of these entities and individuals are revealed. On the other hand, the public's ability to understand and evaluate this proceeding will not be significantly undermined as they will nonetheless be able to read the vast majority of the transcripts and learn in detail about the efforts to attract investment in the Distressed Fund.

However, to the extent that the parties seek to redact whole swaths of dialogue from various depositions—and therefore withhold more than identities—that branch of the instant motion is denied. Furthermore, these swaths of dialogue were designated confidential by Tirschwell's counsel, and Tirschwell's counsel conceded at oral argument that there is no need for these portions to be redacted. (*See* So-Ordered Stipulation re Designations of "Confidential" [NYSCEF Document No. 132.]) Nonetheless, the Court agreed, during oral argument, that the name of a certain entity discussed within one of these passages could be redacted.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, this branch of the motion is granted in part to the extent that the names of actual and prospective clients, as well as the name of one non-client entity as discussed at oral argument, may be redacted from the deposition transcripts submitted on this motion as exhibits A, D, E and G, and the branch of this motion seeking to redact whole swaths of dialogue from said transcripts is denied.

Counsel for Tirschwell and TCW Defendants shall file newly redacted copies of the aforesaid transcripts in compliance with this decision and order.

2. Identity of the Male TCW Employee Disciplined for Compliance Violations (Affirm. in Supp. of Sealing, Exs. B, C [Deposition Transcripts].)

In this branch of the sealing application, TCW Defendants seek to withhold the name of a certain male TCW employee who was disciplined for compliance violations.

The Court finds that, at this stage, the potential harm caused by revealing the identity of this male TCW employee outweighs the public's interest in knowing his identity. The public's knowledge of other information about the male TCW employee—such as his position and disciplinary history—is likely sufficient for the public to evaluate whether Tirschwell and this male TCW employee were treated differently, without disclosing his name.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, the Court grants this branch of the sealing application.

3. "Internal Use Only" TCW Document (Affirm. in Supp. of Sealing, Ex. F)

Here, TCW Defendants seek to file a redacted copy of a document detailing efforts to obtain investments in the Distressed Fund from roughly 142 entities and / or individuals. The names of all the potential investors have been redacted as well as individuals from and / or associated with these potential investors. In addition, certain information about these potential investors has been redacted, including predictions about the likelihood of these individuals and / or entities investing in the Distressed Fund.

The Court finds that there exists good cause to file this internal TCW document in its current redacted format. At this time, the Court finds that the harm to TCW Defendants' competitive advantage and business relationships that would likely occur from public disclosure outweigh any public interest in learning this information.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, the Court grants this branch of the sealing application.

4. Email with Identities of Non-Party Clients and Prospective Clients of TCW (Affirm. in Supp. of Sealing, Ex. H)

The Court finds that there is good cause, at this stage, to allow TCW Defendants to withhold the names of certain non-party clients and prospective clients from public disclosure, as mentioned in an email chain attached as Exhibit H to this motion. At this stage, the Court finds that the public can reasonably understand and evaluate the merits of the pending summary judgment motions without the disclosure of these names. Furthermore, any potential benefit from publicly disclosing said names is outweighed by the likely harm to TCW Defendants' business relationships that would likely occur upon said disclosure.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, the Court grants this branch of the sealing application.

5. Internal TCW Document Discussing Business Activities, Employee Compensation, Etc. (Affirm. in Supp. of Sealing, Ex. I.)

TCW Defendants seek leave to redact certain information from public view as contained in an internal TCW document that discusses TCW's business activities and employee compensation information.

This Court finds, at this stage, that the likely harm resulting from public disclosure to TCW's competitive advantage and the privacy interest of its non-party employees outweigh the public interest in learning this information.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, the Court grants this branch of the sealing application.

6. Email Concerning Existing TCW Client and Potential Investor in Distressed Fund (Affirm. in Supp. of Sealing, Ex. J.)

TCW Defendants seek leave to redact the name of a client with a “substantial business relationship” with TCW who was targeted as a potential investor in the Distressed Fund. TCW Defendants also seek to redact the name of another non-party mentioned in this email—whose name the Court has granted leave to redact in other exhibits submitted on this motion.

The Court here finds that there is good cause to withhold public disclosure of the names mentioned in this email. At this stage, it appears to the Court that the potential harm to TCW’s competitive advantage, its business relationships, and this client’s interests outweigh any benefit that such disclosure might yield in helping the public understand and evaluate the pending motions for summary judgment.

Accordingly, weighing the interest in public access against the potential harm to TCW Defendants as well as certain non-parties, the Court grants this branch of the sealing application.

B. Context of the Instant Decision and Order

In granting the majority of the relief requested on this application, the Court notes that the instant motion essentially sought to withhold from public view two areas of information: (1) information relating to the efforts to attract \$100 million of investment in the Distressed Fund; and (2) information relating to the identity of a male TCW employee who was disciplined for compliance violations.

With regard to the first area of information, the Court notes that over 100 potential investors appear to have been solicited to achieve the \$100 million funding goal for the Distressed Fund. At this stage, it does not appear that the identity of any one of these prospective investors will impact how the two pending motions for summary judgment may be resolved. As such, the Court has found that the substantial harm that could occur to TCW Defendants’ business relationships and competitive advantage upon public disclosure of this information outweigh any benefit that disclosure of these identities may have in helping the public understand and evaluate the merits of the pending motions for summary judgment.

Similarly, with regard to the second area of information, this Court finds that, at this stage, it does not appear that the name of the male TCW employee is important for the public’s ability to evaluate whether Tirschwell and this male TCW employee may have been treated differently. On the other hand, public disclosure of this male TCW employee’s name will likely result in significant harm to his privacy and reputational interests.

The Court further notes that the instant sealing application is being granted at an early stage in the contest of the merits: the opposition and reply papers to the two motions for summary judgment have not yet been filed; and, depending on the outcome of said motions, a

trial may take place. As such, this Court reserves its right to revisit the limited sealing application that it has granted on this motion at a later stage. Moreover, should this case proceed to trial, it will be for the trial judge to determine whether any of the information sealed on this motion should be withheld from public view—the determination on this motion in no way binds the trial judge.

CONCLUSION

Accordingly, upon the foregoing documents, after hearing oral argument, and as explained in the instant decision and order, the Court having considered the interest of the public as well as the interests of the movant Defendants TCW Group Inc., TCW LLC and David Lippman (collectively, “TCW Defendants”) in protecting their competitive advantage and business relationships, and the potential harm to certain non-parties resulting from public disclosure, and finding, at this stage, with two motions for summary judgment having been filed, good cause, pursuant to 22 NYCRR § 216.1 (a), to allow TCW Defendants to file publicly viewable versions of the exhibits attached to this motion with certain information redacted and filing unredacted versions of the same under seal, it is hereby

ORDERED that the motion is granted in part and denied in part, to extent that TCW Defendants are directed to, within twenty (20) days, re-file publicly viewable versions of exhibits A, D, E, G to this motion wherein only names and identities are redacted and no whole swaths of dialogue are redacted, and the motion is otherwise granted in full; and it is further

ORDERED that, within twenty (20) days, counsel for TCW Defendants are to purchase a copy of the oral argument transcript of November 19, 2019 (“the Oral Argument Transcript”) and e-file a publicly viewable version of said transcript with any names and / or identities redacted if those names were redacted, pursuant to the instant decision and order, in any of the exhibits to this motion and shall e-file an unredacted version of said transcript under seal; and it is further

ORDERED that, within twenty (20) days, TCW Defendants are to serve a copy of this order with notice of entry upon the Clerk of the Court along with appropriate copies of any unredacted documents to be filed under seal pursuant to the instant order; and it is further

ORDERED that the Clerk of the Court is directed, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to permit movant to file under seal an unredacted version of the Oral Argument Transcript, as part of the instant motion, and unredacted versions of the exhibits attached to the instant motion under seal, as exhibits to the two motions for summary judgment (Seq. 006, 008) pending before this Court, (collectively, “the sealed documents”) and to separate these sealed documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the Court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the Court) except for counsel of record for any party to this case, any party, and any representative

of counsel of record for a party upon presentation to the County Clerk of written authorization from said counsel and appropriate identification; and it is further

ORDERED that the Court, or any other judge supervising this matter, may, upon motion or sua sponte, revisit the instant decision and order with regard to any portion thereof should it later appear that there is no longer good cause to withhold any portion of the sealed documents from public view; and it is further

ORDERED that the upon the papers in the aforementioned motions for summary judgment (Seq. 006, 008) being fully submitted, any party submitting papers to said motions wherein information has been redacted from public view, pursuant to the instant decision and order or a future order of this Court, shall submit paper and electronic working copies of said summary judgment papers to this Court wherein the redacted information is highlighted in yellow.

The foregoing constitutes the decision and order of this Court.

11/22/2019
DATE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE