

Brummer v Wey

2019 NY Slip Op 33757(U)

December 20, 2019

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Lucy Billings

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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
220 5th Avenue, New York, NY 10001

For Defendants Wey and NYG Capital LLC

Jonathan D. Lupkin Esq. and Nathaniel E. Marmon Esq.
Lupkin PLLC
80 Broad Street, New York, NY 10004

LUCY BILLINGS, J.S.C.:

Plaintiff moves to seal the transcript of his deposition
conducted January 31, 2019, which this court declassified
pursuant to the parties' confidentiality stipulation in an order
dated June 28, 2019,. Defendants Wey and NYG Capital LLC cross-
move to declassify the transcript of plaintiff's deposition
conducted March 6, 2019, except for page 492, line 16, through

page 501, line 19. Plaintiff separately moves to seal the transcript of his deposition conducted March 6, 2019. For the reasons explained below, the court denies plaintiff's motions and grants defendants' cross-motion.

I. PLAINTIFF'S MOTIONS TO SEAL THE TRANSCRIPTS

The court may seal the transcripts of plaintiff's deposition conducted January 31, 2019, and March 6, 2019, only upon finding good cause. 22 N.Y.C.R.R. § 216.1(a); Matter of James Q., 32 N.Y.3d 671, 680 (2019); Wilder v. Fresenius Med. Care Holdings, Inc., 175 A.D.3d 406, 410 (1st Dep't 2019); Matter of East 51st St. Crane Collapse Litig., 106 A.D.3d 473, 474 (1st Dep't 2013); Applehead Pictures LLC v. Perelman, 80 A.D.3d 181, 191 (1st Dep't 2010). See Abe v. New York Univ., 169 A.D.3d 445, 448-49 (1st Dep't 2019). The party seeking to seal a record bears the burden to demonstrate good cause. Mosallem v. Berenson, 76 A.D.3d 345, 349 (1st Dep't 2010); Danco Labs. v. Chemical Works of Gedeon Richter, 274 A.D.2d 1, 8 (1st Dep't 2000).

Plaintiff fails to allege, let alone demonstrate, show good cause for sealing the deposition transcripts. Matter of James Q., 32 N.Y.3d at 680; Wilder v. Fresenius Med. Care Holdings, Inc., 175 A.D.3d at 410; Matter of East 51st St. Crane Collapse Litig., 106 A.D.3d at 474; Mosallem v. Berenson, 76 A.D.3d at

349. Instead, plaintiff asks the court to prohibit use of the deposition transcripts, pursuant to C.P.L.R. § 3103(a), due to defendant Wey's misuse of the March 2019 deposition transcript to harass plaintiff and nonparties. C.P.L.R. § 3103(a) allows for a "protective order denying, limiting, conditioning or regulating the use of a disclosure device." C.P.L.R. § 3103(a). The statute does not protect the transcript of a deposition, but rather authorizes protections in the conduct of the deposition in the first instance. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A.D.3d 401, 407-408 (1st Dep't 2018); Jones v. Maples, 257 A.D.2d 53, 56-57 (1st Dep't 1999). See Hutton v. Aesthetic Surgery, P.C., 161 A.D.3d 595, 596 (1st Dep't 2018); Nathel v. Nathel, 55 A.D.3d 434, 434 (1st Dep't 2008); Wygocki v. Milford Plaza Hotel, 38 A.D.3d 237, 237 (1st Dep't 2007); Matter of Dier, 13 A.D.3d 150, 151 (1st Dep't 2004). Equally fundamentally, plaintiff's failure to present the transcript of January 31, 2019, or more than a few pages of the transcript of March 6, 2019, provides the court no basis to seal the transcripts beyond those few pages. Matter of New York City Asbestos Litig., 151 A.D.3d 550, 551 (1st Dep't 2017). See Balestriere PLLC v. BanxCorp, 96 A.D.3d 497, 498 (1st Dep't 2012).

Finally, plaintiff points out that, under the

confidentiality stipulation, only the parties had access to the transcripts of plaintiff's deposition. If so, this restricted access belies any claim that sealing the transcripts of plaintiff's deposition from the public would have prevented publication of the March 2019 transcript to harass plaintiff and nonparties. Instead, plaintiff may pursue remedies for breach of the confidentiality stipulation.

II. DEFENDANTS' CROSS-MOTION TO DECLASSIFY THE TRANSCRIPTS

Defendants seek to declassify the transcript of plaintiff's deposition conducted March 6, 2019, pursuant to the confidentiality stipulation, however, so that the transcript will be publicly accessible in the future.

A. The Confidentiality Stipulation

The confidentiality stipulation, which the court also ordered May 2, 2019, 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.

Paragraph 4 of the Stipulation provides:

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." Id. ¶ 4.

B. 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

at 348; Danco Labs. v. Chemical Works of Gedeon Richter, 274 A.D.2d at 6. 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 at 191; Mosallem v. Berenson, 76 A.D.3d at 349-50; 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); Oxford 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 April 1, 2019, defendants notified plaintiff of their disagreement with plaintiff's designation of his deposition conducted March 6, 2019, as confidential.

Plaintiff did not respond to defendants' notification.

Pursuant to the confidentiality 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).

Plaintiff claims that defendants published pages from the March 2019 transcript of his deposition online with demeaning content added to harass him and that his complaints to defendants to cease violation of the confidentiality stipulation went unanswered. Plaintiff further points out that defendants published articles with superimposed photographs of him and defamatory text on pages of the deposition transcript, but does not seek any relief regarding the photographs. In any event, plaintiff does not show that his March 2019 deposition contains any confidential information. The excerpts from the transcript that he presents and that were publicized do not contain any confidential information under the confidentiality stipulation. Nor does a review of the entire March 2019 transcript reveal any confidential information. Plaintiff thus fails to meet his burden to demonstrate that his deposition of March 6, 2019,

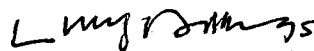
contains confidential information. Maxim, Inc. v. Feifer, 161 A.D.3d at 554; JPMorgan Chase Funding Inc. v. Cohan, 134 A.D.3d at 455; 1 Model Mgt., LLC v. Kavoussi, 82 A.D.3d 502, 503 (1st Dep't 2011). See West Harlem Bus. Group v. Empire State Dev. Corp., 13 N.Y.3d 882, 886 (2009).

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. Plaintiff's insistence that the First Amendment to the United States Constitution does not entitle defendants to disseminate information available for the purposes of litigating this action, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984), is misplaced, because the confidentiality stipulation permits declassification independent of such a right. The First Amendment does afford plaintiff the right to correct any distortion of information from the litigation that defendants may disseminate. Any distortions of facts that inaccurately demean or disparage plaintiff may be the subject of further defamation claims.

IV. CONCLUSION

In sum, plaintiff fails to meet his burden to demonstrate good cause for sealing the transcripts of his deposition conducted January 31, 2019, and March 6, 2019, 22 N.Y.C.R.R. § 216.1, or for maintaining the confidential designation of the March 2019 deposition transcript. Therefore the court denies plaintiff's motions to seal the transcripts and grants defendants' cross-motion to declassify plaintiff's deposition testimony of March 6, 2019, except page 492, line 16, through page 501, line 19, 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 page 492, line 16, through page 501, line 19, on the court's e-filing system. This decision constitutes the court's order.

DATED: December 20, 2019



LUCY BILLINGS, J.S.C.

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