SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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WHITE & CASE LLP,

Plaintiff,

- v -

SHIPMAN ASSOCIATES, LLC,

Defendant.

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DECISION AND ORDER

Index No. 653098/17

MOT SEQ 005, 006, 007, 008

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff law firm White & Case LLP ("White & Case") commenced this breach of contract action seeking unpaid attorneys' fees from the defendant on June 7, 2017. On November 25, 2019, the defendant filed a motion for summary judgment dismissing the complaint in its entirety. The plaintiff opposed and cross-moved for summary judgment on its breach of contract claim. Those motions have been fully submitted and remain pending before the court.

The plaintiff now moves for leave to file several exhibits to its summary judgment opposition and cross motion under seal and to redact sections of other submissions in support of its opposition and cross motion pursuant to 22 NYCRR 216.1 (section 216.1 of the Uniform Rules for the New York State Trial Courts) (SEQ 005, SEQ 008). The defendant does not oppose the

plaintiff's first application for such relief (SEQ 005). In response to the plaintiff's second application, the defendant cross-moves for endorsement of a confidentiality agreement filed by the parties in 2018, to strike certain material from the record, and for the issuance of a "formal caution" against the plaintiff (SEQ 008). In response to the defendant's cross motion, the plaintiff purports to cross-move for sanctions against the defendant (SEQ 008).

The defendant also moves separately to strike the plaintiff's summary judgment cross motion as untimely or, in the alternative, to strike from the summary judgment cross motion certain references to alleged wrongdoing by the defendant (SEQ 007). The plaintiff opposes the defendant's striking application. The plaintiff also moves to strike all entries the defendant submitted in opposition to the plaintiff's summary judgment cross motion as untimely (SEQ 006).

For the following reasons, (1) the plaintiff's sealing applications filed under motion sequences 005 and 008 are granted, (2) the defendant's cross motion filed under motion sequence 008 is denied, (3) the plaintiff's cross motion filed under motion sequence 008 is denied, (4) the defendant's motion to strike filed under motion sequence 007 is denied, and (5) the plaintiff's motion to strike filed under motion sequence 006 is denied.

II. DISCUSSION

A. Motions to Seal and For Related Relief

22 NYCRR 216.1(a) provides, in relevant part, that "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records … 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." "[T]here 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). Nonetheless, the public's right to access is not absolute. See Danco Labs. v Chemical Works of Gedeon Richter, 274 AD2d 1 (1st Dept. 2000). "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." Applehead Pictures, LLC v Perelman, 80 AD3d 181, 191 (1st Dept. 2010); see Danco Labs. v Chemical Works of Gedeon Richter, supra; see also Matter of Holmes v Winter, 110 AD3d 134 (1st Dept. 2013), revd on other grounds 22 NY3d 300 (2013); Schulte Roth & Zabel, LLP v Kassover, 80 AD3d 500 (1st Dept. 2011). "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 [court] papers, even when both sides to the litigation request sealing." Applehead Pictures, LLC v Perelman, supra, at 192 (citations omitted); see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.U., 28 AD3d 322 (1st Dept. 2006); Liapakis v Sullivan, 290 AD2d 393 (1st Dept. 2002); Matter of Hofmann, 284 AD2d 92 (1st Dept. 2001).

The burden is on the party seeking to seal court records to establish "good cause." Maxim, Inc. v Feifer, 145 AD3d 516, 517 (1st Dept. 2017). "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 Pictures, LLC v Perelman, supra, at 192 (quoting Mancheski v Gabelli Group Capital Partners, 39 AD3d 499, 502 [2nd Dept. 2007]) (some internal quotation marks and citation omitted). "Conclusory claims of the need for confidentiality" and "the mere fact that embarrassing allegations may be made … even if ultimately found to be without merit, [are] not … sufficient bas[es] for a sealing order." Matter of Hofmann, supra at 93-94. However, the protection of communications covered by the attorney-client privilege may be a sufficiently important consideration to warrant sealing. See Haider v Geller & Company LLC, 457 F Supp 3d 424 (S.D.N.Y. 2020); Diversified Grp., Inc. v Daugerdas, 217 FRD 152 (S.D.N.Y. 2003).

The plaintiff has made two separate applications to seal and redact certain documents it offers in support of its cross motion for summary judgment and in opposition to the defendant's motion for summary judgment. The first application seeks to file Exhibits V, W, X, Y, Z, AA, BB, CC, DD, and EE to the cross motion and opposition under seal, to redact sections of the plaintiff's memorandum of law and affidavit of Oliver Brahmst discussing the foregoing exhibits, and to redact Exhibits B, I, J, R, S, and T to the cross motion and opposition. The second application seeks to file Exhibits A and B of the plaintiff's supplemental affidavit in support of its cross motion for summary judgment with redactions.

In support of each of its applications to seal or redact certain court records, the plaintiff submits the affirmation of White & Case attorney Joshua Berman. Berman claims that sealing and redaction is warranted because the documents at issue contain details about confidential work done for the plaintiff's former client, the defendant, or details related to the end of the attorney-client relationship. Specifically, Berman states that Exhibits J, R, S and T to the plaintiff's summary judgment cross motion and opposition are itemized time records containing confidential information related to communications between the plaintiff and the defendant, and Exhibit I contains a discussion about a business venture proposed by the defendant. Berman

further avers that Exhibits V, W, X, Y, Z, AA, BB, CC, DD, and EE to the cross motion and opposition, and Exhibits A and B to the supplemental affidavit in support of the cross motion, all contain information relating to the circumstances under which the relationship between the parties was terminated. According to Berman, the communications reflected in this second set of documents constitute "confidential information" as defined by the New York Rules of Professional Conduct, either because they are protected by attorney-client privilege or are likely to be embarrassing and detrimental to the defendant if disclosed.

The defendant does not oppose the relief the plaintiff requests. However, in response to the plaintiff's second sealing application, the defendant has cross-moved for judicial endorsement of the parties' "Joint Protective Order" filed with the Court on December 20, 2018, in lieu of the specific relief sought by the plaintiff. The defendant further seeks an order striking from the record "any and all references to Plaintiff's allegations regarding why it claims that it was fired," and implores the Court to "issu[e] a formal caution to Plaintiff" that "any future efforts to litigate their theory of why White & Case claims they were fired" and "any other insulting and unprofessional conduct[] will result in sanctions."

In support of their sealing applications, the parties invoke Rule 1.6 of the New York Rules of Professional Conduct

("Rule 1.6"), which states that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person." See 22 NYCRR 1200. Confidential information is defined as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Id. "The ethical obligation to maintain the 'confidences' and 'secrets' of clients and former clients is broader than the attorney-client privilege and exists '"without regard to the nature or source of information or the fact that others share the knowledge."'" Wise v Consol. Edison Co. of New York, 282 AD2d 335, 335 (1st Dept. 2001) (quoting Brennan's, Inc. v Brennan's Rest., Inc., 590 F2d 168, 172 [5th Cir. 1979] [quoting ABA Code of Professional Responsibility, EC 4-4 (1970)]).

Thus, an attorney is generally barred from maintaining an action against a former client where the action would require the disclosure of the client's confidences. See id. However,

an attorney may reveal confidences and secrets to the limited extent necessary to establish or collect attorney's fees or to defend against an accusation of wrongful conduct. See 22 NYCRR 1200.19(c)(4); Balestriere PLLC v BanxCorp, 96 AD3d 497 (1st Dept. 2012); Nesenoff v Dinerstein & Lesser, P.C., 12 AD3d 427 (2nd Dept. 2004).

Exhibits J, R, S, T, and I to the plaintiff's summary judgment cross motion and opposition contain information regarding the nature of the work the plaintiff did or discussed doing for the defendant. It is beyond dispute that such information constitutes confidential information within the meaning of Rule 1.6.

Exhibits V, W, X, Y, Z, AA, BB, CC, DD, and EE to the plaintiff's cross motion and opposition, and Exhibits A and B to the plaintiff's supplemental affidavit in support of the cross motion, also contain confidential information. The first set of documents consists of a series of emails related to a legal matter on which the defendant sought the plaintiff's advice. It is apparent from the exchanges that the plaintiff understood the defendant to be engaged in, or about to engage in, wrongdoing in connection with this matter. The parties' attorney-client relationship terminated around the time of the foregoing emails. The second set of documents contain a discussion of the same events in connection with a malpractice suit the defendant

brought against the plaintiff in Connecticut. The information in all of these documents, insofar as it relates to alleged wrongdoing by the defendant's representatives, is very likely to be embarrassing or detrimental to the defendant.

Under these circumstances, the relief sought by the plaintiff serves a compelling objective - namely, furthering the plaintiff's ethical obligation to protect former client confidences – that outweighs the presumption of the public's entitlement to access to court records. The court concludes that redaction and sealing, as described in the plaintiff's moving papers, is warranted.

However, there is no basis for the expanded relief the defendant seeks in its cross motion. As the defendant is undoubtedly aware after multiple discussions with the court on the matter, its request for the court to endorse the parties' confidentiality agreement is improper. While the parties may enter into any confidentiality agreement they wish, such agreements are not binding on the court. Nor does the mere existence of a confidentiality agreement, whether in the template promulgated by the Commercial Division or not, obligate the court to exercise its discretion to seal court records. Instead, sealing is to be granted on a case-by-case basis upon a showing of good cause only. The defendant has not made any such showing.

The defendant's application to strike "any and all references to Plaintiff's allegations regarding why it claims that it was fired" is similarly without any sound legal basis. CPLR 3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." Thus, that material is deemed "spurious" by a party does not of itself warrant striking. The material must also be unnecessary, which courts have interpreted to mean irrelevant. "Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)." Soumayah v Minnelli, 41 AD3d 390, 393 (1st Dept. 2007) (quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C:3024:4, at 323). "A motion to strike scandalous or prejudicial material from a pleading … will be denied if the allegations are relevant to a cause of action." New York City Health and Hospitals Corp. v St. Barnabas Community Health Plan, 22 AD3d 391, 391 (1st Dept. 2005); see Hirsch v Stellar Management, 148 AD3d 588 (1st Dept. 2017); Wittels v Sanford, 137 AD3d 657 (2016).

In addition to failing to point to any specific documents or passages in the record that should be stricken, the defendant

has not demonstrated that the allegations it refers to are irrelevant to the plaintiff's claims. Though the circumstances surrounding the termination of the attorney-client relationship between the parties do not, at first blush, appear to have any bearing on whether the defendant owes the plaintiff attorney's fees, the defendant has introduced allegations in its submissions suggesting that the amount of fees owed should be determined with direct reference to those circumstances. For example, the defendant has submitted the affidavit of Heather Lourie, the defendant's Chief Operating Officer, stating that "[a]ny fee claim by White & Case now must take into account that [the plaintiff] quit, suddenly, at a crucial point in the sale process, forcing [the defendant] to incur significant expenses … getting new counsel up to speed very quickly." Lourie avers that based on her "20+ years of experience, those 'transition' expenses should be deducted from whatever might otherwise be due to White & Case." In many other submissions, the defendant and its representatives expound in great detail on *their* version of the events leading to the termination of the attorney-client relationship, further suggesting that the manner of the plaintiff's departure should bear on the outcome of this case.

The defendant has shifted its position on the importance of the circumstances surrounding the plaintiff's departure over the course of its motion practice. After initially complaining of

the plaintiff's "bullying" bill-collection tactics at the end of the attorney-client relationship, the defendant insisted in its opposition to the plaintiff's summary judgment cross motion that "whether White & Case quit or was fired is simply irrelevant to its fee claim." In its most recent submission, however, the defendant stated that while "*whether* White & Case quit or was fired" has no bearing on liability, it is "relevant to the calculation of damages." The defendant further opined that the reason *why* the plaintiff was fired was irrelevant to both liability and damages.

The evolution of the defendant's posturing on this issue reflects the difficulty of reconciling its desire to center this action around its own version of the events leading to the termination of the attorney-client relationship with its demands for the categorical exclusion of the plaintiff's version of the same events from the record. But the defendant cannot have it both ways. While it is understandable that the defendant wishes to preclude the unflattering implications made in the plaintiff's evidentiary submissions, it is disingenuous to suggest that the question of "whether" the plaintiff was fired or quit can be divorced from "why" the plaintiff was fired or quit. If the defendant intends to argue, as it has thus far, that the plaintiff's "suddenly" quitting means that the plaintiff's fees must be discounted, then the plaintiff's

allegations and evidence telling a very different story are relevant. Moreover, they would fall squarely within an exception to Rule 1.6 allowing limited disclosure of client confidences to the extent necessary to establish or collect a fee.

Though the court has found that the sealing and redaction of documents containing the plaintiff's allegations is warranted to protect the defendant's confidences, striking all such allegations is plainly improper. Accordingly, the branch of the defendant's cross motion seeking to strike must be denied.

Finally, the branch of the defendant's cross motion seeking the issuance of a formal "caution" against the plaintiff is without any basis in law or fact and must be denied. The plaintiff's "cross motion" seeking sanctions against the defendants is likewise denied as procedurally improper.

B. Motions to Strike

The Court turns next to the parties' competing motions to strike various documents submitted by their adversaries. In its motion, the defendant seeks to strike the plaintiff's cross motion for summary judgment as untimely, or, in the alternative, to strike "any and all references in the Cross-Motion to any confidential communications between or among client and counsel in March 2017, pursuant to CPLR 3024(b), inasmuch as any such

communications are irrelevant as a matter of law to the issues to be tried."

In a preliminary conference order dated January 18, 2018, the court directed that any dispositive motion must be made no later than 60 days after the filing of the note of issue. The court did not vacate or modify that directive in any subsequent discovery order. The plaintiff filed a note of issue on September 24, 2019. Accordingly, the deadline to move for summary judgment was November 25, 2019, the first business day following the expiration of the 60-day period on November 23, 2019. The defendant timely moved for summary judgment on November 25, 2019. However, the plaintiff did not cross-move for summary judgment until January 22, 2020, approximately 120 days after the note of issue was filed.

In general, where a party moves for summary judgment beyond a deadline mandated by court order, the lateness may only be excused upon a showing of good cause for the delay, which must be something more than mere law office failure. See Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell Univ., 114 AD3d 472, 473 (1st Dept. 2014); see also Brill v City of New York, 2 NY3d 648, 652 (2004). This rule applies equally to untimely cross motions for summary judgment. As the First Department has emphasized, "respect for court orders and statutory mandates and the authoritative voice

of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a 'cross motion' notwithstanding the absence of a reasonable explanation for its untimeliness." Kershaw v Hosp. for Special Surgery, 114 AD3d 75, 89-90 (1st Dept. 2013).

Nonetheless, the First Department has also "held, on many occasions, that an untimely *but correctly labeled* cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause." Id. at 87 (collecting cases) (emphasis in original). A true cross motion is "merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion." Id. (quoting Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1) (internal quotation marks omitted); see CPLR 2215. Conversely "a cross motion is an improper vehicle for seeking relief from a nonmoving party." Kershaw v Hosp. for Special Surgery, supra at 88. Untimely, mislabeled cross motions that do not raise issues "nearly identical" to those raised in the timely, initial motion may not be entertained without good cause shown for the delay. Id.; see, e.g., Muqattash v Choice One Pharmacy Corp., 162 AD3d 499 (1st Dept. 2018); Hennessey-Diaz v City of New York, 146 AD3d 419 (1st Dept. 2017); Rubino v 330

Madison Co., LLC, 150 AD3d 603 (1st Dept. 2017); Borges v Placeres, 123 AD3d 611 (1st Dept. 2014).

Here, the defendant timely moved for summary judgment dismissing each of the plaintiff's claims, which sound in breach of contract, account stated, and *quantum meruit*, or, in the alternative, to cap the damages to which the plaintiff may be entitled. The plaintiff's cross motion seeks summary judgment on the plaintiff's breach of contract claim. There is no dispute that the plaintiff's motion is a true, properly labeled cross motion. Moreover, the only claim raised in the plaintiff's motion is identical to a claim the defendant has moved on. The defendant's conclusory assertion that the plaintiff has presented "a significant amount of new factual allegations" is belied by the Court's own review of the papers. Accordingly, the defendant's application to strike the plaintiff's cross motion for summary judgment is denied, and the cross motion is deemed timely.

The alternative relief the defendant seeks is also denied. The defendant asks the Court to strike "any and all references" in the plaintiff's cross motion to its communications with the plaintiff in March 2017. The court notes that this application is essentially an earlier, narrower, version of relief the defendant sought under motion sequence 008. For the same

reasons discussed supra at pp. 10-13, the defendant does not present an adequate basis for this relief.

The plaintiff's application to strike the defendant's opposition to its cross motion for summary judgment as untimely is also denied. The plaintiff was not prejudiced by the one-day delay in the defendant's filing and has filed reply papers responsive to the arguments in the defendant's opposition. The court may properly consider both the defendant's opposition and the plaintiff's reply in deciding the plaintiff's summary judgment cross motion.

III. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motions for leave to file several exhibits to its summary judgment opposition and cross motion under seal and to redact sections of other submissions in support of such opposition and cross motion pursuant to 22 NYCRR 216 (SEQ 005, SEQ 008) are granted to the extent described below; and it is further,

ORDERED that Exhibits V, W, X, Y, Z, AA, BB, CC, DD, and EE to the plaintiff's cross motion for summary judgment and opposition to the defendant's motion for summary judgment, none of which have been filed, shall be filed under seal on or before January 15, 2021; and it is further,

ORDERED that the proposed redactions included in the plaintiff's memorandum of law and affidavit of Oliver Brahmst, and in Exhibits B, I, J, R, S, and T to the plaintiff's summary judgment cross motion and opposition, and in Exhibits A and B of the plaintiff's supplemental affidavit in support of its cross motion for summary judgment, are permitted *nunc pro tunc*; and it is further,

ORDERED that the defendant's cross motion seeking endorsement of the parties' confidentiality agreement, the striking of certain allegations, and the issuance of a formal caution against the plaintiff (SEQ 008) is denied in its entirety; and it is further,

ORDERED that the plaintiff's purported cross motion for sanctions (SEQ 008) is denied as procedurally improper; and it is further,

ORDERED that the defendant's motion to strike the plaintiff's summary judgment cross motion as untimely, or, in the alternative, to strike certain references in the cross motion from the record (SEQ 007) is denied in its entirety; and it is further,

ORDERED that the plaintiff's motion to strike the defendant's opposition to the plaintiff's summary judgment cross motion as untimely (SEQ 006) is denied.

This constitutes the Decision and Order of the court.

Dated: December 30, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON