

Lerner v Newmark & Co. Real Estate, Inc.
2021 NY Slip Op 30085(U)
January 12, 2021
Supreme Court, New York County
Docket Number: 657273/2017
Judge: Andrea Masley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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JUSTIN LERNER,

Plaintiff,

- v -

NEWMARK & COMPANY REAL ESTATE, INC., BGC
PARTNERS, INC and NEWMARK KNIGHT FRANK f/k/a
NEWMARK GRUBB KNIGHT FRANK,

Defendants.

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INDEX NO. 657273/2017

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 71, 72, 98, 99, 100, 101, 102, 103, 104, 105, 110, 111, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for SEAL.

In motion sequence number 002, defendants Newmark & Company Real Estate, Inc. (Newmark) and BGC Partners, Inc. (BGC) move to seal NYSCEF Doc. No. 64. This court record “contains excerpts from Newmark’s ... Broker Policy Handbook.” (NYSCEF Doc. No. [NYSCEF] 68, Sheridan aff ¶ 3.)

In support, Newmark submits the affidavit of Kevin McCabe. (NYSCEF 122, McCabe aff.) McCabe is an Executive Vice President and Regional Managing Director of Ross Real Estate Inc., an affiliate of Newmark. (*Id.* ¶ 1.) He is also on the Operating Committee of Newmark’s parent entity. (*Id.*) McCabe states, “I was personally involved in the development of Newmark’s Broker Policy Handbook.” (*Id.* ¶ 5.) He adds that “Sections 1, 2, 3, 4, 15, 16, 17, 18 and 19 of Newmark’s Broker Policy Handbook contain competitively sensitive information, namely, Newmark’s confidential internal policies and procedures.” (*Id.* ¶ 6.) According to McCabe, “Newmark has dedicated significant resources to develop Newmark’s Broker Policy Handbook as it is tailored to Newmark’s business model and applies exclusively to Newmark brokers and certain of Newmark’s former brokers.” (*Id.* ¶ 7.) McCabe states,

“Section 15 does not reflect information that is ‘industry standards’ as it is a Newmark-specific dispute resolution mechanism. Newmark’s fee sharing guidelines and internal arbitration procedures set forth in Section 2 and 15 of Newmark’s Broker Policy Handbook were

developed over the course of many years and reflect deep institutional insight into the commercial real-estate industry that sets Newmark apart from its competitors. To my knowledge, there are no competitor real estate firms that provide similar resources or dispute resolution mechanisms to its brokers. Public disclosure of Newmark's Broker Policy Handbook will harm Defendant Newmark, as competitor firms will be able to adopt copycat procedures policies, which is an unearned advantage."

(*Id.* ¶¶ 15-16.) McCabe further provides that "[a]ll Newmark brokers agree to the internal arbitration procedures set forth in Section 15 when joining Newmark as an Independent contractor or employee." (*Id.* ¶ 12.)

In opposition, plaintiff Justin Lerner argues that "Newmark itself through prior counsel, Emily Milligan, has filed its entire Broker Policy Handbook including the sections it now seeks to redact ... in Newmark Southern Region LLC v. Barnes, New York County Index 655186/2016." (NYSCEF 129, Supplemental Memorandum of Law at 1.) Lerner adds that the Broker Policy Handbook has been filed in other actions as well. (NYSCEF Doc. Nos. 130, 131, 132.)

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

"(a) [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, 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 the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, 'court records' shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a)."

Judiciary Law § 4 provides that judicial proceedings shall be public. "The public needs to know that all who seek the court's protection will be treated evenhandedly," and "[t]here is an important societal interest in conducting any court proceeding in an open forum" (*Baidzar Arkun v Farman-Farma*, 2006 NY Slip Op 30724[U],*2 [Sup Ct, NY County 2006] [citation omitted].) The public right of access, however, is not absolute. (*See Danco Lab, Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000].)

The "party seeking to seal court records bears the burden of demonstrating compelling circumstances to justify restricting public access" to the documents.

(*Mosallem v Berenson*, 76 AD3d 345, 348-349 [1st Dept 2010] [citations omitted].)
Good cause must “rest on a sound basis or legitimate need to take judicial action.”
(*Danco Labs.*, 274 AD2d at 9.)

In the business context, courts have sealed records where trade secrets are involved or where the disclosure of documents “could threaten a business’s competitive advantage.” (*Mosallem*, 76 AD3d at 350-351 [citations omitted].) Additionally, the First Department has affirmed the sealing of records concerning financial information where there has not been a showing of relevant public interest in disclosure of the financing. (See *Dawson v White & Case*, 184 AD2d 246, 247 [1st Dept 1992].) For instance, in *Dawson v White & Case*, the First Department stated that the plaintiff-appellant failed to show “any legitimate public concern, as opposed to mere curiosity, to counter-balance the interest of defendant’s partners and clients in keeping their financial arrangement private.” (*Id.* [internal quotation marks and citation omitted].)

Here, the excerpts of Newmark’s Broker Policy Handbook that defendants move to seal are virtually identical to the unsealed court records in other actions as affirmed by Lerner’s counsel. (*Compare* NSYCEF 126, Proposed Redactions with NYSCEF 132, Falik v. Newman Filing; *see also* NYSCEF 127, Hart aff ¶ 2.) Because virtually identical information was filed publicly in other actions, defendants have failed to establish their burden of demonstrating compelling circumstances to justify restricting public access to Newmark’s Broker Policy Handbook here. (*Mosallem v Berenson*, 76 AD3d 345, 348-349 [1st Dept 2010] [citations omitted].) This information has already been made available to the public and therefore there is no showing of a sound basis or legitimate need to take judicial action here. (*Danco Labs.*, 274 AD2d at 9.) In similar circumstances, the failure to take reasonable steps to have a publicly filed document sealed has resulted in waiver. (*Abdullahi v Shenoy*, 174 AD3d 1334, 1335 [4th Dept 2019]; *Ava v NYP Holdings, Inc.*, 64 AD3d 407, 416 [1st Dept 2009]) [“Notably, plaintiff herself made her medical records public by filing them in court in her action against Epstein without requesting that they be filed under seal.”] These multiple unsealed filings also indicate that the information at issue is not a secret.

The court has considered the parties’ remaining arguments and they do not demand an alternative result.

Accordingly, it is

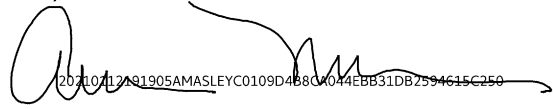
ORDERED that motion sequence number 002 to seal is denied; and it is further

ORDERED that defendants are directed to replace the placeholder at NYSCEF Doc. No. 64 with the unredacted document; and it is further

ORDERED that the County Clerk is directed to unseal NYSCEF Doc. No. 64; and it is further

ORDERED that movant is directed to serve a copy of this order on the County Clerk in accordance with the procedures set forth in the Protocol on Courthouse and

County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website - www.nycourts.gov/supctmanh).


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1/12/2021

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE