

GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.
2016 NY Slip Op 31431(U)
July 20, 2016
Supreme Court, New York County
Docket Number: 650242/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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GS PLASTICOS LIMITADA,

Plaintiff,

-against-

Index No. 650242/09
5500 -

BUREAU VERITAS CONSUMER PRODUCTS
SERVICES, INC.,

Defendant.

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JOAN A. MADDEN, J.:

Defendant Bureau Veritas Consumer Products Services, Inc. ("BVCPS") moves for an order granting renewal of its motion to seal, and, upon renewal, permitting certain documents to be filed under seal. Plaintiff GS Plásticos Limitada ("GS") opposes the motion.

Background

GS is a Brazilian manufacturer of toy "premiums" for the promotional market, which are small plastic toys like those found in McDonald's Happy Meals. BVCPS provides testing and inspection services for consumer products, including toys premiums like the ones manufactured by GS. Non-party Kellogg Brazil, and its subsidiary of the Kellogg Company ("Kellogg"), sought BVCPS's inspection services to test certain stamps manufactured by GS which were to be used for promotional inserts in Kellogg's products.

This action arises out of allegations that, *inter alia*, between August 2006 and October 2006, BVCPS issued various reports that incorrectly found that GS's stamps contained dangerously high levels of arsenic. BVCPS provided its reports to Kellogg, which thereafter cancelled its contract with GS to manufacture the stamps. Discovery is complete, and BVCPS has moved for summary judgment dismissing the GS's remaining claim against BVCPS for tortious interference with GS's contract with Kellogg.

BVCPS previously moved to seal various documents and two affidavits submitted in

support of its summary judgment motion. By order dated May 22, 2015, the court sealed the documents pending further order of the court and issued a briefing schedule with respect to the sealing issue. In support of its motion, BVCPS argued, *inter alia*, that the documents should be sealed since “(i) all the information at issue is sensitive business information, (ii) the public has no legitimate interest in the information, other than mere curiosity, and (iii) releasing the information to the public would harm BVCPS’s business and invade the privacy of their parties.” GS opposed the motion to seal.

By decision and order dated October 19, 2015, the court denied the motion to seal. With respect to those documents that BVCPS asserted contain sensitive business information,¹ the court denied the motion, noting that “BVCPS submits no affidavits from any representatives of defendants explaining why the documents are sensitive or contain information that would give undue advantage to their competitors, including that its testing methods from more than ten years ago are unique to BVCPS or are otherwise entitled to protection.” However, the court permitted renewal of the motion to seal as to these documents “upon an affidavit of demonstrating a basis for finding that the testing methods and other information will impact BVCPS’s competitive standing in the market place and/or the documents contain proprietary information akin to a trade

¹These documents included the affidavit of Shari Piskorz, which describes BVCPS’s sample testing, procedures, and methodology, and provides a description of the retesting of the stamps and the findings from the inspection; Exhibits 53 and 54 which, respectively, describe difficulties in testing for arsenic, and contain the December 2006 test report showing the stamps failed the heavy metals testing; Exhibits 24, 30, 31, and 33, which discuss BVCPS’s problems with testing the stamps and reflect the investigation into the mistakes in such testings; and Exhibits 25 and 63, which are the Quality Assurance Plan used for the stamps and set forth testing methods and standards and changed over the course of testing, and Exhibit 28 which provides a description of the retesting of the stamps and the results of such retesting. Of these documents, BVCPS seeks renewal of its motion to seal only with respect to the affidavit of Shari Piskorz, and accompanying documents and Exhibits 25, 28, 31, 33, and 63.

secret.”

BVCPS now moves for renewal of its motion to seal the affidavit of Shari Piskorz, and accompanying exhibits (“the Piskorz affidavit”) and 25, 28, 31, 33, and 63 to the Polonsky Affirmation. In support of its motion, BVCPS submits the affidavit of James Keast (Keast), who is presently employed by BVCPS as a Vice President of Account Management and Technical Services. Keast states that in his current role, he is “fully familiar with BVCPS’s marketing, its competitors, its efforts to retain existing significant customers and to develop new significant customers, and the effects of confidential business information on BVCPS’s competitive efforts” (Keast Aff. ¶ 2). From 2005 to 2007, Keast was BVCPS’s Director of Premiums and, according to Keast, in that role, he was “responsible for BVCPS’s testing of premiums for some of its clients, including Kellogg [and] is familiar with BVCPS’s testing of premiums for Kellogg during the 2006 time period at issue in this litigation” (Id ¶ 3). He states that there is “good cause [for sealing] because all the information at issue is confidential business information and releasing the information to the public would help BVCPS’s competitors and hurt BVCPS competitively” (Id ¶ 4).

In particular, with respect to the Piskorz affidavit, Keast states that it “contain[s] confidential information related to BVCPS’s testing of products, its work flow, its internal procedures, and its quality assurance and quality control (“QA/QC”) procedures. These documents include detailed descriptions of BVCPS’s testing methods from receipt of the samples, to sample preparation, digestion and transfer to the Inductively Coupled Plasma spectroscopy lab” (Id ¶ 5). Keast further states that while the Piskorz affidavit “is directly addressed to procedures and testing in 2006, many of these procedures are still relevant today” (Id, ¶ 6). He further states that “[p]ublic disclosure of the document would disclosure these

procedures, including current QA/QC procedures, to BVCPS's competitors and give them competitive advantage. At the same time, such public disclosure would be to BVCPS's detriment and adversely affect BVCPS's competitive standing" (Id).

With respect to Exhibits 25 and 63, which are the Quality Assurance Plan ("QAP"), used for the stamps, Keats maintains that these documents "set out the testing methods and standards, the frequency of testing, the changes over the course of the project in testing and other facets of the plan for testing the Stamps (Id ¶ 7). Keast further states that while this information is from 2006, "some of it is still relevant today, and public disclosure to competitors would provide them with a competitive advantage to BVCPS's detriment [as it] would lay out to BVCPS's competitors the details of its testing program for premiums like the stamps" (Id). As for Exhibits 28, 31 and 33, Keast states that these documents "contain[] confidential discussions of the investigation undertaken by BVCPS of the erroneous testing results and of the corrective actions taken by BVCPS" (Id ¶ 8). He further states that "the detailed review of the investigation of the erroneous test results...which discloses BVCPS's QA/QC procedures and methods... and include[s] the corrective action request which affected BVCPS's confidential testing procedures" (Id). According to Keast, "public disclosure of these documents would provide BVCPS's competitors with a window into BVCPS's approach to and methods for investigation of challenged test results in 2006 and would still be meaningful to BVCPS today...and would be to BVCPS's detriment competitively" (Id).

GS opposes the motion, arguing that the Keast's affidavit does not provide a basis for finding "good cause" to seal. In particular, GS asserts that the broad use and knowledge of the procedures and methods at issue, noting that Kellogg's testing protocol requires BVCPS to provide "standard services" including developing a QAP, and that Kellogg's Quality Assurance

Manual “provides exhaustive highly detailed, guidance regarding the tests procedures, methods, frequency and timings that should be included in the QAP” (Affirm in Opp, at 2). In addition, GS asserts that the “broad use and knowledge of the procedures and methods at issue is indicated by that fact that the [relevant] Kellogg’s [testing protocol] is based on twenty U.S. and International requirements and methods” (Id). GS argues that as these testing procedures and methods are well known and widely used, and were known and used by STR, a competitor of BVCPS, that also did testing for Kellogg, in 2006. In support of its statements, GS relies on the affidavit of its owner and officer Enrico Sessarego, and certain exhibits attached to his affidavit indicating, *inter alia*, that Kellogg required third-party testing companies, like BVCPS, to follow a certain testing protocol in compliance with various government regulations, and that STR used the same QA/AC procedures as BVCPS.

GS also asserts that Keast does not provide any factual allegations to support his conclusion that the records at issue are strategic, and that he fails to provide any empirical data or foundational facts from which specific harm can be established. Thus, GS argues, the records are “historic,” known to BVCPS’s competitors, and non strategic, and are not subject to sealing.

In his reply affidavit, Keast states that while STR had access to the same information, manuals, procedures and requirements for Kellogg, that STR is “not really competitor of BVCPS’s” but “a co-provider of services,” nor is STR the only other testing and accreditation company in the world (Keast Reply Aff ¶ 6). He further states that Kellogg’s testing requirements and procedures, while known to BVCPS and STR, ...are confidential with respect to Kellogg’s own competitors (Id ¶ 7). Keast also states that the argument that BVCPS’s methods and procedures are not confidential as they are based on well known standards, only is relevant to Exhibits 25 and 63 regarding the QAP for testing stamps [and that] the details of the

testing program are confidential and are not known to Kellogg's and BVCPS's competitors (other than STR which is the recipient of the same information as BVCPS)..." (Id ¶ 8). As for the Piskorz's affidavit, Keast states that it includes "the details of the work flow at BVCPS, and how the testing is carried out, that information goes well behind mere testing standards..." (Id ¶ 9). He further states that contrary to GS's position, the documents are not limited to historic information and are subject to protection as trade secrets.

Discussion

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made were unknown to the movant and were therefore not brought to the court's attention" (*Tishman Constr. Corp. of New York v. City of New York*, 280 AD2d 374, 376 [1st Dept 2001])[citations omitted]. Here, renewal is granted as the Keast affidavit provides new facts, and the court specifically permitted BVCPS to renew upon an affidavit.

In determining whether upon renewal, "good cause" exists to seal the documents at issue, the court notes that under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499 [2d Dept 2007]; *Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322 [1st Dept 2006], *lv denied* 10 NY3d 705 [2008]). The public right to access, however, is not absolute (*Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [1st Dept 2000]). 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]). That rule states that:

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 interest of the public as well as of the parties (22 NYCRR 216.1 [a]).

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” (*Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d at 325). “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” (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d at 502). “Confidentiality is clearly the exception, not the rule” (*Matter of Hoffman*, 284 AD2d 92, 93-94 [1st Dept 2001]), and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1).

In determining whether sealing is warranted, the court must balance the interests of the public as well as of the parties (*Mancheski v. Gabelli Group Capital Partners*, 39 AD3d 499, 502 (2nd Dept 2007); *.Doe v New York Univ.*, 6 Misc 3d 866 [Sup Ct, NY County 2004]). With respect to this balancing, the First Department, has held that “the public has a powerful interest in open court proceedings” (*Mosallem v. Berenson*, 76 AD3d 345, 350 [1st Dept 2010]). Moreover, it “has authorized sealing only in strictly limited circumstances” such as to protect the confidentiality of trade secrets, or to preserve the privacy of an infant (*see, Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d at 325 [internal citations omitted]). Of relevance here, “in the business context, [the courts] have allowed sealing where trade secrets are involved ...or where the release of documents could threaten a businesses’ competitive advantage” (*Mosallem v. Berenson*, 76 AD3d at 350-351).

Here, BVCPS has not shown that the documents at issue contain trade secrets,

confidential information, or could threaten its competitive advantage. To the contrary, as argued by GS, and not refuted by Keast in his reply affidavit, the testing procedures and methods contained in the documents are based on standard procedures and protocols required by Kellogg, based on federal guidelines, as opposed to unique procedures and methods developed by BVCPS. In this regard, neither of Keast's affidavits provide any scientific basis or explanation for his contention that the testing procedures and methods are trade secrets or confidential business information. Moreover, BVCPS acknowledges that these testing procedures and methods were known by at least one other testing company. Thus, it cannot be said that such testing procedures or methods are entitled to protection as a trade secret (*see Mosallem v. Berenson*, 76 AD3d at 351; *compare, Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [permitting redaction of part of the record that would reveal trade secrets related to the manufacture and distribution of the oral contraceptive RU-486]; *Matter of Twentieth Century Fox Film Corp*, 190 AD2d 483, 488 [1st Dept 1993][finding sealing of infant's contract for performance of a motion picture should be sealed where petitioner's "relationship with its competitors, as well as with other artists in its employ, could be compromised by the disclosure of the details of the contracts, which include information as to how it has marketed the subject motion picture"]).

Next, with respect to Exhibits 28, 31 and 33, BVCPS asserts that the details as to its testing procedures during its internal investigations and the corrective measures it took following the erroneous testing of GS's product go beyond standard testing procedures and methods, generally used in the industry. However, it fails to provide a scientific or other basis as to why these testing procedures qualify as a trade secret, for example, by pointing to efforts by BVCPS, if any, to develop these testing procedures or to ensure their confidentiality, or how the release of these procedures would harm BVCPS competitively. In this connection, as the court noted in its

previous decision denying BVCPS's motion to seal, the testing at issue occurred more than ten years ago, and while Keast asserts that certain unspecified information in the documents remains relevant and thus disclosure of the testing information will threaten BVCPS's current competitive standing, he fails to provide any explanation or facts supporting this assertion (*see Mosallem v. Berenson*, 76 AD3d at 351 [defendants failed to demonstrate how documents that were over 10-years old would cause harm to its present-day business]).² Finally, as BVCPS is a global company performing safety testing of various items, including consumer goods, it cannot be said that disclosure of documents is of no public interest (*compare Dawson v. White & Case*, 184 AD2d 246 [1st Dept 1992][plaintiff failed to demonstrate relevant public interest in disclosure of financial documents in an for an accounting against a law firm]).

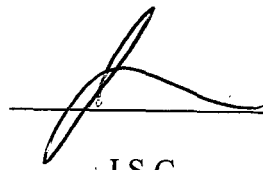
Conclusion

In view of the above, it is

ORDERED that the motion to renew is granted and, upon renewal, the motion to seal is denied; and it is further

ORDERED the court's May 22, 2015 order directing that certain documents shall be sealed shall be vacated within twenty days of efileing of this decision and order.

DATED: July 20, 2016



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

²To the extent the release of information relating to the corrective actions taken by BVCPS may potentially cause "embarrassment or damage to [its] reputation," these concerns are insufficient to constitute good cause for sealing court records (*see Mosallem v. Berenson*, 76 AD3d at 351)..