

Meissner v Yun
2017 NY Slip Op 32721(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 650913/12
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

-----X
JOERN MEISSNER,

Plaintiff,

-against-

TRACY YUN and MANHATTAN ENTERPRISE
GROUP LLC,

Defendants.
-----X

ANDREA MASLEY, J.:

This case involves the alleged take-over, by defendant Tracy Yun (Yun), of Manhattan Review LLC, a limited liability corporation established to assist persons who are preparing to take exams for admission to business schools, and the take-over of the assets of the LLC. For the purposes of this motion, it is unnecessary to examine the complex history of this litigation.

In this motion, Yun, who is appearing unrepresented, moves for an order and judgment, pursuant to CPLR 5104 and Judiciary Law §§ 753 (A) (3) and 773: (1) finding plaintiff Joern Meissner (Meissner) guilty of contempt of court for failing to comply with a court ordered confidentiality stipulation dated August 19, 2015 (the Confidentiality Stipulation) governing certain discovery material; (2) enjoining plaintiff from using designated confidential information; and (3) directing plaintiff to redact/remove protected confidential information from public filings on the federal and state court dockets and elsewhere.

The Confidentiality Stipulation provides that either party can designate information as confidential information, and limits the use of that information by the receiving party to use "for the purposes of this litigation," "[e]xcept with the prior

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written consent of the Producing party or by Order of the Court.”

Yun aff, exhibit B, ¶¶ 6, 5. The Confidentiality Stipulation

defines confidential information as:

“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 designating the material as confidential, be detrimental to the conduct of that party’s business or the business of any of that party’s customers or clients.”

Id., ¶ 3 (a).

Yun alleges that Meissner violated the Confidentiality Stipulation by incorporating information contained in three email chains between Yun and attorney Christopher Kelly, dated December 30, 2010, November 4, 2011 and December 21, 2011, in allegations made by Meissner in an action in the United States District Court for the Southern District of New York entitled *Manhattan Review LLC v Yun*, US Dist Ct, SD NY, 16 Civ 0102 (LAK). The allegations that are quoted by Yun include, among others, the following:

“49. During this time period, namely December 2011, Yun was consulting with Kelly, receiving advice from Kelly, acting upon Kelly’s advice, and informing the employees of Manhattan Review that she was acting upon the advice of counsel in closing down Manhattan Review, creating a new entity and transferring all of Manhattan Review’s assets, clients, intellectual property and employees to her entity, Manhattan Elite Prep.

“83. Specifically but not exclusively, in December 2011, Kelly advised Yun about how to engage in a sham transaction for the transfer of Manhattan Review’s trademarks, but then advising Yun: ‘Whatever you give [Manhattan Review] you could then just turn around and pay yourself.’

"84. Specifically but not exclusively, in December 2011, Kelly had actual knowledge that Yun was intent on dissolving Manhattan Review, and he further advised Yun, 'If you dissolve [Manhattan Review] and distribute all assets (pay yourself etc), you could then start from scratch with another entity (or two)...[You] will have to negotiate with Joern about what to do with [Manhattan Review] name, website, trademark, etc., as you note.'"

Yun mem of law at 9-10.

According to Yun, the allegations are derived almost completely from information contained in the email chains, and are gross distortions of the facts. Yun also asserts that the federal action, in which the allegations are made, is duplicative of derivative claims previously dismissed in this action.

Yun contends that the documents were designated confidential information, and, therefore, their use in the federal action by Meissner constitutes a violation of the Confidentiality Stipulation.

Yun had produced the email chains in response to a motion by Meissner in the context of this litigation. According to the decision ordering their production, Yun claimed that the documents were protected by attorney-client privilege. *Meissner v Yun*, 2016 NY Slip Op 30468(U), *1 (Sup Ct, NY County 2016, Oing, J.). There is no indication that Yun claimed that the documents were otherwise confidential.

In his decision on the motion, Judge Oing held that the three email chains that are the subject of this motion were not protected by the attorney-client privilege, because Kelley was not, in fact, Yun's attorney, but rather, represented Manhattan

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Review, LLC.¹ *Id.* at 2. Judge Oing, therefore, ordered that the three email chains be produced by Yun. *Id.* at 4.

In a later order, dated June 9, 2016, Judge Oing directed Yun to provide the documents to Meissner on or before June 20, 2016. On June 19, 2016, Yun moved before the Appellate Division, First Department, for a stay of discovery pending a hearing and determination of appeals from Judge Oing's various orders. That motion was denied, and interim relief, which had been granted by the Appellate Division, was vacated on August 4, 2016.

According to Yun, she produced the email chains around August 4, 2016, and in a footer to the documents, Yun wrote, "Confidential Pursuant to Protective Order August 19, 2015 N.Y. Sup. Ct. 650913/12." Yun reply aff, ¶ 4. It is that footer on which she bases her claim that use of the content of the email chains violated the Confidentiality Stipulation, because Meissner failed to obtain either her prior written consent or an order of the court before using information contained in the documents.

When Yun originally produced the documents in response to a motion made by Meissner, pursuant to the Confidentiality Stipulation, she did not claim that the email chains were confidential for any reason other than as attorney-client documents. If she believed that the email chains were confidential for any other reason, she should have made that

¹ Judge Oing also ruled that one email chain, dated March 27, 2012, was privileged, because it was dated after Manhattan Review, LLC was dissolved and it concerned trial preparations for this litigation. That email chain was not turned over to Meissner and is not involved in this motion.

claim at the time. As a general rule, "when a party fails to challenge a disclosure request in a timely fashion, inquiry into the propriety of the information sought is foreclosed." *Park Knoll Assoc. v Schmidt*, 99 AD2d 772, 772 (2d Dept 1984) (internal quotation marks and citation omitted); see also *Pagones v Maddox*, 172 AD2d 809, 811 (2d Dept.1991) (defendants waived "objections to all but palpably improper items in the demands for bills of particulars by failing to timely move for a protective order"). Here, Meissner's request for the email chains was not palpably improper.

The court recognizes that Yun is not an attorney, and is appearing unrepresented; however, were this court to permit her to raise an entirely new and unrelated claim of confidentiality, after the court fully examined and rejected her original claim of confidentiality based upon a purported lawyer-client relationship, it would merely be rewarding Yun for her own failure to timely assert the full bases for her claim of confidentiality, and would unjustifiably burden the court.²

In any case, even had Yun timely raised her claim of confidentiality, her motion must be denied, because the allegations quoted by Yun do not contain confidential information as defined in the Confidentiality Stipulation. In that document, confidential

² Yun complains in her reply affidavit that counsel for Meissner did not notify her until August 17, 2017, in a letter, that Meissner disagreed with her belated designation of the emails as confidential. But it was her designation of those emails as confidential that was untimely, rather than the letter of counsel which was sent in response to her motion seeking an order of contempt.

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information is defined as containing "trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients." Yun aff, exhibit B, ¶ 3. Yun fails to point out any allegations that disclose, contain, or even refer to trade secrets, propriety business information or competitively sensitive information. Nor may Yun rely on the final portion of the definition, "other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients." *Id.*

That phrase must be taken to relate to the phrase that comes before it, "trade secrets, proprietary business information, competitively sensitive information." Without relating back to those terms, it could apply to virtually any information that the producing party did not wish to reveal, and, as such, is not a proper base for a claim of confidentiality or a motion for contempt.

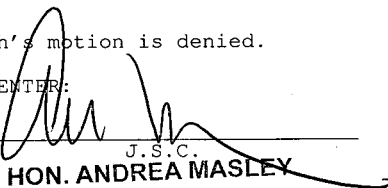
Accordingly, it is hereby

ORDERED that defendant Yun's motion is denied.

Dated:

12/20/17

ENTER:


J.S.C.
HON. ANDREA MASLEY