

Heritage Auctioneers & Galleries, Inc. v Christie's, Inc.
2018 NY Slip Op 30605(U)
April 2, 2018
Supreme Court, New York County
Docket Number: 651806/2014
Judge: Andrea Masley
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NYSCEF DOC. NO. 615

RECEIVED NYSCEF: 04/06/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
-----X
HERITAGE AUCTIONEERS & GALLERIES, INC.
d/b/a HERITAGE AUCTIONS, and HERITAGE ART
& COLLECTIBLES, INC.,

Plaintiffs,

Index No. 651806/2014

- against -

CHRISTIE'S, INC., MATTHEW RUBINGER,
RACHEL KOFFSKY, and CAITLIN DONOVAN,
Defendants.

-----X
MASLEY, J.:

In motion sequence number 009, defendants Christie's, Inc. (Christie's), Matthew Rubinger, Rachel Koffsky and Caitlin Donovan move pursuant to 22 NYCRR §130-1 for attorneys' fees, costs and sanctions against plaintiffs Heritage Auctioneers & Galleries, Inc. and Heritage Art & Collectibles, Inc. (collectively, Heritage) for frivolous conduct by flagrantly violating a confidentiality agreement.

This is an action concerning the sale of rare, high-end, luxury handbags. In its complaint, Heritage declares that it created this lucrative, specialized market category for handbags. Heritage alleges that Christie's, the largest auction house in the world, "launched a corporate raid to misappropriate Heritage's creation." (Complaint, ¶ 1). Specifically, Heritage alleges that Christie's induced the head of the Heritage, defendant Rubinger and two key members of its staff, defendants Koffsky and Donovan, to breach their respective employment contracts and engage in unfair business practices.

The parties entered a confidentiality agreement on December 22, 2014 that was so-ordered by Justice Oing on December 23, 2014 (the Protective Order). It limits the individuals who can see proprietary information produced in litigation designated by the producing party as confidential. The "Attorneys' Eyes Only" designation is the most

sensitive category of confidentiality in the Protective Order. Significantly, it provides in paragraph 10:

"Should the need arise for any party to disclose Classified Information during any hearing or trial before the court, including through argument or the presentation of evidence, such party may do so only after taking such steps as the Court, upon motion of the disclosing party, shall deem necessary to preserve the confidentiality of such Classified Information."

It is undisputed that plaintiffs filed a motion for summary judgment on Friday, July 21, 2017 at 2:13 p.m. (EST) supported by 118 documents, 48 of which contained documents designated attorneys' eyes only, in violation of the Protective Order, and confidential personal information, in violation of 22 NYCRR §202.5(e).

Defendants' attorney, Edward P. Gilbert, Esq., states in his August 17, 2017 affirmation that within minutes of the filing, he called plaintiffs local New York counsel Thomas Battistoni, Esq.,¹ who had filed the offending documents, but Gilbert was diverted to voice mail. Next, Counsel Gilbert alerted all of plaintiffs' counsel by email on Friday, August 17, 2017 at 2:20 p.m. and again at 3:42 p.m. Having heard nothing from plaintiffs, at 4:49 p.m., defendants filed a restrict access affirmation of intent requesting that the clerk's office restrict public access to the classified documents. Counsels Gilbert, Tiemstra and Vartian finally conferred on Friday, at 4:57 pm. Defendants demanded that plaintiffs take all necessary steps to protect the confidential information.

Plaintiff's attorney, Counsel Tiemstra states in her August 9, 2017 affirmation in opposition² that she responded by e-mail to Counsel Gilbert at 4:11 p.m. advising that plaintiffs were in touch with the County Clerk's office and arranging to withdraw the

¹Plaintiffs counsel Laura Tiemstra, Esq. and Armen Vartian, Esq. are California attorneys admitted Pro Hac Vice.

²The court notes that plaintiffs failed to file a memo of law in violation of 22 NYCRR 202.8.

filing. Counsel Gilbert claims he did not see this email until Saturday.³ Without saying when, Counsel Tiemstra states that plaintiffs were later informed that the clerk who could pull the filing was out of the office for the rest of the day. ¶13. Counsels Gilbert and Tiemstra also disagree about the single telephone conference call. She claims the parties agreed to file on Monday, July 24, 2017, a joint stipulation to have all documents sealed. Counsel Gilbert's 5:39 p.m. email "confirms" his demand that plaintiffs take all necessary steps to correct their violation of the Protective Order. Counsel Tiemstra concludes her affirmation in ¶16 that "With the court closed and our offices out of state, we believed that there was nothing we could do before Monday morning."

In fact, there was more that could be done⁴ and Counsel Gilbert did so. He emailed the court.⁵ On Saturday, July 22, 2017, at 10:29 a.m., defendants filed a proposed order to show cause requesting that (1) the documents be temporarily sealed until resolution of the order to show cause; (2) permanently seal the documents; (3) sanctions for violation of the confidentiality stipulation; and (4) attorneys' fees and costs in filing the motion. Somehow, Counsel Gilbert reached Justice George Silver, Acting Deputy Chief Administrative Judge in NYC, who participated in a phone conference with Counsels Gilbert and Vartian. Eventually at 2:04 p.m. on Saturday, Justice Silver notified the parties that he had contacted the county clerk who was able to restrict

³Counsel Gilbert claims that the e-mail landed in his spam file blaming Counsel Tiemstra for using her personal email account. However, the document attached to Gilbert's August 17, 2017 affirmation does not support his theory of her personal g-mail use, but confirms the date and time of his receipt of the e-mail.

⁴On evenings, weekends and holidays, emergency applications may be made by calling 800-430-8457 or e-mailing emergency@nycourts.gov. This system has been in effect since November 19, 2008.

⁵Counsel Gilbert reached out to this court by e-mail on Friday at 7:19 p.m. Having been newly assigned to the commercial division it was not my practice to access my court e-mail after hours or on weekends. It is now.

public access.⁶ At 2:49 p.m. on Saturday, Counsel Gilbert requested that Heritage review the public documents to ensure that all violative disclosures were addressed. Counsel Vartian responded by email at 3:02 p.m. that attorneys Tiemstra and Battistoni "are unavailable this weekend, we'll work thorough all the papers Monday morning." Counsel Gilbert continued to comb through the documents and found additional violations. Finally on Monday, afternoon, plaintiffs forwarded a draft proposed stipulation sealing the documents.

Heritage's mistaken disclosure contained defendants' valuable information, the disclosure was likely to harm defendants, and Heritage knew it. Heritage claims that it invested millions of dollars and years of trial and error efforts so as to create this niche market. Heritage claims that it "hired an outside expert to take Rubinger to Hong Kong and Japan and introduced him to the most valuable, coveted, and confidential supply sources in Asia." (Amended Compl., ¶19.). When defendants left Heritage, it had an inventory of handbags it valued at \$3.5 million. (Rohan aff., ¶ 51). Therefore, Heritage appreciated the value of the disclosure.

Heritage has incurred great expense, including filing this action, and gone to great lengths to protect its own valuable information. In the amended complaint, Heritage claims that it protects its trade secrets through written agreements with employees, "prohibiting the disclosure of those trade secrets, including its customer and dealer lists, customer requirements, methods of doing business, computer programs, compilations of information, records, specifications, sales procedures, processes and other confidential information." (amended compl., ¶ 7.) Rubinger's employment was subject to a written contract and included a post-employment non-compete covenant, a

⁶l, and other judges, have now been provided with Judge Tingling's mobile number.

post-employment covenant not to solicit Heritage's employees or customers, and a covenant not to use or disclose Heritage's trade secrets. (*id.*) Koffsky and Donovan signed agreements which provided that they would maintain Heritage and any of its operating subsidiaries' trade secrets as confidential, though neither agreement included any non-compete provisions nor set forth any specific term of employment. (*id.*) The nondisclosure provision of the 2012 Employment Agreement defines "trade secrets and confidential information" as information:

"not previously known or made available to the public or Employee, consisting of, but not limited to, information relating to the following: (a) costs estimates, terms, proposals and projections, (b) pricing estimates, terms, proposals and projections, © actual or proposed contract or investment terms, including terms relating to the development, operation, business cooperation, financing or funding of the business of the Employer and/or the Employer's Affiliates, projects, sales or other business activities, (d) financial statements, financial information or financial projections, whether current, historical, projected or pro forma, (e) actual and proposed project structures, transaction structures, organizational structures, personnel plans or human resource development or training plans, (f) actual or proposed marketing, product development, product distribution plans or roll-out plans, (g) plans, proposals, economic models, economic projection and due diligence materials relating to acquisitions or development projects under consideration, (h) licenses, patents, know how rights, technical specifications, product descriptions, product modifications and descriptions and trade secrets, (i) memoranda, opinions, comments and advice of legal, tax or business consultants, (j) information relating to business relationships with past, present and proposed customers and dealers, service providers or advisors relating to projects or business, (k) documents, information and reports relating to customer and dealer lists, customer surveys, customer comments, customer suggestions, call on customers and potential customers, and the like, (l) formulas, patterns, devices, secret inventions, processes, computer programs, compilations of information, records, specifications, sales procedures, methods of doing business, and other confidential information (all of which are hereinafter referred to as "Trade Secrets and Confidential Information"), which are owned by the Employer and which are used in the operation of the business of the Employer or any of the Employer's Affiliates"

(Rohan aff ¶ 2).

The nondisclosure provision further provides that Rubinger:

"shall not disclose any of the Trade Secrets and Confidential Information, directly or indirectly, or use them in any way, either during the Employment Term or at any time thereafter, except as required in the course of employment under this Agreement. All such Trade Secrets and Confidential Information, whether prepared by Employee or otherwise coming into Employee's possession, shall remain the exclusive property of the Employer and shall not be removed from the premises of the Employer unless necessary for the business of the Employer, or in any event shall be promptly delivered to the Employer upon termination of this Agreement..."

(*id.*).

As a result of the fact that, "disclosure or use of such Trade Secrets and Confidential Information" would "provide Employee with an unfair advantage if the Employee were to engage in a business that is competitive with the business of the Employer and the Employer's Affiliates," Rubinger agreed that during the term of the 2012 Employment Agreement, and for twenty-four months following the termination of the agreement for any reason, to not:

"engage or participate in, or own any interest in, provide any financing for, perform any service for, or act in any other capacity for, any business or organization which engages or participates, directly or indirectly, in the business of auctioning collectibles anywhere in North America that is competitive with the collectibles auctioning business of the Employer or any of the Employer's Affiliates..."

(*id.*, ¶4, 4[a][i]).

Heritage has done everything possible to protect its confidential information. Indeed, this is an action about the violation of confidentiality provisions. The heart of this action is that everything about its business is confidential and that the stakes are high. Therefore, Heritage knew that disclosure of defendants' confidential information would hurt.

The handbag auction market and this case have received significant media attention and the information was likely to get out. See, Julie Creswell and George Gene Gustines, *High-End Hermès Handbags at Center of Suit Against Christie's*, NY

Times, June 13, 2014;⁷ Gueda Voien, *Heritage Auctions Says Christie's-Owned Collectrium Stole Millions of Their Listings*, The Observer, Dec. 13, 2016;⁸ Eileen Kinsella, *Heritage Auctions Claims Christie's Snatched Its Purse Experts. Now, the Case Is Going to Court*, Art and Law, Feb. 16, 2018 ("The case reveals intense competition in the luxury handbag market.");⁹ The media coverage of this case is certainly well known to the attorneys in the case. Accordingly, there was an excellent chance that the longer the documents remained public, the more likely that defendants' proprietary information would reach the public domain where it could be exploited.

Plaintiffs' response to its mistaken disclosure was insufficient in light of the highly confidential and valuable information. The court must reject plaintiffs' understanding that during the 4:57 p.m. phone conference, the parties agreed to wait until Monday to address the disclosures as either naive, negligent or worse. Counsel Vartian's objection to reviewing the documents to confirm that nothing was overlooked, and waiting until Monday, aggravated the situation caused by plaintiffs.

Heritage has gone to great lengths to protect its own confidential information, and by executing the confidentiality agreement resulting in a protective order, it was expected to do the same to protect defendants' proprietary and confidential personal information.

The issue is whether Heritage's conduct was "frivolous." Conduct is frivolous if

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension,

⁷<https://www.nytimes.com/2014/06/14/business/high-end-hermes-handbags-at-center-of-suit-against-christies.html>.

⁸<http://observer.com/2016/12/heritage-auctions-says-christies-owned-collectrium-stole-millions-of-their-listings>.

⁹<https://news.artnet.com/art-world/judge-ruling-heritage-christies-purse-1225952>.

modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section.

In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

The court credits Counsel Tiemstra that it was a mistake to file defendants' confidential documents publicly. The mistake was exasperated by an administrative decision in the County Clerk's office to allow it to be without a clerk with knowledge to take down confidential documents during business hours. As local counsel, and the person responsible for filing the documents, Counsel Batistoni is responsible for the mistaken filing, not a fifth year associate admitted *pro hac vice*. Accordingly, the court cannot find that the initial mistaken filing was "undertaken" to "harass or maliciously injure," and thus frivolous. Rather, plaintiff's inadequate response was a violation of a protective order, here a so ordered stipulation. Such a violation can have serious consequences. See *Blum v Schlegel*, 1997 U.S. App. LEXIS 5442 (2d Cir 1997)(where law professor challenged law schools decision for denial of tenure alleging it was based on his exercise of free speech, court dismissed complaint when professor violated protective order and published information from colleague's tenure file). In addition, a social security number was not redacted, in violation of 22 NYCRR §202.5(e), and risking identity theft. Such cavalier conduct flouting a protective order and court rules

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cannot be countenanced without consequences. Though the confidentiality agreement has no stated penalty, the court finds that an award of attorneys' fees incurred in making the OSC and costs associated in protecting the documents is an appropriate and proportionate response.

Accordingly, it is

ORDERED that defendants' motion, sequence number 009, requesting attorneys' fees as a sanction is granted; and it is further

ORDERED that the issue of the amount of defendants' reasonable attorneys' fees, charges, expenses and all reasonable costs incurred in the enforcement of the protective order is severed and referred to a Special Referee to hear and report with recommendations (or, if the parties shall so stipulate, to hear and determine). That issue is held in abeyance until the court receives the report and a motion pursuant to CPLR 4403, and a final determination is issued; and it is further

ORDERED that defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M),¹⁰ who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: _____

4/2/18

ENTER: _____

J.S.C.

¹⁰Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/suptctmanh under the "References" section of the "Courthouse Procedures" link).