

Frey v Itzkowitz

2019 NY Slip Op 31062(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 805014/2018

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10**

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**CINDY FREY, as Executor of the Estate of Glenn
Frey, and CINDY FREY, Individually,**

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Plaintiff

-against-

**STEVEN ITZKOWITZ;
THE MOUNT SINAI HOSPITAL, ICAHN SCHOOL
OF MEDICINE;
MOUNT SINAI DOCTORS HOSPITAL PRACTICE;
and
THE MOUNT SINAI HOSPITAL,**

Defendants

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GEORGE J. SILVER, J.:

In the instant medical malpractice action, plaintiff CINDY FREY (“plaintiff”), as executor of the estate of GLENN FREY (“decedent”), moves pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 216.1 (a), for an order sealing the entire file in this action until the time of trial. In support of the application, plaintiff states that the parties previously met before Justice Judith McMahon on October 24, 2018 to discuss a confidentiality agreement with respect to “economic records.” Thereafter, the parties appeared before Judicial Hearing Officer Alice Schlesinger on January 18, 2018, to further discuss the potential parameters of a confidentiality agreement. The parties, however, were unable to agree to the terms of an agreement. As such, plaintiff filed the instant motion.

Plaintiff submits that plaintiff is entitled to sealing because plaintiff’s wrongful death and loss of consortium claims, if proven at trial, will invariably result in plaintiff seeking damages based on economic losses that she has or will incur due to decedent’s death. For instance, by reason of decedent’s death, plaintiff claims that plaintiff has incurred “administration expenses, funeral expenses and other expenses in the settlement of the estate of the decedent.” It is axiomatic, plaintiff avers, that at some point during discovery in this litigation defendants may seek tax returns and other financial items that plaintiff contends are afforded a heightened level of protection from disclosure. Plaintiff cites one Appellate Division, First Department, case in support of the proposition that tax returns are generally protected from disclosure (*see Matthews Indus. Piping Co., Inc. v. Mobil Oil Corp.* 114 AD2d 772 [1st Dept 1985]). At oral argument before the court

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on March 5, 2019, plaintiff also argued that sealing was warranted because of decedent's status as a critically acclaimed and well-renowned member of the popular musical group The Eagles.¹

Uniform Rules for Trial Courts (22 NYCRR) § 216.1 (a) provides that “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,” and requires the court to “consider the interests of the public as well as of the parties.” 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, e.g., in the case of trade secrets (*see Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6-7 [2000]). Thus, the court is required to make its own inquiry to determine whether sealing is warranted (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006], *lv denied* 10 NY3d 705 [2008]), and the court generally will not approve wholesale sealing, even when both sides to the litigation request sealing (*see Matter of Hofmann*, 284 AD2d 92 [1st Dept 2001]). Since there is no absolute definition, a finding of good cause, in essence, “boils down to . . . the prudent exercise of the court's discretion” (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007] [internal quotation marks and citation omitted]).

On the issue of sealing, as relates to anonymous captions, the Appellate Division, First Department, has stated as follows:

“[W]e remind the bench and bar that, even where the parties seek to stipulate to such relief, the trial court should not pro forma approve an anonymous caption, but should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it” (*Anonymous v Anonymous*, 27 AD3d 356, 361 [1st Dept 2006] [internal quotation marks and citation omitted] [no showing evident in case involving child support]).

As such, in New York there is a strong presumption favoring public legal proceedings and against sealing files without good cause shown (*Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483 [1st Dept 1993]). Notably, good cause has been shown in circumstances where the information sought to be sealed touches on a matter traditionally treated confidentially, such as personal medical records (*see, for example, John C. v. Martha A.*, 156 Misc.2d 222, 230-32 [N.Y. City Civ. Ct., 1992][sealing the entire court file in a landlord/tenant matter because information about respondent's HIV status was interspersed throughout the record]). And so it could be argued that like medical records, tax returns contain confidential, sensitive information. Indeed, as

¹ The Eagles are an American rock band formed in Los Angeles in 1971. The founding members were decedent, Don Henley, Bernie Leadon and Randy Meisner. With five number-one singles, six Grammy Awards, five American Music Awards, and six number-one albums, the Eagles were one of the most successful musical acts of the 1970s.

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medical records contain private information about our personal health, one could claim that likewise, tax records contain private information about our personal finances.

But here, plaintiff has made no showing that disclosure of tax returns and financial information that may be exchanged during the discovery phase of this litigation would implicate the privacy interests of plaintiff and decedent so fundamentally as to outweigh the interest of public access to court proceedings. Indeed, there is nothing unusual about the circumstances surrounding this case, absent decedent's celebrity, that would warrant wholesale sealing of the entire court file. To be sure, plaintiff simply contends, without further elaboration, that plaintiff and decedent's tax returns are private financial records, and therefore entitled to protection by that fact alone. By that logic, any litigant coming to court would be entitled to the same protection plaintiff now seeks so long as that litigant routinely files tax returns. To be sure, were this court to grant the instant application based on the lean arguments advanced, future litigants coming to this court would be able to sensibly ask for the same protection plaintiff is looking for here, and this court would not have a principled reason to distinguish

their cases from this case. If this court were to deny their applications simply because they have not achieved the same level of status or acclaim as decedent, such litigants would be able to rightfully ask what makes this case so different from theirs? Why should a famous plaintiff be entitled to protections that less renowned individuals can only dream of? And in an ever-shifting world, what level of fame warrants sealing protection in the first place?

Contrary to plaintiff's assertions, *Matthews Indus. Pipinc Co., Inc., supra*, does not stand for the proposition that tax returns should be sealed without exception. Rather, *Matthews Indus. Pipinc Co., Inc., supra* stands for that proposition that since disclosure of tax returns is generally a disfavored practice, a party seeking to compel their production must make strong showing of overriding necessity. Indeed, where tax returns are sought, it must be shown that the returns are indispensable to the litigation and that their contents are unavailable from other sources. That is an entirely different inquiry from the examination of whether those records should be sealed.

Unlike *Matthews Indus. Pipinc Co., Inc., supra*, here defendants have yet to make a request for plaintiff or decedent's tax returns, let alone a request for any other financial information. Instead, plaintiff is seeking a preemptive declaration that plaintiff and decedent's tax returns are entitled to sealing protection. In doing so, plaintiff is attempting to seal the entire court file rather than waiting to make an application for sealing as the need potentially arises once disclosure of specific documents that may be entitled to protection is actually sought. Proceeding in the latter, rather than the former, manner would afford the court the chance to make an individualized assessment as to the merits of sealing specific documents, and would also give the court the opportunity to fashion a remedy less restrictive than sealing (i.e. production with redaction).

Notably, contrary to plaintiff's interpretation, *Matthews Indus. Pipinc Co., Inc., supra*, had nothing to do with the sealing of tax returns. The case can more accurately be described as a case about the relevance of tax returns in a particular litigation rather than whether those records should

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be accessible to any court user. As such, plaintiff's proffered argument has nothing to do with whether plaintiff and decedent's tax returns are indispensable to the litigation. Instead, plaintiff is arguing that tax returns should simply be sealed because of the privacy concerns they unearth, especially where the parties to a litigation are famous.

In this court's view, the celebrity of the parties in a particular case should not entitle them to the presumption that their medical records or financial information will be sealed purely on account of their fame. Inasmuch as our courts are supposed to model the pursuit of equality that our society is constantly striving to achieve, actions that favor the wealthy and well-respected over the less affluent and underprivileged run athwart of the principle that justice is blind. As Harper Lee's protagonist Atticus Finch stated in *To Kill A Mockingbird*, "[o]ur courts have their faults, as does any human institution, but in this county our courts are the great levelers, and in our courts all men are created equal" (Harper Lee, *To Kill A Mockingbird* [1960]).

In the instant matter, the court finds that plaintiff has not established good cause for the sealing of the entire court file until the time of trial. Indeed, as mentioned, the record is devoid of facts supporting the need to seal the entire court file. Plaintiff's blanket statements regarding protections afforded to tax returns and other financial records are bereft of factual support within the record, and binding legal precedent within the Appellate Division, First Department.

But more fundamentally than that, what this application boils down to is the notion of whether, in the eyes of the law, courts should treat those with greater means and renown differently from those with lesser means and prominence. This court refuses to countenance such unequal treatment. In the view of this court, if the scales of justice are tipped too heavily on one side, the perception of justice and fairness collapses for all.

Accordingly, the court finds that plaintiff and decedent have failed to establish the requisite good cause to warrant the sealing of the entire court file in this action. However, the court's finding is without prejudice to plaintiff renewing an application for partial sealing of certain records that defendants may seek to disclose during this litigation on a case-by-case basis once such disclosure is actually sought rather than anticipated in the abstract.

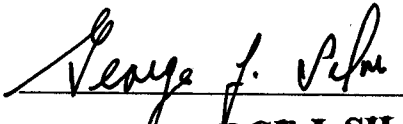
For the foregoing reasons, it is hereby

ORDERED that plaintiff's instant application is denied; and it is further

ORDERED that the parties are directed to appear for a conference before the court on May 28, 2019 at 9:30 AM at the courthouse located at 111 Centre Street, Room 1227 (Part 10).

This constitutes the decision and order of the court.

Dated: April 12, 2019


HON. GEORGE J. SILVER