

Cernich v Athene Holding Ltd.
2019 NY Slip Op 33513(U)
November 21, 2019
Supreme Court, New York County
Docket Number: 654688/2018
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART

IAS MOTION 48EFM

Justice

-----X

INDEX NO. 654688/2018

STEPHEN CERNICH

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

ATHENE HOLDING LTD.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for

SEAL

The facts of this case are fully set out in this court's decision on motion sequence number 002, but the court will provide a brief summary here. (NYSCEF Doc. No. [NYSCEF] 92.) Plaintiff Stephen Cernich is a former officer and employee of defendant Athene Holding Ltd. (Athene). (NYSCEF 46 at ¶¶ 2-4.) Cernich and Athene entered into a "global transaction" to resolve issues connected with Cernich's departure. (*Id.* at ¶ 9.) The global transaction consists of a Separation Agreement and General Release (Separation Agreement) and a Repurchase Agreement, as well as "certain protective covenant provisions set forth by share contracts that granted the shares subject to repurchase." (*Id.* at ¶¶ 8-9.) Athene subsequently commenced an action by writ in Bermuda against Cernich for violations of section 97 of the Companies Act of 1981. (*Id.* at ¶ 22.) Cernich, in turn, filed this action against Athene to permanently enjoin the litigation in Bermuda, and declare that any litigation must proceed in New York. (*Id.* at 39, 43, 55-58.)

In motion sequence number 004, Athene moves to redact the Separation Agreement insofar as it contains the prices at which Cernich purchased shares of Athene. Athene also seeks to redact the Repurchase Agreement to the extent it contains the prices at which Athene repurchased these shares from Cernich, including the total "Repurchase Payment" and its components. Cernich does not oppose.

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) 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 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]). The

movant must demonstrate good cause to seal records under Rule § 216.1 by submitting “an affidavit from a person with knowledge explaining why the file or certain documents should be sealed” (*Grande Prairie Energy LLC v Alstom Power, Inc.*, 2004 NY Slip Op 51156 [U], *2 [Sup Ct, NY County 2004]). Good cause must “rest on a sound basis or legitimate need to take judicial action” (*Danco Labs.*, 274 AD2d at 9). Agreements to seal are insufficient as such agreements do not establish “good cause” (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2012 NY Slip Op 33147[U], * 9 [Sup Ct, NY County 2012]).

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, Athene has demonstrated good cause to redact the Separation Agreement and Repurchase Agreement to the extent they either contain the prices at which Cernich purchased shares of Athene or the prices at which Athene repurchased these shares from Cernich, including the total “Repurchase Payment” and its components. There is no showing of any legitimate public concern to counter-balance the interest of the parties in keeping their financial arrangement private. (*Dawson*, 184 AD2d at 247.)

Indeed, no member of the press or public attended the argument of this motion which was publicly posted. Moreover, disclosure of this pricing information could threaten Athene's competitive advantage. Pursuant to, and in accordance with, Rule 216, having determined that good cause exists for the redacting of the Separation Agreement and Repurchase Agreement as detailed in this decision, and the grounds having been specified, it is now accordingly,

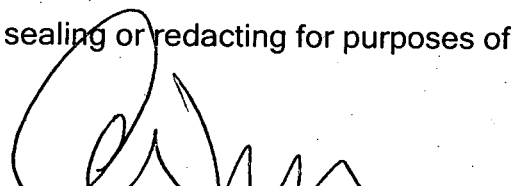
ORDERED that the motion is granted to the extent that Athene shall redact all references to pricing information as directed by this decision from the Separation Agreement and Repurchase Agreement; and it is further

ORDERED that the County Clerk, upon service to him of this order, shall seal NYSCEF Doc. Nos. 100, 101, 102, and 103, but unseal NYSCEF Doc. Nos. 98 and 99; and it is further

ORDERED that until further order of the court, the County Clerk shall deny access to the unredacted documents to anyone (other than the staff of the County Clerk or the court) except for counsel of record for any party to this case, a party, and any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from the counsel; and it is further

ORDERED that this order does not authorize sealing or redacting for purposes of trial.

11/21/19
DATE


ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE