Gottwald v Geragos
2020 NY Slip Op 31492(U)
May 21, 2020
Supreme Court, New York County
Docket Number: 162075/2014
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART** **43**

Justice

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LUKASZ GOTTWALD,

Plaintiff,

- v -

MARK GERAGOS, GERAGOS & GERAGOS, A PROFESSIONAL CORPORATION,

Defendant.

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INDEX NO. 162075/2014

MOTION DATE 12/19/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 437, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469

were read on this motion for DISCOVERY.

ROBERT R. REED, J.:

In this defamation action, non-party Kesha Rose Sebert (Sebert) moves for a protective order to preclude plaintiff Lukasz Gottwald, professionally known as "Dr. Luke" (Gottwald), from disclosing certain evidence pursuant to a previous court decision (motion sequence number 008). Gottwald does not oppose Sebert's motion. Sebert and defendant Mark Geragos (Geragos or the Geragos defendants) have submitted a proposed stipulation to resolve the motion. Gottwald, however, has declined to execute it. For the following reasons, the motion is granted.

BACKGROUND

The court has discussed the facts of this case at length in several earlier decisions and will not repeat them in detail here. In any event, the relief requested in this motion is

procedural in nature, rather than substantive, so factual review is largely unnecessary. Nonetheless, it is necessary to note that this matter follows a separate breach of contract action Gottwald commenced against Sebert in this court which has generated ongoing heavy litigation (Index No. 653118/14, Schecter, J. [the first action]).

In the present action, the decision disposing of the parties' earlier motions to compel and cross motions for protective orders (respectively, motion sequence numbers 005 and 006) was entered on October 18, 2018. *See* non-party's reply mem of law, exhibit 43. That decision specifically ordered Gottwald to disclose to Geragos a quantity of discovery material that Sebert had previously disclosed to Gottwald in the first action. *Id*. The parties appealed the October 18, 2018 order. On May 2, 2019, in a decision which reviewed two discovery orders in the first action as well as this court's October 18, 2018 order, the Appellate Division, First Department upheld that latter ruling, stating:

> "We find no basis for disturbing the court's discovery order directing Gottwald to comply with the Geragos defendants' requests for production (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]). We have considered Gottwald's remaining arguments in that appeal and find them unavailing."

Gottwald v Sebert, 172 AD3d 445, 446 (1st Dept 2019). Gottwald's eventual compliance with the court's October 18, 2018 discovery ruling gives rise to Sebert's current motion.

Sebert notes that, on November 8, 2018, shortly after the entry of the October 18, 2018 order, Justice Schecter issued several discovery-related rulings in the first action, one of which involved some of the same material that this court had just ordered

Gottwald to disclose to Geragos. *See* non-party's reply mem of law at 8-10. In disposing of motion sequence number 043 in the first action, Justice Schecter ruled as follows:

> "Upon the foregoing papers, it is ordered that the motion by [Sebert] to seal certain medical records and sensitive personal information is granted without opposition. Good cause exists on these motions to seal this information, which is completely irrelevant to the summary judgment issues. There is no legitimate public interest warranting revealing such private information that is not relevant at this juncture.
>
> "It should be noted that nothing in this or any of the court's other sealing decisions should be construed as a ruling on what evidence may be admitted at trial. Admissibility and sealing are different issues, and it is premature to rule on the former.
>
> "Finally, by noon on November 13, 2018, [Gottwald] and [Sebert] shall jointly submit a proposed order permitting the redaction of all portions of the record in the summary judgment motions that the court permitted in the four sealing decisions issued today. The order shall itemize each instance where a document is to be redacted."

See non-party's mem. of law, exhibit 13.

In the present action, Sebert seeks a protective order to modify the court's October 18, 2018 decision so as to exclude from Gottwald's production some of the evidence that Justice Schecter had ordered sealed in the first action (motion sequence number 008).[1] *See* notice of motion, Godesky affirmation, ¶¶ 1-10. Gottwald does not oppose this request, and Geragos accedes to it as well "at the request of a former client [i.e., Sebert] and in recognition of her claimed confidentiality interests." *See* plaintiff's mem of law at 1, ns 1, 2; defendants' reply mem. of law at 12. Gottwald, however, objects to the stipulation that Sebert and Geragos subsequently negotiated between themselves to limit Geragos's disclosure to Gottwald herein by excluding some of the evidence that was

[1] The specific discovery items at issue are annexed as exhibits to the supporting affirmation of Sebert's counsel, who submitted the material in separate sealed envelopes marked "confidential." *See* Godesky affirmation, exhibits 1-42.

sealed in the first action. *Id*., at 1-2; non-party's reply mem. of law, exhibit 45. In a letter dated October 29, 2019, Gottwald's counsel observed that his client did not execute that stipulation, and correctly recounted the telephone conference in which the court's Part Clerk averred that the stipulation will not be so-ordered unless all parties have first agreed to it and executed it. *See* Movit letter, October 29, 2019. Because they have not done so to date, the court must disregard the proposed stipulation and turn its attention to Sebert's non-party application (motion sequence number 008).

DISCUSSION

As an initial matter, the court notes that the relevant portion of its October 18, 2018 order found as follows:

> "In the court's assessment none of [the parties'] arguments is sufficiently persuasive to justify an exercise of its discretion under CPLR 3103 (a) at this time.
>
> "In particular, the court believes that the statute requires more than a mere decision on whether or not to approve the final, disputed sentence in the parties' proposed stipulations. The excessively indefinite language in that sentence simply does not account for the various determinations that are contained in this decision. Of particular importance is that the parties' respective arguments concerning the relevance - or not - of any information about plaintiff's alleged prior acts of sexual misconduct, and/or the facts underlying plaintiff's prior litigation with [Sebert], are now moot. The court has already determined that such evidence *is* relevant - as is evidence of any damages that plaintiff claims to have sustained either personally or to his reputation - and has granted those portions of defendants' motions and cross motions which seek production of that evidence pursuant to New York's policy favoring liberal discovery. *See, e.g.*, *Rivera v NYP Holdings Inc.*, 63 AD3d at 469; *Polygram Holding, Inc. v Cafaro*, 42 AD3d at 340-341. The court is reassured that its decision is correct by the rule interpreting CPLR 3103 (a) that 'disclosure is warranted where records of a sensitive and confidential nature relate to the injury sued upon.' *Del Terzo v Hospital for Special Surgery*, 95 AD3d at 553. In their current forms, of course, neither of the proposed stipulations takes the court's rulings into account. As a result, they

> must be re-drafted to do so. This may be done, at a minimum, by using language that specifically designates all of the types of evidence that the court has deemed to be relevant and discoverable as constituting 'confidential information.' Additionally, the parties may wish to explicitly reserve their rights to object to the admissibility of such evidence at trial, as is their right. Further, the parties have alluded to possibly seeking additional discovery from non-party witnesses [. . .], and they may wish to designate that as 'confidential information' as well. The fact that there is a great deal of supposition underlying these considerations makes it improper for the court to draft the parties' confidentiality stipulation for them. Instead, at this juncture, the court believes that neither of the proposed stipulations before it is adequate to justify an exercise of discretion pursuant to CPLR 3103, and, therefore, denies plaintiff's cross motion for the entry of a confidentiality order under that statute. The court's denial is without prejudice to the parties' right to renew their application for a confidentiality order at the status conference of this action which will be scheduled in the near future. At that time, the court intends to enter an order to dispose of all of the remaining discovery issues in this action, and it is willing to consider incorporating a confidentiality provision into that order. The court closes this decision by strongly advising the parties to confer and agree on a mutually acceptable version of such a confidentiality order, and attempt also to resolve any other outstanding discovery issues among themselves as well."

See non-party's reply mem of law, exhibit 43.

As can be seen, this portion of the October 18, 2018 order contains two essential rulings. The first will be referred to herein as the "relevance ruling." It held that any information that Gottwald obtained in the first action concerning his "alleged prior acts of sexual misconduct, and/or the facts underlying [his] prior litigation with [Sebert]" is relevant to the claims and counterclaims in this action, and that Gottwald must therefore turn over to Geragos certain specified items of evidence that contain such information. The second ruling in the October 18, 2018 order will be referred to as the "confidentiality ruling." It found that the court could not enter a confidentiality order at that juncture since the parties had failed to identify which items of evidence in their possession contained "confidential information" that should be protected during the discovery process. To resolve that impasse, the court

ordered the parties to confer and to stipulate to the terms of a proposed confidentiality order, and to specify therein which items of evidence would be covered thereby. The parties failed to do this, and Sebert instead submitted a non-party motion for a protective order. She seeks to shield certain items of evidence that contain confidential information which she had disclosed to Gottwald in the first action, but does not wish him to turn over to Geragos in this action. Her motion cites CPLR 5015 and 3103 as bases for granting such a protective order. The court will address each statute.

Before doing so, it is necessary to consider the effect of the First Department's May 2, 2019 decision that "[w]e find no basis for disturbing the court's discovery order directing Gottwald to comply with the Geragos defendants' requests for production." *Gottwald v Sebert*, 172 AD3d at 446. The effect of this ruling was to deny the parties' appeal and to affirm the court's "relevance ruling." As a result, this decision will *not* consider any of the arguments that the parties have raised herein which seek to modify the "relevance ruling" portion of the October 18, 2018 order. Instead, this decision is limited to consideration of the parties' arguments to modify the "confidentiality ruling" portion of the prior order.

As previously observed, Sebert's non-party motion relies on two statutes. The first is CPLR 5015 (a) (2), which states that:

> "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: . . . newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial . . .."

The court finds that this statute cannot provide the basis for Sebert's motion. Its language plainly requires a movant to establish the existence of "newly-discovered evidence which, if

introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial." In an attempt to do so, Sebert's counsel points to "changed circumstances in the Sebert litigation [i.e., the first action] whereby the key evidence . . . has been unsealed." *See* non-party's mem of law at 12. This assertion is insufficient for two reasons. First, it appears to be untrue. Plaintiff's counsel contends that the subject evidence remains under seal in the first action. *See* Movit affirmation in opposition, ¶ 19. Further, an examination of the public court records clearly shows that Justice Schecter entered five sealing orders on November 8, 2018 (two of which affected the subject evidence), but not any subsequent orders to either vacate or modify those rulings. Therefore, the court finds that counsel's statement is belied by the record.

Second, the two sealing orders were entered on November 8, 2018, *after* this court issued its decision on October 18, 2018. As a result, Justice Schecter's orders cannot constitute "newly-discovered evidence," as the term is defined in CPLR 5015 (a) (2), since they did not exist at the time this court issued its ruling. *See e.g. Pezenik v Milano*, 137 AD2d 748, 749 (2d Dept 1988) (ALJ's decision did not constitute "newly discovered evidence" since it was not issued until *after* the subject judgment was entered).

Finally, the court is mindful that New York law affords it the discretion to treat a motion to modify a prior ruling, which was improvidently designated as an application under CPLR 5015 (a) (2), to instead constitute a request for leave to renew, pursuant to CPLR 2221 (e) (2), based on "a change in the law that would change the prior determination." *See e.g. Vaca v Village View Hous. Corp.*, 170 AD3d 619, 620 (1st Dept 2019). However, even if the court elected to do so, it would not avail Sebert in this case. For the purposes of the statute, a

"change in the law" is defined as a "new law or a clarification of prior law." *See e.g.*, *Jackson v Westminster House Owners Inc.*, 52 AD3d 404, 405 (1st Dept 2008). Justice Schecter's November 8, 2018 sealing orders constitute procedural rulings, which do not satisfy that statutory definition. Therefore, the court concludes that Sebert may not rely on CPLR 5015 for the relief requested in her motion.

The other statute that Sebert invokes as a basis for her motion is CPLR 3103 (a), which provides that:

> "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The First Department holds that, under CPLR 3103 (a), "[a] trial court is vested with broad discretion regarding discovery, and its determination will not be disturbed absent a demonstrated abuse of that discretion." *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 (1st Dept 2009). As previously noted, the First Department has also upheld the "relevance ruling" of this court's October 18, 2018 order. *Gottwald v Sebert*, 172 AD3d at 446. Accordingly, the could will not consider any of the arguments that Sebert or Gottwald raised in favor of a protective order to exclude certain items of evidence from being disclosed to Geragos on the ground that it is not relevant. *See* non-party's mem. of law

at 14-15; plaintiff's mem. of law at 2-7.[2] Instead, it will only consider the arguments concerning modification of the October 18, 2018 order's "confidentiality ruling."

Sebert asserts that a protective order is warranted, both to protect her interests, and in the interests of justice, as regards "highly sensitive medical, financial, personal, and proprietary information that would embarrass and prejudice [Sebert] if disclosed publicly." *See* non-party's mem of law at 12-14. As previously noted, Gottwald does not oppose this request, and Geragos also agrees to "at the request of a former client and in recognition of her claimed confidentiality interests." *See* plaintiff's mem of law at 1, ns 1, 2; defendants' reply mem. of law at 12. For its part, the court notes that CPLR 3103 permits the discretionary modification of a discovery order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." In the October 18, 2018 decision, the court had also previously noted the possibility that it might eventually be necessary to enter an order to protect evidence from the first action which contained "confidential information" during the discovery process in this action. *See* non-party's reply mem of law, exhibit 43. The time to do so appears to have come. Accordingly, on consent of all parties, the court grants so much of Sebert's motion as seeks a protective order pursuant to CPLR 3103 to modify the "confidentiality ruling" that is contained in its October 18, 2018 decision. The only issues to be resolved are the nature and extent of that modification.

[2] The court notes that, although Geragos does not object to the entry of a protective order to shield evidence containing Sebert's confidential information from disclosure, he also does not argue that the evidence should be excluded from disclosure, and notes that the First Department's May 2, 2019 decision precludes modification of the "relevance ruling" in this court's October 18, 2018 order. *See* defendants' reply mem. of law at 2-8.

As previously indicated, the "relevance ruling" in the court's October 18, 2018 decision precludes any protective order that would flatly exclude any items of first action evidence from disclosure in this action. Accordingly, only the "confidentiality ruling" contained in that order is subject to modification in connection with this motion. On that issue, Sebert's memorandum of law contains an oblique statement concerning "changed circumstances in the Sebert Litigation [i.e., the first action]." *See* non-party's mem of law at 12. This actually refers to two of the sealing orders that Justice Schecter entered on November 8, 2018 -- specifically, the ones that disposed of motion sequence numbers 042 and 043. *See* notice of motion, exhibits 12, 13. The former ruling ordered the sealing of "third-party sensitive personal, medical and financial information" (an oblique reference to material sought from Sebert and/or the celebrated entertainer known as "Lady Gaga") and applied to the exhibits designated by document numbers 1557-1594 and 1638. *Id*., exhibit 12. The latter ruling (which specifically named Sebert) ordered the sealing of "certain medical records and sensitive personal information," and applied to the exhibits designated by document numbers 1595-1631. *Id*., exhibit 13. That amounts to a total of 74 documents containing confidential information about Sebert that Justice Schecter ordered sealed during disclosure. In this action, however, Sebert's counsel's only identified the 42 documents annexed to her moving papers (and submitted separately in sealed envelopes) as containing "confidential information" in need of protection. *See* Godetsky affirmation, exhibits 1-42. That amounts to a discrepancy of 32 sealed, confidential documents which might be inadvertently disclosed in this action because of the breadth of the October 18, 2018 order.[3]

[3] The October 18, 2018 decision specifically directed Gottwald to produce "documents relating to [his] 'prior legal disputes'" and "documents relating to Kesha Sebert and/or Lady Gaga," which subsumed the majority of the

This would both jeopardize the integrity of Justice Schecter's sealing orders and work a prejudice against Sebert, neither of which the court will be a party to. Of equal concern is the question of whether all 42 of the documents submitted with Sebert's motion are among the material that Justice Schecter ordered sealed in the first action. If they are not, but nevertheless contain confidential information as Sebert's counsel alleges, then any protective order that the court issues will need to be expanded to cover more documents than those which Justice Schecter ordered sealed in the first action. After comparing the electronically filed records of the first action with the sealed submissions that Sebert's counsel made in this action, the court notes that there is a certain amount of overlap, but it cannot find that there is complete identity between the two sets of documents. As a result, the court finds itself in the same position as it was on October 18, 2018 -- i.e., unable to issue a final and complete "confidentiality ruling."

This is not to say that the court is incapable of granting Sebert's order for a protective order. It would uphold principles of equity and fair treatment to accord all 74 of the documents which Justice Schecter ordered sealed in the first action the same treatment during Gottwald's disclosure to Geragos in this action. Further, because the parties have consented to it, the 42 documents annexed to Sebert's moving papers in this action should also be sealed, regardless of whether some of them may duplicate the 74 documents covered by Justice Schecter's orders and some may be new submissions. Finally, to the extent that there is other material among the evidence disclosed in the first action which Sebert,

material he obtained from Sebert during discovery in the first action. *See* non-party's reply mem. of law, exhibit 43.

Gottwald or any interested third parties may allege to contain confidential information,[4] that material too should be sealed during discovery in this action, once it is identified.

To that end, the court grants Sebert's motion, pursuant to CPLR 3103 and to the extent described above, and directs her counsel to prepare a draft order of protection which provides that: 1) all of the documents covered by Justice Schecter's two relevant November 8, 2018 orders (which disposed of motion sequence numbers 042 and 043 in the action bearing Index No. 653118/14) shall be sealed in this action; 2) the 42 documents annexed as exhibits to the instant non-party motion (Godetsky affirmation, exhibits 1-42) shall be sealed in this action; and 3) any additional documents that the movant and an interested third-parties may designate as containing confidential information shall be sealed in this action.[5]

As regards the third category of documents, the court directs Sebert's counsel to confer with plaintiff's counsel regarding which items of evidence plaintiff intends to disclose to Geragos, and to either prepare a list that specifies the documents chosen from among that material that contain "confidential information" and that should be sealed, or a written statement that there are no such additional documents among plaintiff's disclosure material. Counsel shall conduct that conference no later than 30 days after service of a copy of this order with notice of entry. Counsel for Sebert shall submit a proposed protective order, in

[4] E.g., Lady Gaga.

[5] Sebert's moving papers also mentioned certain evidence that she disclosed in litigation in Tennessee which purportedly contains "confidential information, " and which was ordered sealed in that action. *See* non-party's mem of law at 4. However, her papers to not identify that evidence with specificity or include copies of any sealing orders from the Tennessee court. Nevertheless, should Sebert wish to include any of the sealed evidence from that case in her proposed confidentiality order in this case, she is free to do so.

acceptable form and in conformity with the terms of this order, within 20 days after the aforementioned conference is complete.

After the protective order is signed, the court expects the parties to complete the discovery process in this action expeditiously. Should any party seek to challenge the proposed order of protection on the grounds that a given discovery item does not contain "confidential information," that party may move for such relief within 10 days after receipt of a copy of said proposed protective order. The court admonishes counsel not to include objections based on other grounds such as admissibility. The October 18, 2018 order specifically noted that "the parties may wish to explicitly reserve their rights to object to the admissibility of such evidence at trial, as is their right."[6] *See* non-party's reply mem of law, exhibit 43. The court's objective is to complete the discovery phase of this action as soon as possible, in view of the fact that that process has already been unduly attenuated. To that end, the court closes this decision by admonishing counsel that non-compliance with the terms of this order may result in the imposition of sanctions, fines or penalties.

DECISION

Accordingly, for the foregoing reasons, it is hereby ordered that the motion of non-party Kesha Rose Sebert for a protective order, pursuant to CPLR 3103, to modify this court's October 18, 2018 decision (motion sequence number 008) is granted.

[6] Justice Schecter also observed in her November 8, 2018 decision that "admissibility and sealing are different issues." See non-party's mem. of law, exhibit 13.

Settle order on notice.

5/21/2020
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:	X	SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE