

United Realty Mgt., Co., Inc. v Capital One, N.A.

2020 NY Slip Op 32656(U)

August 14, 2020

Supreme Court, New York County

Docket Number: 653721/2013

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY Justice
PART IAS MOTION 48EFM
INDEX NO. 653721/2013
MOTION DATE
MOTION SEQ. NO. 012
UNITED REALTY MANAGEMENT, CO., INC. and JONATHAN P. ROSEN, Plaintiffs,
- v -
CAPITAL ONE, N.A., Defendant.
DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 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, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 460, 558, 582, 583, 584, 585, 586, 588

were read on this motion to/for SEAL

In this action, plaintiffs United Realty Management, Co., Inc. (United) and Jonathan P. Rosen allege that defendant Capital One, N.A. (CONA), knowingly processed withdrawal transactions that were not authorized by the required account signatories. (NYSCEF Doc. No. [NYSCEF] 1 Complaint at ¶ 1.) CONA allegedly remitted these withdrawn funds to nonparty Louise E. Litvin in a manner intended to conceal the transactions from United. (Id.) Plaintiffs subsequently interposed their claims for breach of contract, fraud, aiding and abetting fraud, commercial bad faith, and conversion.

In motion sequence number 009, CONA moved to seal court records. (NYSCEF 319, Order to Show Cause 009.) Plaintiffs opposed and argued that the public interest

weighs against sealing because this action involves the misconduct of a major bank.

The court denied the motion because CONA failed to show how decades old information could cause harm to its present-day business. (NYSCEF 343, Decision and Order at 2.)

The motion was also denied because CONA failed to submit affidavits from persons with knowledge “fleshing out what the policies and procedures were, what they are, and how disclosure could threaten CONA’s competitive advantage.” (*Id.*) Although CONA submitted one affidavit of its assistant general counsel, it was deficient. (*Id.*)

In motion sequence number 012, CONA moves again to seal (1) CONA’s anti-money laundering (AML) procedure documents, (2) AML alerts and related documents from CONA’s AML system, (3) testimony concerning CONA’s AML processes, (4) testimony concerning suspicious activity reports (SARs) “due to the statutory prohibition against revealing whether or not a SAR was or was not filed in any case,” (5) CONA’s procedure documents concerning fraud prevention and fraud detection operations; (6) testimony and an email concerning CONA’s anti-fraud processes, (7) CONA’s procedures and systems for processing transactions, (8) the personal home address of witnesses, and (9) CONA customer personal identifying and financial information for non-parties including addresses, dates of birth, social security numbers, customer and account holder names, and account transaction information. Plaintiffs opposed and largely argued that CONA’s affidavits do not comport with this court’s prior order.

At oral argument, no one from the public or press appeared. (NYSCEF Doc. No. 460, tr. at 2:14-17.) Because a number of court records contain the allegedly sensitive information, plaintiffs sought guidance from the court as to how sealing would proceed as an administrative matter. (*Id.* at 12:2 - 13:5.) To conserve resources, the court proposed that the parties file their summary judgment motions under temporary seal.

CONA would then have an opportunity to sift through the filings and identify the sensitive information for this court to review. (*Id.* at 13:11 - 14:2.) Depending on whether good cause exists, the motions would then be unsealed in part or entirely.

The parties assented to the court's proposal, and after filing their summary judgment motions, they filed supplemental briefing. (NYSCEF 582 and 588.) In CONA's supplement affirmation, it again identified the categories of information that it sought to redact, but this time, it identified in a chart where these categories appeared only with respect to the summary judgment filings. (NYSCEF 582, Curtis Supp. Aff. at 3-5.) In plaintiffs' supplemental briefing, they requested that if the court finds good cause to seal, it should specify the precise text and order whichever party filed the material to redact the information at issue.

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) [e]xcept 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].) Good cause must “rest on a sound basis or legitimate need to take judicial action.” (*Danco Labs.*, 274 AD2d at 9.)

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].)

Good cause exists to redact AML and anti-fraud information as set out in CONA’s chart from NYSCEF 540, 548, 549, 550, 491, 537, 538. CONA submits the affidavit of Connell Friel, a manager of process management with the AML Readiness and Support Team of Capital One. (NYSCEF 442, Friel Aff. ¶ 1.) Friel swears under oath,

“I ... maintain an understanding of CONA’s policies, procedures, practices, and systems related to anti-money laundering (AML) and detection and prevention of fraud and criminal activity,

including CONA's "Anti-Money Laundering (AML) Compliance Procedure" and "Compliance - Anti-Money Laundering (AML)" procedure and the system and processes used in connection with the AML Alert Documents." (*Id.* ¶ 5.)

Friel adds, "While CONA routinely revises and improves its AML procedures, all of the AML Procedure Documents are substantially similar to and representative of CONA's current anti-money laundering procedures. The majority of the specific procedures, practices, methods and systems described therein are essentially the same today." (*Id.* ¶ 9.) Friel also swears under oath that "disclosure of this information would make the information available to and known by CONA's competitors ... in the banking industry who would then be able to compare their own practices to CONA's (without CONA being able to do the same.) ... to more efficiently revise, improve, evaluate or develop their own practices." (*Id.* ¶ 10.) According to Friel, "disclosure of any of the AML Procedure Documents would jeopardize the efficacy of the practices described, because individuals seeking to circumvent measures to detect or prevent potential money laundering, [would] avoid detection of improper transactions, or avoid the potential filing of a suspicious activity report." (*Id.* ¶ 11.) Friel's affidavit remedies the deficiencies in CONA's previous sealing application by showing that decades old information could harm CONA because that information is still vital to CONA's present day business. Friel's affidavit also provides that disclosure could threaten a competitive advantage and pose a security risk. (*Mosallem*, 76 AD3d at 350-351.) Accordingly, Friel's affidavit comports with this court's prior order by stating point blank that the majority of the specific procedures, practices, methods and systems described are essentially the same today. (NYSCEF 442, Friel Aff. ¶ 10.)

Good cause also exists to redact CONA's Withdrawals & Check Cashing Procedure as set out in CONA's chart from NYSCEF 544. CONA submits the affidavit of Rhonda Bettis, a Senior Director of Market Operations. (NYSCEF 446, Bettis aff. ¶ 1.) Bettis swears under oath that "CONA's 'Withdrawals and Check Cashing' procedures produced during discovery in this case are relevant to and revelatory of the currently effective versions of the same documents." (*Id.* ¶ 24.) Bettis states that "many of the procedures are still current or substantially similar to current procedures." (*Id.*) Bettis further outlines how disclosure could threaten a competitive advantage or create a security risk - these arguments are virtually the same as those raised by Friel. (*Id.* ¶ 24.) Accordingly, this affidavit remedies the deficiencies in the prior application and shows how disclosure could threaten a competitive advantage. (*Mosallem*, 76 AD3d at 350-351.)

Good cause exists to redact fraud and deposit processing procedures from NYSCEF 541 and 543 pursuant to CONA's chart for largely the same reasons previously discussed with respect to the other categories. The affidavit of Rebecca White, a Director in the Customer Protection department of Capital One is sufficient for the same reasons as the other affidavits. (NYSCEF 443, White aff.)

Good cause also exists to redact the negotiability standards procedure from NYSCEF 542 as outlined in CONA's chart because the affidavit of Teresa Edwards, a Director of Items Processing of Capital One is sufficient for the same reasons discussed above. (NYSCEF 444, Edwards aff.)

Good cause similarly exists to redact the personal identifying information of CONA's non-party customers as set out in CONA's chart from NYSCEF 366, 503, 507,

513, 514, and 575. (Uniform Rules for Trial Courts (22 NYCRR) § 202.5[e]; *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007].)

Good cause exists to redact fraud and deposit processing procedures from NYSCEF 541 and 543 pursuant to CONA's chart for largely the same reasons previously discussed.

Because the multiple affidavits submitted by CONA identify why the various categories of information concerning the banks procedures should be redacted, good cause exists to redact NYSCEF 404-441 with exhibits 39 and 40. This is true especially because no member of the press or public has expressed interest in these matters, and plaintiffs submit no affidavits from persons with knowledge to dispute the sensitivity of the information at issue.

However, CONA has not sustained its burden of showing why good cause exists to redact the home addresses of certain "witnesses." It is true that leave to redact home addresses belonging to third-party borrowers has been granted in certain circumstances, but it is not clear from this application who these witnesses are and why sealing their home addresses is necessary. Leave to redact NYSCEF 471 and 572 is denied.

The court is mindful, however, of plaintiffs' request that the parties who filed the documents at issue should be responsible for the redacting. In the interests of efficiency, and because CONA is in the best position to redact the court records at issue, CONA shall provide redacted versions of the documents it produced in discovery that plaintiffs' have filed in connection with plaintiffs' summary judgment motion or that CONA has filed in connection with its summary judgment motion.

Accordingly, it is

ORDERED that the motion is granted as set forth above; and it is further

ORDERED that the County Clerk, upon service to him of this order, shall seal NYSCEF Doc. Nos. 540, 541, 542, 543, 544, 548, 549, 559, 491, 537, 538, 366, 503, 507, 513, 514, 575, 404-441 with exhibits 39 and 40; and it is further

ORDERED that within 30 days of this order being filed on NYSCEF, CONA shall file redacted versions of those court records it filed under temporary seal and shall provide to plaintiffs redacted versions of CONA's documents that plaintiffs have used on plaintiffs' summary judgment motions; and it is further

ORDERED that 10 days thereafter, plaintiffs shall file those redacted versions on NYSCEF; and it is further

ORDERED that until further order of the court, the County Clerk shall deny access to the sealed 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.
8/14/2020
DATE

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

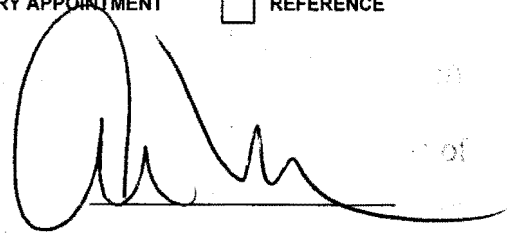
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:



J.S.C.