

Parvis v Rakower Law PLLC

2020 NY Slip Op 32957(U)

September 3, 2020

Supreme Court, New York County

Docket Number: 656102/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM
Justice
INDEX NO. 656102/2017
MELISSA PARVIS
Plaintiff, MOTION DATE 02/13/2020, 03/06/2020
- v - MOTION SEQ. NO. 004 005
RAKOWER LAW PLLC,
Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150
were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179
were read on this motion to/for SEAL

This is a declaratory judgment and breach of contract action concerning an attorney's fees dispute between the parties. In motion sequences 004 and 005, plaintiff moves pursuant to 22 NYCRR 216.1(a) to seal certain documents, and pursuant to CPLR § 3103 to enter under seal a proposed protective order. In motion sequence 005, plaintiff also moves to remove documents filed on the e-file system, and pursuant to 22 NYCRR 130-1.2 for attorney's fees. Plaintiff's motions are opposed and are consolidated for joint disposition. The Decision and Order is as follows:

BACKGROUND

In 2013, plaintiff brought a sexual harassment action against her former employer, HSBC Securities (USA) Inc. (HSBC), alleging sexual misconduct by senior HSBC executives. Plaintiff resolved her claims against HSBC pursuant to a settlement agreement. Thereafter, plaintiff's fiancé, James Rist and her former colleague, Michael Picarella, commenced respective federal actions in the United States District Court for the Southern District of New York (Rist and Picarella actions) (NYSCEF #131, Halter aff exhibit B). They alleged that HSBC terminated their employment in retaliation for reporting the sexual harassment against plaintiff (id.). Subsequently, HSBC issued documentary and testimonial subpoenas

to plaintiff, requiring her to produce documents and give testimony as a third-party witness in the Rist and Picarella actions (NYSCEF #1, Complaint, ¶ 5).

On April 29, 2015, plaintiff hired defendant to represent her and to respond to the subpoenas (*id.*). The parties executed an engagement letter setting forth the terms of her representation, including the attorney's fees that she would be charged (*id.*, ¶ 6). The letter required plaintiff to pay an advance retainer and reserved defendant's right to request replenishment or increase the retainer amount (NYSCEF #9, Engagement Letter, 2).

On June 19, 2015, defendant obtained an order from the District Court to protect plaintiff's identity as an innocent third-party in the Rist and Picarella actions, and further required that the parties use a pseudonym for plaintiff in all filings submitted to the Court (District Court Order) (NYSCEF #131, Halter aff, exhibit B). Plaintiff's identity was kept off of the record in the Rist and Picarella actions (June 1, 2015 Telephone conf tr, 6).

Thereafter, defendant charged and billed plaintiff \$54,034.57 for the work performed, which exceeded the \$25,000 advance retainer by \$29,034.57 (Complaint, ¶ 10). Plaintiff refused to pay and brought an action for a declaratory judgment and breach of contract against defendant, alleging that the engagement letter disallowed defendant to charge and bill any amount above the retainer for legal services without obtaining her approval and providing her notice of the retainer's exhaustion (*id.*, ¶ 27-35).

During August and September of 2019, the parties submitted several letters to this court in connection with their privilege and discovery disputes (NYSCEF #129, Halter Affirmation). These letters include: 1) defendant's August 9, 2019 letter to the court challenging plaintiff's privilege assertions (NYSCEF #130, Halter aff, exhibit A); 2) plaintiff's August 16, 2019 letter to the court responding to defendant's August 9, 2019 letter (NYSCEF #131, Halter aff, exhibit B); 3) defendant's August 30, 2019 letter to the court regarding plaintiff's responses and objections to defendant's second document requests (NYSCEF #132, Halter aff, exhibit C); and 4) plaintiff's September 6, 2019 letter to the court responding to defendant's August 30, 2019 letter (NYSCEF #133, Halter aff, exhibit D).

Defendant's August 9, 2019 letter to the court, in relevant part, discussed the terms under the settlement agreement in detail. Exhibit 1 to the letter is the privilege log dated July 29, 2019, which includes entries addressing the settlement agreement. Exhibit 2 is the settlement agreement itself. Exhibit 3 to the letter is a videotaped deposition of plaintiff, labeled confidential, in the Rist and Picarella actions dated May 29, 2015. Exhibit 4 is the transcript of a telephone conference with the parties and the District Court in the Rist and Picarella actions dated June 1, 2015. Exhibit 5 is plaintiff's response to defendant's first request for admissions.

In the August 16, 2019 letter, counsel for plaintiff discussed, in part, the settlement agreement, the directives of the U.S. Magistrate and District Court judges that plaintiff be identified by a pseudonym in order to protect her identity as a non-party witness in the Rist and Picarella actions, and a discussion of plaintiff's underlying claims against HSBC. Exhibit 1 to the letter is the July 29, 2019 privilege log. Exhibit 2 is the District Court order dated June 19, 2015 directing the parties to redact all identifying information of plaintiff in the Rist and Picarella actions.

Defendant's August 30, 2019 letter to the court discusses, as relevant herein, the specific terms of the settlement agreement and the content of a magazine article that discusses HSBC's counsel's poor treatment of plaintiff during her deposition. Exhibit 1 to the letter is Plaintiff's Responses and Objections to Defendant's Second Notice of Discovery in the instant action, which in part discussed the settlement agreement. Exhibit 4 is the complaint in Picarella's action in New York State Supreme Court against Liddle & Robinson, LLP and James Hubbard for legal malpractice. Exhibit 5 is the June 1, 2015 letter from defendant, who at the time represented plaintiff, to U.S. Magistrate Judge Peck seeking a protective order against any further depositions of plaintiff in the Rist and Picarella actions. Exhibit 8 is another letter from defendant to Judge Peck dated May 27, 2015, seeking limitations on discovery produced in the Rist and Picarella actions.

Plaintiff's September 6, 2019 letter requested, in part, an order from this court requiring defendant to destroy its copies of the settlement agreement and that defendant not utilize plaintiff's information learned in the underlying litigation in the instant matter.

This court's December 12, 2019 order resolved the disputes asserted in the letters (NYSCEF # 127). The Order directed plaintiff to produce a copy of her settlement agreement with HSBC, required the parties to confer regarding a proposed protective order to govern production of the settlement agreement, and required the protective order agreed by both parties to be filed under seal (*id.*).

DISCUSSION

I. Plaintiff's Motions to Seal and for a Protective Order

In her motion to seal (MS 004), plaintiff seeks to redact or file under seal the letters and the attached exhibits the parties submitted to the court disputing privilege assertions and discovery responses pursuant to 22 NYCRR 216.1(a). Plaintiff argues that good cause exists because the letters contain sensitive and personal information protected by the confidential settlement agreement and by the District Court Order. Plaintiff also argues that public access to the confidential information would not further any substantial public interest.

In her additional motion to seal (MS 005), plaintiff moves to seal additional documents and to remove documents from NYSCEF that defendant filed in support of defendant's opposition in motion sequence 004. Plaintiff argues that defendant failed to redact portions in its opposition that reveal she was the person behind the pseudonym the District Court ordered. Plaintiff also argues that the fee dispute arbitration transcript excerpt defendant publicly filed should remain confidential. In addition, plaintiff contends that the instant motions and the supporting exhibits should be sealed as they reveal the substance of the proposed protective order, and highlight portions of defendant's opposition that are the subject of this motion. Plaintiff argues that all other documents defendant filed that are the subject of this motion should remain under seal pursuant to plaintiff's protective order.

In opposition, defendant opposes only the redaction or sealing of a subset of publicly filed documents, including: The District Court Order; Picarella's complaint in the legal malpractice action; the magazine article, and all references to those documents in defendant's letters to the court. Defendant argues that plaintiff cannot establish good cause for sealing or redacting these documents because they are publicly available and may be retrieved by any person with internet access. Defendant also contends that plaintiff revealed the information she seeks to seal and redact. Defendant further contends that plaintiff fails to identify any harm that would result if the documents were publicly filed.

In addition, defendant contends that plaintiff allowed others to identify her involvement as a third-party witness in the Rist and Picarella actions. Defendant also argues that 22 NYCRR 137.10 explicitly permits its use of the fee dispute arbitration transcript excerpt, as this action is an ancillary legal action with respect to plaintiff unpaid fees to defendant. Finally, defendant argues that whether the press or the public intervenes in a motion to seal is not dispositive.

In her reply, plaintiff argues that filing the documents at issue would make it clear that she is the "nonparty Jane Doe" referred to in the Order thereby destroying the confidentiality the District Court ordered. In addition, plaintiff contends that republishing Picarella's complaint in the legal malpractice action would give legitimacy to his discussion of the settlement agreement. Plaintiff also contends that sealing is appropriate as no member of the public or press has opposed her motion to seal, and sealing is not prejudicial against defendant.

New York courts have long recognized a "broad presumption that the public is entitled access to judicial proceedings and court records" (*Mosallem v Berenson*, 76 AD3d 345, 348-49 [1st Dept 2010]; see *Matter of Brownstone*, 191 AD2d 167 [1st Dept 1993]). Before sealing records to the public, the court must meet the requirements of 22 NYCRR 216.1(a), which states in relevant part that:

“Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records . . . 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 of the parties.”

(22 NYCRR 216.1[a]).

While the term “good cause” is not defined, any sealing order “should be clearly predicated upon a sound basis or legitimate need to take judicial action” (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 325 [1st Dept 2006]). The First Department has generally “been reluctant to allow the sealing of court records” (*id.* at 324). Confidentiality “is the exception, not the rule, and the court is always required to make an independent determination of good cause” (*In re Will of Hoffman*, 284 AD2d 92, 93-94 [1st Dept 2001]). The burden is on the party seeking to seal court records “to demonstrate compelling circumstances to justify restricting public access” (*Mosallem*, 76 AD3d at 349). Additionally, sealing of the record is inappropriate if the information sought to be sealed is already a matter of public record (*see Massel v Gibbins*, 74 NYS3d 834, 837 [Sup Ct, NY County 2018]); *see also Doe v New York Univ.*, 786 NYS2d 892, 902 [Sup Ct, NY County 2004]).

Here, plaintiff has demonstrated good cause to seal the settlement agreement, and documents related thereto. Public policy supports the sealing of a settlement agreement where, as here, the terms of the agreement are not material to the action (*see In re New York Cty. Data Entry Worker Prod. Liab. Litig.*, 222 AD2d 381, 381 [1st Dept 1995]; *IDW Group, LLC v Levine Ins. Risk Mgt. Services, Inc.*, 40 Misc 3d 368, 382 [Sup Ct, NY County 2013]). Accordingly, the settlement agreement shall be sealed and references to the settlement agreement in the letters and exhibits at issue shall be redacted, including in those documents addressed in motion sequence 004.

As to the remainder of the documents, plaintiff fails to demonstrate good cause, including as to those related to her involvement in the Rist and Picarella actions. Plaintiff’s conclusory argument that the remaining letters and exhibits should be sealed because they are protected by the District Court Order is insufficient to establish good cause. Indeed, plaintiff’s moving papers fail to provide an explanation as to what kind of information is protected by the District Court Order, and what harm would occur if such information is revealed.

Further, the information contained in the documents at issue is publicly available. Plaintiff has already revealed her allegations of sexual harassment during her employment at HSBC and her subpoena by HSBC in the Rist and Picarella actions (NYSCEF # 141, 143, Yang aff, exhibit 4, January 16, 2018 aff of

Melissa Parvis and exhibit 6, mem of law in opposition to defendant's motion to dismiss and to disqualify plaintiff's counsel).

Plaintiff also filed documents in this action identifying herself as the non-party witness in the Rist and Picarella actions. For instance, in opposition to a prior motion, plaintiff described defendant's request for a fee arbitration as seeking to recover fees related to, "[a] successful application to Judge Peck and Judge Carter for an order protecting Parvis' privacy by redacting her name from the public filings in *Rist*. (*Hubbard Aff Ex. 21* (June 12, 2015 Order))" (NYSCEF #143, 12 [emphasis in original]).

Moreover, in his brief to the United States Court of Appeals for the Second Circuit, Picarella inadvertently identified plaintiff by name and disclosed plaintiff's pseudonym as Michelle Parker in the Rist and Picarella actions (NYSCEF #139, Yang aff, exhibit 2, Picarella's appellate brief, 13). Sometime in June or July 2017, plaintiff was notified of Picarella's disclosure but did nothing about it (NYSCEF #140, Yang aff, exhibit 3, fee arb tr, 8-9). Further, the complaint in Picarella's legal malpractice action included details of plaintiff's sexual harassment during her employment at HSBC and her pseudonym as Michelle Parker in the Rist and Picarella actions (NYSCEF #132, Halter aff, exhibit C, exhibit 4, ¶¶ 7-10, 32, 65).

Finally, plaintiff incorrectly asserts that the fee dispute arbitration transcript excerpt that defendant publicly filed should remain confidential under 22 NYCRR 137.10. Defendant is permitted to use the excerpt because this action is an ancillary legal action to plaintiff's unpaid legal fees (22 NYCRR 137.10).

Accordingly, plaintiff's motions to seal are granted as to the settlement agreement and documents related to and referencing that agreement only.

As for the branch of plaintiff's motion for a protective order, the parties agree that the settlement agreement should be subject to a protective order, but disagree as to the terms of said order. Accordingly, the parties shall utilize the Confidentiality Stipulation for Part 54 of the New York State Supreme Court, Commercial Division, New York County.¹

II. Attorney's Fees

In support of her application for attorney's fees, plaintiff contends that defendant failed to redact its opposition, revealing that she was the person behind the pseudonym in the District Court order. In opposition, defendant requests the Court to require plaintiff's counsel to pay for attorney's fees it reasonably expended

¹ The Confidentiality Stipulation for Part 54 may be accessed at: https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Confidentiality_Sti p_Part_54.pdf.

for responding to the motion and for obtaining service of an unredacted copy of the motion.

Pursuant to 22 NYCRR 130-1.2, the court may award costs “only upon a written decision setting forth the conduct on which the award is based, the reasons why the court found the conduct to be frivolous . . . and the amount awarded to be appropriate” (22 NYCRR 130-1.2). As discussed above, the court granted plaintiff’s motion to seal as to the settlement agreement and documents related to the settlement agreement only. Since defendant’s filings does not contain any unredacted references to the settlement agreement, there is no basis to award attorney’s fees. Thus, plaintiff’s application for reasonable attorney’s fee is denied. In addition, defendant’s request for reasonable attorney’s fees is also denied for failure to file a cross-motion.

III. Conclusion


Accordingly, it is hereby

ORDERED that the branches of plaintiff’s motions to seal documents and to remove documents electronically filed are granted only as to the settlement agreement, and documents related thereto. Plaintiff shall submit a proposed order indicating the documents to be sealed, redacted, and/or removed pursuant to the determinations herein, within thirty days; it is further

ORDERED that the branch of plaintiff’s motion for attorney’s fees is denied; it is further

ORDERED that the branch of plaintiff’s motion for the court to enter plaintiff’s proposed protective order is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within fourteen (14) days of entry.

<u>9/3/2020</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE