

**Thomas v Rubin**

2021 NY Slip Op 30863(U)

March 11, 2021

Supreme Court, New York County

Docket Number: 159367/2019

Judge: Verna Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

INDEX NO. 159367/2019
MOTION SEQ. NO. 006

RACHEL THOMAS, proceeding
pseudonymously,
Plaintiff,

- v -

HOWARD RUBIN and
ASHLEY DUDUK,
Defendants.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for OTHER RELIEF-PROCEED PSEUDONYMOSLY

In September 2019, Rachel Thomas, proceeding pseudonymously, filed a summons and complaint against defendants Howard Rubin ("Rubin") and Ashley Duduk ("Duduk"), asserting aggravated sexual abuse (first cause of action); battery (second cause of action); assault (third cause of action) and intentional infliction of emotional distress ("IIED") (fourth cause of action). (NYSCEF Doc. No. 1-2, summons and complaint). This action stems from allegations that, in 2016, plaintiff was sedated by Duduk with cocaine and alcohol at Rubin's penthouse apartment in New York County and, once rendered incapable of consent, persuaded to sign a non-disclosure agreement and participate in a threesome with Duduk and Rubin in exchange for \$5,000.00. It was further alleged that plaintiff was "lured into another room which, unbeknownst to [her], was the dungeon Rubin used to brutally beat and sexually abuse women." Defendants allegedly restrained plaintiff to a swing set and proceeded to physically assault and sexually abuse her. (NYSCEF Doc. No. 2 ¶¶ 27-42, complaint).

Relatedly, in 2017, plaintiff's attorney, the Balestriere Firm, commenced a federal lawsuit in the United States District Court for the Eastern District of New York ("the federal court") against Rubin and several of his associates based on similar allegations of sexual assault by other women, which is currently pending. (see Lawson v Rubin, 1:17-cv-06404-BMC-SMG [EDNY 2017]) ("the federal action").<sup>1</sup> In November 2017, the federal court granted the alleged victims' motion for a protective order permitting them to proceed under pseudonyms. (NYSCEF Doc. No. 49, November 2017 decision and order).

Plaintiff now moves this Court for an order allowing her to proceed pseudonymously and preventing defendants from revealing her identity in the instant litigation. (NYSCEF Doc. Nos. 68-74, 88-93). Plaintiff argues, in sum and substance, that she is entitled to a protective order as a victim of sexual assault under Civil Rights Law § 50-b. (NYSCEF Doc. No. 69 at 8, memo of law). Moreover, she asserts that the need for anonymity, given the highly sensitive and personal nature of the allegations in this action, outweigh any public interest or purported prejudice to defendants. (NYSCEF Doc. No. 69 at 9-14). Plaintiff further requests that all documents filed in this matter containing her real name and reference to her identity be sealed pursuant to 22 NYCRR 216.1. (NYSCEF Doc. No. 69 at 14-15).

<sup>1</sup> Plaintiff is not a party to the federal action but she is referenced in the federal complaint.

In opposition to the motion, defendants contend that Civil Rights Law § 50-b is not applicable to the present facts inasmuch as “[t]here are no criminal proceedings against [d]efendants or in which [p]laintiff is testifying.” (NYSCEF Doc. 75 at 16-17, *memo of law*). Additionally, defendants assert that the balance of factors that must be considered in evaluating the need for pseudonyms do not weigh in plaintiff’s favor. Defendants further argue that, since plaintiff’s attorney has already revealed her real name in the federal action, there is no harm to plaintiff in continuing this litigation under her real name; that plaintiff will not be dissuaded from continuing with the litigation insofar as she has already conceded to proceeding irrespective of this Court’s determination on the motion; that the public interest outweighs the need for anonymity; and that defendants would be prejudiced by the requested relief because they would not be afforded the same protections. (NYSCEF Doc. 75 at 7-16).

The default rule is one of openness and disclosure in judicial proceedings. (*see* CPLR 2101[c]; “*J. Doe No. 1*” v *CBS Broadcasting Inc.*, 24 AD3d 215, 215 [1st Dept 2005]). Notwithstanding the foregoing, “there is a statutory exception that operates to keep the identity of any victim of a sex offense confidential.” (*Jane Doe v John Doe*, 189 AD3d 406, 407 [1st Dept 2020]). Civil Rights Law § 50-b provides, in pertinent part, that:

“[t]he identity of any victim of a sex offense, as defined in article one hundred thirty ... of the penal law ... shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.”

The protections of Civil Rights Law § 50-b do not apply to everyone claiming to have been the victim of a sexual assault. The statute was enacted to spare victims of sexual assault the embarrassment of being publicly identified in the news media and to encourage such victims to cooperate in the prosecution of sexual offenses.” (*Anonymous v Graham Sch. Found., Inc.*, 2020 NY Slip Op 33047[U], \*2 [Sup Ct, Queens County 2020], citing New York Bill Jacket, 1999 S.B. 5539, Ch. 643). “As such, courts have afforded victims of sexual offenses protection under CRL § 50-b where there has either been an arrest and prosecution, or there is an investigation.” (*Anonymous v Graham Sch. Found., Inc.*, 2020 NY Slip Op 33047[U] at \*2 [internal citations omitted]; *see Brown v New York City Police Dept.*, 264 AD2d 558, 561 [1st Dept 1999]; *Doe v Kidd*, 19 Misc 3d 782, 787 [Sup Ct, NY County 2008]).

Alternatively, “[t]here is . . . a separate common-law exception that empowers a court to ‘use its discretion in balancing [the party’s] privacy interest against the presumption in favor of open trials and against any potential prejudice to [the opposing party].’” (*Jane Doe v John Doe*, 189 AD3d at 407, quoting *Anonymous v Lerner*, 124 AD3d 487, 487 [1st Dept 2015] [internal quotation marks omitted]). In doing so, the Court may consider the following factors: “(1) (w)hether the justification asserted...is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature; (2) whether the party seeking anonymity has an illegitimate ulterior motive; (3) the extent to which the identity of the litigant has been kept confidential; (4) whether identification poses a risk of mental or physical harm, harassment, ridicule, or personal embarrassment; (5) whether the case involves information of the utmost intimacy; (6) whether the action is against a governmental or private entity; (7) the magnitude of the public interest in maintaining confidentiality or knowing the party’s identity; (8) whether revealing the identity of the party will dissuade the party from bringing the lawsuit; (9) whether the opposition to anonymity has an illegitimate basis; and (10) whether the other side will be prejudiced by use of the pseudonym.” (*Doe v Vajpayee*, 2020 NY Slip Op 33766[U], \*3-4 [Supreme Court, NY County 2020], citing *Doe v Szul Jewelry, Inc.*, 2008 NY Slip Op 31382[U] [Sup Ct, NY County 2008]).

22 NYCRR 216.1 (a) provides, in relevant part, that “[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 of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.”

Here, this Court is persuaded that, insofar as plaintiff has failed to establish the existence of a criminal proceeding or, at the very least, a criminal investigation against defendants relating to these allegations, plaintiff may not avail herself of the protections of Civil Rights Law § 50-b. (*see Doe v Kidd*, 19 Misc 3d at 787 [Sup Ct, NY County 2008]). Notwithstanding the foregoing, upon a careful balancing of plaintiff’s claimed right to privacy against the presumption of openness in judicial proceedings, the motion is granted. There is no question that plaintiff seeks to preserve privacy in a case of a sensitive and highly personal nature and that there is a risk of personal embarrassment given the salacious allegations asserted in this litigation. The potential harm is further supported by a letter purportedly sent to plaintiff from Rubin, dated January 10, 2019, wherein he allegedly threatened to “testify publicly that [she is] a professional prostitute who agreed to have S&M sex with [him] for [\$5,000.00] and that [she] acknowledged that [she] understood the hazards of engaging in S&M behavior.” (NYSCEF Doc. No. 71, *letter*). There is no indication that plaintiff has an illegitimate ulterior motive in seeking to preserve her identity; this action is not against a governmental agency and, thus, there is no need for increased transparency to the general public; the interest of preserving plaintiff’s anonymity outweighs any public interest in knowing her identity; and defendants will not be prejudiced by the requested relief inasmuch as they know plaintiff’s identity.

Although defendants take issue with the fact that the Balestriere firm has already referred to plaintiff by her real name in the federal action, not only was plaintiff not a party to that action, but it is not readily apparent from the brief mention in the federal complaint that she is indeed the plaintiff in this matter. Furthermore, defendants’ argument about prejudice is belied by the fact that similar relief was granted to another plaintiff in another action against Rubin, based on similar allegations, which was not opposed. (NYSCEF Doc. No. 52, *decision and order*, in *Parker v Rubin*, Supreme Court, New York County, Index No. 650126/2018).<sup>2</sup> Irrespective of plaintiff’s representation that she intends to proceed in this matter if this application is denied, a balancing of the relevant factors nevertheless weigh in favor of anonymity. (*see Jane Doe v Vajpayee*, 2020 NY Slip Op 33766[U] at \*3-4). All remaining arguments are either without merit or need not be addressed. In accordance with the foregoing, it is hereby

**ORDERED** that plaintiff’s motion to proceed herein under a pseudonym, rather than in her legal name, and to proceed throughout this action under such pseudonym, rather than in her own name, is granted, *nunc pro tunc*; and it is further

**ORDERED** that said information shall only be shared between the parties to this litigation notwithstanding any consent to share agreed to by plaintiff; and it is further

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<sup>2</sup> In further support of this Court’s determination, it should be noted that in another matter related to the federal action, this Court issued an order, in accordance with an attached stipulation, sealing certain documents and assigning pseudonyms to the defendants claiming to be victims in the federal action. (NYSCEF Doc No. 34, order, in *Yifat V. Schmur et al., v John Balestriere et al.*, Sup Ct, NY County, Index No. 160095/2018).

**ORDERED** that any documents containing plaintiff's real name shall be redacted or referred to by the pseudonym "Rachel Thomas" prior to filing; and it is further

**ORDERED** that in accordance with Part 216 of the Uniform Rules for the Trial Courts, that good cause exists for the sealing in part of the file in this action and in accordance with the decision herein, it is now

**ORDERED** that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal NYSCEF Doc Nos 29, 47, and the documents submitted with respect to the instant motion specifically NYSCEF Doc Nos 68-93 to be sealed in the docket of the New York State Courts Electronic Filing System and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

**ORDERED** that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants.

March 11, 2021

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE