

Aghazadeh v Proskauer Rose, LLP
2021 NY Slip Op 32690(U)
December 16, 2021
Supreme Court, New York County
Docket Number: Index No. 154080/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8Behzad Aghazadeh et al

INDEX NO. 154080/2021

- v -

MOT. DATE

Proskauer Rose, LLP

MOT. SEQ. NO. 1-4

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

In this special proceeding, petitioners seek a protective order regarding the non-party subpoena duces tecum served upon petitioner Gehzad Aghazadeh, and a protective order and an order to quash the non-party subpoena duces tecum served upon petitioners Scott Epstein and Gibson Dunn & Crutcher LLP ("Gibson Dunn"), pursuant to CPLR §§ 2304, 3101(a), and 3103. Respondent Proskauer Rose LLP ("Proskauer") has answered the petition, opposes the relief sought and cross-petitions to compel petitioner's compliance with the subpoenas.

There are three additional motions pending. In motion sequence 2, petitioners move to seal portions of five exhibits that Proskauer filed in support of its opposition to the petition. In motion sequence 3, non-party Berkshire Global Advisors LP ("Berkshire") moves to seal, or in the alternative, redact and/or remove all references to Berkshire in Proskauer's Memorandum of Law in Opposition to Petitioners' Motion for a Protective Order and to Quash Subpoenas Duces Tecum, in Support of Respondents' Motion to Dismiss the Petition, and in Support of Respondent's Cross-Petition, dated July 2, 2021, filed in partially redacted form at NYSCEF Doc. Nos. 85, 121 and 159, with the redacted version proposed by Berkshire. Berkshire further seeks sanctions against Proskauer.

Proskauer opposes both motion sequences 2 and 3. Finally, in motion sequence 4, Proskauer moves to dismiss. Petitioners oppose that motion.

At oral argument held on the record, a transcript of which has been provided to the court, the court granted Proskauer leave to submit a surreply in the form of a letter. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

The court will consider the petition, cross-petition and motion to dismiss in tandem, since they are interrelated and the disposition of one necessarily impacts the others.

Dated: 12/16/21


 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

The underlying subpoenas were served in connection with a legal malpractice action pending in Massachusetts where respondent is a defendant. That action is entitled Robert Adelman, M.D. v. Proskauer Rose, LLP, Commonwealth of Massachusetts Superior Court SUCV2020-0735-BLS 2. By way of background, Proskauer represented Adelman, who now claims that Proskauer negligently drafted agreements governing entities that managed a hedge fund. Proskauer asserts here that the information it seeks vis-à-vis the underlying subpoenas will show that “Aghazadeh, not Proskauer, forced Adelman, his business partner, out.” As for the remaining parties to this action, Epstein is CFO of Aghazadeh’s hedge fund management entity and Gibson Dunn is Aghazadeh’s counsel.

There is no dispute that some portion of Proskauer’s subpoena targeting Aghazadeh seeks relevant, non-privileged information and should be provided. Indeed, as Proskauer points out, “[t]he Massachusetts court already has recognized that Aghazadeh’s misconduct is central to that case, holding that ‘Proskauer is free in defending itself against [Adelman’s] claim to argue that the harm that befell Adelman was not because of anything it did nor did not do but because of Aghazadeh’s unlawful actions’” (see decision/order dated November 30, 2020, Justice Janet L. Sanders).

Yet, none of the petitioners have provided any records to Proskauer. The crux of the dispute is whether the subpoena targeting Aghazadeh should be limited because it is “needlessly burdensome” and “harassing”. Petitioners further assert that the subpoenas targeting Epstein and Gibson Dunn should be quashed because they “are part of the broader campaign against [] Aghazadeh.” Further, petitioners represent that “any relevant, non-privileged documents will be produced by [] Aghazadeh. Proskauer does not need [] Epstein and Gibson Dunn to produce these documents again.” Alternatively, like the Aghazadeh subpoena, petitioners argue that the court should narrow the subpoenas directed to Epstein and Gibson Dunn.

“[A] motion to quash a subpoena *duces tecum* should be granted only where the materials sought are utterly irrelevant to any proper inquiry” (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). The party seeking to quash a subpoena must “establish[] that the requested documents and records are utterly irrelevant” or that the subpoenas subject the witness to harassment (*Myerson v. Lentini Bros. Moving & Storage Co., Inc.*, 33 NY2d 250 [1973]).

The court agrees with Proskauer that the subpoenas, as narrowed by Proskauer’s May 14, 2021 letter, are tailored to obtain relevant information. Proskauer explains that the underlying subpoenas seek documents concerning three aspects of the Massachusetts action: the negotiation of the agreements between Aghazadeh and Adelman, Aghazadeh’s role at the hedge fund management entities, and Aghazadeh’s breaches. Petitioners’ papers are filled with hyperbole and circular reasoning, but aside from that, petitioners have failed to demonstrate that the subpoenas are irrelevant to any proper inquiry. Indeed, petitioners concede that Proskauer is entitled to at least some of the records requested.

Nor have petitioners shown that the subpoenas constitute harassment. While Aghazadeh may not like what Proskauer says or thinks about his actions, Proskauer is not simply targeting petitioners to make their lives more difficult. Rather, Proskauer seeks information to support its defenses in a legal malpractice action in which it faces real and significant liability.

Finally, the court is not convinced that the subpoenas directed to Epstein and Gibson Dunn are duplicative so as to warrant a quash. Each played a significant role in connection with the underlying transactions at issue in the Massachusetts action.

Thus, the petition must be denied. Indeed, to hold otherwise, could potentially hamstring Proskauer’s defense in the Massachusetts action. Such a result would be improper. Accordingly, the petition is denied and this proceeding is dismissed. Relatedly, the cross-petition to compel petitioners’ compliance with the subpoenas is granted. Petitioners shall respond to the subpoenas as narrowed by Proskauer’s May 14, 2021 letter within 30 days from service of this order with notice of entry.

The court now turns to the motions to seal. As a general rule, the public is entitled to access to judicial proceedings and court records (*Mosallem v. Berenson*, 76 AD3d 345 [1st Dept 2010] *citing Mancheski v. Gabelli Group Capital Partners*, 39 AD3d 499 [1st Dept 2007]). The public's right to access, however, is not absolute (*id. citing Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1 [2000]). Nonetheless, petitioners and Berkshire bear a heavy burden on their respective motions.

Pursuant to 216.1(a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1[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 of the parties.

"Although the term 'good cause' is not defined, 'a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action'" (*Mosallem, supra* at 349, *quoting Gryphon Domestic VI, LLC*, 28 AD3d 322, 325 [1st Dept 2006]; *see also Abe v. New York University*, 169 AD3d 445 [1st Dept 2019]). The party seeking to seal court records must demonstrate compelling circumstances to justify restricted public access (*Mancheski, supra* at 502; *see also Maxim, Inc. v. Feifer*, 145 AD3d 516 [1st Dept 2016]; *see also Wilder v. Fresenius Medical Care Holdings, Inc.*, 175 AD3d 406 [1st Dept 2019] ["plaintiff has failed to make a showing of a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceeding"]). The First Department, however, has been reluctant to allow the sealing of court records, even when both parties have presented a joint application (*see i.e. Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 28 AD3d 322 [1st Dept 2006]).

Petitioner's motion to seal is denied. Petitioner's counsel concedes that several of the subject records are already publicly available. Otherwise, petitioner's counsel's unsubstantiated assertion that they will be harmed by certain records remaining publicly available is insufficient to warrant the relief they seek.

As for Berkshire's motion, it is granted in part. Previously, Berkshire responded to a subpoena from Proskauer believing that the response was subject to a confidentiality order on the advice of Proskauer's counsel. Thus, Berkshire's counsel explains "[w]hen Berkshire produced these documents, it was done with the express agreement that its production would be protected by the Massachusetts Order and thus that Proskauer would keep the documents and information confidential and in accordance with the Massachusetts Trial Court Rule VIII." Berkshire's counsel complains that Proskauer failed to abide by the original confidentiality order by releasing Berkshire's confidential information. Berkshire has proposed redactions, annexed to its motion as Exhibit "F".

Proskauer opposes the motion, claiming that the information which Berkshire seeks to seal was obtained from alternative non-confidential sources, but admits that one piece of information was obtained from Berkshire. As for this particular item, Proskauer claims that it should not be kept confidential, and otherwise argues that Berkshire is not entitled to the relief it seeks. The court has reviewed the disputed excerpts of Proskauer's memorandum and finds that Berkshire is entitled to sealing of the last paragraph of page 11 of said memorandum. The information contained in this paragraph is not publicly available, reveals Berkshire's proprietary information and business dealings/strategy, and was disclosed under the guise of a confidentiality order. Therefore, the court will grant Berkshire's motion to the extent that Proskauer is directed to refile its MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS DUCES TECUM, IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE PETITION, AND IN SUPPORT OF RESPONDENT'S CROSS-PETITION, NYSCEF Document Number 188, redacting the last paragraph of page 11 in its entirety and NYSCEF Document Number 188 shall be marked sealed upon service of

a copy of this order with notice of entry upon the county clerk along with the appropriate NYSCEF Form located at:

<https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notification.for.sealing.pdf>.

The balance of Berkshire's request for sealing is denied, as is its application for sanctions. Berkshire has failed to meet its heavy burden on this motion with respect to the remaining information which it proposes to seal from public view. Nor does the court find sanctions warranted for the several sentences which Proskauer failed to redact in its memorandum of law.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the petition is denied in its entirety and motion sequence 4 to dismiss the petition is granted; and it is further

ORDERED that the cross-petition to compel petitioners' compliance with the subpoenas is granted. Petitioners shall respond to the subpoenas as narrowed by Proskauer's May 14, 2021 letter within 30 days from service of this order with notice of entry; and it is further

ORDERED that petitioners' motion to seal is denied; and it is further

ORDERED that Berkshire's motion to seal is granted to the extent that Proskauer is directed to re-file its MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS DUCES TECUM, IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE PETITION, AND IN SUPPORT OF RESPONDENT'S CROSS-PETITION, NYSCEF Document Number 188, redacting the last paragraph of page 11 in its entirety and NYSCEF Document Number 188 shall be marked sealed upon service of a copy of this order with notice of entry upon the county clerk along with the appropriate NYSCEF Form located at:

<https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notification.for.sealing.pdf>.

And it is further **ORDERED** that Berkshire's motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

12/10/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.