

Niamehr v Law Offs. of Michael S. Lamonsoff, PLLC
2022 NY Slip Op 30232(U)
January 21, 2022
Supreme Court, New York County
Docket Number: Index No. 653682/2020
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

DANIEL NIAMEHR,

Plaintiff,

- v -

LAW OFFICES OF MICHAEL S. LAMONSOFF, PLLC,
MICHAEL LAMONSOFF, and BETH KIRSCHNER

Defendants.

-----X

INDEX NO. 653682/2020
MOTION DATE 11/17/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 154, 155, 156, 157, 158, 159, 160, 161, 167, 168, 169, 170, 176, 177

were read on this motion to/for STRIKE/SEAL/SANCTIONS

In this action arising from events that allegedly transpired during and after the plaintiff attorney's brief period of employment as an associate with the defendant law firm, the Law Offices of Michael S. Lamonsoff, PLLC (the Law Firm), the defendants move to strike certain information pertaining to clients of the Law Firm from the plaintiff's affidavit dated October 9, 2020, and the exhibits annexed thereto, or, in the alternative, to seal the affidavit and exhibits. The defendants further seek sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1. The plaintiff opposes the motion. The motion is granted in part.

The plaintiff is a young personal injury attorney who commenced employment with the Law Firm on May 6, 2019. On August 3, 2020, the plaintiff submitted his resignation, purportedly due to "ethical dilemmas" in connection with client matters that he avers the defendants' conduct created. On August 7, 2020, the plaintiff commenced this lawsuit. The amended complaint seeks to recover for the defendants' alleged breach of the compensation terms of his employment agreement and related oral agreements. The defendants assert counterclaims accusing the plaintiff of improperly using the Law Firm's confidential and proprietary information to solicit clients for his own practice, harassing female colleagues, and lying in his employment application.

On October 9, 2020, in opposition to the defendants' motion to dismiss the amended complaint, the plaintiff submitted a 56-page affidavit with 55 exhibits attached thereto. The defendants seek to strike or seal paragraphs 11(e), 52-53, 93-128, 129, 133-135, 138-139, 141, 142-143, 146-147, 149, 153, 155, 157, 191, 207-210, and Point II A of the affidavit, as well as exhibits 14, 22-30, 32-34, 36-38, 41-42, 44, 45, 53, and 54. The foregoing consists of, inter alia, reference to the names of clients of the Law Firm, descriptions of work performed for those

clients, allegations of misconduct by the defendants in connection with such work, public court filings and case information sheets, and email and text correspondence between employees of the Law Firm.

In support of their application, the defendants invoke Rule 1.6 and 1.9 of the New York Rules of Professional Conduct (“Rule 1.6” and “Rule 1.9,” respectively). Rule 1.6 states that “[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person.” See 22 NYCRR 1200. Confidential information is defined as follows:

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Id. Rule 1.9 provides, in relevant part, that a lawyer “who has formerly represented a client in a matter shall not thereafter...reveal confidential information of a former client protected by Rule 1.6 except as these rules would permit or require with respect to a current client. Id. “The ethical obligation to maintain the ‘confidences’ and ‘secrets’ of clients and former clients is broader than the attorney-client privilege and exists “without regard to the nature or source of information or the fact that others share the knowledge.”” Wise v Consol. Edison Co. of New York, 282 AD2d 335, 335 (1st Dept. 2001) (quoting Brennan’s, Inc. v Brennan’s Rest., Inc., 590 F2d 168, 172 [5th Cir. 1979] [quoting ABA Code of Professional Responsibility, EC 4–4 (1970)]).

Thus, an attorney is generally barred from maintaining an action where the action would require the disclosure of client confidences. See id. However, an attorney may reveal confidences and secrets to the limited extent necessary to establish or collect attorney’s fees or to defend against an accusation of wrongful conduct. See 22 NYCRR 1200.19(c)(4); Balestriere PLLC v BanxCorp, 96 AD3d 497 (1st Dept. 2012); Nesenoff v Dinerstein & Lesser, P.C., 12 AD3d 427 (2nd Dept. 2004).

The defendants contend that the material identified in its moving papers is privileged and confidential client information and ask that it be stricken. CPLR 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” Thus, that material is deemed “spurious” by a party does not of itself warrant striking. The material must also be unnecessary, which courts have interpreted to mean irrelevant. “A motion to strike scandalous or prejudicial material from a pleading ... will be denied if the allegations are relevant to a cause of action.” New York City Health and Hospitals Corp. v St. Barnabas Community Health Plan, 22 AD3d 391, 391 (1st Dept. 2005); see Hirsch v Stellar Management, 148 AD3d 588 (1st Dept. 2017); Wittels v Sanford, 137 AD3d 657 (2016).

Initially, the defendants make no argument that any of the material in question is protected by the attorney-client privilege. Much of it merely references the name of a client matter without significant detail. Nonetheless, even identifying clients of the Law Firm by name or case number or disclosing public filings that are not “generally known” can constitute a disclosure of confidential information within the meaning of Rule 1.6. Moreover, some of the material does plainly disclose details regarding the Law Firm’s internal strategies on individual cases. The plaintiff’s insistence that he is simply honoring his former clients’ “right to know” about purported malpractice at the firm for which he worked by publicizing such malpractice in a civil lawsuit for his own benefit does not change the fact that the information he reveals is confidential. It only raises the question of why he did not disclose the information directly to his clients while he was working for them.

As the court has stated, there is no exception to the prohibition on disclosure of client confidences where an attorney seeks to use such confidences to bolster his own claims. Thus, the question becomes whether the plaintiff’s disclosure is relevant to defend against the defendants’ accusations of wrongful conduct in their counterclaims. The court concludes, at this stage, that it is. The defendants aver in their answer with counterclaims that prior to his departure, the plaintiff was assigned to a federal multi-district litigation matter (the MDL). The MDL is the client matter most frequently referenced in the plaintiff’s affidavit and exhibits. The defendants further aver that “[s]ince the case was labor-intensive, it provided Mr. Niamehr with what looked like a perfect opportunity to hoodwink the [Law Firm] into believing that he was spending all of his time toiling away on the case, when in fact he was acting in furtherance of his scheme to steal cases, start a solo practice, and extract money to fund those cases from [the Law Firm].” The defendants go on to assert counterclaims against the plaintiff based in part on this alleged behavior. Inasmuch as the plaintiff seeks to introduce evidence that he was, in fact, working diligently on the MDL, and that his resignation was based on his purported “ethical concerns” about the defendants’ behavior in the course of their practice rather than being part of a scheme to steal clients, the evidence is relevant to his defense against the defendants’ accusations. The defendants’ arguments to the contrary are unpersuasive.

Equally without merit is the defendants’ suggestion that the materials in question can be stricken because, although they may be relevant to the defendants’ counterclaims, they should not have been submitted at this early stage of the proceedings. That the materials may not be properly considered on a motion to dismiss or may not entitle the plaintiff to the relief he seeks in his own motion to dismiss is not a basis for striking.

The court turns next to the defendants’ alternative application for sealing. 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 ... 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.” “[T]here is a broad presumption that the public is entitled to access to judicial proceedings and court records.” Mosallem v Berenson, 76 AD3d 345, 348 (1st Dept. 2010).

Nonetheless, the public's right to access is not absolute. See Danco Labs. v Chemical Works of Gedeon Richter, 274 AD2d 1 (1st Dept. 2000). "The presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access." Applehead Pictures, LLC v Perelman, 80 AD3d 181, 191 (1st Dept. 2010); see Danco Labs. v Chemical Works of Gedeon Richter, *supra*; see also Matter of Holmes v Winter, 110 AD3d 134 (1st Dept. 2013), *rev'd on other grounds* 22 NY3d 300 (2013); Schulte Roth & Zabel, LLP v Kassofer, 80 AD3d 500 (1st Dept. 2011). "Thus, the court is required to make its own inquiry to determine whether sealing is warranted, and the court will not approve wholesale sealing of [court] papers, even when both sides to the litigation request sealing." Applehead Pictures, LLC v Perelman, *supra*, at 192 (citations omitted); see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.U., 28 AD3d 322 (1st Dept. 2006); Liapakis v Sullivan, 290 AD2d 393 (1st Dept. 2002); Matter of Hofmann, 284 AD2d 92 (1st Dept. 2001).

The burden is on the party seeking to seal court records to establish "good cause." Maxim, Inc. v Feifer, 145 AD3d 516, 517 (1st Dept. 2017). "Since there is no absolute definition, a finding of good cause, in essence, 'boils down to ... the prudent exercise of the court's discretion.'" Applehead Pictures, LLC v Perelman, *supra*, at 192 (quoting Mancheski v Gabelli Group Capital Partners, 39 AD3d 499, 502 [2nd Dept. 2007]) (some internal quotation marks and citation omitted). "Conclusory claims of the need for confidentiality" and "the mere fact that embarrassing allegations may be made ... even if ultimately found to be without merit, [are] not ... sufficient bas[es] for a sealing order." Matter of Hofmann, *supra* at 93-94. However, the protection of confidential client information may be a sufficiently important consideration to warrant sealing. See Haider v Geller & Company LLC, 457 F Supp 3d 424 (S.D.N.Y. 2020); Diversified Grp., Inc. v Daugerdas, 217 FRD 152 (S.D.N.Y. 2003).

"A finding of 'good cause' presupposes that . . . no alternative to sealing can adequately protect the threatened interest." Mancheski v Gabelli Group Capital Partners, 39 AD3d 499, 502 (2nd Dept. 2007) (citing In re Herald Co., 734 F2d 93, 100 [2nd Cir. 1984]). Accordingly, "less restrictive alternatives to closure" should be employed whenever possible. Anonymous v Anonymous, 263 AD2d 341, 344 (1st Dept. 2000). Appropriate alternative relief may be granted to balance the competing interests of public access and the need for secrecy or confidentiality. See Danco Labs v Chemical Works of Gedeon Richter, *supra*.

Here, the defendants' submissions establish that the redaction of the plaintiff's affidavit and sealing of some of the exhibits attached thereto strikes the appropriate balance between protecting confidential information and preserving the public's right of access to judicial documents. Specifically, the court finds that paragraphs 93-127, 133, 138-139, 142-143, 146, 149, and 155, of the affidavit, and exhibits 22-30, 32-34, 36-38, 41, and 54 thereto, should be redacted/sealed, as appropriate, in their entirety.

As to paragraphs 11(e), 52-53, 129, 141, 153, 157, 191, 207-210, and Point II A, of the affidavit, and exhibits 14, 44, 45, and 53 thereto, the court finds that redaction of the names and client numbers of the Law Firm's clients included therein, rather than wholesale redaction, is

sufficient to protect confidential information. Paragraph 147 and exhibit 42, which merely reference a malpractice suit filed against the Law Firm by a former client, are not subject to any sealing or redaction. The defendant provides no persuasive argument or authority to the contrary.

The defendants' motion for sanctions is denied upon its failure to establish entitlement to relief pursuant to 22 NYCRR 130-1.1.

Accordingly, it is

ORDERED that the defendants' motion to strike certain information from the plaintiff's affidavit dated October 9, 2020, and the exhibits annexed thereto, or, in the alternative, to seal the affidavit and exhibits, and for an award of sanctions against the plaintiff, is granted to the extent described herein, and the motion is otherwise denied; and it is further

ORDERED that exhibits 22-30, 32-34, 36-38, 41, and 54 to the plaintiff's affidavit dated October 9, 2020, filed at Docket Nos. 49-57, 59-61, 63-65, 68, and 81, as well as the unredacted versions of the plaintiff's affidavit dated October 9, 2020, and exhibits 14, 44, 45, and 53, filed at Docket Nos. 27, 41, 71, 72, and 80 shall remain under seal; and it is further

ORDERED that the plaintiff shall, within 10 days of the entry of this order, file with the County Clerk: (1) a copy of this order, (2) a Notification for Sealing in Electronically Filed Case on NYSCEF Form EF 7, (3) a copy of his affidavit and all exhibits thereto except for exhibits 22-30, 32-34, 36-38, 41, and 54, with (i) the names of all clients and any case number or client number and (ii) paragraphs 93-127, 133, 138-139, 142-143, 146, 149, and 155 of the affidavit, redacted therein, and (4) a Restrict Access—Affidavit or Affirmation of Compliance with the requirements of this order; and it is further

ORDERED that any subsequently filed documents that directly quote from or make reference to the foregoing sealed or redacted information shall be filed in redacted form, with an unredacted version of each document to be filed under seal, following the entry of this order.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/21/2022
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE