Eccles v Shamrock Capital Advisors, LLC
2023 NY Slip Op 32730(U)
August 5, 2023
Supreme Court, New York County
Docket Number: Index No. 651623/2023
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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NIGEL JOHN ECCLES, LESLEY JAYNE ROSS ECCLES, THOMAS GORDON GRIFFITHS, ROBAT JONES, CHRIS STAFFORD, ASHEK AHMED, ANDREW ALLAN, ALEXANDRA AMOS AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAY AMOS, JEANNICE ANGELA, KEN BERMAN, ALEX BIRD, DUNCAN BLAIR, CAMERON BOAL, EHI BORHA, JESSE BOSKOFF, GEOFF BOUGH, MICHAEL BRANCHINI, DANIEL BROWN, KELLI BUCHAN, CHARLENE BURNS, WILLIAM CARROLL, DAVE CAVINO, SHREE CHOWKWALE, HUGH COLE-BAKER, CORAL HOUSE SERVICES LIMITED, CHRIS CORBELLINI, JIM CROFT, CYRUS DAVID, DAVIDSON FAMILY REVOCABLE TRUST, ROBERT DEL PAPA, JAMES DOIG, RYAN DONER, KEVIN DORREN, PAYOM DOUSTI, CARL EKMAN, F RESIDUAL LLC,RYAN FABER, JASON FARIA, VICTORIA FARQUHAR, RORY FITZPATRICK, ADRIANA ESTRADA GENAO, MITCHELL GILLESPIE, ALAN GOLDSHER, WILL GREEN, MELANIE GRIER, JUSTIN HANKE, RYAN HANSEN, NEIL HARRIS, PETER HENDERSON, MATTHEW HEVIA, ANDREW HEYWOOD, STEVEN HOLMES, JUSTIN M HUME, GREG HUMPHREYS, TIM JACKSON, CORY JEZ, THANYALUK JIRAPECH-UMPAI, DEVASHISH KANDPAL, MICHAEL KANE, ALAN KARAMEHMEDOVIC, MARCUS KELMAN, DAVID KERR, GALINA KHO, DYLAN KIDDER, SARAH KILLARNEY-RYAN, ALLAN KILPATRICK, ALI KING, STEVEN KING, DAVID KNAPP, MIKE KUCHERA, ANGELA ROMANO KUO, JESSE LAMBERT, AMY LANGRIDGE, DIOMIRA LAWRENCE, JOHN LIGHTBODY, FRANK LOCASCIO, ANDY LOVE, KRISTEN LU, GARY MA, KEVIN MACPHERSON, MAX MANDERS, JOHN MANGAN, SUNJAY MATHEWS, CAROLINE MCDOWALL, JULIE MCELRATH ANDERSON, KEVIN MCFLYNN, EILEEN MCLAREN, MARTIN MCNICKLE, DAN MELINGER, ANDREW MELLICKER, RAYNA MENGEL, MATT MILLEN, JOSH MOELIS, VINCE MONICAL, JEN MORDUE, EILIDH MORRISON, SIMON MURDOCH, ANDERS MURPHY, EOIN MURPHY, ANDREW MURRAY, MATTHEW MUSICO, JAMES NEWBERY, OWEN O'DONNELL, XAVIER OLIVER-DUOCASTELLA, MARK PETERS, MICHAEL PETERSON, JEREMY PIPPIN, RICHARD MELMON TRUST, THOMAS RICHARDS, SHAWN RINKENBAUGH, IAN RITCHIE, JUSTINE SACCO, NICHOLAS SHARP, SCOTT SHAY, JAKE SILVER, THOMAS SMYTHE, DAN SPIEGEL, KEITH STERLING, DAVID STESS, VARUN SUDHAKAR, JOHN SUTHERLAND, WARRICK TAYLOR, STUART TONNER, JOHN VENIZELOS, KYLE WATCHEL, LYNNE WALLACE, WALLEYE INVESTMENTS LLC,BRENDAN WATERS,

INDEX NO. 651623/2023

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

SKYE WELCH, MICHAEL WILLIAMS, PHYLLIS L JONES, ROSS WILSON, BRETT WOLTZ, KRISTIAN WOODSEND, KRIS YOUNG, and ALEXANDER ZELVIN,

Plaintiffs,

- v -

SHAMROCK CAPITAL ADVISORS, LLC,SHAMROCK CAPITAL GROWTH FUND III, LP, SHAMROCK FANDUEL CO-INVEST LLC,SHAMROCK FANDUEL CO-INVEST II, LP, KKR & CO., INC.,FAN INVESTOR LIMITED, FAN INVESTORS L.P., MICHAEL LASALLE, EDWARD OBERWAGER, ANDREW CLELAND, MATTHEW KING, CARL VOGEL, DAVID NATHANSON, FASTBALL HOLDINGS LLC,FASTBALL PARENT 1 INC.,FASTBALL PARENT 2 INC.,PANDACO, INC., and FANDUEL GROUP, INC.,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 94, 95, 96, 97, 98, 99, 100, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for SEAL.

In motion sequence number 001, defendants seek to permanently seal the complaint in this action (NYSCEF Doc. No. [NYSCEF] 2, compl.), and accompanying affidavit of David Michael Thomson, K.C., (NYSCEF 3, Thomson aff) pursuant to the parties' stipulation governing the production and exchange of confidentiality information (the Confidentiality Agreement) in a prior action (First NY Action). (NYSCEF 285, so ordered confidentiality order, in *Eccles v Shamrock Capital Advisors, LLC,* Sup Ct, NY County, index no. 651223/2020.) Alternatively, defendants seek to redact both documents and have submitted proposed redactions. In motion sequence number 002,

plaintiffs oppose both of defendants' request, arguing that defendants have not satisfied their burden in permanently sealing these documents or redacting them.

Procedural Background

This action, brought under CPLR 205(a), is a purported renewal of the First NY Action, in which the Appellate Division dismissed the entire complaint.[1] In the First NY Action, the KKR and FanDuel Defendants moved to seal and/or redact certain documents, but later withdrew the motion by stipulation. (NYSCEF 366, decision and order, in First NY Action [mot. seq. no. 017]; NYSCEF 367, unsealing order, in First NY Action.)

The Parties' Arguments

Plaintiffs admit that this complaint cites information that defendants designated as confidential pursuant to the Confidentiality Agreement but contend that this action continues to be governed by the Confidentiality Agreement. (NYSCEF 96, mem of law in support at 4.[2]) According to plaintiffs, they provided notice to defendants of their intention to incorporate information covered by the Confidentiality Agreement and moved by Order to Show Cause (OSC), for a court order temporarily sealing the complaint for thirty days (*see* NYSCEF 100, OSC [mot. seq. no. 001]), allowing defendants time to evaluate the materials to determine whether to keep this information

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[1] The Appellate Division, First Department dismissed the remainder of plaintiffs' claims in the First NY Action (the first, second, and fourth causes of action) and held that Scots law applied to the first and second causes of action and further held that the plaintiffs failed to state the first and second claims under Scots law. (*Eccles v Shamrock Capital Advisors, LLC*, 209 AD3d 486 [1st Dept 2022], *lv to appeal granted*, 39 NY3d 916 [2023].) Accordingly, the First Department dismissed plaintiffs' fourth cause of action, aiding and abetting breaches of fiduciary duty. (*Id.*)

[2] Pages refer to NYSCEF generated pagination.

under seal, or, as plaintiffs point out, unsealed consistent with the parties' stipulation to unseal.[3] (*See* NYSCEF 364, stipulation withdrawing motion to seal confidential information, in the First NY Action.)

Defendants seek to permanently seal the complaint and Thomson affidavit because they assert that plaintiffs' use of information, produced by defendants and designated as confidential in the First NY Action, in this action violates the parties' Confidentiality Agreement to use confidential information "only for purposes of this litigation and for no other purposes." (NYSCEF 285, Confidentiality Agreement, in First NY Action ¶ 7.) The parties dispute whether this action falls within the definition of "this litigation." Defendants contend that this action is not the same as the First NY Action as this complaint asserts several new causes of action. Plaintiffs disagree and argue that this action is the same, on-going litigation as the First NY Action and is brought as a new action only by virtue of the CPLR 205(a) device. Thus, plaintiffs contend that there is no breach of the Confidentiality Agreement.

Defendants also assert that, in any event, the information utilized by plaintiffs in this complaint includes confidential, commercially sensitive financial information of nonparties, individuals, and other private companies which separately satisfies the standard to redact. As to this argument, plaintiffs counter that defendants have failed to satisfy their burden in specifying why the documents should be redacted. Further, plaintiffs characterize the information referenced in these documents as dated and stale and therefore no harm to defendants' present-day business.

[3] Nothing in the First NY Action is filed under seal or redacted.

Discussion

As to plaintiffs' alleged breach of the Confidentiality Agreement, the court will not decide this issue on this motion.[4] The court denies the request to permanently seal the complaint and Thomson affidavit in their entirety. Courts will permit sealing only upon a finding of good cause where movant shows "'compelling circumstances to justify restricting public access.'" (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 206] [internal citation omitted], quoting *Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010].) Wholesale sealing is disfavored. (*See Applehead Pictures LLC v Perelman*, 80 AD3d 181, 192 [1st Dept 2010] [citation omitted].) An alleged breach of a confidentiality agreement entered into for purposes of exchanging information is not relevant to the motion to seal insofar as it does not constitute a basis to seal. Rather, it demonstrates the steps taken to protect confidential information and can buttress an argument in support of sealing/redacting. (*See Linkable*, 75 Misc 3d 1231[A] at *3.) Parties may designate information as confidential, but it is another matter whether the information can be shielded from the public. In sum, the allegation that plaintiffs breached the Confidentiality Agreement does not excuse defendants from making a showing of good cause why certain information should be redacted. Further, the court finds that redaction is more appropriate in this case, especially in light of defendants' proposed redactions.

[4] It appears that defendants have briefed the CPLR 205(a) issue in their motions to dismiss (motion sequence numbers 012 and 013). Thus, it is not appropriate to decide on this motion to seal, whether filing this action using purportedly confidential material constitutes a breach of the Confidentiality Agreement from the First Action.

Defendants' reliance on *Linkable Networks, Inc v Mastercard Inc.* is misplaced and further compels this result. (75 Misc 3d 1231[A], *5 [Sup Ct, NY County 2022].) There, the court found good cause existed to redact briefs and other exhibits that revealed confidential information. (*See id.)* The court in *Linkable* noted that one of the moving defendants in *Linkable* took steps to maintain the confidentiality of the documents by entering into the protective order and, rather, that it bolstered the movant's request. (*See id.*) The court did not grant redaction solely on that basis but found good cause to redact where redaction prevented disclosure of business and legal strategy. (*See id.*) More to the point, Justice Reed sought compliance from the parties to abide by his sealing procedures, effective July 2022, particularly subsections (d) and (e), (*id.*), which requires parties to identify with specificity the good cause to redact "each document or piece of information[.]" (*Practices in Part 43*, Commercial Division – New York County/Manhattan, available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part-43-Rules.pdf [procedures as of July 2022] [last accessed Aug. 2, 2023].) Furthermore, the court is not persuaded by the other cases cited by defendants, such as *Wolters Kluwer Fin. Services. Inc. v Scivantage,* 2007 WL 1498114, *6-7 [SD NY, May 23, 2007, No. 07-CV-2352, Baer, J.].)

However, defendants' request to redact is incomplete and must be supplemented. First, defendants shall submit an affidavit attesting that the information they seek to redact here is not already publicly available in the First NY Action. Information that is publicly available in the First NY Action will not be redacted here.

Defendants shall submit new proposed redactions should there be any information they seek to redact here but is already publicly available in the First NY Action.

Additionally, defendants' request to redact must be supplemented because their request at this point is incomplete. Defendants refer to one example of plaintiffs' use of confidential information—defendants assert that plaintiffs quoted confidential presentations which in turn revealed financial models and analyses. Defendants' request at this point is incomplete because defendants seek to redact other items not just the financial models and analyses. Moreover, such an assertion is conclusory without a detailed explanation from a person with knowledge as to why this information must be kept from public view, i.e., what is defendants' compelling interest in this information. Such an affidavit would also explain how the information defendants are seeking is not historical, stale, or otherwise irrelevant to the present-day business interests.

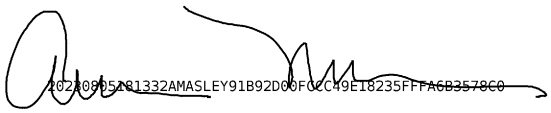
At this time, the court will maintain the complaint and Thomson affidavit under temporary seal for a period of 20 days from the date of the Court of Appeals decision in the First NY Action. Since defendants have submitted proposed redactions to the complaint and affidavit, which will also be maintained under temporary seal, defendants shall have 20 days from the date of the Court of Appeals decision in the First NY Action to submit the sealing chart, consistent with Part 48's Procedures on sealing, and affidavits to support their redaction request. (*See Cortlandt Street Recovery Corp v Bonderman*, 71 Misc 3d 908, 912 [Sup Ct, NY County 2021] [denying motions to seal without prejudice and permitting parties to "concisely and specifically address[] each exhibit that the party seeks to have sealed or redacted."].) As explained above, good

cause also requires an affidavit from a person with knowledge explaining the harm caused by disclosure. To streamline things, defendants are encouraged to identify categories of confidential information disclosed in the complaint and Thomson's affidavit, explain the harm associated with disclosure of that information, and identify the paragraphs of the complaint and/or Thomson's affidavit that apply to this category of confidential information. Should defendants not file any supplemental documents, the court will direct the County Clerk to lift the temporary seal on all unredacted copies of the complaint and Thomson's affidavit.

Accordingly, it is

ORDERED that the motion is denied without prejudice; and it is further

ORDERED that defendants shall notify the court by email (SFC-Part48@nycourts.gov) when defendants' supplemental documentation is e-filed.



8/5/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE