DREW DOSCHER, Plaintiff - against - SOBEL & CO., LLC and MCMILLAN, CONSTABLE, MAKER & PERRONE, LLP, Defendants.

14 CV 646 (RMB) (GWG)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2014 U.S. Dist. LEXIS 29063

March 3, 2014, Decided
March 3, 2014, Filed

COUNSEL: [*1] For Drew Doscher, Plaintiff: Angelo Todd Merolla, A. Todd Merolla, P.C, Atlanta, GA.

JUDGES: RICHARD M. BERMAN, U.S.D.J.

OPINION BY: RICHARD M. BERMAN

OPINION

DECISION & ORDER

I. INTRODUCTION

Before the Court is the motion of non-parties Sea Port Group Securities, LLC, The Seaport Group LLC, and its individual owners (collectively, "Seaport"), to intervene in this action "pursuant to *Federal Rule of Civil Procedure 24* for the limited purpose of protecting confidential information that the Plaintiff [Drew Doscher ("Doscher")] gratuitously included in the Complaint [filed on January 31, 2014 (the "Complaint")] . . . ." (Letter from Ronald G. Blum to Hon. Richard M. Berman, dated Feb. 6, 2014 ("Seaport Mot."), at 1.) In its motion, Seaport argues that "[i]ntervention is necessary to show that the limited portions of the Complaint. . . along with the entirety of Exhibits A and F to the Complaint, should be redacted and sealed" because, among other things, **a)** "FINRA mandates that arbitration proceedings [referred to in the Complaint] are confidential" and "Exhibit A and paragraphs 19 and 28 [of the Complaint] concern these proceedings;" **b)** "the [*2] information that Seaport seeks to seal reflects confidential business information;" and **c)** "none of this information is relevant to the elements of Plaintiff's claims." (Id. at 2.)

Doscher, the Plaintiff in this action and a former Seaport employee, responded to Seaport's motion by letter, dated February 11, 2014, arguing, among other things, that: **a)** "Doscher is not subject to any confidentiality agreement with Seaport;" and **b)** Seaport cannot overcome the "strong presumption of public access to judicial documents" because it "presents no . . . 'higher values' to warrant the sealing and redaction of portions of the Complaint." (Letter from A. Todd Merrolla to Hon. Richard M. Berman, dated Feb. 11, 2014, at 1-2.) Oral argument was held on February 18, 2014, during which Seaport waived additional briefing.[1] (Hr'g Tr., dated Feb. 18, 2014, at 21:4-11.)

> 1 At oral argument, Defendants Sobel & Co., L.L.C., and McMillan, Constable, Maker & Perrone, L.L.P. (collectively, "Defendants") informed the Court that they "don't have a position" regarding Seaport's motion. (Hr'g Tr., dated Feb. 18, 2014, at 11:5-13.)

For the reasons set forth below, Seaport's motion to intervene is denied:[2]

> 2 Any issues [*3] raised by the parties not specifically addressed herein were considered by the Court on the merits and rejected.

II. LEGAL STANDARD

"In order to intervene as of right pursuant to *Rule 24(a)(2)*, the applicant must: (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and

(4) show that its interest is not adequately protected by the parties to the action." *In re Holocaust Victim Assets Litig., 225 F.3d 191, 197 (2d Cir. 2000)*. Under *Rule 24(b)(1)(B)*, the Court, in its discretion, may "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P. 24(b)(1)(B)*.

"To determine whether documents should be placed under seal, a court must balance the public's interest in access to judicial documents against the privacy interests of those resisting disclosure." *Application of Utica Mut. Ins. Co. v. INA Reinsurance Co., 468 F. App'x 37, 39 (2d Cir. 2012)* (citing *Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119-20 (2d Cir. 2006))*. "The Second Circuit has articulated a three-step process for determining whether documents should [*4] be placed under seal." *Mut. Marine Office, Inc. v. Transfercom Ltd., No. 08 Civ. 10367, 2009 U.S. Dist. LEXIS 31739, 2009 WL 1025965, at *4 (S.D.N.Y. Apr. 15, 2009)*.

> First, a court must determine whether the presumption of access attaches. A presumption of access attaches to any item that constitutes a "judicial document"--i.e., an "item . . . relevant to the performance of the judicial function and useful in the judicial process." Second, if the court determines that the item to be sealed is a "judicial document," the court must then determine the weight of the presumption of access. "[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." Finally, after determining the weight of the presumption of access, the court must "balance competing considerations against it." "Such countervailing factors include but are not limited to the danger of impairing [*5] law enforcement or judicial efficiency and the privacy interests of those resisting disclosure."

Id. (quoting *Lugosch, 435 F.3d at 119*).

III. DISCUSSION

Seaport does not specify whether it seeks to intervene as of right under *Rule 24(a)*, or permissively under *Rule 24(b)*, and does not mention, much less analyze, the legal standard applicable to either rule. Seaport also fails to cite to any legal authority applying to mandatory intervention, and the two cases it cites with respect to permissive intervention do not involve a party's efforts, as here, to seal judicial documents. (See Seaport Mot. at 2.) In the absence of any discussion of the legal standards for intervention, or citation to relevant authority, Seaport has failed to demonstrate that intervention is warranted. See *Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 58 (S.D.N.Y. 1993)* ("The burden of showing a right to intervene is on the applicant.")

Even assuming, arguendo, that Seaport had made a legally sufficient application to seal judicial documents, the Court would likely deny Seaport's motion on "futility" grounds because it has failed to articulate any basis for sealing the particular information contained [*6] in the Complaint.[3] See *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation. No. 02 Civ. 8472, 2008 U.S. Dist. LEXIS 53923, 2008 WL 2594819, at *4 (S.D.N.Y. June 26, 2008)* ("Although legal futility is not mentioned in *Rule 24*, courts have held that futility is a proper basis for denying a motion to intervene."). The Complaint, and the exhibits attached thereto, are clearly "judicial documents," and are analyzed with "strong presumption in favor of public access." *ING Global v. United Parcel Service Oasis Supply Corp., No. 11 Civ. 5697, 2012 U.S. Dist. LEXIS 144923, 2012 WL 4840805, at *6 (S.D.N.Y. Sep. 25, 2012)*; see *Bunkers Intern. v. Orient Oil, No. 08 Civ. 10905, 2008 U.S. Dist. LEXIS 117548, 2008 WL 5431166, at *1 (S.D.N.Y. Dec. 23, 2008)* (Complaint is a "judicial document" because it is "relevant to the performance of the judicial function and useful in the judicial process." (quoting *United States v. Amodeo, 44 F.3d 141, 145 (2d Cir.1995))*; *Allman v. UMG Recordings, Inc., No. 08 Civ. 7113, 2008 WL 5062513, at *1 (S.D.N.Y. Nov. 21, 2008)* ("Declarations and exhibits in support of a motion for summary judgment would likely be 'judicial document[s]' to which a presumption of public access would apply.").

> 3 The Court denied Seaport's request to seal portions [*7] of the Complaint while its motion to intervene was pending. (See Administrative Order, dated Feb. 7, 2014.)

Seaport argues (unpersuasively) that the Court should afford only minimal weight to the presumption of access in this matter because the "limited information Seaport seeks to seal would not impact any determination the Court could be asked to make as to . . . the sufficiency of Plaintiff's claims [and] is irrelevant." (Seaport Mot. at 3.) The Court disagrees. Without addressing the

sufficiency of Doscher's claims against Defendants, the Court finds that the portions of the Complaint, and the attached exhibits, that Seaport wishes to seal appear to relate directly to Doscher's allegations that Defendants engaged in fraud by failing to disclose material information to him. (See e.g., Compl., filed Jan. 31, 2014, at ¶ 29 ("[I]t was never disclosed to Doscher that his 'phantom' equity account would evaporate upon his termination as an employee"); Id. ¶28-29 ("Meagher and Smith . . . were systematically manipulating the technology expenses of Sea Port Group Securities, LLC and its Affiliates . . . [t]he aforementioned matters were either known or discovered by Defendants, but never [*8] disclosed to Doscher."); Id. ¶29 ("An example of the evidence indicating the overbilling of expenses for technology is attached hereto as Exhibit F, revealed to Doscher only after his termination . . . .").) These allegations, together with the rest of the Complaint, constitute a "roadmap to [Doscher's] claim for relief; for this reason, the presumption [in favor of public access] is strong as applied to the . . . Complaint." *Bunkers Intern. v. Orient Oil, 2008 U.S. Dist. LEXIS 117548, 2008 WL 5431166, at * 1.*

Nor does Seaport provide any meaningful support for its confidentiality claims, i.e., it does not identify any "countervailing factors" that would defeat the strong presumption of public access to the Complaint. *Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006)*; see *U.S. v. King, No. 10 Cr. 122, 2012 U.S. Dist. LEXIS 83634, 2012 WL 2196674, at *2 (S.D.N.Y. June 15, 2012)* ("The party seeking to seal the documents in question bears the burden of showing that higher values overcome the presumption of access."); *DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 826 (2d Cir. 1997)* ("The burden of demonstrating that a document submitted to a court should be sealed rests on the party seeking such action."). For example, [*9] Seaport relies entirely on a non-binding statement from the FINRA website in an effort to support its argument that the arbitration demand attached to the Complaint is confidential. (Seaport Mot. at 2.) And, even assuming that certain agreements produced by Seaport at oral argument applied to protect the information included in Doscher's Complaint, "the mere existence of a confidentiality agreement covering judicial documents is insufficient to overcome the *First Amendment* presumption of access." *Aioi Nissay Dowa Ins. Co. Ltd. v. ProSight Specialty Management Co., Inc., No. 12 Civ. 3274, 2012 U.S. Dist. LEXIS 118233, 2012 WL 3583176, at *6 (S.D.N.Y. Aug. 21, 2012)* (internal quotation marks omitted). Seaport also fails to articulate any harm that would result from public disclosure of the Complaint, which, in fact, has been public since January 31, 2014. *E.E.O.C. v. Kelley Drye & Warren LLP, No. 10 Civ. 655, 2012 U.S. Dist. LEXIS 28724, 2012 WL 691545, at *3 (S.D.N.Y. Mar. 2, 2012)* ("[B]road allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test [for sealing judicial documents]." (internal quotation marks omitted)); *MacroMavens, LLC v. Deutsche Bank Securities, Inc., No. 09 Civ. 7819, 2011 U.S. Dist. LEXIS 46316, 2011 WL 1796138, at *2 (S.D.N.Y. Apr. 27, 2011)* [*10] (denying plaintiffs request to seal judicial documents where "Plaintiff [did] not make a particularized showing of the injury that public disclosure of this information would cause").

For the foregoing reasons, Seaport's motion to intervene is denied.

Dated: New York, New York

March 3, 2014

/s/ Richard M. Berman

RICHARD M. BERMAN, U.S.D.J.