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Commercial division update

Use and abuse of confidentiality orders

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Confidentiality orders have become a routine part of commercial litigation. CPLR Section 3103(a) allows parties to seek a protective order "denying, limiting, conditioning or regulating the use of discovery devices . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person . . . ." In addition to restricting the distribution and use of sensitive documents exchanged in discovery, in exceptional circumstances confidentiality orders can limit access to an "Attorneys' Eyes Only" basis, barring litigation counsel from disclosing the designated materials to their clients.

While confidentiality orders are valuable tools in protecting competitive and other sensitive information, they are subject to abuse. Aggressive or inattentive counsel can overdesignate those documents that are protected, adding burden and expense to the opposing party. Indeed, in a recent Commercial Division case, Google was sanctioned for just that. This decision sends a stern reminder to litigation counsel of the need to be well-versed on the applicable rules and standards, which we address below.

Commercial Division Sanctions

In *Callsome Solutions Inc. v. Google Inc.*, No. 652386/2014, 2018 WL 5267147 (N.Y. Co. Oct. 23, 2018), Justice Andrea Masley of the New York County Commercial Division scolded and sanctioned Google for their excessive use of confidentiality designations. The confidentiality order in that case permitted Attorneys' Eyes Only designations. Of the 4,771 pages of documents Google produced in discovery, it initially designated 3,690 as Confidential and 233 as Attorneys' Eyes Only. Google also designated significant portions of deposition testimony, including "I don't know" answers.

The plaintiff objected, explaining that the designations adversely impacted counsel's ability to represent their client by preventing counsel from discussing designated materials with their client. Following those objections and several meet-and-confers, Google began slowly to de-designate their Attorneys' Eyes Only designations; 233 documents labeled Attorneys' Eyes Only decreased to 28, and 8,390 Attorneys' Eyes Only lines in depositions decreased to 632 lines. Some of the later de-designations occurred following the court's prompting at a conference, and others after the plaintiff had moved for relief and the imposition of sanctions.

In issuing sanctions against Google in the form of an award of attorney's fees under 22 NYCRR § 130-1.1, Justice Masley

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held that "Google's conduct flouts widely accepted rules of civility embedded in the New York litigation and in particular the Commercial Division" and that its conduct "effectively prevented the resolution of this litigation." The court listed a number of factors in support of its ruling, including that "the large number of designations, reviews, re-reviews, trickle of de-designations, culminating in wholesale de-designation on the eve of argument on this motion does not support Google's assertion of appropriateness." The court found that "Google's wholesale de-designations confirm that Google's initial designations were not made in good faith." Justice Masley observed that Google had designated documents as Attorneys' Eyes Only that were in fact correspondence between the parties, and others that were publicly available. Google also designated documents as Attorneys' Eyes Only on the ground they contained market share research, which upon review the court found they did not.

In addition to the improper designations, Justice Masley was not impressed with Google's proposal to resolve plaintiff's motion by offering to permit three of plaintiff's principals to have access to Attorneys' Eyes Only documents if plaintiff would agree to withdraw its motion. The court stated that Attorneys' Eyes Only designations are not negotiable and documents are either appropriate for such a designation, or they are not. In awarding plaintiff the fees in making the motion, as well as the costs associated with the reviews and re-reviews, Justice Masley found that Google's improper conduct had serious consequences, including "not only delay, but also the impact on the communications between Callsome and its attorney."

General Standards

Rule 11-j (a) of the Rules of the Commercial Division of the Supreme Court (§ 202.70 of the Uniform Rules for N.Y. State Trial Courts) provides that parties wishing the entry of a confidentiality order shall use the form in Appendix B thereto. That form defines Confidential Information as follows:

> 'Confidential Information' shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients.

In *Oppenheim v. Mayo-Stumer Associates Architects, P.C.*, 2009 N.Y. Misc. LEXIS 4792 (N.Y. Co. Apr. 20, 2009), a RICO defendant moved for a protective order deeming all discovery in that case confidential on the ground that "the RICO allegations are highly stigmatizing and damaging to their established reputation as highly regarded architectural professionals" and that some of the documents contained "trade secrets." Justice Charles Ramos of the New York County Commercial Division denied that motion, finding that the defendant failed to carry its burden of establishing the existence of confidential information. Nevertheless, the court entered a confidentiality order permitting individual documents to be designated confidential if good faith grounds existed.

Attorneys' Eyes Only

Attorneys' Eyes Only designations raise concerns as they prevent counsel from discussing such materials with his or her client, thereby inhibiting attorney advice. Notably, the Commercial Division's model form contains no such provision, the bar committee that drafted and recommended that form having expressed concern that the inclusion of that category would cause "it to be invoked far more than necessary." Rule 11-6 (b), however, does permit parties to propose confidentiality orders to the court that deviate from that model form.

New York courts categorize Attorneys' Eyes Only designations as the most sensitive category and limit its use to cases involving trade secrets and/or the production of competitively sensitive information. *Heritage Auctioneers & Galleries, Inc. v. Christie's, Inc.*, No. 651806/2014, 2018 WL 1672756 at *1 (N.Y. Co. Apr. 6, 2018) (Masley, J.); *see SNI/SI Networks LLC v. DIRECTTV, LLC.*, 132 A.D.3d 616, 617, 18 N.Y.S.3d 342, 342 (1st Dep't 2015); *L.K. Station Group, LLC v. Quantek Media, LLC.*, 20 Misc. 3d 1142(A), 872 N.Y.S.2d 691 (N.Y. Co. Aug. 7, 2008).

In *Gryphon Domestic VI, LLC v. APP Int'l Fin Co., B.V.*, 28 A.D.3d 322, 326, 814 N.Y.S.2d 110, 114 (1st Dep't 2006), the First Department was faced with an Order by Justice

Helen Freedman of the New York County Commercial Division permitting certain pricing information to be designated Attorneys' Eyes Only, as well as sealed. Specifically, an institutional distressed debt trader, that had purchased promissory notes, brought that action against the issuers and guarantors of those notes. The plaintiff had designated as Attorneys' Eyes Only documents reflecting the price the plaintiff paid to acquire those notes. Plaintiff argued that disclosure of that information to the defendants would be prejudicial to its settlement position and "hamper their ability to negotiate a fair debt restructuring with defendants."

The defendants responded that the Attorneys' Eyes Only designation interfered with their counsel's ability to consult with them regarding facts essential to their defense. In reversing, the First Department found that such designations were not appropriate to enable a party "to retain an advantage over the other party when sealing prevents counsel from fully discussing with their clients" relevant information to formulate a defense.

Filing under Seal

Filing documents with the court under seal raises yet another concern -- that the sealing of court files is inconsistent with the public's right of access to judicial proceedings. NYCRR § 216.1 limits the sealing of court records to narrow circumstances:

> (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. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

As Justice Masley stated in *Continental Industries Group, Inc. v. Ustuntas*, No. 653215/2012, 2018 WL 1901982, at *1 (N.Y. Co. Apr. 18, 2018), the sealing of documents filed with court must "overcome the presumption of public access, the need for secrecy must outweigh the public's right of access."

In *Gryphon*, in addition to allowing pricing documents to be designated Attorneys' Eyes Only, the court permitted them to be filed under seal. In reversing that aspect, the First Department observed that sealing undermines "the broad constitutional presumption . . . that the public is entitled to access to court proceedings." Hence, a court's authority to seal "is strictly limited." The First Department added that the good cause requirement for sealing must balance the interests of the public with those of the parties.

Conclusion

Embedded in the Commercial Division's use of its model confidentiality order is the need to promote efficiency in discovery and litigation, while protecting truly confidential information. New York courts recognize the importance of confidentiality order provided that designations are made in good faith and applied in limited circumstances. The recent *Callsome* decision should put counsel on notice that courts will police the improper use of confidentiality orders by, where appropriate, imposing sanctions for abuse.

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