

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

AL 46 DOE,

Plaintiff,

DECISION and ORDER

-against-

Index #: 903844-20

DIOCESE OF ALBANY a/k/a THE ROMAN CATHOLIC
DIOCESE OF ALBANY, NEW YORK; OUR LADY OF THE
ANNUNCIATION PARISH a/k/a CHURCH OF OUR LADY
OF THE ANNUNCIATION; and DOES 1-5 whose identities are
unknown to Plaintiff,

Defendants.

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MACKEY, J.:

In this action brought pursuant to the New York State Child Victims Act (CPLR 214-g) plaintiff moves for an order authorizing him to “publicly release” a portion of non-party Bishop Emeritus Howard Hubbard’s (“Bishop Hubbard”) deposition transcript. Defendant Roman Catholic Diocese of Albany (the “Diocese”) opposes the motion and cross-moves

for a protective order. Alternatively, the Diocese seeks an order directing that the full transcript, rather than just a portion thereof, be released. Bishop Hubbard opposes the motion.¹

THE PARTIES' STIPULATION

In advance of Bishop Hubbard's deposition, counsel for several hundred parties in CVA cases involving the Diocese signed an agreement (the "Stipulation") concerning how the deposition would be taken in a coordinated fashion and how it can be used, then presented it to the court to be "so ordered." The deposition was later taken over several days and plaintiff, supported by several other parties,² now seeks permission to release select portions of the transcript to the public. The Bishop and the Diocese oppose, arguing that such release would violate the Stipulation. As relevant here, the parties agreed:

The deposition shall be videotaped and recorded, but will not be available to the public. No signer of this agreement, whether in attendance at the deposition or not, may release the contents of the deposition to the public unless and until an agreement is reached among counsel and said agreement is so-ordered by the Court (Stipulation ¶15[e]).

No signer of this agreement may provide a copy of the deposition transcripts to any other person, even if said person attends the deposition, except that a signer may provide said transcripts to (i) individuals employed by the signer's law firm and (ii) the signer's retained experts, as long as said individuals and experts agree to keep said transcripts confidential; outside of these limited circumstances, only the Court Reporter, can distribute said transcripts (Stipulation ¶15[f]).

¹ At oral argument Bishop Hubbard's attorney withdrew his cross-motion for the imposition of sanctions against plaintiff's counsel (NYSCEF Document 52, p. 79).

² The court allowed all parties in CVA cases involving the Diocese to submit papers on the instant motion.

Bishop Hubbard's deposition testimony may be used as substantive evidence in discovery and at trial (Stipulation ¶15[h]).

DOE v HAIGHT (Index No. 5262-19)

While plaintiff's motion in the case at bar was pending³ the plaintiff in *Doe v Haight* (hereinafter "Doe") moved for summary judgment on liability against both the Diocese and *pro se* defendant Mark Haight. Doe's motion papers included excerpts from Bishop Hubbard's deposition, but his counsel withheld that exhibit from Mr. Haight out of concern that serving it on him might violate the Stipulation, which Mr. Haight had not signed. Doe also moved to file the transcript under seal, again out of concern that failing to do so might violate the Stipulation. In opposition to Doe's summary judgment motion the Diocese submitted Bishop Hubbard's entire deposition transcript, which it asks the court to seal.⁴ In a November 16, 2021 Decision and Order (NYSCEF Document 53) the court denied Doe's motion to seal, concluding:

Here, good cause for sealing Bishop Hubbard's deposition transcript has not been demonstrated. Although the parties' stipulation prohibits "release" of the transcript to the public, it expressly provides that it may be used in legal proceedings. Thus, the parties clearly envisioned that the transcript would not remain forever confidential. It is important to note that the stipulation makes no mention of the parties seeking an order sealing the transcript in the event of its use in judicial proceedings. In any event, under the circumstances presented here the court would decline to issue a sealing order even if stipulated to by all parties.

³ Plaintiff's motion was originally returnable on October 1, 2021 but has been adjourned several times at the request of counsel. The final return date was January 28, 2022.

⁴ Although the Diocese submitted no papers on Doe's motion to seal, at oral argument of the motion in the case at bar counsel for the Diocese advised that his client supports sealing (NYSCEF Document 52, p. 67).

At oral argument in the case at bar the court raised the question of whether the decision in *Doe v Haight* rendered the motion herein moot. In response, the Bishop's counsel requested the opportunity to weigh in on the sealing issue, since he was unaware of the motion in *Doe v Haight* until after the decision had been rendered. Because that issue has implications for other cases, the court agreed to revisit the matter in a coordinated fashion. Accordingly, the court has allowed all interested parties to submit argument herein "on the issue of whether the transcript should be sealed when used in motion practice" (NYSCEF Document 52, p. 73).

REQUEST TO SEAL THE TRANSCRIPT WHEN USED IN A MOTION

The parties agree that Bishop Hubbard's deposition transcript may be used at trial and acknowledge that it will, therefore, be public at that time.⁵ They also concur that the transcript can be used in motion practice, although the Stipulation does not mention that one way or the other. They disagree, however, on whether the transcript should be filed under seal when used in a motion. The defendants argue that the Stipulation "clearly" expresses the parties' intention to have the transcript sealed when used in motion practice, while the plaintiffs counter that the Stipulation "clearly" provides just the opposite. The Stipulation, however, is not a model of clarity either way. Although it states that the transcript shall not be "released" or "available" to the public, it provides for its use at trial and the parties accept that it will necessarily be public at that point. And although the Stipulation provides that the transcript may be used "as substantive evidence in discovery," it does not spell out what that means. Further, although the Stipulation makes no reference to use of the transcript in motion practice, the parties agree that such use must be allowed. The only point of contention is whether the transcript should be sealed when used in a motion. The word "seal," which is a term with

⁵ At oral argument Bishop Hubbard's counsel stated: "At trial you can't [seal it]. You can't and you shouldn't do it. But with motion practice it's easy" (NYSCEF Document 52, p. 44). Counsel for the Diocese agreed "that at trial it is certainly necessary and anticipated by the parties that it would be utilized for that purpose" (Id. at 65-66).

a very specific meaning (see 22 NYCRR 216.1[a]), does not appear in the provisions of the Stipulation pertaining to Bishop Hubbard's deposition.⁶ Because the parties' intentions with respect to sealing are not clearly stated, the court finds the Stipulation to be ambiguous on that issue.

It is a "general principle that an ambiguous contract term should be construed against the drafter" (*Garcia v American Gen. Life Ins. Co. of N.Y.*, 264 AD2d 808, 809 [2nd Dept 1999]) and "where reasonable minds could differ as to what was intended by the parties" the court may consider extrinsic evidence when interpreting the contract (*Karol v Polsinello*, 127 AD3d 1401, 1404 [3rd Dept 2015] [internal quotation and citation omitted]). Here, however, there is no need to determine what the parties intended because, once the transcript was used in a motion, it became a court record and it is now for the court to decide whether it should be sealed, independent of the parties' intentions or desires.

"[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] citing *Mancheski v Gabelli Capital Partners*, 39 AD3d 499, 501 [2nd Dept 2007]; see also *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006] lv. den. 10 NY3d 705 [2008] and *Danco Labs v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [1st Dept 2000]). Pursuant to 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 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

⁶ The word "seal" appears just once in the Stipulation, in ¶5(k), which provides that a "Roe List" containing the names child sexual abuse survivors "shall be a continuing document maintained under seal..."

opportunity to be heard.” This rule was promulgated to assure that the public interest in access to court records is properly considered and weighed by the courts when the parties agree that court records should be sealed (*see Mancheski v Gabelli Group Capital Partners, supra* at 501, citing *Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483, 484-486 [1st Dept 1993]). “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, e.g., in the case of trade secrets. 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 motion papers, even when both sides to the litigation request it. 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 Pearlman*, 80 AD3d 181, 191-192 [1st Dept 2010] [internal quotations and citations omitted]). It is incumbent upon a party seeking a sealing order to demonstrate “the existence of a substantial probability that public disclosure of the information will prejudice [his] right to a fair trial” (*People v Arthur*, 178 Misc.2d 419, 421 [Supreme Court, New York County 1998]).

Here Bishop Hubbard asserts prejudice, but to demonstrate it he cannot rely on “unsupported and conclusory assertion(s)” (*City of Schenectady v Edison Exploratorium, Inc.*, 147 AD3d 1264, 1267 [3rd Dept 2017]). He claims that release of his deposition transcript would “taint the jury pool and unfairly result in a trial by the press” (NYSCEF Document 51, p. 7), but provides no specifics whatsoever. Rather than point to any particular testimony that he deems problematic, with an explanation of how he believes it could taint the jury pool, he simply rests his argument on an unsupported and conclusory assertion. Similarly, the Diocese has submitted no evidence of prejudice. Because the defendants have failed to demonstrate a compelling reason to seal Bishop

Hubbard's deposition transcript, and have not overcome the broad presumption that the public is entitled to access court records, the motion to seal must be denied.

Moreover, even if the court were to seal the transcript when used in motion practice it would amount to no more than a temporary measure, since it will become public as soon as it is used in trial. There are some 300 cases pending against the Diocese and any benefit of sealing would inure only to the first case reached for trial. There are also some practical considerations that the court must take into account. Many motions are orally argued on the record in open court and, inevitably, motions for summary judgment will involve discussion of the evidence presented, including Bishop Hubbard's testimony. This would result in the "piecemeal" disclosure of testimony that the Diocese, quite reasonably, wishes to avoid. Likewise, decisions on summary judgment motions necessarily will include an analysis of the evidence presented, which again would result in disclosure of the testimony bit-by-bit. Further, the transcript is replete with hundreds of objections, which the court will have to rule on prior to its use in trial (see 22 NYCRR 202.15[g]). That will most likely have to be done in a coordinated fashion in open court on an objection-by-objection basis, again resulting in discussion of the testimony and its inevitable public disclosure on a piecemeal basis. Given all of this, it would be virtually impossible to keep the testimony confidential.

Accordingly, the defendants' motion for an order sealing Bishop Hubbard's deposition transcript when it is used in motion practice is denied. Plaintiff's motion for an order permitting him to "publicly release" a portion of the transcript is denied as moot.

REDACTIONS

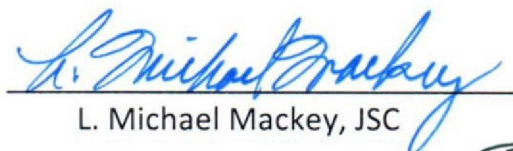
Finally, Bishop Hubbard argues that denial of his request to seal will result in the identity of sexual abuse victims becoming public. However, the privacy rights of alleged victims can be safeguarded by redacting their names and any other identifying information. Accordingly, the Diocese's motion for a protective order is granted to the

extent that all counsel are directed to redact the names, and any other identifying information, of alleged victims prior to any public filing of the transcript.

SO ORDERED.

ENTER.

Dated: March 10, 2022
Albany, New York


L. Michael Mackey, JSC



Papers Considered: NYSCEF Documents 7, 9, 13-15, and 17-56.

03/10/2022

This memorandum constitutes the Decision and Order of the court. The Court has uploaded the original Decision and Order to the case record in this matter maintained on the NYSCEF website, whereupon it is to be entered and filed by the Office of the County Clerk. Counsel is not relieved from the applicable provisions of CPLR 2220 regarding service and notice of entry.