

# New York Law Journal



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VOLUME 242—NO. 36

THURSDAY, AUGUST 20, 2009

## COMMERCIAL DIVISION UPDATE

## Expert Analysis

# Filing Commercial Documents Under Seal

The ability to file under seal documents containing confidential or proprietary information is often of significant concern to commercial litigants who wish to keep such information from competitors. To the surprise of some, succeeding on a sealing motion in the Commercial Division can be difficult due to the presumption of openness in New York courts.

The recent decision in *Mosallem v. Bersenson*<sup>1</sup> illustrates the public versus private tensions with which New York courts must grapple when deciding sealing motions. Under the applicable rule, litigants must show “good cause” to justify sealing, and case law interpreting this standard has generally mandated a demonstration of “compelling circumstances.” While such a high standard may make sense in cases in which the public has a genuine interest, some have suggested its application to be too severe when applied to routine commercial disputes. The recent holding in *Mosallem* suggests that a more liberal interpretation of good cause may be more appropriate in commercial cases.

This article discusses the requirements that movants must demonstrate to file documents under seal. First, we focus on the definition of good cause and the historic standard of review. We then discuss the application of this standard in the Commercial Division and the tensions that arise in applying the strict good cause standard in commercial cases.

### Current Application

Under §216.1 of the Uniform Rules for the



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New York State Trial Courts, litigants need to demonstrate good cause for the sealing of documents. “In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.”<sup>2</sup> While the term “good cause” is not

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defined in the Uniform Rules, courts have historically applied a restrictive interpretation. The Appellate Division, First Department, for instance, has noted that it “has authorized sealing only in strictly limited circumstances.”<sup>3</sup> Courts have found grounds to seal documents where the documents contain important business information, the disclosure of which could harm a litigant’s competitive standing.<sup>4</sup> As such, examples of what constitutes good cause in New York courts include the threat of disclosure of “trade secrets, closely held business secrets, [and] confidences that if disclosed, will give a competitor an unearned advantage.”<sup>5</sup> Courts have also established that good cause exists to protect a party’s private financial information<sup>6</sup> or the documents of

parties in arbitration.<sup>7</sup>

Section 216.1 instructs courts to balance these private interests against the interests of the public in having access to records of judicial proceedings. The public’s right of access as provided in §216.1 is grounded in the First Amendment as well as common law rights of access to court records and proceedings.<sup>8</sup> Constitutional and common law principles generally require access to court proceedings to promote fairness and transparency in the judicial system. Moreover, the right of public access ensures the availability of information in private cases relating to “matters of public concern.”<sup>9</sup> In *Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, for example, the First Department placed the burden on the moving party of showing a “sound basis or legitimate need” for the court to seal the record, and further held that the interests of public and press in “issues of major public significance... weigh[ed] heavily” against sealing certain information about the manufacture and distribution of the drug RU-486.<sup>10</sup>

The court noted in *Danco Labs.* that “[s]ince the right is of constitutional dimension, any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public’s right to access.”<sup>11</sup> Similarly, in *Mancheski v. Gabelli Group Capital Partners*, the Appellate Division, Second Department, held that the party seeking to seal documents must demonstrate (1) compelling circumstances justifying secrecy and (2) no alternative to sealing that could adequately protect the moving party’s interest.<sup>12</sup> The court must make an independent determination without regard to agreements by the parties.<sup>13</sup>

Although the presumption of openness existed prior to the promulgation of §216.1,<sup>14</sup>

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one court has noted that §216.1 was enacted out of a concern that courts were ignoring the public interest and acquiescing too frequently to parties' agreements to seal records.<sup>15</sup> In the First Department case of *In re Twentieth Century Fox Film Corp.*, the court suggested that the rule was enacted because the practice of sealing records in settlements of products liability and other tort cases kept the public in the dark about defective products.<sup>16</sup> While the public interest in openness may have a strong basis in mass tort actions, courts often invoke the same public interests in accessibility in commercial cases where the public need to know is not as compelling.<sup>17</sup>

The New York courts have acknowledged that the public's rights of access are not absolute,<sup>18</sup> and that the public's interest must be weighed against individuals' interests, including privacy rights or due process.<sup>19</sup> In addition, the Appellate Division has recognized a legitimate public interest in sealing documents to encourage the settlement of private litigation.<sup>20</sup> However, these interests are often found to be overshadowed by the public's right of access, the protection of which is reflected in the "compelling circumstances" test which presents a significant hurdle to litigants who seek to seal documents in New York.

Where parties cannot show that the information sought to be sealed is a trade secret or that its disclosure would harm the parties' economic competitiveness, the presumption of public disclosure usually dictates that the documents remain public. In *Gryphon Domestic VI*, the First Department reversed an order of the New York County Commercial Division sealing documents that contained the prices paid for certain notes issued or guaranteed by the defendants where the plaintiffs argued only that disclosure of the prices would be detrimental in negotiations to restructure the debt: "Sealing...is not appropriate merely to protect the advantage that one side might have over the other in negotiating an agreement in a commercial dispute between sophisticated business entities."<sup>21</sup>

### Standard of Review

Recent Commercial Division cases have likewise acknowledged the strong presumption in New York against sealing records, causing some litigants to question whether the right of public access might be weighed too heavily in commercial disputes between private parties.

When courts are presented with insufficient evidence of good cause, the presumption of public access has mandated holdings against the party that sought to seal the record. For instance, in *Biosynexus, Inc. v. Glaxo Group Ltd.*, the court denied without discussion a motion to seal the record in a case alleging that the defendants provided confidential information obtained under a joint venture agreement to a third-party competitor of the plaintiff.<sup>22</sup> The court held that the defendants "offer[ed] only conclusory statements to support their position."<sup>23</sup>

Similarly, in *Grande Prairie Energy LLC v. Alstom Power, Inc.*,<sup>24</sup> the court denied a

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motion to seal even though the parties had stipulated that information designated as confidential would be filed with the court under seal. As that stipulation was not so-ordered by the court, the court observed that "[a] confidentiality agreement is insufficient for the court to seal a file."<sup>25</sup> Moreover, the court held that because the parties had offered no evidence in support of their motion to seal pursuant to Rule 216.1, "it is impossible for the Court to make an independent determination of good cause to seal the file."<sup>26</sup> The court held that it would reconsider the motion if the parties provided an affidavit from a person with knowledge of the parties' reasons for sealing.<sup>27</sup>

Notably, in *L.K. Station Group, LLC v. Quantek Media, LLC*, the court held that it was bound by the strict requirements of the New York good cause standard and denied the defendants' motion to seal confidential business information and loan agreements, even though the court suggested a more liberal standard might have been appropriate in that case.<sup>28</sup> There, the plaintiff asserted that the public had a "substantial" interest in access to the documents because the matter was related to "activities of a prominent private equity company and hedge fund," and that the documents did not contain trade secrets.<sup>29</sup>

The defendants argued that the documents nonetheless contained "sensitive and private business information," and had been designated as confidential to protect non-parties, including those whose involvement in the loan agreement had never been made public.<sup>30</sup> The court held the defendants were required to demonstrate on a document by document basis that good cause existed to seal, and that there was no feasible alternative to sealing.<sup>31</sup> Ultimately, the court found the defendants had failed to address each document, and failed to show good cause at least in part because they did not establish that the documents contained trade secrets.<sup>32</sup>

### The 'Mosallem' Decision

In *Mosallem*, the court granted a motion to seal business records even though the information therein did not rise to the level of trade secrets.<sup>33</sup> There, the plaintiff, a former advertising executive convicted of rigging vendors' bids and receiving kickbacks, sued his former employer alleging that other executives were aware of his conduct and that such practices were standard in the company. In response to a motion to dismiss, the plaintiff submitted 44 documents, including internal invoices and correspondence, confidential memoranda and a confidential employment agreement.

A journalist who proposed to act as a third-party intervenor sought public access to the documents, arguing that the industry had a strong interest in "understanding industry billing practices."<sup>34</sup> The defendants argued that the public's interest was "mere curiosity" because the documents were several years old, and that the defendants had an interest in maintaining the confidentiality of their records even if they did not contain trade secrets.<sup>35</sup> The court reasoned, though, that the age of the documents cut against both arguments, as their disclosure was unlikely to affect the defendants' competitiveness but was also unlikely to provide much legitimate value for the public.<sup>36</sup>

While the *Mosallem* court invoked the presumption of openness in §216.1, it ordered the 44 documents to be sealed, in part perhaps due to the odd procedural posture of the case. The plaintiff had obtained some of the confidential documents during his employment, and others had been turned over to the plaintiff by the government to assist in his criminal defense. Thus, although the plaintiff had legally obtained the documents,

the court found his continued possession of them after the termination of his employment and his guilty plea was wrongful. Moreover, in the same decision, the court dismissed the plaintiff's claims, with leave to replead only two claims unrelated to the confidential documents. Thus, the court found, "the only justification for allowing them to become part of the public record in this case...is to harm or embarrass the...defendants in some manner."<sup>37</sup> The court found the defendants' interest in keeping its business information confidential, the public's interest in grand jury secrecy, and the plaintiff's duty of loyalty to his former employer, established good cause for the documents to be sealed.<sup>38</sup>

### Evolving Standard of Review?

Although the circumstances in *Mosallem* were unusual, the court indicated that parties may seal outdated business records that did not constitute trade secrets when the public has little interest therein.<sup>39</sup> In so holding, *Mosallem* marks a subtle evolution in the standard of review as the court approved the sealing even though it was unlikely that disclosure of the outdated documents would harm the movants' business.<sup>40</sup> While this holding did balance both the private and public interests, it could be viewed as not entirely harmonious with the traditional New York case law and the compelling circumstances test to justify sealing.<sup>41</sup>

In a 2008 opinion, Justice Herman Cahn of the New York County Commercial Division urged that the traditional good cause standard is too heavily weighted toward the disclosure of filings and discounts the state's interest in having a "user friendly" court system, particularly for commercial litigants. While Justice Cahn denied a motion to seal confidential business documents, as the applicable standard had not been satisfied, he noted: "It could be argued that trial courts should be given more discretion in arriving at a proper balance."<sup>42</sup>

Justice Cahn described the federal courts as applying a more liberal good cause standard than courts in New York State.<sup>43</sup> Similarly, the Delaware Chancery Court, another venue specializing in commercial litigation, has developed a somewhat broader scope of types of documents which qualify for filing under seal: "trade secrets, third-party confidential materials, and non-public financial information are matters deserving of protection."<sup>44</sup> This standard

protects a broader range of information than the New York good cause standard, which focuses on potential harm to a party's competitiveness in the marketplace.

### Conclusion

The Commercial Division appears to recognize that the presumption of openness in New York at times conflicts with legitimate needs of commercial litigants who may be required to place sensitive information in court records. The applicable standard may not fully appreciate that commercial cases usually do not have the broad social impact as do, for example, mass tort cases.

To protect the interests of commercial litigants, the Commercial Division should explore ways to ease the strict application of the good cause standard that may be more appropriate in other contexts. *Mosallem* moves the Commercial Division toward becoming more "user friendly," but time will tell if a relaxed standard of review will ultimately replace in commercial cases the historic requirement of compelling circumstances to justify sealing.



1. No. 115654/05, N.Y.L.J. June 29, 2009 at 31, cols. 2-3 (Gammerman, J.H.O.).

2. N.Y. COMP. CODES R. & REGS. tit. 22, §216.1 (2009).

3. *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 325, 814 N.Y.S.2d 110, 113 (1st Dept. 2006); accord *Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 8, 711 N.Y.S.2d 419, 424-25 (1st Dept. 2000).

4. *Crain Commc'ns, Inc. v. Hughes*, 135 A.D.2d 351, 351-52, 521 N.Y.S.2d 244, 244-45 (1st Dept. 1987), aff'd 74 N.Y.2d 626, 541 N.Y.S.2d 971 (1989).

5. *Landberg v. Nat'l. Enters.*, No. 0103104/2006, 2007 WL 2176343 (N.Y. Co. July 6, 2007) (citing *Griffen v. Scudder, Stevens & Clark, Inc.*, N.Y.L.J., June 28, 1991, at 22, col. 3 (1st Dept. 1991)).

6. See, e.g., *D'Amour v. Ohrenstein & Brown, LLP*, No. 601418/2006, 17 Misc.3d 1130(A), 2007 WL 4126386, at \*21 (N.Y. Co. Aug. 13, 2007) (Lowe, J.).

7. See, e.g., *Cohen v. S.A.C. Capital Advisers, LLC*, No. 112479/05, 2006 WL 399766, at \*8 (New York Co. Jan. 3, 2006) (quoting *Feffer v. Goodkind, Wechsler, Labaton & Rudolf*, 152 Misc.2d 812, 815-16, 578 N.Y.S.2d 802, 804 (N.Y. Co. 1991), aff'd 183 A.D.2d 678, 584 N.Y.S.2d 56 (1st Dept. 1992)).

8. See *Danco Labs.*, 274 A.D.2d at 6, 711 N.Y.S.2d at 423.

9. Id. at 6-7, 711 N.Y.S.2d at 424; see also *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988); accord *In re Nat'l*

*Broad. Co., Inc.*, 635 F.2d 945, 951-52 (2d Cir. 1980).

10. 274 A.D.2d at 8, 711 N.Y.S.2d at 425 (quotations omitted).

11. Id. at 274 A.D.2d at 6, 711 N.Y.S.2d at 423.

12. 39 A.D.3d 499, 502, 835 N.Y.S.2d 595, 598 (2d Dept. 2007).

13. See *Gryphon*, 28 A.D.3d at 324, 814 N.Y.S.2d at 112.

14. See *Twentieth Century Fox*, 190 A.D.2d at 485, 601 N.Y.S.2d at 269.

15. *In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 485-86, 601 N.Y.S.2d 267, 269 (1st Dept. 1993).

16. Id. at 486, 601 N.Y.S.2d at 269; see also Noeleen G. Walder, "Bid to Seal Records in State Case Rejected," N.Y.L.J. ONLINE (Aug. 13, 2008), available at <http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?hubtype=&id=1202423737608> (quoting Mark C. Zauderer).

17. See, e.g., *Gryphon*, 28 A.D.3d at 326, 814 N.Y.S.2d at 114.

18. See, e.g., *Danco Labs.*, 274 A.D.2d at 8, 711 N.Y.S.2d at 425.

19. See *Nat'l. Broad. Co.*, 635 F.2d 945, 950 (2d Cir. 1980); see also *Twentieth Century Fox*, 190 A.D.2d at 486, 601 N.Y.S.2d at 269.

20. See *Crain Commc'ns.*, 135 A.D.2d at 352, 521 N.Y.S.2d at 245.

21. 28 A.D.3d at 326, 814 N.Y.S.2d at 114.

22. No. 604485/2005, 11 Misc. 3d 1062(A), 2006 WL 624896, at \*9 (N.Y. Co. March 13, 2006) (Fried, J.).

23. Id.

24. No. 600926/03, 5 Misc. 3d 1002(A), 792 N.Y.S.2d 709 (Table), 2004 WL 2295660, at \*2 (New York Co. Oct. 4, 2004) (Ramos, J.).

25. Id.; see also *Gryphon*, 28 A.D.3d at 324, 814 N.Y.S.2d at 112; accord *Eusini v. Pioneer Elecs. (USA), Inc.*, 29 A.D.3d 623, 626, 815 N.Y.S.2d 653, 655 (2d Dept. 2006).

26. *Grand Prairie Energy*, 2004 WL 2295660, at \*2.

27. Id.

28. No. 60105/08, 20 Misc. 3d 1142(A), 2008 WL 4172655, at \*3 (N.Y. Co. Aug. 7, 2008) (Cahn, J.).

29. Id. at \*1-2.

30. Id. at \*2.

31. Id. at \*2.

32. Id. at \*2.

33. *Mosallem* at 33.

34. Id. at 31-32, cols. 3, 1.

35. Id. at 31, col. 3 (citing *Crain Commc'ns.*, 135 A.D.2d at 352, 521 N.Y.S.2d at 244).

36. *Mosallem* at 31-32, cols. 3, 1.

37. Id. at 32, col. 3.

38. Id.

39. Id.; see also *D'Amour* at \*21.

40. *Mosallem* at 31, col. 3; cf. *Gryphon Domestic VI*, 28 A.D.3d at 326, 814 N.Y.S.2d at 114.

41. See, e.g., *Danco Labs.* at 274 A.D.2d at 6, 711 N.Y.S.2d at 423.

42. L.K. *Station Group*, 2008 WL 4172655 at \*2.

43. Id.

44. *Fitzgerald v. Cantor*, No. 16297-NC, 2001 WL 422633, at \*2 (Del. Ch. April 17, 2001); see also *Romero v. Dowdell*, No. Civ. A. 1398-N, 2006 WL 1229090, at \*2 (Del. Ch. April 28, 2006).

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