UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ALEXANDRIA REAL ESTATE EQUITIES, INC.,

Plaintiff,

-v-

WILLIAM FAIR,

Defendant.

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No. 11 Civ. 3694 (LTS)

MEMORANDUM ORDER

Respondent William Fair ("Fair") brings this motion to seal parts of the Court's record in connection with Alexandria Real Estate Equities, Inc. ("Alexandria")'s petition to confirm an Arbitration Award pursuant to 9 U.S.C. § 9. Fair requests that the Court seal "all copies of the Arbitration Award in the record of this action, and other documents submitted by [Alexandria] that give an account of the confidential arbitration." (Respondent's Memorandum of Law in Support of Motion to Seal Parts of the Record 1, Aug. 8, 2011, ECF No. 13 (hereinafter Resp't Memo.).) Alternatively, Fair asks the Court to seal specific pages in the Award and paragraphs in other documents submitted by Alexandria. (Respondent's Reply Memorandum of Law in Support of Its Motion to Seal Parts of the Record 9-10, Aug. 25, 2011, ECF No. 15 (hereinafter Reply Memo).) For the following reasons, the motion is denied.

BACKGROUND

Fair is a former Alexandria employee. (Risk Declaration ¶ 3, Aug. 8, 2011, ECF No. 16.) He was hired on or about May 2007 as a Managing Director of Life Sciences (Brenner

Declaration Exh. A 1, Aug. 25, 2011, ECF No. 14), with the responsibility of assisting in an Alexandria development project in Manhattan. (Risk Declaration ¶ 3.) In November 2008, Alexandria terminated Fair for making disparaging statements about Alexandria in emails sent from his company address. (Final Award 3-4, June 3, 2011, ECF No. 1.) After ending Fair's employment, and pursuant to his employment contract, Alexandria initiated arbitration proceedings, seeking a declaratory judgment that it did not owe Fair severance pay. (Id.) Alexandria also made several libel claims against Fair, alleging that, after his termination, he had libeled the company in emails sent to individuals not employed by Alexandria. (Final Award 5.) On February 28, 2011, the Arbitrator ruled in favor of Alexandria on the severance pay claim, and denied all other claims. (Risk Declaration ¶ 7.) In the Award, the Arbitrator explained the events that led to Fair's termination, and quoted the statements on which Alexandria premised its libel claims against Fair. (Final Award 4-6.) The Award did not compel either party to take any action. (Final Award 4-5, 10, 14-15.) On May 31, 2011, Alexandria filed a notice of petition to confirm arbitration, attaching a copy of the Award. The unopposed motion was granted on July 11, 2011. On August 8, Fair moved to seal parts of the record, including the petition itself, the attached Award and an attached supporting declaration. Fair does not contest the confirmation of the Award.

DISCUSSION

The public and the press have a qualified First Amendment right to access judicial documents and proceedings. Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir.

2004).[1] When a party to a request for sealing of documents argues that the First Amendment presumption attaches to those documents, a reviewing court must address whether the presumption is applicable. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006); United States v. All Funds on Deposit at Wells Fargo Bank in S.F., Cal., in Account No. 7986104185, Held in the Name of Account Servs., Inc., 643 F. Supp. 2d 577, 580 (S.D.N.Y. 2009). In making this assessment, a court must first determine whether the documents that the moving party wishes to seal are judicial documents that have a presumption of access. Lugosch, 435 F.3d at 120. If the documents are judicial documents, the court goes on to determine whether the applicant has demonstrated that the presumption of access is overcome by the need to protect higher values. Id.

A document is a judicial document when it passes either prong of the "logic and experience" test, which asks whether the document has "historically been open to the press and general public," Hartford Courant, 380 F.3d at 91 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)), or "public access plays a significant positive role in the functioning of the particular process in question." Id. Additionally, a document is deemed "judicial" for purposes of the First Amendment presumption when access to the document is "derived from or [is] a necessary corollary of the capacity to attend the relevant proceedings." Lugosch, 435 F.3d

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[1] Members of the public also have a common law right to access judicial documents, but "[t]he common law does not afford as much substantive protection to the interests [in access to judicial documents] of the press and the public as does the First Amendment," Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (cited in Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006)). Because the Court finds that Fair does not overcome the First Amendment presumption of access, it is not necessary to analyze his application under the less rigorous common law presumption.

at 120 (quoting Hartford Courant, 380 F.3d at 93).

Even if a document is classified as a judicial document, the First Amendment presumption can be overcome by a showing that the requested sealing is narrowly tailored to preserve "higher values." Lugosch, 435 F.3d at 120 (quoting In re N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987). Although the term has not been comprehensively defined, courts have identified particular examples of "higher values." E.g., Lugosch, 435 F.3d at 125 (the attorney-client privilege); United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (national security); United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995) (protection of the privacy of innocent third parties); Pal v. N.Y. Univ., No. 06 Civ. 5892(PAC)(FM), 2010 WL 2158283, at *1 (S.D.N.Y. May 27, 2010) (confidentiality of sensitive patient information). The party seeking the sealing of judicial documents bears the burden of showing that higher values overcome the presumption of public access. DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 826 (2d Cir. 1997).

Petitions to confirm arbitration awards, and their attendant memoranda of law and supporting documents, are "judicial documents that directly affect[] the Court's adjudication" of the confirmation petition. Church Ins. Co. v. Ace Prop. & Cas. Ins. Co., No. 10 Civ. 698(RJS), 2010 WL 3958791, at *1 (S.D.N.Y. Sept. 23, 2010); Mut. Marine Office, Inc. v. Transfercom Ltd., No. 08 Civ. 10367(PGG), 2009 WL 1025965, at *4 (S.D.N.Y. April 15, 2009). Such documents are subject to the presumption of public access under the First Amendment because "[i]n circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done." Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., Nos. 07 Civ. 8196(PKC), 07 Civ. 8350(PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Aug. 12, 2010). This is true whether or not the petition to confirm an arbitration award is contested, see Church Ins. Co., 2010 WL 3958791, at *1, because an unopposed petition for confirmation of an

arbitration award is treated as akin to a motion for summary judgment, in which the court independently applies the facts of the case to the legal standard for award confirmation. Id. (quoting D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 109-10 (2d Cir. 2006)).

As the party moving to place these documents under seal, Fair bears the burden of demonstrating what "higher values" overcome the presumption of public access and justify sealing. DiRussa, 121 F.3d at 826. Fair has failed to identify interests that rise to the level of higher values. Fair argues that, if the petition, Award and supporting documents remain public, they may be read by future employers who may be less likely to hire him as a result of knowing the details of his employment history with Alexandria. (Reply Memo. 9.) Protection against this possibility does not rise to the level of a higher value recognized in the Second Circuit.[2] The possibility of future adverse impact on Fair's employment is not as serious as, and is far less determinate than, for instance, the personal ramifications of the public airing of sensitive

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[2] In arguing that preventing possible adverse impacts on employment is a higher value, Fair analogizes this case to Alexandria Real Estate Equities, Inc. v. Kelley, No. CV 09-01349 DDP (PJWx) (C.D. Cal. June 11, 2009) (order granting motion to seal) (attached to Notice of Petition to Confirm Arbitration, June 3, 2011, ECF No. 1). In Kelley, Alexandria successfully petitioned for confirmation of an arbitration award against a former employee. The former employee then moved that all documents submitted with the petition to be sealed on the grounds that, if they were left unsealed, public knowledge of them would impede her ability to find new employment, as it had in the past. The court, applying the Ninth Circuit's "compelling reasons" test for sealing dispositive motions, found that the former employee had shown "sufficient evidence of actual injury to outweigh the public's broad interest in disclosure." Id. at 4. Not only did the court in Kelley decide the motion to seal under a different legal standard than this Court must apply to Fair's motion, but the former employee in that case was able to demonstrate that the unsealed documents had actually prevented her from obtaining employment. Whether or not the prevention of further actual injury to employment prospects constitutes a "higher value" as well as "compelling reason," Fair has not produced evidence that the unsealed documents have caused him actual injury, so Kelley is not persuasive precedent on this point.

medical information. See Pal, 2010 WL 2158283, at *1. Nor is it as serious as the need to preserve attorney-client privilege, an important part of our judicial process. Lugosch, 435 F.3d at 125. Fair also argues that the documents should be sealed because the rules governing the arbitration established that the Award and arbitration proceedings would be confidential. (Resp't Memo. 3-4.) However, the mere existence of a confidentiality agreement covering judicial documents is insufficient to overcome the First Amendment presumption of access. Church Ins. Co., 2010 WL 3958791, at *3 (quoting Mut. Marine Office, 2009 WL 1025965, at *5).

Because Fair has not met his burden of demonstrating that higher values justify sealing the record, it is unnecessary to determine whether his sealing requests are narrowly tailored. The First Amendment presumption of access to judicial documents holds.

CONCLUSION

For the foregoing reasons, Fair's motion to seal the record or portions thereof is denied. This memorandum order resolves docket entry no. 10.

Dated: New York, New York
November 30, 2011

LAURA TAYLOR SWAIN
United States District Judge