

ORIGINAL

No. H030719

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

EAGLE BROADBAND, INC.,
Plaintiff and Appellant,

v.

THOMAS MOULD a/k/a benderanddunford
Defendant and Respondent.

FILED

FEB - 2 2007

Court of Appeal - Sixth App. Dist.
MICHAEL J. YERLY, Clerk

BY _____ DEPUTY

Appeal from Order of the Santa Clara Superior Court
The Honorable William J. Elfving
Case No. 105CV050179

**RESPONDENT MOULD'S OPPOSITION TO APPLICATION TO
FILE DOCUMENTS UNDER SEAL; DECLARATION OF PAUL
CLIFFORD**

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INTRODUCTION

On January 18, 2007, appellant Eagle Broadband, Inc. (“appellant” or “Eagle”) applied to this Court for an order sealing certain documents. The requested sealing goes far beyond what the trial court ordered. Eagle’s Application is disingenuous at best in that it fails to inform this Court that the trial court thrice refused to seal much of the information which Eagle now seeks to have sealed in this Court’s file.

Eagle also falsely asserts that it made its motion to seal documents in the trial court “[t]o protect the interests of both Eagle and Mould . . .” In reality, Mould opposed Eagle’s motions to file documents under seal in the trial court and he has no interest in keeping the amount of Eagle’s attorneys fees secret.

Eagle’s sole motive in seeking to have information regarding the amount of its legal fees sealed in the trial court was to prevent its shareholders from knowing how much this SLAPP has cost the company to litigate. Eagle itself put the information regarding its litigation costs at issue by making it a foundation block in its opposition to Mould’s motion for attorneys fees, clearly waiving any claim of confidentiality by doing so.

Further, as the litigation cost information has not been sealed in the trial court’s files, it serves no useful purpose for this Court to order that this same information be sealed in its files. Since “the horse is already out of the

barn,” it would make little sense to close the barn door now.

Respondent Thomas Mould hereby opposes Eagle’s request to seal in this appeal any documents or information which were not sealed by the trial court, as such sealing would be contrary to the important public policy that litigation take place in the open and be subject to public scrutiny.

I. PROCEDURAL HISTORY

Eagle is correct in asserting that the parties entered into a confidentiality agreement regarding *settlement negotiations*. (See AA 916-917.) The purpose of this was to allow the parties to freely disclose their own confidential information to the other in the course of the negotiations without fear that the opposing party would publicly disclose that information. (See AA 916-917.) However, Eagle waived any claim of confidentiality to the information regarding the attorneys fees which it incurred in this action when it chose to make said information a basis of its opposition to Mould’s motion for attorneys fees. Clearly, this was the trial court’s view, since it sealed only the confidentiality agreement and Eagle’s written settlement offer, as well as the three paragraphs of Khachatourian’s declaration that addressed those items and specific statements made during the settlement negotiations. (AA 860-861, ¶¶ 7-9, 915-921, 794-795.)

On July 26, 2006, Eagle filed a motion in the trial court to seal

documents related to Mould's motion for attorneys fees, including Eagle's opposition memorandum and Khachatourian's declaration. (AA 815.) On August 9, 2006, the trial court ordered that *only* the following information be sealed: "Paragraphs 7 through 9, and Exhibits G and H to the Declaration of Katrina Khachatourian in Support of EAGLE's Motion to Seal."¹ (AA 795.) The trial court did not order that the total cost of this litigation to Eagle be hidden from the public, nor did it seal any excerpts of Eagle's opposition to Mould's motion for attorneys fees, or any of Mould's reply brief. (See AA 794-795.)

On August 15, 2006, Eagle made an ex parte application for "clarification" of the trial court's sealing order, requesting that the trial court seal information which it had declined to seal, in particular the hourly rates of Eagle's counsel and the cost of the litigation. (Clifford Decl., ¶ 2, Exhibit A.) On August 15, 2006, the trial court denied Eagle's ex parte application. (Clifford Decl., ¶ 2.) On or about August 23, 2006, Eagle filed a motion to "clarify" the trial court's sealing order, asking for essentially the relief which the trial court had denied (i.e., the sealing portions of paragraphs in the Khachatourian declaration and Mould's reply memorandum which discussed Eagle's counsel's hourly rates and Eagle's attorneys' fees). (Clifford Decl.,

¹ Although the trial court's order references the Khachatourian declaration in support of Eagle's motion to seal, it appears the court actually meant to reference the Khachatourian declaration in opposition to Mould's motion for attorneys fees. (See AA 794-795, 823-825, 859-863.)

¶ 3, Exhibit B.) Mould opposed Eagle's motion. (Clifford Decl., ¶ 4, Exhibit C.) On September 19, 2006, after hearing Eagle's motion for "clarification," the trial court again refused to seal the information which it declined to seal on August 9, 2006. (Clifford Decl., ¶ 5, Exhibit D.)

Eagle is now attempting, *for the fourth time*, to prevent the public from knowing how much this litigation has cost the company. As the trial court did not seal this information, such a sealing by this Court would be both ineffectual and unnecessary.

II. EAGLE DOES NOT STATE GOOD CAUSE FOR FILING ITS DOCUMENTS UNDER SEAL.

Public policy favors open access to court records. In *NBC Subsidiary, Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1219, our Supreme Court stated:

Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truth-finding function of the proceeding.

[Citation omitted.] Therefore, "[a]s a general rule, '. . . court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic.'" (*Gilbert v. National Enquirer* (1996) 43 Cal.App.4th 1135, 1149 [citation omitted].)

For this reason, to file documents under seal, a showing must be made that there exists an overriding interest that overcomes the right of public access to the record, that the overriding interest supports sealing the record, that a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, and that the proposed sealing is narrowly tailored. (Cal. Rules of Court, Rules 2.550(d)-(e), 8.160 (e)(6).) Eagle has failed to satisfy these requirements.

Here, contrary to public policy, Eagle seeks to seal portions of its opening brief and portions of the trial court's record that are not under seal which discuss the attorneys fees which Eagle has paid its own counsel. Eagle provides no evidence of any *overriding* interest in sealing these records. Indeed, the trial court refused to seal the records. (AA 794-795.) Eagle falsely asserts that these records should be filed under seal because "This information is the exact type of information that was contained in Exhibit H of the Khachatourian Declaration, which the trial court found an overriding interest justified the filing of the exhibit under seal." (Application, p. 6.)

First, Eagle fails to explain what overriding interest exists in hiding the costs of this litigation from its shareholders and the general public. The trial court clearly carefully weighed the allegedly competing interests of

protecting the confidentiality of settlement negotiations with that of the right of the public to know what goes on in litigation.

Second, the information and documents which the trial court sealed were actual settlement communications between the parties. Although Eagle's fees may have been stated in those communications, the trial court apparently found that the overriding interest of confidentiality did not apply to the actual amounts because Eagle disclosed the amount of its legal bills in its opposition to Mould's attorneys fees motion, arguing that its legal bills were evidence that Mould's fee request was excessive. (AA 843:5-21.)

Further, the purpose of the confidentiality agreement, which is the purported basis for Eagle's request to seal, was obviously to prevent either party from disclosing the confidential information of the *opposing party*, not to prevent either from disclosing *its own* information.² Clearly, if one of the parties chooses to reveal *its own* "confidential" information, it is free to do so. Mould could hardly sue Eagle for a breach of the confidentiality agreement because Eagle disclosed information about itself.

² Despite its arguments about the sanctity of the settlement negotiations and the confidentiality agreement, Eagle chose nonetheless to disclose Mould's settlement communication in its opposition to Mould's fee motion (AA 901-902), despite the fact that it is clearly covered by the confidentiality agreement (see AA 916-917). Tellingly, Eagle has not object to, or attempted to have sealed, any of *Mould's* information which he necessarily used in both the settlement negotiations and in making his motion for attorneys fees.

The instant situation is a classic example of waiver of the confidentiality, if any, of the information with which Eagle opposed Mould's motion for attorneys fees. Here, Eagle chose to disclose its allegedly confidential information about its attorneys fees in its opposition to Mould's fee motion, thereby waiving any claim it has to protect the alleged confidentiality of the information. (*Noel v. Dumont Builders* (1960) 178 Cal.App.2d 691, 696-97 [waiver may be the result of an act so inconsistent with the intent to enforce a right as to induce a reasonable belief that such right has been relinquished]; see *Wilson v. Superior Court* (1976) 63 Cal.App.3d 825, 830 [party who places her tax returns at issue may not claim statutory confidentiality]; see also *Register Division of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 902 [person who voluntarily discloses his medical records with regard to claim against a county waives any expectation of privacy in the disclosed records].)

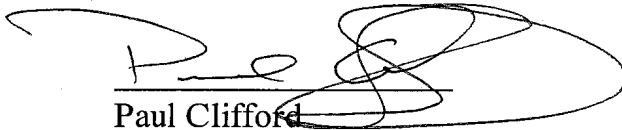
Eagle asserts, without any explanation whatsoever, that if the records are not sealed, future settlement negotiations could be undermined, "further prejudicing Eagle." (Application, p. 7.) How could this Court's refusal to seal the amount that Eagle has spent in this lawsuit (which amount was not sealed by the trial court in its files) possibly affect any future settlement

negotiations?³ Clearly, Mould is not concerned about the disclosure of this information. If anything, the likely outcry of Eagle's shareholders about the waste of *their* money on this lawsuit may encourage Eagle to end this SLAPP and *stop* wasting the shareholders' money.

CONCLUSION

Eagle's attempt to harass respondent Mould and force him to incur additional, unnecessary fees in opposing, for the fourth time, its attempt to seal portions of the record, is typical of Eagle's course in this SLAPP. There is absolutely no legal basis in this appeal to seal anything which the trial court did not seal.

Dated: February 2, 2007



Paul Clifford
Attorney for Defendant/Respondent
THOMAS MOULD

³ In fact, after the trial court refused to seal the amount of Eagle's attorneys fees, Eagle did settle with another defendant, who was also represented by Mould's counsel. (Clifford Decl., ¶ 6.)

DECLARATION OF PAUL CLIFFORD

I, Paul Clifford, declare as follows:

1. I am an attorney at law duly licensed to practice before all California courts and am a counsel of record for defendant/respondent Thomas Mould, a/k/a Doe 5 (“Respondent”) in this matter. I was a counsel of record in this case in the trial court. I have personal knowledge of the facts contained in this declaration, unless otherwise indicated. If called upon to testify I am competent to do so. The documents attached to this declaration are true copies of what they purport to be.

2. Attached hereto as Exhibit A is a true copy of Eagle’s *Ex Parte* Application to Clarify Order Granting Plaintiff Eagle Broadband Inc.’s Motion to Seal. On August 15, 2006, the trial court denied said application and ordered that Eagle make a noticed motion.

3. Attached hereto as Exhibit B is a true copy of the Memorandum of Points and Authorities in Support of Eagle Broadband’s Motion to Clarify Order Granting Plaintiff Eagle Broadband’s Motion to Seal, which was filed in the trial court on or about August 23, 2006.

4. Attached hereto as Exhibit C is a true copy of Defendant Doe 5’s Opposition to Plaintiff’s Motion to “Clarify” Order Granting Plaintiff Eagle Broadband’s Motion to Seal, which was filed in the trial court on September 7, 2006.

5. On September 19, 2006, the trial court denied Eagle's motion for "clarification" of its order sealing documents. Attached hereto as Exhibit D is a true copy of the trial court's order.

6. In October 2006, Eagle and another defendant in this action, Doe 3, entered into a settlement. I was also an attorney of record for Doe 3 in this action.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct in this declaration was executed on February 2, 2007, at Berkeley, California.


Paul Clifford