STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

(FILED: February 25, 2013)

GARY J. GAUBE, CHIEF EXECUTIVE OFFICER and TRUSTEE	:	
V.	:	**C.A. No. PB 08-4371**
LANDMARK MEDICAL CENTER	:	

DECISION

SILVERSTEIN, J. Before this Court is Blue Cross and Blue Shield of Rhode Island's ("Blue Cross") Motion for Entry of a Confidentiality Order. Blue Cross seeks to prevent public disclosure of documents requested by Landmark Medical Center ("Landmark")—both as to documents exchanged between the parties and to documents submitted to the Court—and to close the courtroom during the evidentiary hearing.[1] The Special Master of Landmark as well as Steward Health Care System LLC, and Blackstone Medical Center, Inc. f/k/a Steward Medical Holdings Subsidiary Four, Inc. (collectively, "Steward") filed objections and participated in oral arguments along with counsel for the Providence Journal, who participated in oral argument without objection from any party. The issue is to what extent Blue Cross may prevent third-party and public access to certain information.

[1] A hearing date has not been set as of this filing.

I

Background

Blue Cross claims that it holds setoff and recoupment rights under a 2006 Hospital Participation Agreement with Landmark (the "Agreement"), and that it should be allowed to exercise such rights to recover $2,300,000 allegedly owed to it by Landmark. In connection with that claim, the Court directed the parties to appear for an evidentiary hearing. In preparation for that hearing, Landmark's Special Master requested the production of certain documents related to the Agreement from Blue Cross.

Blue Cross claims that the information requested by the Special Master contains confidential commercial information. Blue Cross also contends that the evidentiary hearing is likely to elicit testimony and documentary evidence involving confidential commercial information. The documents and testimony allegedly relate to Blue Cross' negotiating techniques, methodologies, and parameters. Blue Cross argues that the testimony and documents are valuable to Landmark and other hospitals that negotiate with Blue Cross, as well as Blue Cross' competitors, and that disclosure of the information will give a competitive advantage to those entities over Blue Cross.

Landmark claims that the information sought to be protected is not confidential. It contends that Blue Cross has already disclosed much of the negotiation information related to the $2,000,000 advance in its pleadings, and Blue Cross has put forth no basis for its confidentiality request.

Steward claims that it is owed approximately $7,600,000 in secured and administrative expense claims by Landmark. Accordingly, Steward contends that Blue Cross' set-off and recoupment claims, if allowed, could materially impact Steward's recovery. Thus, Steward

seeks to meaningfully participate in the evidentiary hearing, which Steward argues would require access to the allegedly confidential documents.

II

Analysis

This Court addressed the tension between protective orders and the right of access to judicial records at length in a recent Decision in another case. See Dauray v. Estate of Gabrielle D. Mee, et al., Nos. PB-2010-1195, PC-2011-2640, PC-2011-2757, slip op. at 18-33 (R.I. Super. Ct., filed Jan. 23, 2013) (Silverstein, J.). As this Court previously described, and as recognized by the Special Master, there is no public right of access to unfiled discovery that is not used in a judicial proceeding. See id. at 24-27; Special Master's Obj. to Mot. for Entry of Confidentiality Order, at 4. For good cause pursuant to Rule 26(c), either party may in good faith designate certain documents as confidential. If the opposing party, or an interested third-party, believes that cause for the confidentiality does not exist, that party may request that the Court vitiate the confidentiality designation.

Documents filed with the court or otherwise used in a judicial proceeding, together with the associated testimony, however, are a horse of a different color.[2] In Dauray, this Court

[2] This idiom was explained in a recent law review note:

> "The phrase 'a horse of a different color . . . probably derives from a phrase coined by Shakespeare, who wrote 'a horse of that color' (Twelfth Night, 2:3), meaning 'the same matter' rather than a different one. By the mid-1800s the term was used to point out difference rather than likeness.' American Heritage Dictionary of Idioms 311 (1997). The idiom was popularized in The Wizard of Oz (Metro-Goldwyn-Mayer 1939):
> Dorothy: Oh, please! Please, sir! I've got to see the Wizard! The Good Witch of the North sent me!
> Guardian of the Emerald City Gates: Prove it!
> Scarecrow: She's wearing the ruby slippers she gave her.

recognized that when documents are filed with the court and "reasonably may be relied upon in support of any part of the court's adjudicatory function," the documents become judicial records; thus, the public has a presumptive right of access to those documents. Dauray, slip op. at 28. The right of access has its origin in the long history of presumptively open criminal trials. Id. at 20-21. That right was extended to civil proceedings and has "evolved into a presumption of public access to court proceedings and records that remains a fundamental part of our judicial system today." Id. at 21 (quoting Rosado v. Bridgeport Roman Catholic Diocesan Corp., 970 A.2d 656, 676 (Conn. 2009)).

In its proposed order, Blue Cross includes the following provision:

> "Only [Blue Cross and Landmark] and their counsel, and counsel for those interested parties that have agreed in writing to be bound by this Order, shall be permitted in the courtroom during the hearing or shall have access to the documents or testimony introduced therein without further Order of the Court." (Blue Cross' Mot. for Entry of Confidentiality Order, Ex. A., at ¶ 4.j.)

Based on the presumption of public access to judicial records and the presumption of open courtrooms, the Court will not enter such a blanket order with respect to documents presented to the Court or to courtroom closure.[3]

The Court will, however, in its discretion, consider whether certain documents should be sealed (or unsealed as case the case might be) and/or whether the courtroom should be closed for limited testimony on an ad hoc basis upon the request of any interested party. As this Court

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> Guardian of the Emerald City Gates: Oh, so she is! Well, bust my buttons! Why didn't you say that in the first place? That's a horse of a different color! Come on in!"

Anthony J. Delligatti, Note, A Horse of a Different Color: Distinguishing the Judiciary From the Political Branches in Campaign Financing, 115 W. Va. L. Rev. 401, 401 n.1 (2012).

[3] Blue Cross relied primarily upon Providence Journal Co. v. Convention Center Authority, 774 A.2d 40 (R.I. 2001). That case, however, was in the context of a request pursuant to the Access to Public Records Act ("APRA") and the analysis was based on statutory interpretation. See id. at 45-49. Therefore, it is not controlling on this case, which implicates the right of access to judicial records.

recognized in Dauray, such a determination requires a balancing of the interest in public access (and in this case the access of the interested third-parties as well) against the interest asserted by the party seeking the confidentiality order. Dauray, slip op. at 30-36 (discussing balancing test and the trial court's discretion on protective orders). This balancing principle was also recently recognized by the First Circuit:

> "When addressing a request to unseal, a court must carefully balance the presumptive public right of access against the competing interests that are at stake in a particular case, keeping in mind that only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access." United States v. Kravetz, 2013 WL 341675, *8 (1st Cir., Jan. 30, 2013) (internal quotations and citations omitted).

While these principles will remain the starting point for an ad hoc determination, the Court notes that there is a significant factual difference from Dauray. In Dauray, the interest asserted by the party opposing public disclosure was that party's right to a fair trial. Dauray, slip op. at 34-35. The Court explicitly noted that other theories, such as trade secrets, had not been advanced. Id. at 36. Here, Blue Cross argues that the documents and testimony involve confidential commercial information. Should the Court find that the documents contain confidential commercial information, it must then balance that interest against the public right of access. The United States Supreme Court has noted that there are limits to the common law right of access, and that "courts have refused to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing." Nixon v. Warner Communications, 435 U.S. 589, 598 (1978). Notably, the Court has broad discretion to decide the manner of disclosure. See id. (court has supervisory power over its own records and files); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984) (noting that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of

protection is required"); Polquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993) (noting that "great deference is shown to the district judge in framing and administering [protective] orders").

III

Conclusion

The Court concludes that there is no public right of access to materials exchanged between the parties only, but a confidentiality designation must be for good cause and in good faith. However, the right of public access is implicated once such documents are presented to the Court for its consideration, or when testimony is presented to the Court. Therefore, a blanket sealing of filed documents or closing of the courtroom is inappropriate. An ad hoc determination must be made as to specific documents and testimony, guided by the principles outlined in this Decision.

Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.