

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

NEW PENN FINANCIAL, LLC,

Index No. 653668/2018

Plaintiff,

: Motion Seq. _____

Masley, J.

v.

360 MORTGAGE GROUP, LLC,

Defendant.

-----X

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS REQUEST FOR AN
ORDER TO REDACT DEFENDANT’S MEMORANDUM OF LAW
(NYSCEF DOC. NO. 10) AND EXHIBITS C AND D TO THE
RANZENHOFER AFFIRMATION (NYSCEF DOC. NOS. 14 AND 15)
AND TO SEAL UNREDACTED VERSIONS OF SAME**

Scott D. Musoff
Christopher P. Malloy
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Phone: (212) 735-3000
Fax: (212) 735-2000
scott.musoff@skadden.com
christopher.malloy@skadden.com
Attorneys for Plaintiff

TABLE OF CONTENTS

PRELIMINARY STATEMENT1
ARGUMENT.....4
CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.,
274 A.D.2d 1 (1st Dep’t 2000)5

Dawson v. White & Case,
184 A.D.2d 246 (1st Dep’t 1992)5

Mancheski v. Gabelli Group Capital Partners,
39 A.D.3d 499 (2d Dep’t 2007)5

Matter of Crain Communications, Inc. v. Hughes,
135 A.D.2d 351 (1st Dep’t 1987), *aff’d*, 74 N.Y.2d 626 (1989)5

STATUTES

22 NYCRR § 216.1(a)4, 5

Plaintiff New Penn Financial, LLC (“New Penn”) respectfully submits this memorandum of law in support of its application for an Order pursuant to Section 216.1(a) of the Uniform Rules for New York State Trial Courts to redact the public filing of Defendant’s Memorandum of Law in Support of Its Motion to Dismiss (the “Memorandum of Law”) (NYSCEF Doc. No. 10) and Exhibits C and D to the Affirmation of David Ranzenhofer (“Ranzenhofer Affirmation”) (NYSCEF Docs. Nos. 14 and 15, respectively), all filed on September 20, 2018, and to seal unredacted versions of those same documents.

PRELIMINARY STATEMENT

New Penn commenced this action on July 23, 2018, against Defendant 360 Mortgage Group LLC (“360 Mortgage”) for breach of contract or, in the alternative, for reformation of a contract based on mutual mistake.

As is relevant here, in May and June 2018, New Penn acquired from 360 Mortgage certain mortgage servicing rights (“MSRs”) on mortgages guaranteed by the Government National Mortgage Association (“Ginnie Mae”). The terms of New Penn’s purchase of the MSRs is set forth in a letter of intent (the “LOI”) between New Residential Investment Corporation (“NRZ”), of which New Penn is a wholly owned subsidiary, and 360 Mortgage, dated March 5, 2018, and in two separate but substantially identical Bulk Agreements for the Purchase and Sale of Mortgage Servicing Rights (each a “Mortgage Servicing Rights Purchase Agreement,” or “MSRPA”), dated April 23, 2018 (the “Sale I MSRPA”) and May 8, 2018 (the “Sale II MSRPA” and, together with the Sale I MSRPA, the “MSRPAs”). The terms of the LOI and the MSRPAs are subject to confidentiality provisions and the public disclosure of those terms could cause competitive harm to New Penn and NRZ.

As explained below, when 360 Mortgage filed its motion to dismiss and supporting papers on September 20, 2018, it included on the public docket unredacted copies of the

MSRPAs and unredacted passages in its Memorandum of Law that reveal pricing and other confidential terms of the parties' agreements. Subsequent to filing, 360 Mortgage purported to justify this violation of the MSRPAs by citing a limited exception to the confidentiality provisions allowing a party to use confidential information to defend itself in a legal proceeding. However, this exception does not give 360 Mortgage the right to gratuitously publicize confidential information for reasons unrelated to its defense. Furthermore, sealing confidential information would not impact 360 Mortgage's ability to defend itself. The information New Penn seeks to protect from public disclosure is competitively sensitive and 360 Mortgage has not advanced any countervailing public interest for publicizing this information.

For the reasons set forth herein, New Penn requests that the public versions of the Memorandum of Law and Exhibits C and D to the Ranzenhofer Affirmation be redacted.

BACKGROUND

As explained in the accompanying Affidavit of Andrew Miller ("Miller Affidavit"), New Penn and NRZ frequently purchase MSRs from a variety of companies, in addition to 360 Mortgage, that are in the business of originating or servicing residential mortgages. Because the economic and other terms of these purchases are subject to and result from extensive negotiations, they are competitively sensitive. Knowing the terms on which New Penn or NRZ purchased or offered to purchase a particular pool of MSRs could give a future seller of MSRs information that it could use to its advantage in negotiations with New Penn or NRZ. Thus, public disclosure of these terms could damage the competitive positions of New Penn and NRZ in negotiations for subsequent purchases of MSRs. For these reasons, it is the practice of New Penn and NRZ to include confidentiality provisions in letters of intent and transaction documents relating to their purchases of MSRs. (Miller Affidavit ¶ 4.)

Consistent with this practice, both the LOI and MSRPAs in this case require 360 Mortgage to keep information regarding the MSR purchase in confidence. As is relevant to this application, the MSRPAs define “Confidential Information” to include “[a]ny and all information regarding the transactions contemplated by this Agreement.” (MSRPAs § 1.01.) (The text of the confidentiality provision of the MSRPAs, along with relevant definitions, is attached as Exhibit 1 to the accompanying Affirmation of Christopher P. Malloy, dated September 28, 2018.) The MSRPAs require the parties to hold Confidential Information “in strict confidence, exercising no less care with respect to such Confidential Information than the level of care exercised with respect to the Recipient’s own similar Confidential Information.” (MSRPAs § 11.14(a).)

The MSRPAs include a narrow exception permitting a party to disclose Confidential Information “to defend itself in connection with a legal proceeding regarding the transactions contemplated by this Agreement.” (MSRPAs § 11.14(b)(iv).) The MSRPAs also contemplate that disclosure of Confidential Information may be compelled in a legal proceeding. In the event a party is obligated to produce documents in a legal proceeding, it must “provide prompt notice to the Disclosing Party so that [the Disclosing Party] may seek a protective order or other appropriate remedy.” (MSRPAs § 11.14(d).) Further, in the absence of a protective order, “the Recipient will furnish only that portion of the Confidential Information which in the judgment of its counsel is legally required and will exercise reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information.” (*Id.*)

On September 17, 360 Mortgage’s counsel informed New Penn’s counsel that 360 Mortgage intended to file the LOI in connection with the anticipated motion to dismiss and asked

whether New Penn would consent to counsel for 360 Mortgage filing the LOI publicly.¹ New Penn's counsel advised 360 Mortgage's counsel that New Penn and NRZ believed the economic and certain other terms of the LOI should be redacted before filing because they included competitively sensitive information. (Malloy Aff. ¶¶ 8-9.)

On September 20, 360 Mortgage filed a motion to dismiss. 360 Mortgage redacted the publicly filed version of the LOI. It also filed under seal certain files with loan-level information and redacted passages of the Memorandum of Law that referenced that loan-level information.² However, 360 Mortgage's filings also included unredacted Confidential Information in its filings. Specifically, the public version of the Memorandum of Law includes unredacted references to the pricing terms of the transaction and the Ranzenhofer Affirmation includes as Exhibits C and D unredacted copies of the MSRPA's. (Miller Affidavit ¶¶ 9-10.) At no time prior to filing did 360 Mortgage inform New Penn that it would file confidential information publicly. Accordingly, on the morning of September 21, counsel for New Penn requested that the clerk restrict access to those documents pending this application.

ARGUMENT

The court may issue an order directing the filing under seal of court records “upon a written finding of good cause, which shall specify the grounds thereof.” 22 NYCRR § 216.1(a). “In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.” *Id.* Although the rule does not further define good cause, a sealing order should rest on a “sound basis or legitimate need to take judicial action.” *Danco*

¹ Also on September 17, counsel for 360 Mortgage also asked whether New Penn would stipulate to filing under seal certain files containing personal data. New Penn agreed that sealing would be appropriate.

² On September 20, 360 Mortgage filed a request by order to show cause to permit these redactions and to file certain other exhibits under seal. (NYSCEF Doc. No. 28.) The order to show cause was entered by the Court and is returnable on October 5, 2018. (NYSCEF Doc. No. 35.)

Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd., 274 A.D.2d 1, 8 (1st Dep't 2000) (internal quotation marks and citation omitted). A showing of good cause is sufficient to warrant a sealing order where there is no countervailing "showing of any legitimate public concern, as opposed to mere curiosity." *Dawson v. White & Case*, 184 A.D.2d 246, 247 (1st Dep't 1992). In essence, "good cause boils down to the prudent exercise of the court's discretion." *Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 502 (2d Dep't 2007) (internal quotation marks and citation omitted). Ultimately, courts use "sound discretion" to determine whether movants have met their burden. *Matter of Crain Commc'ns, Inc. v. Hughes*, 135 A.D.2d 351, 351 (1st Dep't 1987), *aff'd*, 74 N.Y.2d 626 (1989).

Good cause exists for sealing documents here. The documents New Penn seeks to have sealed contain confidential and competitively sensitive business information in which the public has no interest. *See Miller Affidavit*. To prevent public disclosure, the parties agreed to protect the MSRPAs as Confidential Information. *See MSRPAs* § 11.14 (defining as confidential "[a]ny and all information regarding the transactions contemplated by this Agreement").

360 Mortgage has advised that it intends to oppose this application based on the limited exception to the confidentiality requirements of the MSRPAs allowing "[t]he Recipient [of Confidential Information to] disclose the Disclosing Party's Confidential Information . . . to defend itself in connection with a legal proceeding regarding the transactions contemplated by this Agreement." (MSRPAs § 11.14(b)(iv).) This argument fails for several reasons. First, even if Confidential Information is needed for 360 Mortgage's defense in a legal proceeding, Section 11.14(b)(iv) neither requires that information to be filed in the public docket nor provides a basis for 360 Mortgage to oppose an application to redact or seal Confidential Information. Indeed, to the contrary, Section 11.14(d) of the MSRPAs requires a party compelled to disclose

Confidential Information in a legal proceeding to take steps to permit the other party “to seek a protective order or other appropriate remedy” or to “exercise reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information.”

Second, Section 11.14(b)(iv) also would not permit 360 Mortgage to use the pendency of a legal proceeding as a basis for publicly releasing Confidential Information for reasons other than defending itself, as it apparently attempted to do when it initially filed the documents at issue. 360 Mortgage’s disclosure by public filing of the Confidential Information would not be necessary for its defense in this action. This Court’s procedures permit confidential materials to be filed under seal or redacted. Following these procedures will not impact 360 Mortgage’s defense. Therefore, 360 Mortgage’s public filing of confidential information would not be “only . . . to defend” itself in this action and thus falls outside the limited exception of Section 11.14(b)(iv).

Third, filing the entire MSRPA was unnecessary. 360 Mortgage only relies on a handful of MSRPA provisions: 13 sections, one annex, and one schedule. Its Memorandum of Law quotes a handful of definitions from MSRPA § 1.01.³ 360 Mortgage also relies on 12 additional sections of the MSRPA.⁴ Finally, 360 Mortgage relies on the Form of Assignment Agreement for Mortgage Loans, MSRPA A-1 to A-3, Memorandum of Law at 5, and MSRPA Schedule

³ Those definitions are: “Ancillary Fees,” Memorandum of Law at 8, “Data Tape,” *id.* at 10, “Purchase Price,” *id.* at 7, “Purchase Price Percentage,” *id.*, “Servicing Compensation,” *id.* at 8, 17, 21 and 23, and “Servicing Rights,” *id.* at 7-8, 9, 17, 21, and 23.

⁴ Those sections are: MSRPA Section 2.02, Memorandum of Law at 9, 10, Section 3.02, Memorandum of Law at 9, 13, Section 4.1, Memorandum of Law at 15, Section 4.12.21, Memorandum of Law at 15, Section 5.07, Memorandum of Law at 14, 24, 25, Section 6.12, Memorandum of Law at 9, 12, Section 6.13, Memorandum of Law at 15, Section 6.17, Memorandum of Law at 14, 24, Section 7.13, Memorandum of Law at 14, 24, Section 11.07, Memorandum of Law at 9, 20, Section 11.09(d), Memorandum of Law at 25 n.13, and Section 11.12, Memorandum of Law at 25 n.13.

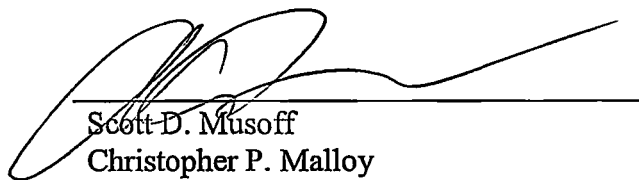
2.01, Memorandum of Law at 10, 18. By contrast, the MSRPA consists of 106 total sections, six exhibits, nine schedules, and one annex.

In contrast to 360 Mortgage's approach of unnecessary overinclusion, New Penn's application requests limited redactions. In the Memorandum of Law, New Penn requests redaction of pricing terms and New Penn's representations, warranties and covenants, and the specific timing of one of 360 Mortgage's obligations for delivery of certain files after the closing. In the MSRPA, New Penn requests redaction of 41 pages and partial redaction of 35 pages of the 120 page MSRPA, leaving 44 pages completely unredacted.

CONCLUSION

For the reasons set forth above, New Penn's application for an order to show cause to redact the public filings of the Memorandum of Law (NYSCEF Doc. No. 10), Exhibits C and D to the Ranzehofer Affirmation (NYSCEF Docs. Nos. 14 and 15, respectively), and Exhibits 1, 3, and 5 to the Miller Affidavit and to seal an unredacted version of the same documents should be granted.

Dated: New York, New York
September 28, 2018



Scott D. Musoff
Christopher P. Malloy
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Phone: (212) 735-3000
Fax: (212) 735-2000
scott.musoff@skadden.com
christopher.malloy@skadden.com
Attorneys for Plaintiff