

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN KIMBALL,)
)
 Plaintiff)
)
 v.) 1:12-cv-00076-JAW
)
 JOHN F. HOWER, JR.,)
)
 Defendant)

ORDER

Defendant John Hower has moved to seal portions of his motion for summary judgment, one of his statement of material facts, portions of the Lemire Deposition, portions of Lemire Deposition Exhibit 5, and two paragraphs and an exhibit associated with the Pinsky Affidavit.¹ (Motion to Seal, ECF No. 37.) Kimball does not object to the motion. Hower's motion does not provide the legal basis for sealing these items, other than to indicate that the results of a court-ordered blood test were marked as confidential pursuant to a consent confidentiality order. I assume, however, that Hower maintains that the confidential discovery materials should remain under seal when filed with the court or used at trial pursuant to the provisions of Federal Rule of Civil Procedure 26(c), which allows for the sealing of depositions or other discovery to protect a party from embarrassment. See Seattle Times Co. v. Rinehart, 467 U.S. 20, 35-36 (1984). I do not know of any other legal basis for sealing this document and Hower has not argued that there is any other legal basis.

Seattle Times, of course, addressed protective orders in the discovery context and recognized that first amendment concerns were implicated to a far lesser extent in the discovery

¹ By separate motion (ECF No. 39) Hower also moved to seal a curriculum vitae (ECF No. 38-4) that was inadvertently filed with a personal data identifier. By separate text order I have granted that motion without objection. A properly redacted version of the curriculum vitae with the personal identifier has been filed at ECF No. 40-7.

context than in the context of public court proceedings. Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986). Pretrial dispositive motions and the documents considered in connection with them are often viewed as having a different status than discovery documents. Id. at 11-13 (acknowledging that some courts have recognized a public right of access to summary judgment motions). In essence, “only the most compelling reasons” can override the public’s right of access to judicial records. In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005) (quoting FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987)). The “compelling reasons” standard applies with equal force to summary judgment opinions as to trials. See, e.g., Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir.2006) (“[T]he resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events. Thus, compelling reasons must be shown to seal judicial records attached to a dispositive motion.”) (citations and internal quotation marks omitted). With these basic legal principles in mind, I turn to the unique circumstances now before the court.

FACTUAL BACKGROUND

Kimball’s complaint includes the following allegations. Beginning in 2001, Kimball and Hower engaged in a long-term sexually intimate relationship without contemplation of legal marriage. (Complaint ¶ 4.) In February 2011, Kimball was diagnosed with certain sexually transmitted diseases. (Id. ¶ 12.) Hower allegedly admitted that he knew he had a sexually transmitted disease but never told Kimball of this fact until after she confronted him with her diagnosis. (Id. ¶¶ 13-14.) Kimball brought suit against Hower in Maine state court in February 2012 alleging negligence under Maine law. Hower removed the case to this court based on diversity jurisdiction and all matters appeared on this court’s public docket from March 2012

until August 3, 2012, when Kimball filed a motion to seal all pleadings. (ECF No. 11.) I denied the motion to seal all pleadings in the case since the matter had been publicly available in state court and in this court for over six months.

Eventually the plaintiff moved for a court-ordered blood test related to Type I and Type II of the herpes simplex virus. (ECF No. 13.) I ordered that certain attachments filed in conjunction with that motion would be sealed, “at least for now” (ECF No. 22), but in a public order I granted the motion for a court-ordered blood test. (ECF No. 25.) The current motion to seal relates to the results of the court-ordered blood tests. Hower has submitted those results in support of his motion for summary judgment, but asks that the court allow test results and any testimony or legal argument based on those results to remain under seal.

DISCUSSION

I am not insensitive to the fact that the allegations and evidence in this case are of an extremely personal nature and involve private and intimate details of a sexual relationship gone awry. Nevertheless, the plaintiff chose to bring this matter to court as a lawsuit, and the defendant chose to remove the matter to this court where it would become available on an electronic docket. At this late date I think the court is being asked to close the barn door after the horse has escaped. In particular, in this case the motion to seal does not really serve to protect a privacy interest because the interest in question has already been significantly compromised. Moreover, it is evident from reviewing the publicly available filings (ECF No. 38 and attachments) that Hower is attempting to seal his HSV-2 test result, that he would not be attempting to seal the result if it were other than what it is, and that his summary judgment arguments would include an obvious additional argument if the HSV-2 result were other than

what it is. Thus, sealing the selected portions of the pleadings and exhibits really serves no purpose.²

Rule 26

Rule 26 of the Federal Rules of Civil Procedure outlines general provisions governing discovery in a civil action. The scope of civil discovery is broad:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b). Because the scope of discovery is so broad, the Rules provide that a court may issue a protective order when the circumstances call for one. Pursuant to Rule 26(c), a court may issue a protective order, “for good cause, . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Among other possibilities, a court may forbid the discovery from taking place, limit the scope of disclosure or discovery, limit who may see the discovery materials, and require that material be filed under seal. Fed. R. Civ. P. 26(c)(1)(A)-(H).

Items for which Hower seeks sealed status in the context of summary judgment

Hower seeks sealed status for the following items:

1. Portions of pages 3 and 8-12 of his motion for summary judgment, wherein Hower discusses the results of the court-ordered blood testing;
2. The second sentence of paragraph 22 of his statement of material facts;

² As if to underscore this very point, Hower refiled, not under seal, the Pinsky Affidavit, redacted to remove Dr. Pinsky's personal identifiers. (ECF No. 40-7.) When he made that public filing, paragraphs 5 and 6 of the affidavit, revealing the test results, were not redacted. In the current motion Hower seeks to have these two paragraphs sealed, but he has made them publicly available in another filing.

3. Portions of pages 12-18 of the Lemire Deposition in which the witness (plaintiff's expert) discusses the results of the court-ordered blood test;
4. Paragraphs 5 and 6 of the Pinsky Affidavit, which also references the test results; and
5. Most of the information contained in Lemire Deposition Exhibit 5, the lab report that reveals the test results (both HSV-1 and HSV-2).

Legal Basis for the Summary Judgment Motion

Hower's motion for summary judgment is directed at both counts of the complaint, which allege negligence (count I) and negligent infliction of emotional distress (count II). The motion is based, first, on the contention that Kimball has not suffered any physical harm as required for count I. (Motion at 5.) Hower argues that Kimball's seropositive test for HSV-1 does not support the contention that she is inflicted with a sexually transmitted disease. He also argues that even though her blood test shows the presence of antibodies for HSV-1 and HSV-2, because she has never experienced any herpetic outbreak, she does not have genital herpes and thus does not have a sexually transmitted disease. (Id. at 5-7.)

Second, Hower argues that there is no genuine issue of material fact as to whether he knew or should have known that he was infected with HSV-2. Because he never had any symptoms associated with genital herpes, he maintains that he had no duty to protect Kimball from the disease. (Id. at 7-9.) According to summary judgment evidence cited by Hower, 81% of infected persons are unaware of their infections. (Id. at 8.) As an ancillary argument, Hower argues that his status as a physician does not impose upon him any heightened duty regarding the reasonable precautions he should have taken. (Id. at 9-10.)

Third, Hower makes a causation argument. According to Hower, Kimball cannot prove that he was the likely source of either the HSV-1 or HSV-2 antibodies that were found in

Kimball's blood. (*Id.* at 11-12.) Finally, Hower makes an argument as to count II of the complaint that Kimball cannot state a cause of action for negligent infliction of emotional distress based upon Hower's alleged breaches of his duty of honesty and fidelity to her in light of their intimate sexual relationship. This legal argument is based on his assertion that "no such duty exists." (*Id.* at 13.)

Resolution of the Pending Motion to Seal

Given the legal and factual context of the complaint and the motion for summary judgment, it is apparent to me that the court could not enter a meaningful order either granting or denying the motion for summary judgment without considering Hower's test results. The issue presented by this motion is not only whether the exhibits should be permanently sealed on the court's docket, but also whether the court's order should itself be redacted to delete references to the test results. Of necessity this analysis requires a balancing of the public's right to read and understand the rationale behind a court's decision versus the defendant's interest in maintaining privacy regarding personally embarrassing medical test results. In this case that analysis is further complicated by the fact that Hower has already filed one of the revealing documents on the public docket (the Pinsky affidavit), letting the proverbial "cat out of the bag." Furthermore, the context of his redactions in the motion, statement of material facts, deposition excerpt, and deposition exhibit make it apparent that the results of the court-ordered blood test must be considered by the court when addressing this motion. Neither the plaintiff's expert's testimony nor the defendant's arguments make a great deal of sense unless one understands the result of the HSV-2 test.

Hower, as the party who seeks sealed status for the pleadings and exhibits, has the burden of demonstrating "compelling reasons" requiring that the information remain sealed. Hower's

motion does not reveal any compelling reason why this test result should remain sealed, other than the personal embarrassment associated with a fact that can be readily gleaned from the public docket. Whether this matter is decided by summary judgment or at trial, the test result is part of the material evidence. Given the context of the entire case, that evidence is not entitled to sealed status once it has been filed with the court in support of a dispositive ruling on the merits of the case. Therefore, I now deny the motion to seal in all respects, except that the unredacted versions of Lemire Deposition Exhibit 10, originally filed at ECF No. 37-12, and the Pinsky Affidavit, originally filed at ECF No. 37-13, will remain under seal because they divulge personal identifiers in the form of the witnesses' dates of birth. Those exhibits, redacted as to dates of birth, have been publicly filed at ECF No. 40-6 (Lemire Dep. Ex. 10) and ECF No. 40-7 (Pinsky Affidavit). In addition, the unredacted version of Lemire Deposition Exhibit 5, which is currently filed at ECF No. 37-7, will remain under seal because it includes the defendant's complete date of birth. Hower may either refrain from refileing this exhibit, in which case it will not serve as evidence in support of any statement of material fact he might have cited it in, or refile a version of this exhibit as an additional attachment to his motion for summary judgment. If he selects the latter course of action, the exhibit will be redacted only to remove the month and day of his date of birth.

This order and the motion to seal will remain under seal for fourteen days in order to give the parties ample time to determine how they wish to proceed. At the conclusion of the fourteen-day period, this order and the motion to seal with all accompanying documents, except the three exhibits referenced above, ECF Nos. 37-7, 37-12, and 37-13, will be unsealed and made publicly available on the docket. Entry will be: motion denied, with the exception of the two date-of-birth references in the expert witness materials.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Federal Rule of Civil Procedure 72.

So Ordered.

March 28, 2013

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

KIMBALL v. HOWER

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK

Date Filed: 03/06/2012
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Case in other court: Maine Superior Court, Kennebec
County, CV-12-00052

Cause: 28:1446 Petition for Removal- Personal Injury

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