Filed 4/15/20

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

BRIAN FARGO,

Plaintiff and Respondent,

v.

JENNIFER TEJAS,

Defendant;

ELECTRONIC FRONTIER FOUNDATION et al.,

Movants and Appellants.

No. B299393

(Los Angeles County Super. Ct. BC685343)

APPEAL from an order of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Reversed and remanded with directions.

UCLA School of Law First Amendment Clinic, Eugene Volokh and Jennifer Wilson for Movants and Appellants.

Rutan & Tucker, Ronald P. Oines and Kathryn Z. Domin for Plaintiff and Respondent.

No appearance for Defendant.

Appellants Electronic Frontier Foundation and First Amendment Coalition (collectively, appellants) appeal from an order denying their motion to unseal documents in an underlying action by respondent Brian Fargo (respondent) against Jennifer Tejas (Tejas). We reverse the sealing order and remand the matter to the trial court with directions (1) to redact from the documents protected medical information and statements that would disclose the identity of any third parties and (2) to unseal and release the redacted documents.

BACKGROUND

The parties

Respondent is a video game designer, producer, programmer, and executive. He obtained a default judgment against Tejas in the underlying defamation action in which parts of the record were filed under seal.

Electronic Frontier Foundation is a civil liberties organization that represents the interests of technology users in court cases and in policy debates over the application of law in the online world, and in particular, laws and regulations that impact free expression over the Internet. First Amendment Coalition is a nonprofit public interest organization whose concerns include protecting free speech and promoting the "people's right to know" about their government so that they may hold it accountable.

The underlying action

Respondent sued Tejas in December 2017 for defamation, false light, and intentional infliction of emotional distress after Tejas posted to her Instagram account images of respondent and several paragraphs containing statements that were allegedly defamatory per se because they exposed respondent "to hatred, contempt, ridicule, or obloquy, by depicting [him] as engaging in improper, corrupt, immoral and/or illegal conduct." The complaint did not disclose the contents of Tejas's Instagram post but alleged that it was "read by numerous persons," some of whom "commented about the post on Tejas's Instagram feed." Respondent sought damages and injunctive relief.

Tejas failed to respond to the complaint, and respondent moved for default judgment. At the same time, respondent moved to seal paragraph 9 of his supporting declaration, on the ground that it contained "private medical information" relating to his damages from Tejas's post. Respondent also moved to seal exhibits A, E, and F to his declaration, which contained copies of Tejas's post, arguing that sealing those exhibits was necessary "to ensure that the defamatory statements are not distributed on a wider basis than they already have been . . . further damaging [respondent], adding to his emotional distress, and potentially negatively impacting his occupation in the future."

On July 12, 2018, the trial court granted respondent's motion to seal but made no findings to support the sealing order. A default judgment was entered ordering Tejas to remove the post, prohibiting her from republishing the defamatory statements in the post, and awarding respondent $100,000 in punitive damages.

Appellants filed their motion to unseal on April 4, 2019, seeking access to any portions of paragraph 9 of respondent's declaration that did not contain private medical information and to exhibits A, E, and F of the declaration. Appellants sought access to the sealed documents pursuant to the First Amendment and article I, section 3 of the California Constitution.

Respondent opposed the motion, arguing, among other things, that paragraph 9 of his declaration contains private medical information concerning treatments he had undergone for emotional distress caused by Tejas's defamatory posts, unsealing exhibits A, E, and F would republicize the defamatory content and exacerbate his medical condition, and unsealing would not aid the public in evaluating whether the speech at issue was constitutionally protected because Tejas, as a defaulting defendant, admitted the allegations in the complaint.

After hearing argument from the parties, the trial court denied the motion to unseal in its entirety. The court found that paragraph 9 of respondent's declaration "was properly sealed because it contained private medical information relating to the emotional distress [respondent] suffered as a result of the defamatory post and the treatment he received therefor." The trial court further found that exhibits A, E, and F of respondent's declaration "implicated third parties, including a minor, and the Court concluded that their right to privacy outweighed the right of the public to access this information."

This appeal followed.

DISCUSSION

I. Right of access to records in civil cases

Courts in California, have long recognized a common law right of access to public documents, including court records. (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 483 (*Overstock*), and cases cited therein.) Under the common law right of access, court records are presumed to be "'open to the public unless they are specifically exempted from disclosure by statute or are protected by the court itself due to the necessity of confidentiality.' [Citations.]" (*Ibid.*, quoting *McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685, 1687.)

California law also recognizes a constitutional right of access, grounded in the First Amendment, to court proceedings and court documents. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1208, fn. 25 (*NBC*); *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1575; *Overstock, supra,* 231 Cal.App.4th at p. 484.) "A strong presumption exists in favor of public access to court records in ordinary civil trials. [Citation.] That is because 'the public has an interest, in *all* civil cases, in observing and assessing the performance of the judicial system, and that interest strongly supports a general right of access in ordinary civil cases.' [Citation.]" (*Nicholas*, at p. 1575.) Because orders to seal court records implicate the public's right of access under the First Amendment, such orders are subject to ongoing judicial scrutiny, including at the trial court level. (*Ibid.*)

II. Sealed records rules

California Rules of Court, rules 2.550 and 2.551 (rule 2.550 & rule 2.551) codify the principles articulated by California courts concerning the public's First Amendment right of access to

court records. Rule 2.550 provides that "[u]nless confidentiality is required by law, court records are presumed to be open." (Rule 2.550(c).) Rule 2.550 further provides that a court may order a record sealed "only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest." (Rule 2.550(d).) An order sealing the record must specifically state the facts supporting those findings. (Rule 2.550(e)(1)(A).) The findings may be set forth in cursory terms; however, "[i]f the trial court fails to make the required findings, the order is deficient and cannot support sealing. [Citation.]" (*Overstock, supra,* 231 Cal.App.4th at p. 487, fn. omitted.)

Rule 2.551 allows a party, members of the public, or the court on its own initiative to move to unseal a previously sealed record. (Rule 2.551(h)(2).) In determining whether to unseal a record, a court must consider the same criteria set forth in rule 2.550(c)-(e). (Rule 2.551(h)(4).) Express factual findings are not required, however, when ruling on a request to unseal. (*Ibid*.; *Overstock, supra,* 231 Cal.App.4th at p. 488.)

An order on a motion to seal or unseal documents is appealable as a final order on a collateral matter. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77 [order granting motion to seal]; *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1410 [order denying motion to unseal].)

III. Standard of review

Challenges to a sealing order or an order denying a motion to unseal premised on a common law right of access are reviewed under the abuse of discretion standard. (*Overstock, supra,* 231 Cal.App.4th at p. 490.) Courts are divided, however, on the standard of review applicable to challenges premised on the First Amendment right of access. (Compare *People v. Jackson* (2005) 128 Cal.App.4th 1009 (*Jackson*) and *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367 (*Copley*) [de novo review] with *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292 (*Providian*) and *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974 (*McGuan*) [abuse of discretion standard].)

Providian involved review of an order unsealing documents filed under seal as trade secrets. The court in that case acknowledged that "[r]eview of an order to unseal is unlike review of an order to seal records" (*Providian, supra,* 96 Cal.App.4th at p. 301); however, it then proceeded to articulate, in *dicta,* the standard for reviewing an order to seal: "Were we reviewing an order to *seal,* we would proceed in two stages. First, we would examine the express findings of fact required by [California Rules of Court,] rule 243.1(d)[1] to determine if they are supported by substantial evidence. The examination of substantial evidence is made on the basis of the entire record. [Citations.] Next, we would decide whether, in light of and on the basis of these findings, the trial court abused its discretion in ordering a record sealed." (*Providian*, at pp. 301-302.)

---

1 Former rule 243.1 was renumbered rule 2.550 and amended effective January 1, 2007 and January 1, 2016. (Rule 2.550.)

Citing *Providian,* the court in *McGuan, supra,* 182 Cal.App.4th 974, applied the abuse of discretion and substantial evidence standards to review an order to seal court documents as confidential trade secrets. (*Id.* at p. 988.)

Copley involved an order sealing court records following a court-approved settlement between a school district and a minor student who was sexually assaulted while at school. (*Copley, supra,* 63 Cal.App.4th at p. 370.) The court independently reviewed the sealing order, reasoning that "decisions in cases claiming First Amendment rights are reviewed de novo. [Citation.]" (*Id.* at p. 375.)

The court in *Jackson, supra,* 128 Cal.App.4th 1009 also independently reviewed an order sealing portions of an indictment, the transcript of grand jury proceedings, and search warrants issued in a criminal case involving a celebrity defendant's alleged sexual assault of minors. The *Jackson* court noted that in *Providian*, which involved review of an order to unseal, the court, *in dicta,* proposed the "highly deferential" substantial evidence and abuse of discretion standards when reviewing an order to seal. The *Jackson* court then stated: "*Providian's* rationale arguably is persuasive in applying an abuse of discretion standard of review when deciding the propriety of an order to *unseal* documents relating to trade secrets. We doubt whether it is the appropriate standard when *sealing* the type of documents involved in the instant case." (*Jackson*, at p. 1020, italics added.)

Citing both United States Supreme Court and California Supreme Court authority, the court in *Jackson* concluded that "cases implicating First Amendment rights are subject to independent review." (*Jackson, supra*, 128 Cal.App.4th at pp.

1020-1021, citing *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485 and *In re George T.* (2004) 33 Cal.4th 620, 634.) The court explained that "'[i]ndependent review is not the equivalent of de novo review, "in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes" the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citations.] . . .'" (*Jackson*, at p. 1021.) The court further explained that when the trial court does not take testimony, and there is no credibility of witnesses to determine, independent review is the equivalent of de novo review. (*Ibid.*)

Citing *Jackson,* the court in *Oiye v. Fox* (2012) 211 Cal.App.4th 1036 (*Oiye*) independently reviewed an order sealing the medical records of a plaintiff suing a defendant who had sexually molested her. The court in *Oiye* disagreed, however, that the *Jackson* court had independently reviewed the sealing order because First Amendment rights were involved. The court stated: "[W]e understand the [*Jackson*] court's decision to conduct independent review to have been based on the state of the record, where no declarations were presented regarding the propriety of the sealing order, and not on the First Amendment. The same is true of the sealing order in this case. While plaintiff's counsel did submit a declaration, it was aimed at establishing the history of correspondence. The declaration did not confirm counsel's argument about plaintiff's desire to have her medical records sealed. Accordingly, we will independently

review the propriety of the sealing order." (*Oiye*, at pp. 1067-1068.)

We disagree with the *Oiye* court's characterization of the holding in *Jackson*. The court in *Jackson* plainly stated that independent review applies when reviewing sealing orders that implicate the First Amendment right of access. (*Jackson, supra,* 128 Cal.App.4th at p. 1021.) The *Jackson* court went on to explain that independent review is the equivalent of de novo review when the trial court does not take testimony and credibility of witnesses is not at issue. (*Id.* at p. 1021.)

The sealing order in this case implicates First Amendment rights. We agree with the courts in *Jackson* and *Copley*, that the order is subject to our independent review. Although the trial court here arguably took testimony, in the form of respondent's declaration, witness credibility was not an issue given Tejas's default and the default judgment subsequently entered in respondent's favor. Independent review in this case is therefore the equivalent of de novo review. We apply that standard in reviewing the denial of appellants' motion to unseal.

IV. Trial court's failure to make the required findings

The trial court granted respondent's motion to seal without making the express findings required by rule 2.550(d). The trial court's failure to make the required findings renders its sealing order deficient, and the order cannot support sealing the documents at issue. (*Overstock, supra,* 231 Cal.App.4th at p. 487.)

The trial court subsequently made some of the required findings when it denied the motion to unseal, finding that paragraph 9 of respondent's declaration "was properly sealed because it contained private medical information" and that

exhibits A, E, and F were sealed because they "implicated third parties" whose "right to privacy outweighed the right of the public to access this information." Those findings were insufficient to satisfy the statutory requirements. Rule 2.550 also requires express findings that the "proposed sealing is narrowly tailored" and that "[n]o less restrictive means exist to achieve the overriding interest." (Rule 2.550(d), (e)(1)(A).) Because neither the sealing order nor the order denying the motion to unseal contain the required findings, they cannot support sealing the documents sought by appellants.

V. The sealed documents

Based on our review of the entire record, we conclude that the documents sought by appellants were improperly sealed, not only because the trial court failed to make the required statutory findings, but because less restrictive means exist to protect respondent's private medical information and the identity of third parties.

A. Respondent's declaration

Appellants do not seek to unseal any portions of paragraph 9 of respondent's declaration that contain private medical information relating to the emotional distress respondent suffered because of the defamatory post and the treatment he received. The portions of paragraph 9 that refer to respondent's medical condition and treatment are limited and can be redacted.

The balance of paragraph 9 contains statements that are unrelated to respondent's medical condition or treatment but discuss harm to respondent's reputation and future business prospects. The threatened harm to respondent's reputation and business prospects is not an "overriding interest" sufficient to overcome the First Amendment right of access. (See *NBC, supra,*

20 Cal.4th at p. 1208, citing *State v. Cottman Transmission* (Md.App. 1988) 542 A.2d 859 [closure not justified to minimize damage to corporate reputation]; *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1060-1061 ["the intrusions into family privacy that accompany the dissolution of intimate relationships . . . do not support [the] view that no First Amendment right of access exists in divorce cases"]; *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1147 [threatened invasion to right of privacy and threatened harm to reputation "are not the sort of 'extraordinary circumstances' required to justify a prior restraint"].)

B. Exhibits to declaration

In its order denying the motion to unseal, the trial court states that it did not seal exhibits A, E, and F because of the possibility of reputational harm to respondent. Commercial harm or personal embarrassment are not sufficient grounds, in any event, for sealing the exhibits in their entirety. (*Jackson, supra,* 128 Cal.App.4th at p. 1024.) The sealing order states that exhibits A, E, and F were sealed because they "implicated third parties" whose "right to privacy outweighed the right of the public to access this information." Based on our independent examination of the record, we conclude that references to third parties can be redacted or substituted with pseudonyms to protect the third parties' right to privacy without denying public access to the exhibits in their entirety.

DISPOSITION

The order sealing paragraph 9 of respondent's declaration and exhibits A, E, and F to respondent's declaration is reversed. The matter is remanded to the trial court with directions to redact from those documents statements concerning respondent's

medical condition or treatment, and to redact or substitute with pseudonyms statements that could reveal the identity of any third party referred to in the documents. After redacting such information, the trial court shall release the previously sealed documents.

Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST