

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Privacy Trumps Right of Access to Judicial Documents in ‘Giuffre v. Maxwell’

Southern District Judge Robert W. Sweet’s recent decision in *Giuffre v. Maxwell*, 2018 WL 4062649 (S.D.N.Y. Aug. 27, 2018) addresses the press’s application to unseal potentially salacious documents covered by a protective order in an action concerning allegations of sexual abuse. In Judge Sweet’s words, the motion involved “vital societal concepts, the privacy rights of individuals, the judicial process to establish truth or falsity, the transparency of that process, and freedom of information and of the press.” In ultimately deciding against unsealing, Judge Sweet engaged in a concise but thorough review of the law in the Second Circuit on protective orders and the sealing of “judicial documents,” and the tension between the public’s right of access and interest in transparency in the legal system and the individual’s right to privacy.

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‘Giuffre v. Maxwell’

Giuffre v. Maxwell was a defamation case brought by Virginia Giuffre, who had alleged in the media and in court papers that she was the victim of sexual abuse and trafficking when she was a minor, against Ghislaine Maxwell, who Giuffre claimed had facilitated the abuse. Giuffre sued Maxwell for defamation after Maxwell made public statements denying Giuffre’s assertions and referring to Giuffre’s claims as “obvious lies.” During discovery, the parties entered into a protective order permitting them to designate information produced in discovery as confidential. The protective order provided that at the conclusion of the case, the parties could either have their confidential information returned to them

or destroyed. The protective order also provided expressly that it did not have any “force and effect” on the use of confidential information at trial.

After extensive discovery and pretrial litigation including denial of a summary judgment motion brought by Maxwell, the parties reached a confidential settlement in May 2017, the day before the case was scheduled to begin trial. Almost a year later, in April 2018, the Miami Herald and one of its reporters filed a motion to intervene in the proceedings and obtain an order unsealing all of the previously sealed documents in the case, some of which pertained to discovery and related motions, and others of which had been submitted and sealed in connection with Maxwell’s unsuccessful motion for summary judgment. Judge Sweet granted the motion to intervene, recognizing that intervention for the purposes of challenging a confidentiality order is permissible even years after a case is closed, but then denied the motion to unseal the documents.

Tension Between Privacy And the Public Right of Access

The Right to Privacy. Judge Sweet began his decision by reviewing the legal implications of the right to privacy, discussing, in three short paragraphs, a June 18, 2018 *New Yorker* article by Louis Menand—“Why Do We Care So Much About Privacy?”—and a long series of legal decisions on privacy interests ranging from those of Guantanamo detainees, users of public telephone booths, law enforcement cooperators, and women making decisions about reproductive choice. He observed that “[t]he montage of privacy law that has developed around these disparate concepts does not lend itself to easy determinations of privacy rights,” but that certain areas enjoyed an undisputed right to privacy. He concluded that the case before him required balancing of such privacy interests against the public’s right of access to judicial proceedings, rooted in the First Amendment and the common law. *Id.* at **6-7 (citing cases).

The Public Right of Access to Judicial Documents. Judge Sweet next explained two different but related presumptions in favor of access to court records: a “strong” form, rooted in the First Amendment, and a “weaker” form grounded in the common law. Under both forms, the public has a right of access derived from the need for the otherwise independent judiciary to be both accountable and transparent. *Id.* at *7 (citing *United States*

v. Amodeo, 71 F.3d 1044 (2d Cir. 1995)). He went on to note that the presumption of access is not absolute, and that consideration of what weight the presumption should be given depends on the importance of the material at issue to the court’s exercise of its judicial function, weighed against the strength of the countervailing interest in sealing the documents. The role of the documents is measured along a continuum from matters directly affecting an adjudication to those that come before the court “solely

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to [ensure] their irrelevance.” *Id.* at *8 (quoting *Amodeo*, 71 F.3d at 1049). The presumption is at its strongest for “judicial documents,” which are documents “relevant to the performance of the judicial function and useful in the judicial process.” *Id.* at *9 (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006)). Both the common law and First Amendment presumptions may be overcome by specific findings that sealing is necessary to preserve higher values,

such as privacy interests or public safety, and where the sealing order is narrowly tailored to achieve those interests. *Id.* at *8.

Unsealing Denied

Having set forth the applicable standards, Judge Sweet went on to analyze separately whether the discovery-related and summary judgment documents should be unsealed, deciding with respect to the discovery-related documents that no presumption of access applied, and with respect to the summary judgment documents that the strength of the privacy interests at stake outweighed the presumption of access to the documents.

With respect to the discovery documents, Judge Sweet reasoned that both the parties and dozens of non-parties had relied on the confidentiality order in providing evidence concerning particularly salacious allegations related to sexual acts involving non-parties’ and the Plaintiff’s sexual history. He found that most of the discovery documents, which were sealed during the course of discovery and not relied on by the court in rendering an adjudication, were not “judicial documents,” and lay beyond the reach of any presumption of access. Accordingly, he readily denied unsealing with respect to the discovery documents.

Judge Sweet’s consideration of whether to unseal the summary judgment documents was more complicated because documents submitted on a motion for summary

judgment, whether or not relied upon by the court in reaching its decision, are “judicial documents” to which a presumption of access unquestionably applies. He rejected the intervenors’ argument that the presumption was at its strongest, because in this case, he had denied the motion for summary judgment. Citing the Second Circuit’s seminal decision in *Amodeo*, Judge Sweet reasoned that because denial of summary judgment postpones the final determination of the parties’ substantive rights, the public’s right of access is not as pressing as when summary judgment is granted.

Having determined that only a “lesser” presumption of access applies, Judge Sweet next examined the strength of the countervailing factors (under the common law), or higher values (under the First Amendment inquiry) that would be served by continued sealing of the documents. He identified two countervailing interests or values militating against unsealing.

Specifically, he found that the privacy interests of third parties were the primary countervailing factor. He noted that the Second Circuit has instructed that the weight of the privacy interest should be evaluated in light of the degree to which the subject matter is traditionally considered private rather than public. In this case, Judge Sweet found that the judicial documents openly referred to

and discussed allegations of sexual assault and trafficking of minors by both public and private persons in comprehensive detail, leading him to conclude that a strong privacy interest had been established. He found that even though the Plaintiff, as well as one of the intervenors, had chosen to waive their privacy interests, Maxwell and dozens of others had provided information in reliance on the confidentiality provided by the protective

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order with the understanding that the information would remain sealed.

Judge Sweet cited the integrity of the judicial process as the second factor weighing against unsealing. He reasoned that the parties had relied on the protective order not just in providing discovery, but in arriving at a confidential settlement of the case, concluding that “the entire context of the litigation ... may demonstrate the need to compel the parties to stick to their bargain.”

Finally, Judge Sweet noted that the intervenors had provided no

“particulars” supporting “the need for evidence gathered from the period from 2015 to 2016 concerning events that took place over 15 years ago.” Finding that unsealing would “promote scandal arising out of unproven potentially libelous statements ... and defeat the compelling privacy interests of the parties and non-parties who relied on the Protective Order,” he concluded that extraordinary circumstances outweighed the presumption of access sufficient to deny the motion to unseal. *Id.* at *13.

Conclusion

The intervenors have appealed Judge Sweet’s decision, giving the Second Circuit an opportunity to further explore the difficult balance between the public’s right of access and core privacy interests regarding highly salacious, unproven allegations.