

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Obtaining Discovery Relating To a Confidential Private Mediation

When parties engage in private mediation, they frequently assume that their mediation-related submissions and communications are not discoverable in litigation. In fact, while courts generally cloak mediation with a fair degree of confidentiality, this protection is not absolute and courts have disagreed whether a party seeking discovery of materials relating to a confidential private mediation (as distinct from a court-sponsored mediation) must make a heightened showing of need.

Southern District Judge Jesse M. Furman recently addressed this issue in *Accent Delight International Ltd. v. Sotheby's*, 2020 WL 7230728 (S.D.N.Y. Dec. 8, 2020). In *Accent Delight*, plaintiffs allege that Yves Bouvier, a non-party art dealer, defrauded them out of approximately \$1 billion in connection with their purchase of world-class art that included Leonardo da Vinci's *Christ as Salvator Mundi*. Plaintiffs

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claim that defendant Sotheby's had a role in the scheme. Plaintiffs moved to compel Sotheby's to produce materials relating to a separate, confidential private mediation between Sotheby's and the original sellers of *Christ as*

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'Accent Delight'

In or around 2003, plaintiffs hired Bouvier to assist them in purchasing a world-class art collection. Over

the next 12 years, plaintiffs allege that while Bouvier was purporting to purchase art on their behalf, he was secretly buying the art for himself and then selling it to plaintiffs at a significant markup. One of the artworks at issue is *Christ as Salvator Mundi*, one of only about 15 authenticated paintings by Leonardo da Vinci that exist today. Plaintiffs allege that in 2013, Sotheby's facilitated the sale of *Christ as Salvator Mundi* from a group of sellers (the da Vinci Sellers) to Bouvier for \$83 million, and that Bouvier then sold the painting to plaintiffs for \$127.5 million, a markup of over 50%. Plaintiffs allege that Sotheby's assisted Bouvier by helping him in his efforts "to justify the [purportedly] fraudulent price" he had charged to plaintiffs.

Plaintiffs are not the only ones who have asserted claims against Sotheby's in connection with its role in the sale of *Christ as Salvator Mundi*. In 2016, Sotheby's filed a separate lawsuit against the da Vinci Sellers seeking a declaratory judgment that Sotheby's did not breach its obligations to them in connection with the sale. See *Sotheby's v. R.W. Chandler*, No. 16-9043 (ALC) (S.D.N.Y.). Even before filing that lawsuit—which was assigned

to Southern District Judge Andrew L. Carter Jr.—Sotheby’s and the da Vinci Sellers began mediating their dispute before a private mediator, former District Judge Barbara Jones (the Mediation). In connection with the Mediation, Sotheby’s, the da Vinci Sellers, and Judge Jones signed an engagement letter providing that the Mediation “was a settlement negotiation deemed private and confidential.” With the assistance of Judge Jones, Sotheby’s and the da Vinci Sellers resolved their dispute and entered into a confidential settlement. At no point did Judge Carter order the parties to mediate or address the confidentiality of the Mediation.

In May 2020, plaintiffs served the da Vinci Sellers with subpoenas seeking their confidential settlement agreement with Sotheby’s and other documents relating to the Mediation, which Sotheby’s moved to quash. Judge Furman granted Sotheby’s motion to quash as to the settlement agreement, but declined to quash the remaining requests. Thereafter, Sotheby’s objected to the production of various documents relating to the Mediation, including communications between counsel for Sotheby’s and counsel for the da Vinci Sellers and communications between Sotheby’s and the Mediator (the Mediation Materials). Plaintiffs moved to compel production of the Mediation Materials.

Discovery of Private Mediation Materials Requires A Heightened Showing

In deciding the motion to compel, Judge Furman first addressed the threshold question whether a party

seeking materials from a private mediation must meet the heightened standard of need adopted by the Second Circuit in *In re Teligent*, 640 F.3d 53 (2d Cir. 2011). *Accent Delight*, 2020 WL 7230728, at *2. In *Teligent*, the Second Circuit addressed a related, but different issue: the standard a party must meet when seeking materials relating to a mediation that is subject to a *court order of confidentiality*. *Id.* (citing *Teligent*, 640 F.3d at 56-57, 62). Here, by contrast, the Mediation is subject to the parties’ private agreement of confidentiality. *Id.*

In *Teligent*, the Second Circuit held that “[a] party seeking disclosure of confidential mediation materials” must meet three requirements: the party “must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality.” *Id.* (quoting *Teligent*, 640 F.3d at 58). In explaining the rationale for this heightened standard, the Second Circuit emphasized that “[c]onfidentiality is an important feature of the mediation and other alternative dispute resolution processes.” *Id.* “Promising participants confidentiality,” the Second Circuit reasoned, “promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally.” *Id.* (internal quotations and citations omitted).

Judge Furman observed that since *Teligent*, only two decisions in this District have addressed whether *Teligent*’s heightened standard of need applies to private mediations subject to a

confidentiality agreement not blessed by any court order: (1) *Rocky Aspen Management 204 v. Hanford Holdings*, 394 F. Supp. 3d 461 (S.D.N.Y. 2019), and (2) *Dandong v. Pinnacle Performance Ltd.*, 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012). *Id.* at *3. Those two decisions reached opposite conclusions. *Id.* In *Dandong*, Judge Leonard B. Sand held that the *Teligent* standard applies to private mediations, 2012 WL 4793870, at *4, whereas in *Rocky Aspen*, Magistrate Judge Gabriel W. Gorenstein held that it does not (and, instead, that the “good cause” standard of Federal Rule of Civil Procedure 26(c) applies), 394 F. Supp. 3d at 463-65.

In addressing “which decision is right?”, Judge Furman characterized “[t]he question [a]s a close one.” *Accent Delight*, 2020 WL 7230728 at *4. Judge Furman ultimately concluded that “the heightened standard applies to confidential private mediations,” citing several reasons for his decision. *Id.* As an initial matter, Judge Furman observed that, in a summary order, “the Second Circuit itself has applied the heightened *Teligent* standard in relation to a confidential private mediation.” *Id.* (citing *In re Tremont Sec. Law, State Law & Ins. Litig.*, 699 F. App’x 8, 15 (2d Cir. 2017)). Judge Furman explained that he was “not at liberty to disregard, let alone contradict, [the] Second Circuit[’s] ruling squarely on point merely because it was rendered in a summary order.” *Id.* (internal quotation marks omitted).

Judge Furman further noted that the *Teligent* court’s rationale for applying the heightened standard was not based on the fact that the underlying mediation had been subject to

a court order of confidentiality, but rather, “on the rationale that promising confidentiality in mediation promotes the free flow of information that may result in the resolution of a dispute.” Id. (internal quotation marks omitted). That latter rationale, Judge Furman reasoned, “applies with as much force to private mediations as it does to court-sponsored mediations.” Id. (internal quotation marks omitted).

In addition, Judge Furman noted that “providing weaker protections to communications during a confidential private mediation than to communications during a court-sponsored mediation would discourage parties from agreeing to engage in private mediation.” Id. Judge Furman concluded that such a result—discouraging private mediation—would have a negative impact on both litigants and the court system generally, because “in many cases, particularly more complex cases, private mediation (which is often conducted with a paid, highly experienced mediator who can devote more time to the matter) may be ... more likely to succeed than[] ... [court]-sponsored mediation,” and “when successful, [private mediation] lightens the court’s docket.” Id.

Judge Furman also observed that applying “a heightened standard to disclosure of information or materials from a confidential private mediation finds support in case law outside the Second Circuit.” Id. at *5 (citing decisions from the District of New Jersey and the Northern District of Oklahoma). In fact, Judge Furman noted that “some courts have gone so far as to adopt an explicit federal

mediation privilege that protects communications made in connection with a mediation—private or otherwise—from discovery.” Id. (citing the Sixth Circuit, as well as decisions from the District of Massachusetts and the Northern District of Georgia).

In evaluating whether plaintiffs had met that standard, Judge Furman identified “the relevant inquiry” as “whether [plaintiffs] ... [could] obtain the information in [the] withheld documents” from a source other than the Mediation Materials.

Accordingly, Judge Furman held that *Teligent’s* “heightened standard should and does apply to private mediations in which there was an explicit promise of confidentiality.” Id.

Plaintiffs Failed To Satisfy The Heightened Showing

Having found that *Teligent’s* heightened standard applies, Judge Furman then addressed whether plaintiffs had met the heightened standard. Id. He concluded that “plaintiffs’ request for the Mediation Materials falls short.” Id. Although the subject matter of the Mediation—the sale of *Christ as Salvator Mundi*—was relevant to plaintiffs’ claims, Judge Furman stressed that to satisfy the heightened standard, plaintiffs had to show more than mere relevance. Id. Instead, plaintiffs had to “establish a special need, resulting unfairness, [and] that the[ir] need for the evidence outweigh[ed] the interest in maintaining confidentiality.” Id. (internal quotation marks omitted).

In evaluating whether plaintiffs had met that standard, Judge Furman identified “the relevant inquiry” as “whether [plaintiffs] ... [could] obtain the *information* in [the] withheld documents” from a source other than the Mediation Materials. Id. Judge Furman concluded that “there is no question that plaintiffs can.” Id. Judge Furman observed that “plaintiffs not only have access to those who were involved in, and the documents from, the underlying transaction [i.e., the sale of the painting],” but “even without the Mediation Materials, they are privy to the theory of Sotheby’s case against the da Vinci Sellers from the declaratory judgment complaint that Sotheby’s publicly filed.” Id. Accordingly, Judge Furman denied plaintiffs’ motion to compel production of the Mediation Materials.

Conclusion

Applying the heightened standard from *Teligent* to confidential private mediations accords with the parties’ intent and will encourage private mediation—particularly in instances when, as occurred with Sotheby’s and the da Vinci Sellers, the parties commence a confidential private mediation before engaging in any litigation.