

Potts v. Rives, 2018 NCBC Order 6.

STATE OF NORTH CAROLINA
IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 2877

W. AVALON POTTS, individually
and derivatively on behalf of Steel
Tube, Inc.,

Plaintiff,

v.

KEL, LLC; RIVES & ASSOCIATES,
LLP;

Defendants,

and

STEEL TUBE, INC.,

Nominal Defendant,

and

LEON L. RIVES, II,

Defendant/
Counterclaimant/
Third-Party Plaintiff,

v.

Avalon1, LLC,

Third-Party Defendant/
Counterclaimant.

**ORDER ON PLAINTIFF'S
MOTION TO FILE UNDER SEAL**

1. On September 25, 2018, Plaintiff W. Avalon Potts filed his response in opposition to Defendants' motion for summary judgment, along with numerous supporting materials. (ECF Nos. 118, 119.) Potts provisionally filed under seal 17 of the documentary exhibits attached to his brief, accompanied by a consent motion to seal under Rule 5.2 of the General Rules of Practice and Procedure for the North

Carolina Business Court. (ECF No. 117 [“Mot.”].) For the reasons discussed below, the motion to seal does not comply with Rule 5.2 and does not provide the Court with sufficient information to determine whether sealing is warranted. The Court issues this Order for the purpose of identifying these procedural defects and giving Potts the opportunity to cure them.

2. Documents filed in the courts of North Carolina are “open to the inspection of the public,” except as prohibited by law. N.C. Gen. Stat. § 7A-109(a); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999). However, “a trial court may, in proper circumstances, shield portions of court proceedings and records from the public.” *France v. France*, 209 N.C. App. 406, 413, 705 S.E.2d 399, 405 (2011) (quoting *Virmani*, 350 N.C. at 463, 515 S.E.2d at 685) (emphasis omitted). “The determination of whether [documents] should be filed under seal is within the discretion of the trial court.” *Taylor v. Fernandes*, 2018 NCBC LEXIS 4, at *4 (N.C. Super. Ct. Jan. 18, 2018) (citation omitted). Nevertheless, courts should conceal records sparingly and only “in the interest of the proper and fair administration of justice[.]” *Virmani*, 350 N.C. at 463, 515 S.E.2d at 685.

3. Business Court Rule 5 governs the process for filing documents under seal in this Court. The rule’s procedures ensure that confidential information may be provisionally filed under seal, providing litigants with certain privacy protections until the Court determines whether the sealing is warranted. *See* BCR 5.2(b), (c). They are also designed to notify the public that documents have been provisionally sealed pending the Court’s ruling, and to provide access to a non-confidential

description of those documents. *See* BCR 5.2(d). As Judge Robinson recently observed, the procedures adopted in Rule 5.2 “are intended to strike an appropriate balance between protecting confidential information and providing the public with notice of the Court’s proceedings from the moment a party moves to file a document under seal.” (Order on Countercl. Pls.’ Mot. for Leave to File Under Seal at 3–4, *Gateway Mgmt. Servs., Ltd. v. Carrbridge Berkshire Grp., Inc.*, 2017-CVS-5275 (NCBC filed Aug. 21, 2017), ECF No. 76.)

4. To accomplish these twin goals, Rule 5.2 requires, among other things, that any motion to file under seal include a “non-confidential description of the material sought to be sealed” and “the circumstances that warrant sealed filing.” BCR 5.2(b)(1), (2). This description must give the Court sufficient information to assess whether sealing is warranted. In addition, when a party files a document under seal, it must also file within five business days a public version of the document that redacts only the confidential information. *See* BCR 5.2(d) (“redactions or omissions should be as limited as practicable”). In the “rare circumstance” in which a party seeks to seal the entire document, the party must file (in lieu of filing a public version of the document) a separate notice that (1) indicates the entire document has been filed under seal; and (2) contains a “non-confidential description of the document.” BCR 5.2(d).

5. Potts’s motion to seal fails to comply with these requirements. Through his motion, Potts seeks to seal 17 documents because they contain “corporate financial information, personal information, and tax filings.” (Mot. ¶ 1.) This generic

description is insufficient to support sealing the documents for at least two reasons. The first reason is that it groups all of the documents together even though the nature of the documents varies widely, ranging from tax statements to e-mails to expert reports. The second is that some types of financial and personal information should be shielded from public disclosure, but others should not. Potts, as the moving party, bears the burden of overcoming the presumption that court records should be open to the public. *See Preiss v. Wine & Design Franchise, LLC*, 2018 NCBC LEXIS 55, at *7 (N.C. Super. Ct. June 4, 2018). His motion to seal, though, does not provide sufficient information for the Court to assess whether the financial and personal information contained within the documents is of the type and quality that should be sealed.

6. It is especially difficult to evaluate the financial and personal information at issue here because Potts does not identify it with specificity. Potts seeks to file all 17 exhibits under seal in their entirety. It is clear, though, that several (and perhaps all) of the documents contain a substantial amount of non-confidential information. For example, Plaintiff's 90-page expert report includes a short history of Steel Tube, Inc., a general industry overview, and the expert's curriculum vitae. (*See* Mot. Ex. L2; *see also* Mot. Ex. L1.) There are also certain account statements that include not only financial information but also pages of boilerplate fine print that are commonplace, not confidential. (*E.g.*, Mot. Exs. F3, F4, F5.)

7. Upon careful review, this does not appear to be the "rare circumstance" that warrants filing documents entirely under seal. If so, then it was incumbent upon Potts to file a public version of the provisionally sealed exhibits, limiting any

redactions to the truly confidential information that he contends should not be disclosed to the public. To the extent Potts had a sound basis to argue that any of the provisionally sealed documents should remain sealed in their entirety, he should have filed a notice containing a non-confidential description of each document. He has done neither to this point.

8. Finally, it bears noting that some of the documents that are the subject of Potts's motion appear to include Defendants' confidential information. (*See, e.g.*, Mot Exs. C4, C5, C7.) To the extent Defendants' information is at issue, they are entitled to, but did not, file a supplemental brief in support of sealing the documents. *See* BCR 5.3.

9. Therefore, the Court **ORDERS** as follows:

- A. Potts shall file a supplemental brief identifying, on a document-by-document basis, what information he believes is confidential and why the information should be sealed (e.g., what harm would result from making the information public). The brief shall be due no later than November 2, 2018.
- B. Upon filing his brief, Potts shall also file public, redacted copies of each provisionally sealed document. The redactions must be as limited as practicable.
- C. In the event Potts contends that an entire document must be sealed, he should explain the basis for that contention in his brief. He must also

file a separate notice with a non-confidential description of each such document.

- D. To the extent that any of the protectable information contained within the provisionally sealed documents belongs to Defendants, they may file a supplemental brief supporting sealing of the documents, as allowed by BCR 5.3.
- E. All documents provisionally filed under seal shall remain under seal pending further order of the Court.

This the 19th day of October, 2018.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases