IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JON H. OBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:07cv0960 (CMH/JFA)
	)	
NELNET, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter is before the court on movant Michael J. Camoin's motion to unseal portions of plaintiff's consolidated memorandum in opposition to defendants' motions for summary judgment, certain exhibits attached to the memorandum, and portions of plaintiff's response to defendants' joint statement of undisputed material facts. (Docket nos. 997, 1009-1). Defendants Nelnet, Inc., Nelnet Education Loan Funding, Inc., Brazos Higher Education Authority, and Brazos Higher Education Service Corporation (collective, "opposing defendants") oppose movant's motion. (Docket no. 1001). The other defendants and plaintiff have not filed a response.

Before filing their motions for summary judgment, defendants filed a joint motion for leave to file documents under seal. (Docket no. 281). On June 11, 2010, the court issued an order granting the parties the ability to file under seal any exhibits to their memoranda in support of the motions for summary judgment that were designated as confidential under the terms of the protective order. (Docket no. 308). The order also stated that any motion to maintain an exhibit under seal must be filed by August 20, 2010 and fully comply with Local Civil Rule 5, and any

exhibit filed under seal that was not the subject of a motion to maintain under seal must be filed electronically by August 25, 2010. *Id.*

Defendants filed motions for summary judgment on June 18, 2010. (Docket nos. 315, 318, 321, 328). Plaintiff filed a consolidated memorandum in opposition to defendants' motions for summary judgment along with 211 exhibits and a response to defendants' joint statement of undisputed material facts. (Docket nos. 408, 411–14). Plaintiff redacted portions of the memorandum in opposition and response to defendants' joint statement of undisputed material facts and filed several exhibits under seal. The court issued a stay in this matter on August 13, 2010 and ordered that "all proceedings in this action relating to pending motions and the trial are stayed under further order of the court" and that "[w]hile this matter is stayed no pleadings shall be filed other than those related to the resolution of the claims by the parties." (Docket no. 558). The claims against opposing defendants were dismissed on October 25, 2010, while the stay was still in place. (Docket no. 564, 566–67). The other defendants that filed motions for summary judgment at the same time were dismissed in October and November 2010. (Docket nos. 565, 569, 573–74). The stay remained in place until the case was closed on November 18, 2010.[1] (Docket no. 575). The court never considered or ruled on the motions for summary judgment and opposition that are relevant to this motion.

First, defendants did not miss the deadline for filing motions for the documents to remain under seal. Movant argues that the orders to stay did not supersede the order setting the August 20, 2010 deadline for motions to maintain the seal. (Docket no. 1009 at 10).[2] However, the

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[1] The case was later remanded by the Fourth Circuit to address claims against defendants that were not involved in the motions for summary judgment at issue here.

[2] The undersigned notes that movant made much more robust arguments in his reply brief than in his original *pro se* motion. While arguments made for the first time in replies are disfavored by the court, *see United States v. Chase*, 466 F.3d 310, 314 n.2 (4th Cir. 2006), the

order to stay the case explicitly stated that "[w]hile this matter is stayed no pleadings shall be filed other than those related to the resolution of the claims by the parties." (Docket no. 558). To file a motion to maintain under seal after August 13, 2010 but before August 20, 2010 would have been to disregard this explicit directive from the court. A new deadline for motions to maintain under seal was never given to the parties, all defendants were dismissed, and the case was closed. As such, the order granting the parties leave to file their memoranda and exhibits under seal (Docket no. 308) is still the operative order concerning filing anything related to the motions for summary judgment under seal.

Second, movant has no common law or First Amendment right to access the sought documents and portions of documents. The mere filing of a document does not trigger the guarantee of access. *See In re Policy Management Systems Corp.*, 67 F.3d 296, 1995 WL 541623, at *3 (4th Cir. 1995). That is because the "guarantee of access has been extended only to particular judicial records and documents." *Stone v. Univ. of Maryland*, 855 F.2d 178, 180 (4th Cir. 1988). Judicial records and documents that serve an adjudicative role in the case have a presumption of access, as the "publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case." *Columbus-Am. Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000). However, a document must play a relevant and useful role in the adjudication process for the either the First Amendment or common law rights of public access to attach. *In re Policy Management Systems Corp.*, 1995 WL 541623, at *4.

Typically, documents filed with a motion for summary judgment are considered judicial documents for the purpose of right to access because the documents are used to "adjudicate

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undersigned has considered the arguments made by movant in its reply given his *pro se* status when filing the original motion.

substantive rights" and "serve as substitute for trial." *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252–53 (4th Cir. 1988). But when the case is dismissed prior to the consideration and disposition of the motion for summary judgment, that motion plays no adjudicative role in the case, and the motion and attached exhibits "have not attained the status of judicial documents to which a constitutional or common law presumption of public access might attach." *iHance, Inc. v. Eloqua Ltd.*, 2012 WL 4050169, at *1 (E.D. Va. 2012) (citing *In re Policy Mgmt. Sys. Corp.*, 1995 WL 541623, at *3–4; *Am. Civil Liberties Union v. Holder*, 652 F. Supp. 2d 654, 660–61 (E.D. Va. 2009)); *see also Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004) (holding that the district court must make the determination on whether discovery materials should be kept under seal after they are made part of a dispositive motion "at the time it grants a summary judgment motion.") (quoting *Rushford*, 846 F.2d at 253).

Here, movant seeks exhibits attached to a consolidated opposition to motions for summary judgment. These motions were never considered or decided by the court, and they had no adjudicative role in this case.[3] Thus, the motions for summary judgment, as well as the opposition, its attached exhibits, and response to defendants' joint statement of undisputed material facts, are not judicial documents. Therefore, neither the common law nor First Amendment rights of access have attached to the documents sought by movant. Accordingly, it is hereby

ORDERED that movant's motion to unseal is denied. The sought documents shall remain under seal.

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[3] In fact, if defendants were to move this court to withdraw the motions for summary judgment and all pleadings related to those motions, the court would have no reason to not grant that motion, as the motions had no bearing on the resolution of the claims against defendants.

Entered this 3rd day of July, 2023.

/s/ JFA
John F. Anderson
United States Magistrate Judge

Alexandria, Virginia

John F. Anderson
United States Magistrate Judge