SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4294-15T2
A-4489-15T2

RICHARD GRABOWSKY,

Plaintiff-Respondent,

v.

TOWNSHIP OF MONTCLAIR, PLANNING BOARD OF THE TOWNSHIP OF MONTCLAIR, FOUNTAIN SQUARE DEVELOPMENT LLC, and MONTCLAIR KENSINGTON URBAN RENEWAL, LLC,

Defendants-Appellants.

Argued March 16, 2017 – Decided August 10, 2017

Before Judges Espinosa, Suter and Guadagno.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4420-12.

Jennifer Borek argued the cause for appellant Township of Montclair (Genova Burns, LLC, attorneys; Ms. Borek and Angelo J. Genova, of counsel; Lawrence Bluestone, on the briefs).

Arthur M. Neiss argued the cause for appellant Planning Board of the Township of Montclair (Beattie Padovano, LLC, attorneys; Mr. Neiss, of counsel and on the brief).

Jonathan T. Guldin argued the cause for respondent (Clark Guldin, attorneys; Mr. Guldin, of counsel and on the brief; Madison Brackelmanns, on the brief).

PER CURIAM

New Jersey follows the "American Rule," which requires litigants to bear their own litigation costs, regardless of who prevails. Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). Nonetheless, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). One of the exceptions to the American Rule established by court rule is the "fund in court" exception. R. 4:42-9(a)(2). The question presented by this appeal is whether that exception applies in this case as a matter of law.

After plaintiff Richard Grabowsky, a Montclair taxpayer and owner of numerous commercial properties in Montclair, successfully challenged an ordinance, the trial court relied upon the fund in court doctrine to award him $123,225.91 in attorney fees and costs. We consolidated the appeals of defendants Township of Montclair and Planning Board of the Township of Montclair (collectively, Montclair). For the reasons that follow, we conclude the fund in court exception does not apply here as a matter of law and reverse.

I.

Because the underlying facts are set forth in the Supreme Court's decision, Grabowsky v. Twp. of Montclair, 221 N.J. 536 (2013), we need not repeat them at length here.

Plaintiff filed a complaint in lieu of prerogative writs against the Township, challenging the validity of an ordinance adopted by the Township to permit the construction of an assisted living facility on a site located next to the Unitarian Universalist Congregation Church of Montclair (Unitarian Church). One of the grounds plaintiff advanced for his challenge[1] was that Mayor Jerry Fried, a member of the Township Council and Planning Board, and a second member of the Council, Nick Lewis, each had a disqualifying indirect personal interest in the development project because of their membership in the Unitarian Church and because Fried allegedly made a comment at one of the public hearings "that an assisted living facility would benefit him because he could admit his mother to the facility." Id. at 543. Plaintiff argued that because of these conflicts, their participation violated the Local Government Ethics Law (LGEL),

[1] Plaintiff also alleged the ordinance was "invalid because it was inconsistent with the Township's Master Plan for redevelopment, and the procedures followed by the Council in adopting the amendments to that plan had therefore violated N.J.S.A. 40A:12A-7 and N.J.S.A. 40:49-2." Grabowsky, supra, 221 N.J. at 544.

N.J.S.A. 40A:9-22.1 to -22.25, and the ethics provision of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-23(b). 221 N.J. at 552.

After we affirmed the dismissal of the complaint on the ground that the two officials did not have a conflict of interest,[2] the Supreme Court reversed, stating:

> [W]e hold that when a church or other organization owns property within 200 feet of a site that is the subject of a zoning application, public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified from voting on the application.
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> [Id. at 541.]

The Court remanded the matter to the trial court for limited discovery on the conflict of interest allegations and for a determination on the merits. Id. at 562.

On remand, the trial court granted plaintiff's motion for partial summary judgment, finding that both Mayor Fried and Councilman Lewis had leadership roles in the Unitarian Church or

[2] Plaintiff sought a preliminary injunction barring the Township and Planning Board from considering or approving development applications for the assisted living facility. Although no party filed a motion for any form of dispositive relief, the trial court sua sponte granted summary disposition, and dismissed plaintiff's complaint with prejudice. The Supreme Court agreed with our conclusion that the trial court's summary disposition was procedurally improper under Rule 4:67-1.

were about to assume leadership roles at the Church, and were therefore disqualified from voting on the ordinance. As a result, the ordinance was "invalid, unlawful, arbitrary, capricious, null, void ab initio and of no force and effect."

The trial court also granted plaintiff's request for attorney's fees. The trial court applied the fund in court exception to determine that plaintiff was entitled to attorney's fees, and awarded a total of $123,225.91 in fees and costs. The award was stayed pending appeal.

On appeal, the Township argues the trial court erred in applying the fund in court doctrine because that exception requires the creation of an economic benefit to a class beyond the litigant, and none was created here or identified by plaintiff. The Township also argues the fund in court doctrine should not apply here because the Legislature did not create a fee-shifting provision under either the MLUL or the LGEL. The Township also challenges the procedure followed by the trial court in awarding fees and the use of a lodestar in determining the fee award. The Planning Board challenges the fee award, noting its limited advisory role, and arguing the trial court failed to set forth findings of the specific economic benefits achieved. Because we agree that the trial court erred in applying the "fund in court" exception to award fees here, we need not address the arguments presented

regarding the method of calculation of those fees or the absence of fee-shifting provisions in the MLUL and LGEL.

II.

We review a trial court's decision regarding the award of attorneys' fees with deference and will only disturb the trial court's decision because of a clear abuse of discretion. Packard-Bamberger & Co., supra, 167 N.J. at 444 (citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). Despite the significant discretion trial courts have in making that decision, "such determinations are not entitled to any special deference if the judge 'misconceives the applicable law, or misapplies it to the factual complex.'" Porreca v. City of Millville, 419 N.J. Super. 212, 224 (App. Div. 2011) (quoting Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960)).

"Because 'sound judicial administration is best advanced if litigants bear their own counsel fees,' the prevailing party in litigation generally is not entitled to an award of attorneys' fees." Henderson v. Camden Cty. Mun. Util. Auth., 176 N.J. 554, 563-64 (2003) (quoting N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)); see also In re Estate of Lash, 169 N.J. 20, 30 (2001); N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999).

The fund in court exception is established by Rule 4:42-9(a)(2), which states:

> Out of a fund in court. The court in its discretion may make an allowance out of such a fund, but no allowance shall be made as to issues triable of right by a jury. A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to the fiduciary for administration, subject to approval and allowance or to disallowance by the court upon settlement of the account.

The name, "fund in court," is somewhat of a misnomer because there is no requirement that the court have jurisdiction over the disbursement of the funds in question. See Henderson, supra, 176 N.J. at 564 (citing Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 45 (1968)); Trimarco v. Trimarco, 396 N.J. Super. 207, 215-16 (App. Div. 2007). Rather, the "fund in court" is created when a "plaintiff's actions have created, preserved or increased property to the benefit of a class of which he is a member." Sarner v. Sarner, 38 N.J. 463, 467 (1962).

The fund in court exception applies to "situations in which equitably[,] allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs." Sunset Beach Amusement Co. v. Belk, 33 N.J. 162, 168 (1996). Such a situation exists "when a party litigates a matter that produces a tangible economic benefit for a class of persons that did not contribute to the cost of the litigation," making it

"unfair to saddle the full cost" of the litigation upon the plaintiff. Henderson, supra, 176 N.J. at 564 (citation omitted) (emphasis added).

In Porreca, supra, we determined that Rule 4:42-9(a)(2) required a two-step process:

> First, the court must determine as a matter of law whether plaintiff is entitled to seek an attorney fee award under the fund in court exception as articulated in Henderson. If the court determines plaintiff has met the threshold, it then has the "discretion" to award the amount, if any, it concludes is a reasonable fee under the totality of the facts of the case.
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> [419 N.J. Super. at 228 (emphasis added).]

We observed further,

> The critical question in considering plaintiff's entitlement to request attorney's fees under this Rule is whether a fund in court was created as a result of his litigation. There need not be recovery of a lump sum fund of money; it is sufficient if the fund is the subject matter of the litigation and is thus brought under the control of the court.
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> [Ibid. (emphasis added).]

One of the examples we cited was Trimarco, supra, in which the plaintiff, a one-sixth shareholder, sued the corporation, two other shareholders and a former company officer both individually, alleging wrongful termination, and derivatively on behalf of the corporation, alleging claims of corporate misconduct under

N.J.S.A. 14A:12-7. 396 N.J. Super. at 211-12. The settlement of the matter produced an economic benefit for the corporation — an individual defendant was required to sell the corporation a contiguous lot that she planned to use to the detriment of the corporation. Id. at 217. This tangible economic benefit was, therefore, independent of any relief afforded the plaintiff. Ibid.

Similarly, although the plaintiff did not receive a money judgment in Porreca, supra, the result of the litigation led to significant economic benefits for the City "in the form of increased revenue, clearly 'creat[ing], protect[ing] or increas[ing] a fund for the benefit' of the City's taxpayers." 419 N.J. Super. at 229.

Plaintiff successfully argued before the trial court that his litigation had served more than his own self-interest and that the citizens of Montclair benefitted from the litigation because he established that the amended ordinance was tainted by conflicts of interests. The trial judge acknowledged there was "insufficient evidence . . . to determine whether . . . the Township will enjoy increased tax benefits" when compared to the payments that were to be made by the developer in lieu of taxes. She did not find this to be an impediment to an award under the fund in court exception, stating, "[a] finding of pecuniary benefit is not necessary to sustain a finding that fees are warranted."

As we have noted, for the fund in court exception to apply, there must be a "fund" that was created, preserved, increased or, at least, the subject of the litigation. Although the trial court described plaintiff's suit as producing a "tangible conferred benefit of protecting the integrity of government and fostering citizen confidence," that cannot be substituted for the requirement that the suit produce a "tangible economic benefit" to a class of persons. As to the critical question, "whether a fund in court was created as a result of his litigation," Porreca, supra, 419 N.J. Super. at 228, no fund was the subject matter of the litigation and the plaintiff's suit did not "create[], preserve[] or increase[] property to the benefit of a class of which he is a member." See Sarner, supra, 38 N.J. at 467 (emphasis added). Therefore, plaintiff's lawsuit fails to survive the first step of the Porreca process; he is not entitled to seek an attorney fee award under the fund in court exception as a matter of law.

We note further that the fund in court exception is to be applied "equitably" when "allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs." Sunset Beach, supra, 33 N.J. at 168 (emphasis added). Because no fund was created by the litigation, the source for the attorney fee award would be the municipal coffers. The net effect is that, although there is admittedly

insufficient evidence of any benefit to them in the form of increased tax revenue, taxpayers would be required to fund plaintiff's lawsuit. These circumstances do not rise to the level of a situation where, in equity, the results achieved for the taxpayers make it "unfair to saddle the full cost" of the litigation upon the plaintiff, Henderson, supra, 176 N.J. at 564 (quoting Sunset Beach, supra, 33 N.J. at 168), and appropriate to saddle the taxpayers with those costs.

There are three purposes underlying the American Rule: "(1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience." In re Niles Trust, 176 N.J. 282, 294 (2003). An attorney fee award to plaintiff serves none of these policies but does penalize the municipal taxpayers who derived no tangible economic benefit from the litigation. Therefore, in addition to failing to meet the threshold requirement that a fund be created, preserved, increased or at least the subject of litigation, the award could not be made "equitably" and consistently with the principles underlying our policy that parties should generally bear their own litigation expenses.

Reversed.