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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1292-15T1

NEW JERSEY INTERGOVERNMENTAL  
INSURANCE FUND,

Plaintiff-Appellant,

v.

LORRAINE SELECKY and  
JOEL I. RACHMIEL, ESQ,

Defendants-Respondents.

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Argued telephonically March 16, 2017 – Decided July 11, 2017

Before Judges Koblitz and Rothstadt.

On appeal from the Superior Court of New  
Jersey, Law Division, Union County, Docket No.  
L-2833-15.

Barry M. Capp argued the cause for appellant  
(Ansell Grimm & Aaron, P.C., attorneys; Mr.  
Capp, of counsel and on the briefs).

Joel I. Rachmiel argued the cause for  
respondents.

PER CURIAM

Defendant Lorraine Selecky filed an action through her  
attorney, defendant Joel I. Rachmiel, for malicious prosecution

against the Borough of Roselle Park Police Department (Borough). Selecky settled her claim with the Borough and entered into a settlement agreement that contained a confidentiality clause, prohibiting her and her attorney from disclosing the existence and terms of the agreement. Plaintiff New Jersey Intergovernmental Insurance Fund (NJIIIF), the Borough's insurer, filed a complaint against defendants alleging they breached the confidentiality clause. It appeals from the Law Division's dismissal of its complaint on summary judgment, arguing that the court erred by not concluding defendants breached the agreement when they made statements to a newspaper allegedly relating to the lawsuit and by not enforcing the agreement's provision for liquidated damages. We disagree and affirm.

The salient facts on summary judgment were not disputed and are summarized as follows. Selecky had been convicted in municipal court of a parking offense. She appealed that conviction and we reversed and remanded for a new trial. See State v. Selecky, A-1346-10 (App. Div. Jan. 11, 2012) (slip op. at 1, 11). On remand, the court acquitted Selecky, and Rachmiel filed the complaint for malicious prosecution on her behalf. The parties settled the matter, and the court dismissed her complaint in accordance with the parties' settlement agreement that also required the Borough

to pay Selecky an agreed upon amount. Plaintiff then paid Selecky on behalf of the Borough.

The confidentiality clause of the agreement restricted Selecky's and her attorney's ability to discuss the terms of the agreement with others. It also addressed the impact on that restriction of any legally required disclosure of the agreement by the Borough to others. It stated:

The Parties acknowledge and agree that . . . the Borough . . . may be obligated to disclose . . . this Agreement to persons under the New Jersey Open Public Records Act [(OPRA)<sup>1</sup>] or common law. Notwithstanding the foregoing, [defendants] agree that they shall not disclose, or cause to be disclosed, the terms of this Agreement, or the fact that this Agreement exists, except to their accountants and/or tax advisors, or to the extent otherwise required by law. . . . In the event that this Agreement is required to be disclosed pursuant to applicable law, [defendants] agree that their communication with any person or the media regarding the Action shall be limited to the statement that "the claim was resolved to my satisfaction."

[(Emphasis added).]

In the preamble to the agreement, the parties defined "the Action" as the malicious prosecution suit that Selecky filed against the Borough and identified it by its Law Division docket number. There was no mention of the municipal court action against

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<sup>1</sup> N.J.S.A. 47:1A-1 to -13.

Selecky. The agreement also designated "any violation of the . . . confidentiality provision [to be] a material breach of th[e] Agreement," entitling plaintiff to file "a summary action to enforce same and . . . entitl[ing it] to 50% of the Settlement Sum as liquidated damages[.]"

Within several days of the parties reaching the agreement, an unrelated third party made an OPRA request to the Borough for a copy of the settlement agreement and, on May 20, 2014, authored a blog post about the settlement. The next day, a local newspaper published a similar article. Later, a reporter from the Star Ledger contacted defendants, and on June 1, 2014, the newspaper published an internet posting and article about the settlement, including comments attributed to defendants as follows:

"She was determined. She was going to do whatever it took," said Joel Rachmiel.

. . . .

"I knew I was right, and innocent," said Selecky . . . .

. . . .

"People that I work with, they all said I was crazy," Selecky recalled.

. . . .

"It was really suspect when he (the officer) sent the ticket in the mail," Rachmiel said.

. . . .

"When you know you're right, you have to fight," she said last week, then added, "I'm happy this long journey has come to an end."

The article also quoted the Borough's attorney as saying, "The borough is happy the matter has been resolved without any finding of any improper behavior by any police officer."

Plaintiff contacted defendants, alleged their comments in the Star Ledger constituted a breach of the settlement agreement, and demanded the damages provided for in the confidentiality clause. Defendants rejected plaintiff's contention, and plaintiff filed this action.

Plaintiff moved for summary judgment, arguing that the statements defendants made to the Star Ledger violated the confidentiality provision of the settlement agreement. Defendants cross-moved for summary judgment, contending that the comments only dealt with the municipal court complaint, did not reference the complaint against the Borough or the settlement agreement, and the settlement agreement was already lawfully published twice before the Star Ledger article as the result of the OPRA request.

The motion judge considered the parties' submissions and oral arguments, granted defendants' cross-motion for summary judgment, and denied plaintiff's motion. In her oral decision placed on the record on October 9, 2015, the judge explained that she could not

"see anything in th[e] agreement that was disclosed in these papers" and that Selecky was only "talking about this municipal court action . . . ." She found that Selecky's comments to the Star Ledger "did not discuss" the malicious prosecution action and that the comments had "nothing to do with" the Borough or the police officer. In fact, she found that the statement made by the Borough's attorney to the Star Ledger actually "went beyond what was supposed to be said," because he commented on the settlement agreement and "he should have just said [']it's been resolved to the borough's satisfaction.[']" The judge also observed that the information that plaintiff was concerned about had been disclosed earlier in the blog post by the OPRA requestor. The judge entered an order awarding summary judgment and dismissing the complaint. This appeal followed.

On appeal, plaintiff argues the court erred in "granting defendants' motion . . . since the communications made by defendants clearly violated the terms of the confidential settlement and release." It also contends that the "liquidated damage provision is enforceable and not an unlawful penalty."

We review the trial court's grant of summary judgment de novo and apply the same standard as the trial court. Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 414 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J.

512, 514 (2012)). Summary judgment must be granted if there is no genuine issue of material fact challenged and the moving party is entitled to judgment as a matter of law. R. 4:46-2. No special deference is afforded to the legal determinations of the trial court when no issue of fact exists. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We conclude from our de novo review of the motion record that summary judgment was properly entered in favor of defendants. We affirm substantially for the reasons expressed by the motion judge in her oral decision. We add the following brief comments.

"[P]arties' [to an] agreement cannot override the public's right of access under OPRA," Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 9 (App. Div. 2009), aff'd, 201 N.J. 5 (2010), but they will still be bound to keep information confidential pursuant to a negotiated agreement, even if that information is later disclosed under OPRA. Here, the parties' agreement expressly provided for the type of information that defendants could disclose about the terms of the settlement agreement in this action or even its existence if the Borough disclosed the settlement agreement in response to an OPRA request.

The statements defendants made to the Star Ledger did not breach the agreement. The parties defined the scope of the restriction upon defendants' right to make comments to those related to the settlement agreement in "the Action," which they specifically defined to mean the malicious prosecution matter, not the municipal court case. The statements defendants made, as compared to the Borough's attorney's comments, did not concern the malicious prosecution at all and had nothing to do with "the terms of th[e settlement] Agreement, or the fact that th[e] Agreement exists[.]" Plaintiff's arguments to the contrary are without merit. If the parties intended to expand the scope of the confidentiality requirement, they could have simply identified the municipal court action as being part of "the Action" and included it as a subject matters as well as the terms of the settlement.

Because we conclude that the judge properly awarded summary judgment to defendants, we need not address plaintiff's remaining argument regarding the enforceability of the confidentiality clause's liquidated damage provision.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION