SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3251-14T1

SHARON KELLY O'BRIEN,

Plaintiff-Appellant,

v.

TELCORDIA TECHNOLOGIES, INC.,

Defendant-Respondent.

Argued January 10, 2017 – Decided July 17, 2017

Before Judges Fisher, Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5516-03.

Kevin Barber argued the cause for appellant (Niedweske Barber Hager, LLC, attorneys; Mr. Barber and Christopher W. Hager, of counsel and on the briefs).

Colleen M. Duffy argued the cause for respondent (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Francis X. Dee and Ms. Duffy, on the brief).

PER CURIAM

This appeal returns to us after a remand. O'Brien v. Telcordia Techs., Inc., 420 N.J. Super. 256 (App. Div.), certif.

denied, 210 N.J. 479 (2011). The case began in 2003 when Sharon O'Brien sued her former employer, Telcordia Technologies, Inc., alleging it discriminated against her based on her age when it laid her off. We reversed the trial court's initial grant of summary judgment in defendant's favor on narrow grounds: namely, that it failed to adequately consider a certification containing hearsay statements by company officers discussing an explicitly discriminatory force adjustment policy.

On remand, the trial court conducted a Rule 104 hearing on the certification's contents, which included testimony from some of the hearsay declarants and the certification's signor. The court then ruled that the certification was inadmissible and again granted summary judgment in defendant's favor. We affirm.

I.

We need not thoroughly review the facts, as we reviewed them at length in our previous opinion. O'Brien, supra, 420 N.J. Super. at 260-62. Suffice it to say, plaintiff was a long-time Telcordia employee who served as a managing director in its customer service department. She was laid off in 2002 along with 786 others, while defendant was in the midst of major multi-year force reduction.

Plaintiff, who was fifty-one at the time, alleged she was fired because of her age. After years of litigation, the trial court granted summary judgment in defendant's favor.

Specifically, the court concluded that plaintiff had failed to demonstrate that defendant's legitimate business reasons behind the layoff were pretextual. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-26, 36 L. Ed. 2d 668, 677-80 (1973). We reversed the trial court's grant of summary judgment, but not for any positive error in the court's findings. Indeed, in an unpublished portion of our opinion, we reviewed at length and affirmed the court's conclusions that Telcordia had a legitimate business reason to lay off plaintiff and that plaintiff had failed to provide "substantial evidence of pretext." O'Brien v. Telcordia Techs., Inc., No. A-4021-07 (App. Div. June 13, 2011) (slip op. at 19-31), certif. denied, 210 N.J. 479 (2011).

Nevertheless, we reversed the trial court because we were concerned that it incompletely considered the admissibility of a three-page certification signed by another Telcordia employee, Stephen Sperman.[1] Sperman worked in the same customer service

[1] In addition to being potentially relevant under a McDonnell Douglas analysis, the certification also may have supported a factual claim that Telcordia had mixed motives for terminating plaintiff. Cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-47, 109 S. Ct. 1775, 1787-89, 104 L. Ed. 2d 268, 284-86 (1989). We questioned but declined to decide whether the mixed motives framework was appropriate for analyzing an age discrimination case brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42. If the Sperman certification were found to be inadmissible, that would moot this legal question because the record would lack sufficient evidence of discrimination under any standard. O'Brien, supra, 420 N.J. Super. at 270.

department as plaintiff when he was laid off in November 2002. He, like plaintiff, sued defendant for age discrimination, but ultimately lost in arbitration.

Sperman's certification, submitted in October 2007, reported statements by two officers of the company: John Musumeci, his immediate supervisor, and Linda Apgar, a recruiting manager in the human resources department. According to the certification, Musumeci announced at a staff meeting in the summer of 2002 that the company was implementing a "going forward" force adjustment policy that would incorporate an employee's age and pension eligibility in layoff decisions. He allegedly stated that "Telcordia's human resources department mandated" the policy. When Sperman challenged the policy's propriety, Musumeci reportedly responded that "he was told by . . . Telcordia's human resources to follow this 'going forward' policy and he was going to follow those orders." Sperman certified he relayed his concern over the policy to Apgar, who also informed Sperman the policy was "to be followed."

We noted that the trial court had not sufficiently addressed the admissibility of these hearsay statements within the certification. O'Brien, supra, 420 N.J. Super. at 269. We also lacked a sufficient record "to independently evaluate" the evidence's admissibility and weight. Ibid. We thus kept

plaintiff's cause of action alive, "hanging by the slender thread" of the evidence in the Sperman certification, and required the trial court to examine the admissibility of that evidence. Id. at 272.

On remand, the trial court held a Rule 104 hearing at which Musumeci, Apgar, and Sperman testified. Musumeci and Apgar both denied they made the statements attributed to them in the certification. They further asserted they played no role in plaintiff's firing: Musumeci was never plaintiff's supervisor, and Apgar's role in the company solely involved recruitment and employee placement at the time.[2]

At the hearing, Sperman's account of Musumeci's statements differed markedly from his certification. Sperman denied Musumeci explicitly "said he wanted [to fire] people based upon pension eligibility." Instead, he testified that Musumeci repeatedly asked the directors which of their employees were pension eligible. Sperman explained that the certification recorded his "understanding [of] what [Musumeci] was driving at" from those questions. The hearing also reviewed transcripts from Sperman's arbitration hearing, in which he offered an even less troubling

[2] We previously noted, Musumeci and Apgar "played no role in the lay-off of plaintiff, and indeed, Musumeci appears to have been laid off prior to plaintiff." O'Brien, supra, 420 N.J. Super. at 269-70.

account of Musumeci's words. However, Sperman denied the accuracy of this prior summary from the arbitration hearing.

After reviewing the testimony, the court concluded the certification was inadmissible on three independent grounds: First, Sperman effectively recanted the certification, making it a sham affidavit. Second, having lost significant evidential value in light of the hearing, the certification was unduly prejudicial under N.J.R.E. 403. Third, the certification contained inadmissible hearsay. The court granted defendant's motion for summary judgment a second time. As we agree with the trial court's hearsay analysis, which provides an independent basis to reject the certification, we affirm.

II.

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010). Accordingly, we review evidentiary decisions for abuses of that discretion. We are to uphold such decisions when supported by sufficient credible evidence in the record. Ibid. We also defer to factual findings made pursuant to a Rule 104 hearing. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011). Conversely, if the trial court applies the wrong legal test when analyzing admissibility, we apply de

novo review. Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012).[3]

Rule 1:6-6 requires that all certifications "set forth only those facts which are admissible in evidence." Accordingly, any certification that includes hearsay "may only be considered if admissible pursuant to an exception to the hearsay rule." New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 317 (App. Div. 2014); Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:6-6 (2017). When a statement includes multiple layers of hearsay, each layer must independently meet an exception. N.J.R.E. 805; Estate of Hanges, supra, 202 N.J. at 375 n.1; Konop, supra, 425 N.J. Super. at 402. The proponent of the hearsay bears the burden. See State v. Miller, 170 N.J. 417, 426 (2002).

Plaintiff argues that Musumeci's and Apgar's statements constitute admissions by a party's agent as defined by N.J.R.E. 803(b)(4). Accordingly, their admissibility hinges on whether the declarants were agents of defendant speaking on a "matter within

[3] We reject plaintiff's contention that we should conduct a de novo review of the record in reviewing both the trial court's rejection of the Sperman certification and the grant of summary judgment. The de novo standard applies only to the summary judgment decision after applying an abuse-of-discretion standard of review to the trial court's evidential ruling. See Estate of Hanges, supra, 202 N.J. at 384-85.

the scope of the agency or employment" at that time. N.J.R.E. 803(b)(4).

The exception relies on basic principles of agency, see 4 Wigmore on Evidence § 1078, at 162 (Chadbourn rev. 1972), to construe a declarant's statement as a "vicarious admission[]" by the party itself, 2D New Jersey Practice: Evidence Rules Annotated, comment on N.J.R.E. 803(b)(4) (John H. Klock) (3d ed. 2009). Its application requires a highly fact-sensitive inquiry into the statement's subject-matter and the declarant's scope of authority. See Spencer v. Bristol-Meyers Squibb Co., 156 N.J. 455, 462-63 (1998) (permitting the admission of hearsay statements about a company's hiring decision that was attributed to specific, identified executives "directly involved in the hiring process" because "the statements concerned an issue within the scope of their duties"); see also Griffin v. City of E. Orange, 225 N.J. 400, 419-20 (2016); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 4 on N.J.R.E. 803 (2016) (noting that "N.J.R.E. 803(b)(4) sanctions the admissibility of admissions made by agents, employees, or representatives . . . when the admissions relate to matters within the performance duties of the agent, representative, or employee").

To determine if a statement qualifies as a vicarious admission, the proponent must sufficiently identify the speaker.

Identification is important for two reasons. First, without knowing the declarant's role within a company, the court cannot determine whether the statement was within his or her employment's scope. Accordingly, in Beasley v. Passaic County, we rejected an employee's double hearsay testimony that his supervisor had "told him that 'downtown' wanted plaintiff fired." 377 N.J. Super. 585, 603-04 (App. Div. 2005). Despite recognizing that "downtown" likely referred to someone in the County administration, we concluded "it was impossible to discern the specific declarant and whether the statement was within that person's scope of employment." Id. at 603. Cf. Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 998-1002 (3d Cir. 1988) (double hearsay statement, in which supervisor told plaintiff "they wanted a younger person for the job" without further identifying the declarants, was inadmissible on identical grounds under the parallel federal rule (emphasis added)).

Second, the declarant must be identified in order to be subject to cross-examination. Beasley, supra, 377 N.J. Super. at 603; see Nobero Co. v. Ferro Trucking, Inc., 107 N.J. Super. 394, 401-04 (App. Div. 1969) (permitting hearsay observations allegedly made by one of two possible employees in part because both employees were identified and testified about the statement). The unavailability of the declarant is a fundamental basis for the

general exclusion of hearsay testimony, see James v. Ruiz, 440 N.J. Super. 45, 59-60 (App. Div. 2015), while the availability of the declarant when the hearsay statement is a party admission serves as an important justification for its admissibility, see Biunno, supra, Current N.J. Rules of Evidence cmt. 1 on N.J.R.E. 803(b)(1) (2016) (noting that admissions are excepted from the hearsay rule because the declarant "cannot complain of his inability to confront and cross-examine the declarant, since he himself is the declarant"); 4 Wigmore, supra, at § 1048, at 4-5.[4]

Applying these principles, the trial court found that the statements in the certification allegedly related by Musumeci and Apgar were excludable for the same two reasons. First, the statements fell beyond the scope of their employment. Second, the original declarant who made the statements was unidentified and the scope of his or her employment was unknown. Since we agree

[4] Plaintiff misplaces reliance on Nobero and Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87 (App. Div.) (affirming admissibility of statements of unidentified employees, such as "lift operator at the bottom of the slope[,]" that another employee, named Mike, had collided with plaintiff on the ski slopes and they had observed Mike was intoxicated), certif. denied, 134 N.J. 560 (1993). First, the declarants, though unidentified, were identifiable and could be questioned, and in Nobero, they were. Nobero, supra, 107 N.J. Super. at 404. Second, the unidentified declarants reported empirical observations, not statements of policy that implicated further questions regarding the precise scope of an employee's responsibilities.

that at least one of these two bases applies to each of the two statements, we affirm the trial court's conclusions.

The certification clarifies that Musumeci's statements are double hearsay: his description of the age-based policy was merely a recitation of what he "was told" by "human resources." As the trial court found, this oblique allusion to the original declarant places the statement outside N.J.R.E. 803(b)(4)'s protection. Much like the reference to "downtown" in Beasley, it is impossible to identify the original speaker with any specificity or discern whether the statement was within the declarant's scope of employment or authority. We note that defendant's human resources department included employees, like Apgar, who had no involvement in crafting corporate hiring or firing policies. Moreover, defendant would have no opportunity to bring in this declarant for cross-examination.

We are unpersuaded by plaintiff's argument that the double-hearsay statement of the unidentified human resources person is irrelevant, as Musumeci was himself authorized to articulate corporate policy. First, according to Sperman's certification, Musumeci was not expressing his own policy, but one allegedly stated to him by an unidentified person in human resources. Thus, proof of the corporate policy depended on the admissibility of the unidentified declarant's statements, which the court properly

excluded. Second, even if the scope of Musumeci's employment were relevant, we would defer to the trial court's fact-finding that Musumeci's statement addressed matters outside the scope of his employment. See Goodman, supra, 415 N.J. Super. at 225. Although there was conflicting testimony about the scope of Musumeci's authority, the court relied on sufficient credible evidence in reaching its conclusion.

As for the statements attributed to Apgar, we affirm the trial court's conclusion that the hearsay statements were not within the scope or authority of her employment. As she testified during the 104 hearing, Apgar's position was solely focused on recruiting and redeployment within the company. She explicitly denied having any responsibilities to advise executive directors about the policy. She was never trained by the company on the policy, nor did she have any role in the formation or implementation of the policy. In short, Apgar's position had neither the appropriate authority or scope to qualify her hearsay statement regarding defendant's corporate firing policy as a party admission under N.J.R.E. 803(b)(4).

In sum, we agree with the trial court's conclusion that the statements in the certification regarding defendant's "going forward" policy were inadmissible hearsay. Accordingly, the trial

court properly granted summary judgment in accordance with our 2011 instructions.

In light of the foregoing discussion, we need not reach the trial court's two alternative bases for rejecting the certification: it is a sham affidavit, see Shelcusky v. Garjulio, 172 N.J. 185, 193 (2000), and it is inadmissible under N.J.R.E. 403 for being unduly prejudicial. Both conclusions are based on the record evidence challenging the veracity of the certification. That evidence includes Musumeci's and Apgar's direct refutations during the Rule 104 hearing, as well as Sperman's inconsistent accounts of his conversations in both the Rule 104 hearing and his arbitration hearing. We also need not consider whether, in light of this expanded record, "the evidence is so one-sided that [defendant] . . . must prevail as a matter of law . . . ." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).[5]

Affirmed.

[5] Notably, much of the contradictory evidence was not in the record before us on the previous appeal, which was assembled before the Rule 104 hearing and also lacked transcripts from Sperman's arbitration. See O'Brien, supra, 420 N.J. Super. at 269.