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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-3630-15T1

HARRY JAY LEVIN
and LEVIN CYPHERS,

Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF
OCEAN COUNTY BUSINESS
ASSOCIATION,

Defendant-Respondent,

and

CHUCK LAING, JAMES EVERETT,
PETER FERRO, GLENN VAN PELL,
STEVE POLLACK, LISA MCCOMSEY,
CHRIS ROSATI, GERRY RODELLI,
SHEREE ROBINSON, PAUL LOSEFF,
and CHAD WHITE, Members of the
Board of Trustees, OCEAN COUNTY
BUSINESS ASSOCIATION GRIEVANCE
COMMITTEE and MEMBERS OF THE
GRIEVANCE COMMITTEE, Individually,¹

Defendants.

Argued May 23, 2017 — Decided August 25, 2017

¹ A stipulation of dismissal without prejudice was filed as to the individual defendants on July 20, 2011; they are not parties to this appeal.

Before Judges Messano and Espinosa.

On appeal from Superior Court of New Jersey,
Chancery Division, Ocean County, Docket No.
C-123-11.

Harry Jay Levin argued the cause for
appellant (Levin Cyphers, attorneys; Mr.
Levin, Colleen Flynn Cyphers and Ronald J.
Bakay, on the briefs).

William J. Raulerson argued the cause for
respondent (Law Offices of Stephen E.
Gertler, attorneys; Cynthia A. Satter, on
the brief).

PER CURIAM

Ocean County Business Association (OCBA) is a private business organization "whose stated purpose is to advance the interest of business in Ocean County." OCBA terminated the membership of plaintiff Harry Jay Levin, an attorney, after a grievance was filed by another OCBA member. Plaintiffs initiated this litigation to compel OCBA to reinstate Levin's membership.² They appeal from a March 18, 2016 order, granting the summary judgment motion of defendant Board of Trustees of OCBA and denying plaintiffs' motion to enforce litigant's rights. We affirm.

² The lawsuit was brought by Levin and his law firm, Levin Cyphers. The complaint asserts Levin was a member of OCBA, makes no corresponding allegation as to Levin Cyphers and seeks the reinstatement of "plaintiff," a singular designation. We therefore refer to Levin and Levin Cyphers as "plaintiffs" and identify the individual and law firm individually where appropriate.

I.

Levin Cyphers retained the services of another OCBA member, Adam Safeguard & Inquiry Systems, Inc. (Adam Safeguard), owned by Dennis DeMey, to perform investigative services. In December 2010, DeMey filed suit against Levin Cyphers for failure to pay fees that were owed for services rendered. In January 2011, DeMey filed a grievance with OCBA against Levin, asserting he had failed to pay any invoices for work Adam Safeguard had been retained to perform. Levin was advised of the grievance and asked for a response. Levin acknowledged generally that he had retained Adam Safeguard to perform work on behalf of clients, identified certain criticisms of the invoices and contended the grievance process should not serve as an alternate form of collections processing but rather should be delayed pending the adjudication of the lawsuit.

Approximately six weeks later, Levin received an e-mail from then-president of the OCBA, Chuck Laing, terminating Levin and his law firm from the association, "effectively immediately." Levin unsuccessfully sought an adjournment of the grievance process pending resolution of DeMey's lawsuit. The request was denied.

In June 2011, plaintiffs filed a verified complaint seeking immediate reinstatement as members of OCBA, and an order to show cause (OTSC) seeking emergent relief. Defendant subsequently

filed an answer, separate defenses, jury demand, and certifications.

The following month, Levin Cyphers settled with Adam Safeguard. The parties entered into a consent order of settlement in which all claims and counterclaims were dismissed with prejudice. The consent order also provided:

[B]y entering into this Consent Order of Settlement, the parties hereby mutually release, relinquish, discharge and waive any and all claims they have or may have by and against each other, including those raised or which could have been raised in this litigation, including all claims known or unknown by them up to the date of this Consent Order of Settlement

In September 2011, after hearing oral argument on the OTSC the trial judge found the process that resulted in plaintiffs' expulsion from OCBA was "flawed and did not comply with the OCBA Constitution." He ordered the grievance process to be "reinstated, providing [plaintiffs] the opportunity to address the grievance as part of a fair and impartial process," and set forth a procedure to be followed:

Plaintiffs objected to the makeup of the grievance committee that was selected. The trial judge entered a new order, appointing the third member of the grievance committee, and setting new dates for actions by the grievance committee and plaintiffs.

After meeting with the parties and receiving supporting documents from them, the grievance committee unanimously recommended that plaintiffs' membership be terminated.

Plaintiffs filed a summary judgment motion, seeking reinstatement and arguing defendant failed to follow its own constitution and the court's orders. Defendant filed a cross-motion for summary judgment, "arguing that plaintiffs did not have a sufficient interest to warrant judicial intervention." The trial judge denied plaintiffs' summary judgment motion and granted defendant's summary judgment motion.

Plaintiffs appealed. In an unpublished opinion, Levin v. Board of Trustees of Ocean County Business Association, A-5596-11 (Mar. 1, 2013), certif. denied, 216 N.J. 4 (2013), we reversed the grant of summary judgment to defendant, reinstated the complaint and affirmed the denial of plaintiff's summary judgment motion "insofar as it sought immediate reinstatement." Id. at 13. We acknowledged plaintiffs were provided with the written grievance prior to being interviewed by the grievance committee. The grievance procedure remained flawed and "fundamentally unfair," however, because defendant did not provide plaintiffs "with the right to confront the grievant" or "a hearing before the board." Ibid. We remanded to the trial court, compelling a new grievance procedure that was not "to be equated with the similar rights

guaranteed by our federal and state constitutions," but conducted pursuant to the following procedures:

The right to confront the grievant at the hearing before the board may be brief and informal, but plaintiffs have a right to be present at all stages at which the grievant provides information both before the grievance committee, which should be reconstituted with members not involved in the prior proceedings, and before the board. Plaintiffs should be offered the right to elicit information from the grievant in the proceedings before the grievance committee

[Id. at 13-14.]

After our decision, plaintiffs filed a motion to enforce the settlement with Adam Safeguard, seeking to bar DeMey from appearing at the grievance proceeding because he had released all claims in the settlement. The trial judge denied the motion, noting that the settlement with DeMey did not bind the OCBA or preclude it from calling DeMey as a witness.

In December 2014, the trial judge prepared an order setting forth the grievance procedure to be followed and reviewed it, line by line, with counsel. Relevant to this appeal, the resulting order addressed the composition of the grievance committee in the following language:

1. The grievance shall be heard by a new Grievance Committee constituted with three members not part of the prior committees or part of prior boards which have participated in the grievance. The new committee shall be

constituted as soon as practical. The selection shall be conducted at the next regularly scheduled meeting after January 1, 2015.

2. The new Grievance Committee shall be selected randomly from OCBA members who consent and have not otherwise been excluded by [the] Court pursuant to paragraph 1.

The proposed order provided for plaintiffs to "provide a written list . . . of any current OCBA member which Mr. Levin has in good faith . . . a conflict and should not be permitted to hear this grievance." Levin abjectly refused to do so, stating there was "no reason for [him] to identify to a group of people that [he's] got conflicts with them," and that he "[didn't] want a list floating around there of the people that [he has] conflicts, potentially conflicts with." As a result of Levin's objection, two paragraphs were deleted from the proposed order. The next paragraph that was proposed called for the random selection of OCBA members who volunteer and have not otherwise been excluded. Levin objected to that on the ground that volunteers would be inclined to be biased. Following his objection, the paragraph was revised to the language that was included in the order.

At the end of the review process, Levin expressly withheld his consent to the form of the order and stated, "I think Your Honor has exceeded what the Appellate Division has said you should do."

A new grievance committee, consisting of Richard Gilchrest, Tony Baumer and Warren Segall, was convened on June 1, 2015. None of the three were named defendants in the complaint filed by plaintiffs or participated on the prior grievance committee. The committee issued its findings and conclusion in writing that plaintiffs violated OCBA Bylaws, Article XI 3-d, which was also a violation of the "OCBA Code of Ethics: Provide goods and services as promised and on time."³ The grievance committee recommended to the OCBA Board of Directors that "Levin not be reinstated to membership."

Defendant Board of Trustees of OCBA conducted a hearing on the grievance, at which both Levin and the grievant were allowed "to present their cases as if for the first time." At the outset of the hearing, each attendee stated his or her name for the record. Four of the Board members, Lisa McComsey, Chad White, Sheree Robinson and Chuck Laing, had been individually named defendants in plaintiffs' lawsuit before plaintiffs voluntarily dismissed them without prejudice in July 2011. Levin did not object to their participation.

³ OCBA has a Code of Ethics which, in part, requires its members to "[r]esolve all complaints in a timely manner" and "[r]espect all customers, employees, suppliers, and competitors."

Levin was given an opportunity to directly address the Board concerning each matter and "provide all information he had." He was able to cross-examine the grievant, and address the evidence presented.

The Board reviewed the Grievance committee's findings and concluded its recommendation was justified. By unanimous vote, the Board concurred with the recommendation that Levin not be reinstated to membership. In addition to Laing, who recused himself from voting "because of possible conflict in this matter," McComsey, Robinson, and White, the Board members in attendance who voted were: Regina L. Gelzer, Joseph Caldeira, Andrew Knox, Sandra Levine, and Christopher Aldrich.

Thereafter, defendant filed a motion for summary judgment and plaintiffs filed a cross-motion to enforce litigant's rights pursuant to Rule 1:10-3. Following oral argument, the trial judge granted defendant's motion for summary judgment, denied plaintiffs' motion to enforce litigant's rights as moot, and denied defendant's motion to preclude portions of plaintiffs' briefs.

II.

On appeal, plaintiffs argue they should be reinstated as members of OCBA. They assert they were not provided a fair and impartial hearing because OCBA Board members who decided whether plaintiffs should be reinstated were previously named as

defendants in this matter and therefore had a conflict of interest. They also contend that, as part of the settlement with Adam Safeguard, DeMey agreed not to participate in the OCBA grievance procedure, effectively ending the grievance. Plaintiffs argue the trial court erred in failing to enforce the settlement agreement pursuant to this interpretation. Defendant counters that plaintiffs waived any objection to the composition of the Board and that, in any event, there was no conflict of interest. Defendant argues further the trial court did not err in concluding the settlement agreement between plaintiffs and Adam Safeguard did not foreclose DeMey from appearing at the grievance hearing.

After considering these arguments in light of the record and applicable principles of law, we conclude plaintiff's arguments lack merit and further, that the argument regarding the settlement agreement with Adam Safeguard lacks sufficient merit to warrant discussion in a written opinion.⁴ R. 2:11-3(e)(1)(E).

⁴ After prevailing in their appeal, specifically winning the right to confront DeMey at the new grievance proceeding, plaintiffs attempted to foreclose any testimony from him through their motion to enforce settlement. At oral argument, the trial judge noted the issue regarding whether DeMey could testify against plaintiffs had existed since 2011, when the case was settled, and that "[t]he Appellate Division had a right to know that" in deciding the parameters of the proper procedure to be followed. Levin replied, "No, they didn't." We agree with the trial judge, both in this observation and in his disposition of the motion.

III.

In reviewing a summary judgment decision, we view the evidence "in the light most favorable to the non-moving party" to determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review questions of law de novo, and need not accept the trial court's conclusions of law. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

Although plaintiffs argue to the contrary, there are no material issues of fact here. The issue is a purely legal question, whether the procedure followed by the Board conflicts with public policy, its own internal rules or any order of the court.

"Private associations do not have unfettered discretion with respect to their membership decisions." Cipriani Builders, Inc. v. Madden, 389 N.J. Super. 154, 164 (App. Div. 2006) (citing Rutledge v. Gulian, 93 N.J. 113, 118-24 (1983); Higgins v. Am. Soc'y of Clinical Pathologists, 51 N.J. 191, 198-204 (1968); Falcone v. Middlesex Cty. Med. Soc'y, 34 N.J. 582, 588-98 (1961)). When a member seeks judicial intervention regarding a private association's member decision, the court must determine whether

"'plaintiff [has] an interest sufficient to warrant judicial action,' and if such an interest is shown, whether 'that interest [has] been subjected to unjustifiable interference by the defendant[.]'" Cipriani, supra, 389 N.J. Super. at 165 (alterations in original) (citing Rutledge, supra, 93 N.J. at 118). When, as here, the private association is a professional or trade association, "a court will extend greater protection to membership." Id. at 166. Still, our review of a private association's membership decision is limited. Ibid. We will "provide relief . . . only if the association's rules or its actions . . . 'conflict with public policy.'" Id. at 166-67 (quoting Higgins, supra, 51 N.J. at 202). "The essence of a fair procedure for expulsion of a member of a private association, particularly one that affects the member's economic interests, is notice of the basis for the proposed expulsion and a fair opportunity for the member to respond to the charges." Id. at 170.

In this case, it was determined that plaintiffs have an interest sufficient to warrant judicial action, Levin, supra, slip op. at 10, and that the procedure initially employed to terminate plaintiffs' membership was fundamentally unfair. At our direction, plaintiffs were to be afforded a new hearing at which they would be provided the rights: to be present at all stages at

which the grievant provided information to the grievance committee and the board, to confront the grievant, and to elicit information from the grievant in the proceedings before the grievant committee. We also directed that the grievance committee "be reconstituted with members not involved in the proceedings." Thereafter, the trial judge entered a very detailed order regarding the procedure to be followed that was designed to implement the principles we outlined in our decision.

Plaintiffs do not contend that defendant failed to honor any of the procedural safeguards required by our prior decision, the trial court's detailed order or the constitution and bylaws of OCBA. Specifically regarding the heavily litigated issue of the membership of the grievance committee, we note the three members were neither named defendants nor participants on the original grievance committee.

Plaintiffs' claim they were denied a fair and impartial hearing is based upon the fact that the voting Board included members who had been individual defendants in this case. Plaintiffs claim they were unaware that these Board members would participate in the grievance decision-making. This contention, which was rejected by the trial court, is irremediably refuted by the record. As we have noted, all the Board members identified themselves by name at the outset of the hearing. Moreover, when

questioned by the trial judge, Levin conceded he was aware board members were in the room that he named in the litigation previously because "[t]hey all sat in the front." Even if, as plaintiffs contend now, Levin was unaware which of the Board members would vote, it was incumbent upon him to inform the Board that he objected to having former defendants participate in the decision. Yet, no objection was made.

As the trial judge correctly pointed out, the Board of Trustees of OCBA was the lead defendant in this matter. Therefore, the ultimate decision on whether plaintiffs would be reinstated was always going to be made by an entity named as a defendant in this action. And, although argument was presented regarding the participation of individual defendants in the grievance committee, no argument was ever presented regarding who could participate at the Board level.

The record clearly shows plaintiffs were provided "[t]he essence of a fair procedure . . . notice of the basis for the proposed expulsion and a fair opportunity for the member to respond to the charges." Cipriani, supra, at 170. The very nature of our review of a private association's decisions on these matters assumes that the final decision will be made by the association whose decision has been challenged. Plaintiffs have cited no authority that dictates the exclusion of Board members on the

basis they raised for the first time following the Board's decision. We are satisfied the hearing complied with public policy, the OCBA's internal rules and the directions of this court and the trial court.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION