SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0834-15T2

RAFAEL VALENTIN,

Plaintiff-Appellant,

v.

BOROUGH OF PENNS GROVE and SARAH RENNER in her official capacity of the Records Custodian of the BOROUGH OF PENNS GROVE,

Defendants-Respondents.

Submitted May 2, 2017 – Decided May 2, 2018

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Salem County, Docket No. L-0088-15.

Law Offices of Conrad J. Benedetto, attorneys for appellant (Conrad J. Benedetto, on the brief).

Puma, Telsey & Rhea, PA, attorney for respondents (Adam I. Telsey and Kristin J. Telsey, on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Plaintiff Rafael Valentin appeals from a September 18, 2015 order denying reconsideration of an order awarding sanctions under Rule 1:4-8 to defendants the Borough of Penns Grove and Sarah Renner. We affirm.

I.

The following facts are found in the certifications, the other documents filed with the trial court, and the hearing transcripts.

On April 24, 2015, plaintiff submitted to Renner, the Borough's Acting Clerk, a request for information under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA). The request "ask[ed] that copies of the materials listed be provided via electronic mail" or "CD ROM via mail".

Renner later certified: She received plaintiff's request on April 24, and she compiled all responsive documents by the due date of May 5. See N.J.S.A. 47:1A-5. However, the documents were too voluminous for her to scan and email. On May 5, she telephoned plaintiff and left a message. When he had not called her back by May 6, she sent him an email referencing her telephone call and stating: "The response to your April 24 OPRA request is ready. However, the documents are [too] voluminous for email. They can be picked up anytime." She received no response from plaintiff.

On May 26, 2015, plaintiff filed a complaint and an order to show cause against the Borough and against Renner in her official capacity as the Borough's record custodian. The complaint was signed and verified by Charles E. Reynolds of the Law Firm of Conrad J. Benedetto. Reynolds asserted that "[a]s of the date of their Verified Complaint, [plaintiff] has not received any response to the April 24, 2015 OPRA request." Reynolds contended defendants had violated OPRA by not providing plaintiff with copies of the requested documents. On May 27, 2015, the trial court signed plaintiff's order to show cause and required defendant to appear for a hearing on June 19.

On May 29, defense counsel sent Reynolds a letter giving notice that "you have filed the above referenced Verified Complaint dated May 22, 2015 in violation of Rule 1:4-8," demanding the complaint be withdrawn within twenty-eight days, and stating defendants would seek sanctions otherwise. The notice recounted Renner's call, attached her email, noted she still had not heard from plaintiff or his counsel, and reiterated that "the documents remain ready and waiting at the Penns Grove Clerk's Office."

Renner later certified: On June 1, plaintiff called Renner and apologized for not checking his email. He said he had no idea the documents had been made ready and were waiting for him. Plaintiff picked up the documents that day.

On June 5, defense counsel sent Reynolds a letter referencing the earlier notice under Rule 1:4-8(b). The letter related the June 1 events, and stated that if the complaint was not withdrawn, defendant would seek sanctions for any legal fees they were forced to incur.

On June 9, defendants filed an answer to the complaint. They filed Renner's certification, which attached her May 5 memorandum to plaintiff responding to his OPRA request, as well as her May 6 email to him. Defendants also filed a certification from their counsel attaching his May 29 and June 5 letters.

Reynolds sent defense counsel a June 9 letter responding to his May 29 and June 5 letters. Reynolds's letter stated that the documents produced to plaintiff on June 1 were inadequate, and that "[p]laintiff will not withdraw his complaint." In response, on June 18, defendants filed with the trial court Reynolds's June 9 letter, the approximately 100 pages of documents Renner had produced to plaintiff, Renner's handwritten notes documenting her attempts to reach plaintiff on May 5 and 6, defendants' signed acknowledgement he received the documents on June 1, and second certifications from defense counsel and from Renner, both disputing the document production were inadequate.

The hearing commenced as scheduled on June 19. Plaintiff's counsel failed to appear. Benedetto's office called the trial

court asking if Benedetto could appear by phone. The court denied the firm's request for phone argument. The firm then requested an adjournment, which the court also denied.

The trial court put the following on the record. The court was not agreeable to a request to appear by phone made "five minutes before" the hearing. The court expected plaintiff's counsel to be at the hearing because there were "a lot of things I'd like to discuss and it would be easier to have counsel here." The court was "not going to take an adjournment request right at the hearing date and time. We're ready to go. That's something that should have been posed to us well in advance." Plaintiff's counsel obtained an order to show cause setting a hearing date, failed to appear for the hearing, and had offered no explanation why his office's call was not made earlier.

At the trial court's request, defense counsel called Benedetto's office. The office advised that an attorney named Dorizio was assigned to represent plaintiff and was on trial in the Bucks County Court of Common Pleas in Pennsylvania. Defense counsel called the Bucks County court and was advised that "there were no trials being conducted at this time."

Plaintiff also attempted to submit a reply brief as the hearing was starting. Under the May 27 order, plaintiff's reply was due by June 16, three days before the hearing. The trial

court told defense counsel that "right as I was walking out, my secretary got some kind of reply to your response" but it was lengthy and the court had not read it. Defense counsel said he called his office fifteen minutes or so after the hearing was supposed to start, and learned that plaintiff had just served a reply brief. The court noted defense counsel did not receive plaintiff's submission until "15 minutes into the hearing time and that's just too late and counsel's not here."

The trial court turned to the merits. The court noted that plaintiff's complaint merely alleged that an OPRA request was made and no documents were provided. The court found that, "before this Complaint was ever filed," defendants made available to plaintiff the extensive documents he requested, called him, and emailed him. The court noted plaintiff later acknowledged receiving the email and the documents.

The trial court dismissed plaintiff's complaint with prejudice. The court denied plaintiff's motion for fees, ruling the catalyst theory did not apply because plaintiff's OPRA request "was the catalyst, not this proceeding. Why they even bothered to file this proceeding is not clear from what we have and the case should have been withdrawn."

On July 8, defendants filed a motion for sanctions pursuant to Rule 1:4-8. Defendants' attorneys filed two certifications

which added the following. In the June 19 call, the Bucks County court had indicated that neither Dorizio nor any attorney from Benedetto's office was on trial or scheduled for trial. There was no explanation why Reynolds was not available for the June 19 hearing.

On August 7, Benedetto filed a certification, stating that a contract attorney had been assigned to represent plaintiff at the 1:30 p.m. hearing on June 19, that the attorney had attended a 9:00 a.m. status conference in Bucks County which became a trial, and that Benedetto was out of town on personal business. Benedetto asked that no sanctions be imposed.

On August 14, the trial court granted defendants' motion for sanctions, finding as follows. Plaintiff's complaint alleged a failure to provide documents under OPRA. ORPA requests must be taken seriously and "the town did, in fact, take it seriously. They responded and made the documents available." Once plaintiff's counsel received the Rule 1:4-8 letters, he should have recognized he "didn't have a claim anymore." He had "plenty of opportunity" to withdraw the complaint or to make a "demand that was more specific," but he failed to withdraw the complaint, failed to have anyone at the hearing to give an explanation, and filed "no responses" until the court was "walking out on the bench." "[A]s a result, the citizens of Penns Grove [had to] pay $1725 . . . for

counsel to represent them on a case that really had no basis." The court ordered that Benedetto, his firm, and Reynolds were jointly and severally liable to reimburse defendants $1725.

Around the end of August, plaintiff filed a motion for reconsideration of the award of sanctions. The trial court denied the motion at a September 18 hearing. The court reiterated that plaintiff filed a complaint seeking documents, defendants responded that they had produced all responsive documents, and plaintiff did not dispute that by filing a response prior to the hearing or attending the hearing in person or through counsel. The court found that once plaintiff's counsel knew defendants had answered plaintiff's OPRA request, it was "very cavalier" for plaintiff and his counsel to "pursue something that they know that there's no reason to pursue."

On October 13, 2015, plaintiff filed a notice of appeal from the September 18 order.

II.

Defendants argue plaintiff cannot now appeal the June 19, 2015 judgment dismissing the complaint, because it was not the subject of a timely reconsideration motion or a timely notice of appeal. We agree.

In his notice of appeal filed October 13, 2015, plaintiff stated he appealed from the order entered on "September 18, 2015,"

namely the order denying reconsideration of the August 14 sanctions order. He similarly appealed only the September 18 order in his amended notice of appeal.

"In civil actions the notice of appeal . . . shall designate the judgment, decision, action or rule, or part thereof appealed from[.]" R. 2:5-1(f)(3)(A). "[I]t is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461-62 (App. Div. 2002) (quoting Pressler, Current N.J. Court Rules, cmt. 6 on R. 2:5-1(f)(3)(i) (2002)). "Consequently, if the notice designates only the order entered on a motion for reconsideration, it is only that proceeding and not the order that generated the reconsideration motion that may be reviewed." Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1 on R. 2:5-1 (2018); see, e.g., Fusco, 349 N.J. Super. at 462. Thus, plaintiff "has no right to our consideration of this issue." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004).

Nonetheless, plaintiff's case information statement (CIS) said he sought to appeal not only the September 18 order but also the August 14 sanctions order and June 19 judgment dismissing his complaint. If "a motion for reconsideration . . . implicate[s] the substantive issues in the" order sought to be reconsidered,

and if "the basis for the motion judge's ruling on [that order] and [the] reconsideration motion[is] the same," then "an appeal solely from . . . the denial of reconsideration may be sufficient for an appellate review of the [earlier order], particularly where those issues are raised in the CIS." Fusco, 349 N.J. Super. at 461. In such an instance, we may "choose to exercise our discretion" to review the earlier order. Potomac Aviation, LLC v. Port Auth. of N.Y. & N.J., 413 N.J. Super. 212, 222 (App. Div. 2010).

We choose to exercise our discretion to review the August 14 sanctions order, because "the basis for the motion judge's ruling on [that order] and the reconsideration motion was the same." Ibid. (quoting Fusco, 349 N.J. Super. at 461).

By contrast, the bases for the motion judge's June 19 judgment dismissing the complaint and its September 18 order denying reconsideration of the sanctions order were not "the same." Fusco, 349 N.J. Super. at 459-60. The dismissal ruling examined whether defendants had responded to plaintiff's OPRA request. The ruling denying reconsideration turned on whether the requirements for sanctions under Rule 1:4-8 were met.

We decline to exercise any discretion we may possess to consider an appeal from the June 19 judgment. That judgment stated that plaintiff's "complaint [and] Order to show cause is dismissed

with prejudice." Thus, the June 19 judgment was a final judgment. Plaintiff did not seek to reconsider or appeal that judgment within the time periods set by the rules.

The trial court's June 19 judgment did not reserve any issues. This was not a situation where an order was not final because "the judge reserved on the issue of counsel fees and costs[.]" N.J. Mfrs. Ins. Co. v. Prestige Health Grp., LLC, 406 N.J. Super. 354, 358 (App. Div. 2009). Indeed, no motion for sanctions had yet been filed. "A motion for sanctions" may be filed up to "20 days following the entry of final judgment." R. 1:4-8(b)(2) (emphasis added).

In any event, after defendants filed a motion for sanctions, plaintiff opposed sanctions without challenging the dismissal. After sanctions were granted, he only sought to reconsider the sanctions order. Moreover, he filed his reconsideration motion more than two months after the judgment, well beyond the non-extendable twenty-day limit. R. 4:49-2; see R. 1:3-4(c). His notice of appeal was filed almost four months after the judgment, far beyond the forty-five day limit. R. 2:4-1(a). His notice of appeal said he was appealing only the September 18 order denying reconsideration of the sanctions. Under those circumstances, we will not exercise our discretion to allow plaintiff at this late date to challenge a final judgment he never challenged before.

Accordingly, we review only the August 14 order granting sanctions and the September 18 order denying reconsideration of the sanctions.

III.

The "decision to award attorney's fees pursuant to Rule 1:4-8 is addressed to the judge's sound discretion[.]" McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011). "[W]e apply an abuse of discretion standard." United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 390 (App. Div. 2009). The trial court's order "will be reversed on appeal only if it 'was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" McDaniel, 419 N.J. Super. at 498 (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)). We must hew to that standard of review.

Under Rule 1:4-8, an opposing party must first serve a "written notice and demand" on the attorney who signed the pleading. R. 1:4-8(b)(1). That notice must warn that sanctions will be sought "if the offending paper is not withdrawn within 28 days of service of the written demand," but if "the subject of the application for sanctions is a motion whose return date precedes the expiration of the 28-day period, the demand shall give the movant the option of either consenting to an adjournment of the

return date or waiving the balance of the 28-day period then remaining." Ibid. Here, defendants gave repeated notices which included those warnings, and plaintiff failed to "request an adjournment of the return date," so he was "deemed to have elected the waiver." Ibid. In other words, plaintiff had to withdraw the complaint prior to the return date on the order to show cause to avoid Rule 1:4-8's application.

Rule 1:4-8(b)(1) authorizes sanctions if a party's pleading, motion, or other paper "violated [paragraph (a) of] this rule." Paragraph (a) requires that counsel ensure that

> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support[.]
>
> [R. 1:4-8(a) (emphasis added).]

The circumstances here showed plaintiff violated at least subparagraphs (1) and (3) of Rule 1:4-8(a).

After plaintiff sent defendants an April 24 OPRA request, Renner called plaintiff on May 5 and emailed him on May 6 that "[t]he response to your April 24 OPRA request is ready" and "can be picked up anytime." On June 1, plaintiff called Renner, apologized for not checking his email, and picked up the responsive documents. Defendants' May 29 and June 5 letters under Rule 1:4-8 brought those facts to the attention of plaintiff's counsel. Yet plaintiff's counsel never withdrew or corrected the central factual allegation in plaintiff's May 26 complaint: that he "has not received any response to the April 24, 2015 OPRA request." By instead pursuing this inaccurate complaint, plaintiff's counsel forced defendants to file a June 9 answer to the complaint and order to show cause, and appear for the show-cause hearing on June 19.

Defendants' June 9 answer reiterated that they had proffered documents in response to plaintiff's OPRA request on May 5 and 6, and that plaintiff had received the documents on June 1. In his June 9 letter to defendants, plaintiff's counsel acknowledged that responses were provided to plaintiff on June 1. Counsel claimed they were inadequate. Nonetheless, plaintiff's counsel still did not amend or withdraw the complaint's inaccurate allegation that no response had been received. Plaintiff's counsel also did not file in court a timely reply brief or certification claiming the

response was inadequate. Plaintiff's counsel also failed to appear at the June 19 hearing. As a result, plaintiff's inaccurate complaint and show-cause order were considered and dismissed at that hearing.

The trial court found plaintiff's attorneys cavalierly chose to "pursue something that they know there's no reason to pursue," with the apparent purpose "to harass or to — to injure the town in some way." The court found plaintiff "needlessly increased the cost of litigation." Thus, the court did "describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed." R. 1:4-8(d).

"'[C]ontinued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim or defense was not.'" United Hearts, 407 N.J. Super. at 390 (citation omitted). "The sanctions created in Rule 1:4-8 are specifically designed to deter the filing or pursuit of frivolous litigation." LoBiondo v. Schwartz, 199 N.J. 62, 98 (2009) (emphasis added). Rule 1:4-8(a)(3) "imposes a continuing duty on the attorney . . . who filed the pleading to correct or withdraw the allegations or the denials contained therein based upon further investigation and discovery." Ibid. If counsel fails to do so, "reasonable fees may be awarded . . .

from that point in the litigation at which it becomes clear that the action is frivolous." Id. at 99 (citing DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 229-30 (App. Div. 2000)).

In DeBrango, the plaintiffs had a reasonable basis to file a complaint, but Summit Bank sent them a Rule 1:4-8 notice and a May 29, 1998 letter showing their factual allegation was incorrect. 328 N.J. Super. at 223-24. We ruled that "after plaintiffs received the May 29, 1998 letter, they lacked a 'good faith' basis to proceed against the bank, and the litigation became frivolous. Plaintiffs' attorney was obligated at that time to withdraw the complaint against Summit Bank because its contentions lacked sufficient evidentiary support." Id. at 228 (citing R. 1:4-8(a)(3)).

Similarly, once plaintiff's counsel received defendants' May 29 and June 5 letters, and their June 9 answer, which made clear the falsity of plaintiff's allegation that no response had been received to his OPRA request, plaintiff's counsel was obligated to withdraw or amend the complaint. By failing to do so, and thus forcing defendants to answer the inaccurate complaint and defend the order to show cause, plaintiff's counsel violated Rule 1:4-8.

Plaintiff argues that, at the June 19 hearing, the trial court should have considered his certification, and Benedetto's request to be heard by phone. However, neither could have

eliminated the basis for sanctions: that, despite knowing for at least two weeks that plaintiff had received a response to his OPRA request, plaintiff's counsel had neither withdrawn nor amended the complaint claiming no response had been received to plaintiff's OPRA request, and instead had proceeded to a hearing on that baseless claim. In any event, plaintiff's reliance on both fails.

First, whether to permit telephonic argument is left to the discretion of the trial court. R. 1:6-2(e) (providing a trial court "may direct argument of any motion by telephone conference without court appearance" (emphasis added)). "Where the technique of oral argument of motions by telephone is employed, it obviously must be scheduled in advance by the court[.]" Pressler & Verniero, Current N.J. Court Rules, cmt. 6 on R. 1:6-2 (2018). The court here did not abuse its discretion in denying a request to participate by phone made only five minutes before the June 19 hearing. Moreover, Benedetto and his office offered no explanation why plaintiff's counsel Reynolds was unavailable to appear at the hearing.

At the August 14 sanctions hearing, plaintiff's counsel argued that staffing problems required the reassignment of the hearing to a contract attorney, and cited Benedetto's August 7 certification that the attorney's 9 a.m. status conference in Pennsylvania became a trial. Even if true, the failure to request

phone argument until five minutes before the 1:30 p.m. hearing gave ample grounds to reject the belated request, particularly as the court wished counsel to be present. Finally, plaintiff has not shown how mere argument would have altered the uncontested fact that plaintiff did not withdraw or amend the complaint.

Second, plaintiff's counsel did not provide plaintiff's certification, or the reply brief it was attached to, to the trial court until the judge was walking onto the bench. Defense counsel did not see it because it was sent to his office while he was in court for the hearing. The reply brief had been due three days before the hearing, no extension had been sought, and no reason was offered for the delay in supplying either the reply brief or the certification.

Plaintiff now argues his certification was a response to defendants' June 18 submission, but his certification was dated June 17, and his certification used essentially the same language as his counsel's June 9 letter. It was not an abuse of discretion for the court on June 19 to refuse to consider a reply brief and certification it had no chance to read and defense counsel had no chance to see because it was not sent until the hearing started.

In any event, we are not reviewing the June 19 order, but the trial court's rulings regarding sanctions issued at the August 14 and September 18 hearings. At those hearings, the court considered

the same points as plaintiff raised in his belated certification, namely plaintiff's assertions that defendants' response was incomplete and plaintiff acted in good faith.

Moreover, plaintiff's certification did not change that he was pursuing a complaint alleging he had not received a response to his OPRA request when in fact he had received a response. Indeed, in his certification, plaintiff admitted picking up the response from Renner on June 1, even as he denied receiving any email or telephone message telling him the response was ready for pickup. The certification claimed the response was incomplete, but gave no reason why plaintiff had not sought to raise that claim by amending his complaint in the weeks that followed.

Furthermore, plaintiff's certification failed to demonstrate that defendants' response was incomplete. Renner supplied plaintiff with documents and a response letter listing plaintiff's requests (in bold) and her responses.

> Enclosed are your responses to your OPRA request dated April 24, 2014 as follows:
>
> **[1.] Provide the current vacant rate of vacant properties including address and listed owned on record.**
>
> Please clarify this request. Assuming, without clarification that this is a request for an address/owner lists of all vacant properties in the Borough, the Borough does not maintain such a list. Therefore, no records exist.

[2.] Provide the current number of absentee landlords including banks and provide name and address.

The Borough does not maintain such a list. Therefore no records exist.

[3.] Provide current ordinance requirements for absentee landlords.

Document does not exist.

[4.] Provide the most recent Master Plan of the Borough of Penns Grove.

Documents are attached[.]

[5.] Please provide copies of all invoices for legal services that relate to the defense of Penns Grove and Acting Clerk, Sarah Renner's defense on the matter titled: Scarpaci v. Renner, Salem County Superior Court, Docket No.: L-58-15[.] This request is to include unbilled legal fees. If an invoice is not yet prepared, a Certification from all lawyers relation to this matter is requested.

Unbilled legal fees and/or a certification from all lawyers are not an appropriate OPRA request. At this time, there are no records in response to this request for unbilled legal fees. Invoice documents are attached.

[6.] Please provide copies of all invoices for any expenses that relate to the defense of Penns Grove and Acting Clerk Sarah Renner's defense on the matter titled: Scarpaci v. Renner, Salem County Superior Court, Docket No.: L-58-15. This request is to include unbilled legal fees. If an invoice is not yet prepared, a Certification from all lawyers related to this matter is requested.

Unbilled legal fees and/or a certification from all lawyers are not an appropriate OPRA request. At this time, there are no records in response to the request.

[7.] Any complaint filed regarding the occupancy of 11-D N. Virginia Avenue, Penns Grove, NJ 08069 for the past five (5) years.

Documents regarding property 11-D N. Virginia Avenue are attached.

[8.] Any complaint filed regarding the use of 11-D N. Virginia Avenue, Penns Grove, NJ 08069 for the past five (5) years.

Documents regarding property 11-D N. Virginia Avenue are attached.

[9.] Any complaint filed regarding the Zoning of 11-D N. Virginia Avenue, Penns Grove, NJ 08069 for the past five (5) years.

Documents regarding property 11-D N. Virginia Avenue are attached.

[10.] All Documents in your possession for the past five (5) years regarding 11-D N. Virginia Avenue, Penns Grove, NJ 08069 for the past five (5) years.

Documents regarding property 11-D N. Virginia Avenue are attached.

[11.] Any Agreement between Penns Grove and NJ DCA regarding zoning, planning or occupancy regarding commercial units.

There is no such agreement. No records exist.

Plaintiff concedes he received full responses for requests 4 and 7, but claims he did not receive adequate responses to the remainder of his document requests.

Regarding requests 1-3, plaintiff certified while defendants claim no "items relative to this request exist, Plaintiff believes that it does" as the items were "discussed in Borough Council meetings prior to Plaintiff's OPRA requests." However, plaintiff provided no details of a discussion stating those records actually existed.[1] Defendants provided the trial court with certifications by Renner and by the Borough's counsel that no such documents existed. Counsel certified he had "reviewed the Borough's entire ordinance[s]" and was "confident there are no known ordinances" responsive to request 3.

Moreover, Renner certified that requests 1 and 2 would require her "to search all Borough records for references to any vacant properties" and "absentee landlords," and "calculate the 'rate'" and "create a list," respectively. However, "OPRA does not require public agencies to create records." Sussex Commons Assocs., Ltd. Liab. Co. v. Rutgers, 210 N.J. 531, 544 (2012) (citing MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534,

[1] At the August 14 hearing, plaintiff's counsel argued the documents "were referenced by the Mayor of Penns Grove [and a council member] during an April Borough Council meeting," but no proof or certification to that effect was ever submitted.

546, 549 (App. Div. 2005)). "OPRA is 'not intended [to be] a research tool [that] litigants may use to force government officials to identify and siphon useful information." Matter of N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under Open Pub. Records Act, 230 N.J. 258, 276 (2017) (alterations in original) (quoting MAG, 375 N.J. Super. at 546). "'OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian's possession.'" MAG, 375 N.J. Super. at 546-47 (citation omitted); accord, e.g., Lagerkvist v. Office of Governor, 443 N.J. Super. 230, 237 (App. Div. 2015). "The request should not require the records custodian to undertake a subjective analysis to understand the nature of the request. Seeking particular information from the custodian is permissible; expecting the custodian to do research is not." Paff v. Galloway Twp., 229 N.J. 340, 355 (2017).

This case is unlike Paff v. Galloway, where the requested email information "was stored electronically[,] and, by the Township's own admission, could have been produced within [two to three] minutes." 229 N.J. at 344, 346, 357. The Court emphasized that the definition of "Government record" in OPRA allowed requests for "'information stored or maintained electronically,'" so "[t]he issue in this case is simply one of statutory interpretation."

Id. at 351 (quoting N.J.S.A. 47:1A-1.1). "By OPRA's [plain] language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record." Id. at 353, 356. Therefore, "[w]ith respect to electronically stored information," the Court rejected that "'OPRA only allows requests for records, not requests for information.'" Id. at 356 (citation omitted).

Here, by contrast, there was no indication that the requested information was "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. Rather, the documents produced by the Borough were forms that were handwritten, hand-signed, or both, indicating it kept paper records or image-processed copies thereof. For "any paper, written or printed book, document, . . . or image processed document," N.J.S.A. 47:1A-1.1, OPRA "only allows requests for records, not requests for information." Burke v. Brandes, 429 N.J. Super. 169, 174 (App. Div. 2012) (quoting Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)). The Court in Paff v. Galloway stressed that "OPRA provisions distinguish between paper records and records in electronic form" and give the latter "different treatment." 229 N.J. at 354.

Moreover, because "OPRA only allows requests for records, not requests for information" from paper documents, "it is 'incumbent on the requestor to perform any correlations and analysis he may desire.'" MAG, 375 N.J. Super. at 547 (citation omitted). The Court in Paff v. Galloway ruled MAG "sensibly stated that OPRA did not countenance '[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity' or 'open-ended searches of an agency's files.'" 229 N.J. at 353 (alteration in original) (quoting MAG, 375 N.J. Super. at 379). The Court distinguished MAG based on the facts in Paff v. Galloway: "Paff circumscribed his request to a two-week period and identified the discrete information he sought. The records custodian did not have to make a subjective judgment to determine the nature of the information covered by the request." Id. at 356.

By contrast, plaintiff's requests 1 and 2 asked for "open ended searches" in which the Borough's files would be "analyzed" to calculate a rate, and "compiled" into a list. Id. at 355 (quoting MAG, 375 N.J. Super. at 549). Renner certified she was not certain how to define "absentee landlord"; did not understand his request to calculate a "vacant rate," and requested clarification which plaintiff did not provide; and was "not sure [she was] even qualified to make those calculations." As in MAG,

requests 1 and 2 "'failed to identify with any specificity or particularity the governmental records sought,'" and instead improperly asked Renner "to do research" and "to undertake a subjective analysis[.]" Id. at 355 (quoting MAG, 375 N.J. Super. at 549).

Requests 5 and 6 sought legal "invoices for legal services" for the Scarpaci case. Defendants produced part of an April 10, 2015 invoice addressed to the Borough. Plaintiff claimed the invoice "is incomplete and can't be authenticated." However, he failed to show the rest of the invoice related to the Scarpaci case, or why it could not be authenticated based on its production by the Borough.

Requests 5 and 6 also sought "unbilled legal fees," and stated: "If an invoice is not yet prepared, a Certification from all lawyers related to this matter is requested." However, OPRA does not authorize plaintiff to ask lawyers "to create" certifications that do not exist. Sussex Commons, 210 N.J. at 544. Moreover, legal fees "unbilled" by the outside counsel to the Borough are by definition not in a record "that has been received," "made, maintained, or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof," as required by OPRA's definition of a "Government record."

N.J.S.A. 47:1A-1.1. Both Renner and the Borough's counsel certified counsel did not provide the Borough with information on unbilled fees.

Defendants certified they provided documents in response to requests 8-10 regarding a particular address, including complaints. Plaintiff's certification said no such documents were provided. However, our review shows defendants produced numerous documents regarding that address, including a complaint.

Finally, defendants certified that no documents existed responsive to request 11 for "[a]ny agreement between the Borough and NJ DCA." Plaintiff's certification simply stated "it is Plaintiff's belief that these documents so exist [sic]," even though Renner and the Borough's counsel certified no such agreement existed. As with requests 1-3, plaintiff argues his good-faith belief precludes the entry of sanctions.

Under Rule 1:4-8, "[i]mposing sanctions is not appropriate where a party 'has a reasonable good faith belief in the merit of his action.'" Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016) (citation omitted). However, a plaintiff's subjective belief must satisfy "a test of objective reasonableness." Wyche v. Unsatisfied Claim & Judgment Fund of State, 383 N.J. Super. 554, 561 (App. Div. 2006); see J.O. v. Twp. of Bedminster, 433 N.J. Super. 199, 221 (App. Div. 2013); see also

LoBiondo, 199 N.J. at 99. Plaintiff provided no evidence showing his belief was objectively reasonable.

Our review of the details of plaintiff's request simply confirms our overall conclusion. The issue under Rule 1:4-8 is whether plaintiff properly pursued a complaint and order to show cause based on the allegation that he "has not received any response to [his] OPRA request" when he in fact received defendant's response weeks before. Our review shows plaintiff received defendants' written response addressing every request. Moreover, he was given documents responsive to seven of his eleven requests. Further, he did not show an objectively reasonable belief that, despite the certification of the records custodian and Borough counsel, responsive documents existed regarding the other four requests. Under these circumstances, it was improper for plaintiff to persist in litigating a complaint and show-cause order based on the allegation he had received no response whatsoever. See DeBrango, 328 N.J. Super. at 227-28.

At the August 14 sanctions hearing, and again at the September 18 hearing, the trial court considered plaintiff's arguments about his particular requests. The court characterized requests 1 and 2 as "interrogatories" improperly seeking information rather than documents. The court heard but did not accept plaintiff's argument that he had a good-faith belief the requested documents existed.

The court focused on the central issue that plaintiff's counsel persisted in prosecuting a complaint and show-cause order based on an allegation counsel knew was false but which he made no effort to withdraw or amend. The court did not abuse its discretion in finding sanctions warranted.

IV.

Plaintiff next challenges the September 18 order denying reconsideration. "We review the court's denial of [plaintiff]'s motion for reconsideration under an abuse of discretion standard." Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016).

Plaintiff argues that at the September 18 reconsideration hearing, the trial court overlooked his submission of plaintiff's certification on June 19. Plaintiff misapprehends the reconsideration standard. Under Rule 4:49-2, "a motion for rehearing or reconsideration" must state "the matters or controlling decisions which counsel believes the court has overlooked" when the court made the decision of which reconsideration is sought. See, e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). "The basis to such a motion, thus, focuses upon what was before the court in the first instance." Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993).

Plaintiff makes no argument that the trial court overlooked anything at the August 14 hearing when it imposed sanctions. At that hearing, the court acknowledged that plaintiff sent to the court just before the June 19 hearing the reply brief, to which plaintiff's certification was attached. Plaintiff cannot overturn the August 14 ruling by arguing the court (like plaintiff) did not mention that reply brief or its accompanying certification at the September 18 reconsideration hearing.

In any event, as discussed above, the trial court rejected the points made in plaintiff's belated certification, namely that defendants' response was incomplete and that plaintiff acted in good faith. The court found no excuse for plaintiff's counsel decision to persist in litigating a complaint based on the false allegation that plaintiff had not received a response to his OPRA request.

V.

Plaintiff has not challenged that $1725 was the appropriate amount of sanctions if sanctions were appropriate. The "sanction imposed for violation of paragraph (a) of [Rule 1:4-8]" may include "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation[.]" R. 1:4-8(d). "The sanctions that are permitted to be awarded, however, are not unbounded, but are

specifically [limited to] 'a sum sufficient to deter repetition of such conduct.'" LoBiondo, 199 N.J. at 99 (quoting R. 1:4-8(d)). Moreover, "the Rule imposes a temporal limitation on any fee award, holding that reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." Id. at 99 (citing DeBrango, 328 N.J. Super. at 229-30).

It became clear that pursuing the complaint's charge was frivolous by June 9. By then, plaintiff's counsel was indisputably aware that defendants had responded to plaintiff's OPRA request and that plaintiff had picked up the response on June 1. Because plaintiff's counsel failed to withdraw or amend the complaint's charge that no response had been received to plaintiff's OPRA complaint, defendants were required to answer the baseless complaint on June 9 and appear to oppose the meritless order to show cause on June 19.

Defendants supplied the trial court with an invoice stating that from June 9 to June 19, in answering the complaint and the order to show cause, and in preparing for and attending the hearing, they expended 11.5 hours at $150 per hour and thus sought $1725. The trial court found that "the time expended" was "reasonable" and "[t]he rate clearly is well within the market" given the "experience and training" of defense counsel. Therefore,

the court found "$1,725 is fair and reasonable." Thus, the court did not "accept passively" defendants' submissions, and did "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application.'" Walker v. Giuffre, 209 N.J. 124, 131 (2012) (quoting Rendine v. Pantzer, 141 N.J. 292, 335 (1995)).

Here, as in Masone, "[p]laintiff does not contend that the work performed or the time expended was unnecessary or excessive. In this instance, the sanction imposed is closely correlated to the litigation sought to be discouraged. Under these circumstances, there is no mistaken exercise of the motion judge's discretion." 382 N.J. Super. at 194-95.

Affirmed.