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THE EVENING JOURNAL : Superior Court of New Jersey
ASSOCIATION, PUBLISHER OF : Law Division
THE JERSEY JOURNAL : Hudson County
Plaintiff, : Docket No. L-2103-17
v. : Opinion

CITY OF BAYONNE AND :
ROBERT F. SLOAN,
IN HIS CAPACITY AS :
CUSTODIAN OF RECORDS FOR
THE CITY OF BAYONNE :
Defendants.

Keith J. Miller, Esq. and Justin T. Quinn, Esq. for
plaintiff (Robinson Miller LLC, attorneys).

Daniel M. Santarsiero, Esq. for defendant (Lum, Drasco &
Positan LLC, attorneys).

D'ALESSANDRO, J.S.C.

The novel issues before this court are whether the Superior Court of New Jersey, under the Open Public Records Act N.J.S.A. 47:1A-1 et seq. (OPRA), can order the release of documents sealed under a federal court order; and whether settlements in other jurisdictions involving New Jersey public entities can be sealed without notice to the parties and to the court in a foreign jurisdiction that the settlement may be subject to disclosure under OPRA.

This court holds that when a settlement with a New Jersey public entity is made in another jurisdiction that the settlement documents shall inform the parties and the court in that jurisdiction that the settlement may be subject to disclosure under OPRA.

A government entity cannot shield itself from public scrutiny by rotely sealing settlements. The public has a right to know that settlements are not borne of reckless judgment, collusion, conflicts of interest or corruption. See, Justice Albin's forceful opinion in Thompson v. City of Atlantic City, 190 N.J. 359 (2007).

For the reasons below, plaintiff's OPRA request for the federal court settlement documents is granted for all parties except for personal identifiers and settlement terms for the infant-plaintiffs.

Parties

Plaintiff is The Evening Journal Association, publisher of the Jersey Journal ("Jersey Journal" or "Plaintiff"). The defendants are City of Bayonne ("Bayonne" or "City") and its custodian of records, Robert Sloan.

Background

On or about December 27, 2013, Bayonne police officers arrived at Kathy Walsh's residence to arrest her son Brandon Walsh. She lived with her sons, Brandon Walsh and Aaron Walsh; her daughter, Elaina Walsh; and her elderly mother, Mary Marshall. Kathy Walsh's six-year-old grandson, J.R., and seven-year-old granddaughter, L.R., were also present when the police arrived.

Subsequently, a civil complaint for damages was filed against the officers and Bayonne in the United States District Court for the District of New Jersey. The plaintiffs in that case were Brandon Walsh; Kathy Walsh individually and as guardian for Elaina Walsh; Mary Marshall; and Maura Walsh as guardian for minors J.R. and L.R. (collectively, the "Walsh-plaintiffs").

The Walsh-plaintiffs alleged that the police used excessive force to restrain Brandon; and that they assaulted others, including two minors and a disabled person, by dousing them with pepper spray.

The defendants in the federal action were Bayonne, Bayonne Police Department, Officer Domenico Lillo, Officer James Wade, and Officer Francis Styles (collectively, the "Bayonne-defendants").

The Jersey Journal's Open Public Records Act Request

The issues before this court arose soon after the Walsh-plaintiffs and Bayonne-defendants settled their case.

On March 27, 2017, the Jersey Journal sent Bayonne a succinct OPRA request for "the terms of the settlement agreement between Brandon Walsh & Kathy Walsh and the Bayonne Police Department - civil action No. 2:14-cv-7186."

On April 10, 2017, Bayonne denied the request in writing because: "The requested information is to be kept confidential pursuant to a court order."

On April 13, 2017, the attorney for the Jersey Journal sent Bayonne arguably controlling legal authority that the documents are subject to disclosure under OPRA and asked Bayonne to reconsider its denial.

Bayonne again declined to release the settlement agreement because it was sealed under a federal court order and contains the names of minors and a disabled person. The "disabled youth's name" was previously disclosed in the caption of the lawsuit and other public filings.

In compromise, the Jersey Journal offered to accept the settlement agreement with the names redacted. Bayonne also rejected that proposal. On April 25, 2017, the Jersey Journal's attorney wrote another letter asking Bayonne to reconsider. Bayonne did not respond to that letter.

The June 1, 2017 Order to Show Cause

A person who is denied access to a government record by a custodian of records may institute a summary proceeding to challenge the custodian's decision by order to show cause. N.J.S.A. 47:1A-6 and Rule 4:52.

The court received plaintiff's request for an order to show cause on May 31, 2017 and signed it on June 1, 2017. Bayonne filed opposition and plaintiff filed a reply. The court heard legal argument on June 30, 2017.

The Walsh-plaintiffs and the Bayonne-defendants did not receive notice of the OPRA request or the Order to Show Cause. The record was silent as to whether they had an expectation of privacy as to the settlement terms.

"[A] public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005); see also, N.J.S.A. 47:1A-1.

The record was silent as to whether Bayonne informed the Walsh-plaintiffs of the OPRA request. The court inferred that Bayonne did not notify them. This court held that they were entitled to notice.¹

Contentions

Plaintiff contended that Bayonne's refusal to provide the settlement agreement was illegal under OPRA and the common law right of access to public records. Plaintiff asked the court to declare that Bayonne's refusal to release the settlement agreement was illegal; and to compel Bayonne to release the agreement, to pay plaintiff's legal fees and costs; and to pay a civil penalty under N.J.S.A. 47:1A-11.

Bayonne contended that it could not release the settlement agreement because it was sealed by order of the Honorable Cathy L. Waldor, United States Magistrate Judge for the District of New Jersey.

Public Policy and OPRA Requests

"New Jersey has a strong, expressed public policy in favor of open government In a democracy, the citizens generally have the right to know the truth about all parts of their government, because, without public

¹ The court's July 24, 2017 order and statement of reasons are incorporated in this opinion and are repeated for context.

knowledge of the realities of governmental activities, essential reforms of those activities will be hindered." McClain v. Coll. Hosp., 99 N.J. 346, 355 (1985) (quoting Stack v. Borelli, 3 N.J. Super. 546, 552 (Law Div. 1949)).

OPRA strives "to maximize public knowledge about public affairs in order to ensure an informed citizenry." Burnett v. County of Gloucester, 415 N.J. Super. 506, 512 (App. Div. 2010) (quoting, Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)).

OPRA requires that all government records be disclosed upon request except those exempted by statute, legislative resolution, administrative regulation, executive order, rules of court, judicial decisions, or federal law. N.J.S.A. 47:1A-1, -9.

"The salutary goal, simply put, is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (App. Div. 2004). Any doubts as to the public's right of access are to be construed "in favor of the public's right of access." See, N.J.S.A. 47:1A-1. "Settlement agreements qualify as accessible [government] records [under OPRA]". C.G. v.

Wilson Twp. Bd. Of Educ., 443 N.J. Super. 415, 423 (App. Div. 2015).

Bayonne did not petition the federal court to unseal the settlement when it received the Jersey Journal's OPRA request. The procedure to unseal a record in federal court was not cited by either party.

Although not applicable in this case, New Jersey Court Rule 1:38-12 governs applications to unseal records: A record that has been sealed by order of the court may be unsealed upon motion by any person or entity. The proponent for continued sealing shall bear the burden of proving by a preponderance of the evidence that good cause continues to exist for sealing the record.

Plaintiff contended that a "similar - if not identical - issue" was raised in Asbury Park Press v. County of Monmouth, supra, 374 N.J. Super. at 4. However, the OPRA request before this court sought the release of a sealed federal court settlement. Asbury Park Press concerned a settlement in the Superior Court of New Jersey.

There is no identical case law to guide the court's analysis when a settlement is sealed by a federal court order. Notably, the cases cited by plaintiff from other jurisdictions also involve state court filings.

In Burnett, the court held that the public interest in settlements is a significant one, because settlements may provide valuable information, regarding the conduct of government officials. Burnett, supra, 415 N.J. at 517. "Settlement agreements qualify as accessible [government] records [under OPRA]". C.G. v. Wilson Twp. Bd. Of Educ., supra, 443 N.J. Super. at 423.

The record before this court was notable for what it did not contain. The record did not inform the court why the motion to seal was filed; why it was a joint application; if the settlement was sealed for the benefit of the Walsh-plaintiffs, the Bayonne-defendants, or both; if OPRA is referenced in the settlement agreement or the motion to seal the record; if Bayonne, the police officers, or an insurer paid all or part of the settlement; if the settlement bars the Walsh-plaintiffs from filing civil, criminal, administrative or other proceedings; and if the settlement was authorized by a city council resolution that may be subject to disclosure under OPRA.

In South Jersey Publication Company v. New Jersey Expressway Authority, our Supreme Court held that a newspaper's interest in keep[ing] a watchful eye on the workings of public agencies is sufficient to establish good faith and provides standing to obtain public records

because the public has a right to know what was disclosed in the settlement agreement, as well as how much taxpayer money was spent settling those claims. 124 N.J. 478, 487 (1991) (quoting Red Bank Register v. Bd. of Ed., 206 N.J. Super. 1, 9 (App. Div. 1985)).

There is no question that the Jersey Journal acted in good faith in requesting the settlement agreement and by trying to obtain disclosure by compromise.

Bayonne argued that it denied plaintiff's OPRA request because the records were sealed by a federal court order and that they must be kept confidential under N.J.S.A. 47:1A-1.1. Plaintiffs argue that settlement agreements by government entities are subject to disclosure under OPRA and the common law; and that neither confidentiality provisions nor sealing orders can shield those agreements.

OPRA makes government records "readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1. The statute broadly defines government records to include documents made, maintained or kept in the course of official government business, but exempts twenty-one categories of information from the definition. See N.J.S.A. 47:1A-1.1. One of the exemptions is that a government record shall not include

"information which is to be kept confidential pursuant to court order." Ibid. "When the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest." Michelson, supra, 379 N.J. Super. at 621. There is nothing before the court to determine if there were legislatively recognized confidentiality concerns in the sealed documents.

United States Magistrate Judge Waldor's March 21, 2017 Order

Judge Cathy L. Waldor's March 21, 2017 order states that it was opened to the court by an unopposed "motion to seal the settlement" by the attorneys for the plaintiffs and Bayonne; and that the parties jointly asked the federal court to "seal the settlement and the corresponding motion."

The order states that Judge Waldor considered the papers and determined good cause to order that: "the Motion to Seal the Settlement ECF Nos. 161 and 164 by Plaintiffs and Defendant is hereby granted that the motion and supporting Declarations of JOEL SILVERMAN, ESQ. and ERIC J. NEMETH, ESQ. shall also be sealed."

Judge Waldor's order does not state if the federal court retained jurisdiction. See, Thompson v. Atlantic

City, 190 N.J. 359, 379-81 (2007). The record before this court is silent as to whether the federal court retained jurisdiction.

In Asbury Park Press, the Appellate Division concluded that a government may not withhold the disclosure of a settlement agreement where the agreement contained a confidentiality provision and was filed under a protective order. supra, 406 N.J. Super. at 1. The court reasoned that the lawsuits are filed in a public forum and the public has a right of access to court documents filed in civil lawsuits. Id. at 9.

In this case, plaintiff argued that defendant may not withhold the disclosure of the settlement agreement under Asbury Park Press and N.J.S.A. 47:1A-1 because OPRA exemptions are to be construed narrowly and "in favor of the public's right of access."

The Supreme Court affirmed Asbury Park Press in 2010:

Had the matter not settled, the lawsuit would have unfolded in a public trial, and any outcome would have been revealed in open court. To expect privacy in the outcome in a lawsuit against the County, then, is hardly reasonable and runs counter to OPRA's core concern of transparency in government.

Asbury Park Press, 201 N.J. 5, 7 (2010).

However, the protective order in Asbury Park Press shielded:

any medical, psychological counseling, financial or personnel information and/or personnel files concerning Plaintiff and/or Defendants, as well as records of complaints and/or investigations conducted by the County of Monmouth ... of harassment, discrimination and/or retaliation by individuals other than Plaintiff, or other documents . . . that pertain to employees of the County of Monmouth other than Plaintiff.

Asbury Park Press, 406 N.J. Super. at 4.

Unlike the case before this court, the settlement agreement in Asbury Park Press contained a confidentiality provision and was not filed with the court or executed in the form of an order or judgment. Instead, the plaintiff and Monmouth County jointly filed a one-sentence stipulation of dismissal terminating the lawsuit with prejudice. Id. at 5.

In Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the court upheld the public's right to disclosure of a confidential settlement entered under seal in a civil lawsuit between private parties. The court held that one who seeks to overcome the strong presumption of access must establish by a preponderance of the evidence that the

interest in secrecy outweighs the presumption. Id. at 23.

Pursuant to Federal Civil Local Rule 5.3(d):

(1) No party or parties shall submit a proposed settlement agreement for approval by a district judge or magistrate judge unless required to do so by statute or other law or for the purpose of retaining jurisdiction. (2) Any settlement agreement filed with the Court or incorporated into an order shall, absent an appropriate showing under federal law, be deemed a public record and available for public review.

When this court issued its order, it did not know why the settlement agreement was sealed, and did not know the settlement terms. Accordingly, this court could not weigh the presumption of access against the interest of secrecy.

Bayonne knew, or could have anticipated, that a highly publicized lawsuit would inevitably prompt an OPRA request. The record before the court is silent as to whether OPRA considerations were contemplated by the Walsh-plaintiffs or Bayonne-defendants.

Plaintiff argued that even if the information requested was not subject to disclosure under OPRA, that the settlement agreement is subject to disclosure under the common law as a public record. See N.J.S.A. 47:1A-1 (OPRA shall not be construed "as affecting in any way the common law right of access to any record").

To obtain common law public records, a citizen seeking access must be acting in "good faith;" and, where the records contain confidential material, the citizen's interest in access must be weighed against the government's interest in confidentiality. Loigman v. Kimmelman, 102 N.J. 98, 104-05 (1986); Phila. Newspapers, Inc. v. State of N.J., 232 N.J. Super. 458, 464 (App. Div. 1989).

Bayonne asserts that the request should also be denied under the common law because plaintiff does not have any legitimate journalistic interest in receiving information that has been previously sealed by a court order, and defendant's interests in preventing disclosure outweighs plaintiff's interests. Plaintiff's good faith legitimate journalistic interest in obtaining the settlement agreement is unassailable. This court cannot weigh the parties' interests without knowing why the settlement agreement was sealed, or without the settlement agreement terms.

Bayonne contended that disclosure of the settlement agreement would require it to commit an act of contempt of court by knowingly violating a federal court order. Bayonne contended that releasing the information might incur sanctions and subject them to litigation by the plaintiffs.

Conversely, plaintiffs contended that there is no federal equivalent to OPRA, and that they might not have standing in federal court to intervene or otherwise demand that the settlement be unsealed and to release the settlement agreement. Plaintiffs agreed during legal argument that this court cannot unseal the federal court record. The court did not find it equitable to compel plaintiffs to pursue relief in federal court.

The Superior Court of New Jersey cannot overturn, vacate or modify Judge Waldor's order by collateral attack. Del. Valley Citizens' Council for Clean Air v. Pennsylvania, 755 F.2d 38, 45 (3rd Cir.), cert. denied, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 54 (1985). When a federal court issues a judgment or decree under federal authority or statute, "that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition." Id. at 44.

The Third Circuit Court of Appeals has held that a federal district court retains jurisdiction over all its confidentiality orders. See, Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994). Although plaintiff argued that Judge Waldor's order only sealed the record, her order granted "the motion to seal the settlement by plaintiffs and defendant". Judge Waldor also

sealed the "supporting Declarations of Joel Silberman, Esq. and Eric J. Nemeth, Esq." The purpose for and the content of the "Declarations" are unknown. Without more information, this court could not determine if Messrs. Silberman and Nemeth were also entitled to notice of plaintiff's request.

Judge Waldor's order is entitled to deference. Comity encompasses voluntary enforcement or recognition of judicial orders and judicial proceedings of another jurisdiction. Stultz v. Stultz, 15 N.J. 315, 319-20 (1954); see also O'Loughlin v. O'Loughlin, 6 N.J. 170, 179 (1951).

Accordingly, this court's July 24, 2017 order dismissed plaintiff's OPRA request and the verified complaint without prejudice. The court directed Bayonne, by August 11, 2017, to move before the federal court to unseal the settlement on notice to the Walsh-plaintiffs, the Bayonne-defendants, the Evening Journal Association, and Messrs. Silberman and Nemeth.

Application for a Stay of the July 24, 2017 Order

On August 1, Bayonne moved for a stay of the July 24th order. The parties waived legal argument. Plaintiff also informed the court that it did not object to Bayonne's motion for a stay. On August 3, Bayonne appealed the July 24th order. Plaintiff filed a cross-appeal.

Bayonne's opposition to the OPRA request at legal argument on the return of the order to show cause suggested that *'we would comply if we could but we can't'* because the record was sealed by federal court order.

In seeking a stay, Bayonne contended for the first time that this court's order would compel its attorneys to violate the Rules of Professional Conduct by pursuing relief that its client does not consent to. However, in opposition to plaintiff's OPRA request Bayonne argued: the City's position with regard to this matter has been consistent and predicated entirely upon the delineated statutory exemption to the production of government records. Def.'s Brief, p. 3

On August 7, plaintiff's attorney wrote to Judge Waldor to inform her of this court's July 24 order, to ask for clarification of her March 21 order, and to request a teleconference, which might "streamline - if not moot - a separate state court litigation."

Bayonne did not file a motion to unseal the record before Judge Waldor. Plaintiff's motion to intervene was granted by Judge Waldor. On August 11, 2017, this court

granted a stay in the public interest,² mindful of the Appellate Division's exclusive jurisdiction. Rule 2:9-1.

Judge Waldor's November 16, 2017 Opinion and Order

Judge Waldor's November 16, 2017 order states:

[T]here is simply no indication from the relevant docket entries that the entirety of the agreement was sealed - let alone docketed for consideration - and there is no language incorporating the settlement into any Order with particularity it must be concluded that the sealing in this matter did not encompass the parties' settlement except insofar as the Court considered and approved a narrow portion of the settlement via the friendly hearing.

[T]he items currently sealed in relation to the friendly hearing are sealed entirely and contain sensitive information throughout. . . the settlement is therefore not a judicial record and the Court need not reach whether the Jersey Journal has a right to obtain the settlement agreement and leaves the parties to pursue the issue in state court.

After Judge Waldor issued her order, the Appellate Division granted the parties' request to dismiss their cross-appeals on December 5, 2017. This court granted plaintiff's application to reinstate the complaint after final legal argument on January 8, 2018.

Judge Waldor only sealed the friendly proceeding for the minor plaintiffs. Within ten days, defendants shall serve plaintiff with a true copy of the settlement agreement in "Brandon Walsh, et als v. City of Bayonne, et

²The order and its statement of reasons are incorporated by reference.

als, Civil Action No.: 2:14-cv-7186" after redaction of identifiers and settlement terms for the minor-plaintiffs.³

³ The Appellate Division denied Bayonne's application for emergent relief on February 7, 2018. The Supreme Court denied Bayonne's stay application on March 12, 2018.