SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0341-22

SIMON LAW GROUP,

Plaintiff-Respondent,

v.

NEW JERSEY POLICEMEN'S BENEVOLENT ASSOCIATION,

Defendant/Third-Party Plaintiff-Appellant,

v.

PETER CRISAFULLI,

Third-Party Defendant-Respondent.

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Argued August 15, 2023 — Decided August 21, 2023

Before Judges Currier and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0706-21.

Robert A. Fagella argued the cause for appellant (Zazzali, Fagella, Nowak, Kleinbaum & Friedman,

attorneys; Robert A. Fagella, of counsel and on the briefs).

Erik Frins argued the cause for respondent Simon Law Group (Simon Law Group, attorneys; Erik Frins, on the brief).

PER CURIAM

Defendant New Jersey Policeman's Benevolent Association appeals from a July 28, 2022 order denying its request for an award of attorney's fees and costs against plaintiff Simon Law Group pursuant to Rule 1:4-8 and the Frivolous Litigation Statute (FLS), N.J.S.A. 2A:15.59.1. We reverse and remand for proceedings consistent with this opinion.

The underlying facts are undisputed. Defendant is a fraternal and labor organization that represents active and retired law enforcement members, and has over 300 local affiliates. It operates a Legal Protect Plan (LPP or plan), which reimburses certain attorney's fees in specified amounts for eligible members. The LPP reimburses at a maximum hourly rate of $130, pays a maximum of $1,000 when a member is a target of an internal affairs investigation, and $3,500 when a member is a target of a criminal investigation.

Any law firm participating in the LPP must agree to abide by the terms and conditions of the attorney guidelines set forth in the plan by executing an attorney acknowledgment of participation form. As noted in the form, the LPP

requires an attorney seeking reimbursement to advise the plan of the nature of the matter the attorney is handling on behalf of the member, submit periodic reports regarding the status of the investigation, and provide a detailed invoice and explanation of the outcome of the representation. The form also recites the maximum reimbursement amounts for representation and the maximum hourly rate eligible for reimbursement. Plaintiff agreed to the plan's terms by executing an attorney acknowledgment and participation form.

In 2018, an officer who was a member of the plan became the target of an internal affairs investigation. The officer and his union submitted the appropriate form to the LPP describing the investigation, and then hired plaintiff to represent him. However, plaintiff failed to provide the LPP information regarding the investigation as it proceeded, or any documentation describing the outcome of the matter.

Plaintiff then submitted an invoice to defendant for $57,172.50 in attorney's fees, which were calculated at a rate of $450 per hour. On November 16, 2020, defendant's counsel sent plaintiff a letter stating plaintiff failed to comply with the LPP because it "did not submit any documents describing the case or its conclusion." Moreover, plaintiff's bill was inappropriate because it exceeded the maximum reimbursement amount and hourly rates. Defense

counsel's letter closed with the following: "Finally, I advise you that should you make an effort to file suit in spite of the obvious lack of validity of your claim, we will take the position that it is frivolous litigation filed in bad faith and proceed accordingly."

On May 18, 2021, plaintiff filed a complaint alleging: breach of contract; quantum meruit; breach of the covenant of good faith and fair dealing; and fraud. On June 2, 2021, defense counsel sent plaintiff a second letter stating: "Before I file our answer and counterclaim, I wanted to give you an opportunity to insure you understand why the claim is frivolous." The letter reiterated plaintiff's claim exceeded the maximum reimbursement permitted and violated the LPP provisions. The letter warned if plaintiff continued to maintain its claims despite the defects noted by defense counsel, and did not accept a $3,500 reimbursement, defendant would "vigorously assert claims for frivolous litigation and attorney's fees against [plaintiff] . . . under the [FLS]." Plaintiff did not withdraw its complaint.

Defendant deposed plaintiff's managing partner. The managing partner testified he never read the terms of the LPP or the plan's attorney guidelines. The partner testified he billed the plan and later sued defendant without ever reading its reimbursement terms. He conceded the plan's terms controlled the

reimbursement of his firm's fees, and that plaintiff filed the lawsuit without ever reading the agreement for reimbursement.

After the close of discovery, defendant moved for summary judgment, asking the court to dismiss plaintiff's complaint and for a judgment limiting plaintiff's recovery to the $3,500 permitted under the LPP. The motion judge found plaintiff was bound by the terms of the LPP and its reimbursement provisions. The judge concluded the terms of the LPP were "crystal clear and the language is unambiguous . . . and . . . provides that there is no more than $3,500 paid to [plaintiff]."

Following the dismissal of plaintiff's claims defendant moved for an award of attorney's fees and costs pursuant to Rule 1:4-8 and the FLS. The judge found the bill plaintiff submitted to LPP "had a number of violations of the applicable reimbursement guidelines[,]" including the excessive hourly rate billed by plaintiff and the reimbursement sought "far exceeded the maximum amount of $3,500 reimbursement." Further, plaintiff provided the plan "no real information or inclination about the outcome of the matter . . . ."

The motion judge noted plaintiff's "lawsuit was filed . . . and continued despite the absen[ce] of any contractual or legal basis [to] hold [defendant] responsible for the fees in excess of the LPP's reimbursement." The judge found

plaintiff "offered no excuse for suing for $57,000 . . . [,] continued to ignore the actual language of the plan[,] and . . . admitted that the plan only authorizes fee reimbursement in the amounts that the firm ignored." He found the managing partner admitted he "never bothered to even read the plan provisions upon which the suit was based."

The motion judge noted defendant's counsel sent two letters "requesting a withdrawal of any claims and notifying [the managing partner] that any such claims are frivolous[,] and that pursuit of such claims potentially would subject the firm to the consequences of frivolous litigation." Moreover, the letters from defendant's counsel offered "an explanation . . . as to why there is no merit to [plaintiff's] claim[s] . . . ."

Notwithstanding these facts, the motion judge denied the request for attorney's fees, citing State v. Franklin Savings Account Number 2067, 389 N.J. Super. 272 (App. Div. 2006). He noted that there, we held an award of fees under Rule 1:4-8(b)(1) required the movant to strictly comply with the requirement of providing the respondent twenty-eight days to withdraw the frivolous pleading. Id. at 281. The judge found neither of the notices sent by defendant's counsel provided notice to plaintiff "of their right to take action to withdraw [the complaint] within the [twenty-eight]-day period." The judge

remarked his ruling "might" be considered a "technical reading of the court rule of elevating form over substance but" he was bound to strictly interpret the rule as required by Franklin Savings.

On appeal, defendant argues the motion judge erred by concluding attorney's fees were not payable because defendant's demands that plaintiff withdraw its complaint did not explicitly state plaintiff had twenty-eight days to do so. Defendant argues it not only complied with the intent of the notice requirement, but also met the requirement because more than twenty-eight days passed before defendant filed the motion for fees. Defendant asserts the motion judge ignored his findings that plaintiff's complaint was frivolous, and instead misinterpreted Franklin Savings because the case does not hold the twenty-eight-day notice requirement is "a jurisdictional prerequisite to a subsequent fee request."

We review a trial judge's decision on a motion for frivolous lawsuit sanctions under an abuse of discretion standard. McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011). Under this standard, we will reverse if the decision "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." Ibid. (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

The FLS permits a court to award attorney's fees in a civil action to a prevailing party if it finds "at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous." N.J.S.A. 2A:15-59.1(a)(1). A pleading is frivolous if: "[t]he non-prevailing party knew, or should have known, that [it] . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(2).

Rule 1:4-8(b) permits a party to seek sanctions against an adversary who has filed a pleading asserting a claim that lacks the legal or evidential support. "[U]nder Rule 1:4-8, an assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009) (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007)).

Prior to seeking sanctions under the rule, the movant must provide written notice to the respondent demanding withdrawal of the frivolous pleading. Toll

Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 69 (2007). Specifically, Rule 1:4-8(b)(1) requires the

> notice and demand . . . shall (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within [twenty-eight] days of service of the written demand. If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the [twenty-eight]-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 [twenty-eight]-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver. The certification shall also certify that the paper objected to has not been withdrawn or corrected within the appropriate time period provided herein following service of the written notice and demand.

Rule 1:4-8(f) states: "[t]o the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. 2A:15-59.1." "Thus, a litigant moving for counsel fees and costs pursuant to N.J.S.A. 2A:15-59.1 is required to comply with Rule 1:4-8(b)(1) . . . , but only '[t]o the extent

practicable.'" Bove v. AKPharma Inc., 460 N.J. Super. 123, 150-51 (App. Div. 2019) (second alteration in original).

We are constrained to conclude the motion judge misapplied his discretion when he relied on Franklin Savings to deny defendant attorney's fees. In Franklin Savings, the State served a bank with a subpoena seeking a customer's bank records, in violation of Rule 4:14-7(c), by advising the bank it could comply by providing the documents sought in the subpoena before the deposition date. 389 N.J. Super. at 276. The customer's attorney sent the State a letter advising its subpoena did not comply with the Rules of Court and that counsel would seek fees pursuant to Rule 1:4-8 if the subpoena was not withdrawn. Id. at 277. The State withdrew the subpoena and served an amended subpoena twenty-three days later, which complied with the Rules of Court. Ibid. The day before the State issued the amended subpoena, the customer's attorney moved to quash the subpoena, and filed for summary judgment and fees pursuant to Rule 1:4-8, along with other relief. Id. at 278. The motion judge granted the motion, including the fee request. Ibid.

We reversed the counsel fee award, noting a sanction for frivolous litigation was not intended to police "a technical violation of a discovery rule" but applies where a party asserts "claims . . . that lack the legal or evidential

support" required by Rule 1:4-8(a). Id. at 281. Moreover, the customer's attorney did not comply with Rule 1:4-8(b)(1) by filing the sanction motion separately from the other applications "and [giving] notice to the adversary of its right to take action to withdraw the objectionable pleading within a twenty-eight-day period." Ibid. We held "[s]trict compliance [with the Rule] is a prerequisite to recovery." Ibid.

Here, there is no dispute plaintiff's complaint was frivolous and lacked a legal or factual basis. It is undisputed plaintiff received two written notices, pre- and post-complaint, advising it of the frivolous nature of its claims. The second notice demanded plaintiff not proceed with its complaint. Defendant filed its motion separately in compliance with the Rule. And the motion for sanctions was filed over one year after the second frivolous litigation notice was served on plaintiff. For these reasons, the facts of this case bear little resemblance to those in Franklin Savings.

Regardless, we must contend with the fact defendant's demand did not expressly state "that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within [twenty-eight] days of service of the written demand." R. 1:4-8(b)(1). The goal of this rule provision is to provide due process; to give the party who filed the

frivolous pleading notice of objectionable filing and an opportunity to avoid sanctions by withdrawing it. See Toll Bros., 190 N.J. at 71 (holding "We fashioned timeframes for bringing frivolous behavior to the attention of the offending party, counsel, or pro se litigant, so that the behavior could be corrected promptly and litigation costs kept to a minimum, thereby preserving judicial, lawyers', and litigants' resources.").

These laudable goals were met in this case. Indeed, plaintiff received multiple warnings regarding its frivolous claims. Once plaintiff filed its complaint, not only did it have the benefit of discovery and defendant's motion for summary judgment, which also clearly highlighted the frivolous nature of its claims, it also had over one year to comply with defendant's demand to withdraw the complaint.

Under the facts presented, we are unconvinced the omission of a twenty-eight-day deadline for withdrawal of the complaint in defendant's demand would have led to a different result. We have held challenges to the notice requirement of Rule 1:4-8 "must be handled on a case-by-case basis." ASHI-GTO Assocs. v. Irvington Pediatrics, P.A., 414 N.J. Super. 351, 364 (App. Div. 2010). This is because "[a] blanket rule insisting on the notification procedures of the court rule could, in certain contexts, leave a party without any effective remedy." Ibid.

The motion judge's admittedly technical reading of the rule deprived defendant of a remedy it was clearly entitled to. For these reasons, we reverse and remand the matter and direct the judge to consider defendant's application for attorney's fees.

Reversed and remanded. We do not retain jurisdiction.