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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1592-20**

**AFRICAN AMERICAN DATA
AND RESEARCH INSTITUTE
(AADARI), LLC and
OBAFEMI (BAFFI)
SIMMONS,**

**Plaintiffs-Respondents/
Cross-Appellants,**

v.

**JEANNE HITCHNER, CITY OF
MILLVILLE, and CITY OF
MILLVILLE POLICE
DEPARTMENT,**

**Defendants-Appellants/
Cross-Respondents.**

Submitted on November 28, 2022 – Decided April 20, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Cumberland County, Docket No. L-0736-20.

Brock D. Russell, attorney for appellants/cross-
respondents.

Rotimi A. Owoh, attorney for respondents/cross-appellants.

PER CURIAM

In this appeal, we consider an order denying defendants Jeanne Hitchner, the City of Millville (Millville), and the City of Millville Police Department's (MPD) motion to dismiss plaintiffs African American Data and Research Institute, LLC (AADARI), and Obafemi Simmons's unverified complaint. We also consider the provision of the order that required defendants to provide plaintiffs with certain internal affairs records pursuant to plaintiffs' Open Public Records Act (OPRA)¹ and common law right of access requests.

Plaintiffs cross-appeal, asserting the judge erred in denying access to the following records: the reasons for MPD officers' separation from employment; "ticket-fixing"; and sexual orientation harassment. Plaintiffs also sought a copy of a settlement agreement regarding Officer Jeremy Proffit under OPRA. Lastly, plaintiffs sought an incident report under OPRA and the common law right of access involving the punching of an unarmed black man while on the ground; and the decision to retain an officer twice accused of assaulting women.

¹ N.J.S.A. 47:1A-1 to -13.

I.

On September 9, 2020, AADARI² made OPRA and common law of access requests to Millville for MPD employee disciplinary and other internal affairs records. After an extension to respond was granted, defendants produced some of the requested documents. Defendants, however, declined to provide records that identified employees who may have been subject to discipline or internal affairs investigations; internal disciplinary determinations or settlements reached between employees and Millville pursuant to Libertarians for Transparent Government v. Cumberland County³ and a certain "incident report."⁴

On November 27, 2020, plaintiffs filed an Order to Show Cause (OTSC) and unverified complaint under Rule 4:67 against defendants alleging the denial of the document requests violated OPRA and the common law. Plaintiffs sought

² The last page of the complaint bore the printed notation "Baffi Simmons - AADARI."

³ 465 N.J. Super. 11 (App. Div. 2020).

⁴ At the time of plaintiffs' initial request, defendants believed the State Office of Public Integrity and Accountability of the Division of Criminal Justice was still conducting a criminal investigation. The incident report and other "particulars" provided to Millville by the State were produced to AADARI on February 24, 2021.

the immediate release of the requested records and an award of counsel fees. The complaint was signed by plaintiffs' counsel and contained a Rule 4:5-1 certification also signed by counsel. Neither Simmons nor an officer of AADARI submitted a verification or affidavit based on personal knowledge in support of plaintiffs' application. In lieu of an answer, defendants filed a letter brief in opposition to the OTSC.

On February 4, 2021, defense counsel moved for an involuntary dismissal of the OTSC and unverified complaint pursuant to Rule 4:37-2(b) because plaintiffs failed to verify the complaint or to provide any supporting affidavit from an AADARI officer or Simmons. Therefore, the pleading was procedurally deficient on its face and warranted dismissal.

Defendants further argued plaintiffs failed to comply with the trial judge's order that "a copy of the [OTSC], verified complaint and all supporting recording affidavits or certifications submitted in support of [plaintiffs'] application be served on the defendants personally within seven days".

After considering counsels' arguments, the trial judge denied defendants' application. In a brief oral decision, the judge concluded defendants waived the jurisdictional defense and explained the application "should have been filed as a motion on notice as to the [c]ourt." The judge further explained, "even if

[defendants' application] was filed on motion to the [c]ourt, it's not as clear cut as one would suggest." The judge stated "[t]his [was] a simple matter." He determined "the [c]ourt doesn't find that there's any factual dispute that exists with regards to the substance of those records that would require the affidavit that the defense was requesting."

The judge then addressed the merits of plaintiffs' application and granted disclosure of some of the records at issue, but only under the common law right of access. The next day, the judge memorialized his oral ruling in an order. Thereafter, the order was stayed pending this appeal.

II.

On appeal, defendants contend the trial court erred in denying their motion for involuntary dismissal pursuant to Rule 4:37-2 based on plaintiff's unverified complaint and lack of proofs submitted at the OTSC hearing. We agree with these contentions.

Our review of a trial judge's legal conclusions is de novo. Mills v. State, Dep't of the Treasury, 435 N.J. Super. 69, 75 (App. Div. 2014) (citing Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010)). In reviewing a summary action conducted under Rule 4:67, we generally use the substantial credible evidence standard. See O'Connell v. N.J. Mfrs. Ins. Co., 306 N.J.

Super. 166, 172-73 (App. Div. 1997). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974). Pursuant to Rule 4:67, "[s]ummary actions are, by definition, short, concise, and immediate, and further, are 'designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment.'" MAG Ent. LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005) (quoting Depos v. Depos, 307 N.J. Super. 396, 399 (Ch. Div. 1997)).

"[A]n OPRA complaint must be filed in accordance with Rule 4:67-2(a), which requires the filing of an OTSC and verified complaint in a summary action." A.A. v. Gramiccioni, 442 N.J. Super. 276, 282 (App. Div. 2015). "Verification requires that the pleading party allege facts that are based on personal knowledge and that such allegations be of facts admissible as evidence to which the affiant is competent to testify." Hodges v. Sasil Corp., 189 N.J. 210, 233 n.2 (2007) (citing R. 1:4-7; Monmouth Cnty. Div. of Soc. Servs. v. P.A.Q., 317 N.J. Super. 187, 193-94 (App. Div. 1998)). Rule 4:67-2(a) specifically requires that the complaint in a summary action be "verified by affidavit made [on personal knowledge] pursuant to [Rule] 1:6-6."

Then, if a court is satisfied that a plaintiff's application is sufficient, the court "shall order the defendant to show cause why final judgment should not be rendered for the relief sought." R. 4:67-2(a). "The court shall try the action on the return day" and if "the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." R. 4:67-5. "If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment." Ibid.

Based on the record before us, plaintiffs' OTSC and complaint were brought as a summary action and heard on the return date in accordance with our court rules. However, plaintiffs did not comply with the court rules and order. Specifically, a verified complaint was not filed and served on defendants which rendered the unverified OPRA complaint a "nullity." See A.A., 442 N.J. Super. at 281-82. Consequently, plaintiff's unverified complaint was "insufficient" to invoke the trial court's subject matter jurisdiction which must rest on a verified complaint. Id. at 282 (citing Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:4-7 (2015)).

Additionally, neither Simmons nor an officer of AADARI submitted an affidavit with personal knowledge of genuine facts to support plaintiffs' application. See R. 4:67-2(a). In the absence of affidavits supporting a verified complaint, the trial judge had only counsels' representations. Such representations cannot—and do not—provide support of factual allegations. "We have consistently vacated trial court decisions that rely only on representations of counsel, rather than on competent evidence." N.J. Div. of Youth & Fam. Servs. v. S.S., 405 N.J. Super. 1, 7 (App. Div. 2008). Here, the trial judge was without sufficient proofs to make factual findings.

The procedural aspects of the Rules governing OPRA summary actions are critical and may not be bypassed by plaintiffs, and the trial judge should have determined procedural compliance as a prerequisite to consideration of the merits of plaintiffs' records request. Because defendants raised the issue of the sufficiency of the unverified complaint, the trial judge should not have concluded defendants waived the defense of lack of subject matter jurisdiction. "The issue of subject matter jurisdiction may be raised at any time" before the trial court. Macysyn v. Hensler, 329 N.J. Super. 476, 481 (App. Div. 2000); see also R. 4:6-7; Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:6-7. As noted above, plaintiffs did not attempt to comply with the requirements

of the Rules prior to filing the OTSC and complaint, and the judge failed to properly consider subject matter jurisdiction. See Royster v. N.J. State Police, 439 N.J. Super. 554, 568 (App. Div. 2015) ("Subject matter jurisdiction can neither be conferred by agreement of the parties nor waived as a defense, and a court must dismiss the matter if it determines that it lacks subject matter jurisdiction."), aff'd as modified, 227 N.J. 482 (2017).

Since we have found the lack of a verified pleading and supporting affidavit was a fatal procedural deficiency, we need not address the points raised in plaintiffs' cross-appeal. Therefore, we reverse and vacate the February 5, 2021 order.

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



CLERK OF THE APPELLATE DIVISION