SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1998-20
A-2348-20

DAVID DEFRANCO,

Plaintiff,

v.

SOUTH ORANGE-MAPLEWOOD BOARD OF EDUCATION,

Defendant-Appellant,

and

SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, COLUMBIA HIGH SCHOOL, ELIZABETH AARON, JAMES MEMOLI, MATTHEW BECHT, STEVEN CAMPOS, WILLIAM KRAIS, and CHS BASEBALL BOOSTER, INC.,

Defendants,

and

JOSEPH FISCHETTI, SAMUEL

MAIETTA, and LORENZO BUSICHIO,

Defendants-Respondents.

DAVID DEFRANCO,

Plaintiff,

v.

SOUTH ORANGE-MAPLEWOOD BOARD OF EDUCATION, JOSEPH FISCHETTI, SAMUEL MAIETTA, and LORENZO BUSICHIO,

Defendants-Respondents,

and

SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, COLUMBIA HIGH SCHOOL, ELIZABETH AARON, JAMES MEMOLI, MATTHEW BECHT, STEVEN CAMPOS, WILLIAM KRAIS, and CHS BASEBALL BOOSTER, INC.,

Defendants.

RANDALL P. NATHAN,

Appellant.

Argued March 21, 2023 – Decided June 9, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1043-16.

David B. Rubin argued the cause for appellant South Orange-Maplewood Board of Education in A-1998-20.

Randall P. Nathan, appellant, argued the cause pro se in A-2348-20.

Sandra N. Varano argued the cause for respondent South Orange-Maplewood Board of Education in A-2348-20 (Nirenberg & Varano, LLP, attorneys; Sandra Varano, on the brief).

Ronald J. Ricci argued the cause for respondent Samuel Maietta (Ricci & Fava, LLC, attorneys; Ronald J. Ricci, and Brooke Bagley, on the briefs).

Andrew L. Schwartz argued the cause for respondent Lorenzo Busichio (Schwartz Law Group, LLC, attorneys; Andrew L. Schwartz, on the brief).

Colin M. Lynch argued the cause for respondent Joseph Fischetti (Zazzali Fagella Nowak Kleinbaum & Friedman, attorneys; Colin M. Lynch, of counsel and on the briefs; Raymond M. Baldino, on the briefs).

PER CURIAM

These appeals were argued back-to-back, and we consolidate them now to issue a single opinion. In A-1998-20, the South Orange-Maplewood Board of Education (the Board) appeals from the Law Division's March 16, 2021 order

denying the Board's motion to enforce a settlement agreement and granting cross-motions brought by defendants Joseph Fischetti and Lorenzo Busichio, to enforce a consent protective order. Both the protective order and the settlement agreement arose out of a lawsuit brought by a former student and member of the baseball team at Columbia High School, David DeFranco, who alleged that, among other things, defendants and others violated the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 to -32 (the DeFranco litigation). At relevant times pled in the DeFranco litigation, Fischetti was the varsity baseball coach, defendant Samuel Maietta was the junior varsity coach, and Busichio was the school's athletic director. The protective order was entered during discovery in the DeFranco litigation to permit the parties to provide discovery while designating it "confidential" and subject to limited disclosure in the context of the DeFranco litigation. As a result, the Board gained access to racially and religiously insensitive text messages exchanged by defendants on their personal cell phones. The parties executed the settlement agreement after a mediation ended the DeFranco litigation in 2019.

In A-2348-20, Randy Nathan appeals from the same Law Division order denying his motion to use these text messages in a pending proceeding in the Office of Administrative Law (OAL). Nathan is the father of another player

who was on the baseball team at Columbia High School, and who also complained about defendants' conduct toward his son. Nathan appealed to the Commissioner of Education (the Commissioner) from the Board's administrative decision denying Nathan's harassment, intimidation, and bullying (HIB) complaint. In addition, Nathan was named as a defendant in a defamation suit brought by Fischetti (the Fischetti litigation), and in that litigation was provided with the text messages subject to a consent protective order. See Fischetti v. S. Orange-Maplewood Bd. of Educ., No. A-0778-18 (App. Div. May 29, 2019) (slip op. at 4–5) (affirming the trial judge's decision to permit Nathan to subpoena the text messages and noting entry of a separate protective order).

Nathan's attempts to use the text messages in the OAL proceedings were thwarted by the administrative law judge (ALJ), who, believing the DeFranco litigation protective order remained in effect and could only be lifted by the trial judge overseeing the now-settled litigation, directed Nathan to seek relief in the Law Division. Nathan did, and the judge denied his request. The Board's and Nathan's appeals followed.

I.

We provide some relevant procedural history to place each appeal in the proper context.

As to A-1998-20

Subject to the consent protective order entered in the DeFranco litigation, defendants agreed to provide their personal cell phones for a forensic audit. Under the terms of the protective order, a "confidential" designation by the producing party automatically rendered the material unusable except by counsel and solely for the purposes of litigation, unless otherwise ordered by the court. If a party disputed the designation of any discovery as confidential, the objecting party could "seek appropriate relief" from the court. The protective order further provided:

> Within sixty [] days after the conclusion of this action by settlement and release, . . . all documents designated as confidential pursuant to this Order and all copies thereof that are in the possession, custody or control of any person other than the producing party shall be returned to the producing party, or shall be destroyed, and if destroyed, a certification to that effect shall be delivered to the producing party.

The order was signed by DeFranco's counsel, the Board's attorney, and counsel for defendants, who, we were advised at oral argument, represented defendants under an applicable insurance policy. During discovery, defendants designated as confidential more than 35,000 group chat text messages stored on their cell phones.

We need not recite the convoluted procedural history that followed, except to say that on October 12, 2018, the judge who was then overseeing the DeFranco litigation entered an order that resulted in the text messages retaining their confidential designation. However, the judge's order also provided that the Board "shall be permitted to utilize the material at issue during confidential Board proceedings for the limited purposes of making personnel recommendations."

The settlement agreement reached in January 2019 was executed by counsel for the parties and provided, in pertinent part,

> This settlement is without prejudice to the rights of the parties in [the Fischetti litigation] or to the right of the Board to file an application before a tribunal of competent jurisdiction to use the text messages at issue in this matter for such disciplinary purposes as the Superintendent or the Board sees fit.
>
> This settlement is further subject to preservation of the text messages at issue in this matter by counsel for defendant[s] . . . as required by the confidentiality order in the present matter.

In July 2019, the Board filed a motion denominated as seeking to "enforce settlement," but the motion actually sought authority to access the text messages and use them "for disciplinary purposes." Defendants opposed the motion and, alternatively, argued the dispute properly should be before the Commissioner.

A different Law Division judge now was overseeing the litigation, and he entered an order permitting the Board to file a petition with the Commissioner seeking release of the text messages. The Board did so, but the Commissioner refused jurisdiction.

The Board moved again in the Law Division "to enforce the settlement agreement," and Fischetti and Busichio cross-moved seeking enforcement of the protective order. The judge considered oral arguments over two days before issuing the March 16, 2021 order now on appeal.

As to A-2348-20

In April 2016, Nathan filed a petition with the Commissioner seeking review of the Board's rejection of his HIB complaint. We need not detail the immediate procedural history that followed, except to say that by June 2018, the Commissioner had resolved any dispute regarding Nathan's standing and ordered a hearing in the OAL on the merits of his petition. In March 2019, the ALJ permitted Fischetti to intervene in the administrative hearing.[1]

After our decision in the Fischetti litigation, and after the ALJ apparently indicated he would not authorize the use of the text messages without an order

[1] Fischetti was the only defendant who sought to intervene in Nathan's OAL proceeding against the Board.

from the Law Division, Nathan moved before the same Law Division judge now overseeing the settled DeFranco litigation for permission to use the text messages in the OAL proceedings. Fischetti opposed the request, even though Nathan, who already possessed the text messages, consented to another protective order in addition to the protective order entered in the Fischetti litigation.

The judge heard arguments on Nathan's request, which the Board supported, contemporaneously with the Board's motion and defendants' cross-motion. The judge's March 16, 2021 order denied Nathan's request for authority to use the text messages in the OAL proceedings.

The Judge's Decision

After reciting at length the procedural history of the two matters and the parties' arguments, the judge noted that a clearly written agreement between the Board and defendants was not subject to modification "unless the modification [wa]s clear and unambiguous[] with an intent to so modify." Relying extensively on a 2006 unpublished opinion from our court involving a protective order entered in an employee's discrimination suit against a utility, the judge reasoned defendants' text messages were "personal and private" and never would "have been revealed without the protections" of the protective order. Given the

resolution of the DeFranco litigation, the judge found the text messages "were not admitted into evidence at trial or any other court proceeding." See Est. of Frankl v. Goodyear Tire & Rubber Co., 181 N.J. 1, 10 (2004) (noting, "The universal understanding in the legal community . . . that unfiled documents in discovery are not subject to public access."). He concluded the "text messages, although they exhibit extreme and unwarranted conduct by educators and mentors, fall under the confines of the [p]rotective [o]rder."

The judge then addressed the first judge's 2018 order permitting the Board to utilize "the text messages . . . 'during [c]onfidential Board proceedings for the limited purposes of making personnel recommendations.'" He found the earlier order was "insufficient to modify the clear, written agreement reached by the parties." He reasoned the 2018 order "was not meant to cover circumstances post-settlement or after case disposition[,]" was not evidence "of any intent to modify the preexisting [p]rotective [o]rder," and it did "not supersede . . . the preexisting, controlling [p]rotective [o]rder." The judge determined "the 'confidential' text messages [we]re not available for use by the Board in tenure proceedings."

Addressing both the Board's and Nathan's arguments, the judge found there was "no dispute among any of the parties" that the text messages were

relevant to proceedings in the OAL. He determined, however, that Nathan and the Board had "skipped a step in their analysis of the issue presented." The judge concluded he must enforce the terms of the protective order and

> [o]nly then can this [c]ourt or the [ALJ] decide that the text messages are relevant to Nathan's claims in the OAL. Because this [c]ourt finds that the terms of the [p]rotective [o]rder are binding and enforceable, the text messages remain confidential, shall be returned to the producing party and preserved pursuant to the terms of the [p]rotective [o]rder, and cannot be released for either Nathan's matter in the OAL or for potential tenure proceedings by the [Board].
>
> [(Emphasis added).]

Despite that unequivocal statement, the judge proceeded to consider whether defendants' reliance on the protective order was "outcome determinative." Citing the protective order, he concluded defendants' reliance was simply one factor that weighed in favor of enforcing the protective order. The judge then considered "other arguments in support of enforcement of the" protective order and conducted "a balancing analysis between the public interest and the private interest asserted," which he concluded was "necessary to determine whether to enforce a particular contract."

Citing Dixon v. Rutgers, 110 N.J. 432, 456 (1988), as the Court's recognition of "the importance and reliance factors that parties place on these

protective orders," the judge noted, "[h]owever, such privacy interests should give way in appropriate cases where there is a stronger competing public interest, such as eradicating discrimination." (citing id. at 449 n.4). The judge then noted "the strong public interest[s] in education," "eradicating discrimination," and "for parents and families to acquire knowledge when there is an existing discriminatory pattern within the school board." He also recognized the interests "[p]arents, siblings, and other relatives assuredly have . . . in knowing when and if their student is being exposed to vulgar and cruel harassment from mentors and advisors in an educational setting." Nevertheless, the judge concluded "the balancing analysis . . . reveals that the private interest outweighs the public interest, thus favoring the preservation and enforceability of the consented to [p]rotective [o]rder."

Citing defendants' "freedom to contract" and reliance on the confidentiality terms of the protective order, the judge said, "the parties lawfully and willfully agreed to the provisions of the [o]rder, and therefore the parties are bound by such terms." Citing our decision in Williams v. Board of Education of Atlantic City Public Schools, 329 N.J. Super. 308, 313 (App. Div. 2000), the judge concluded that if the Board used the text messages against defendants in any future tenure hearings, they would be subject to disclosure under the Open

Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA), and "any person [would] have unqualified access to them[,]" which "would completely frustrate the purpose of the [p]rotective [o]rder." Lastly, the judge noted that the Board had no "substantive right to access these personal messages," which, "although vulgar, crude, and discriminatory, were private and personal text messages."

The judge concluded "the provisions of the [p]rotective [o]rder should be upheld and enforced, thereby prohibiting both the Board from utilizing the text messages for future disciplinary proceedings and Mr. Nathan from utilizing them in the OAL proceeding." He entered the order under review, staying that portion requiring the return of the text messages pending these appeals.

II.

A.

Before us, the Board argues the judge's order is subject to our de novo review and contends his "balancing of the parties' interests was fundamentally flawed." Defendants contend the appropriate standard for our review is whether the judge mistakenly exercised his discretion. They argue the judge properly considered the terms of the protective order and the competing interests regarding the potential public disclosure of the text messages. We have

considered the parties' arguments, the record, and applicable legal standards. We reverse.

Initially, we settle the dispute about the proper standard of review. The Board contends we should conduct our review de novo, because the judge was required to interpret a contract, i.e., the settlement agreement. See, e.g., Univ. of Mass. Mem'l Med. Ctr. v. Christodoulou by Christodoulou, 180 N.J. 334, 349 (2004) ("A settlement agreement between parties to a lawsuit is a contract." (quoting Nolan by Nolan v. Lee Ho, 120 N.J. 465, 472 (1990))); Kieffer v. Best Buy, 205 N.J. 213, 222 (2011) ("The interpretation of a contract is subject to de novo review by an appellate court."). We also have likened a consent order to "an agreement of the parties that has been approved by the court" and applied interpretative tools like those used in construing other types of contracts. Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 292 (App. Div. 2014) (citing Highland Lakes Country Club & Cmty. Assoc. v. Franzino, 186 N.J. 99, 115 (2006)).

Defendants contend that the proper standard of review is whether the judge mistakenly exercised his discretion because this was essentially a discovery dispute governed by the terms of the protective order. Such issues trigger deferential review. See, e.g., Il Grande v. DiBenedetto, 366 N.J. Super.

597, 610 (App. Div. 2004) ("A trial judge's 'disposition of discovery matters, including the formulation of protective orders,' normally is given deference by a reviewing court, absent an abuse of discretion." (quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997))).

To some extent, we agree with both sides. Our first task is to interpret de novo the two "contracts." In this regard, we must examine the plain language of the agreements and discern the parties' intent. Kieffer, 205 N.J. at 223. Contrary to the Board's arguments, the settlement agreement did not override the protective order and guarantee the Board's ability to use the text messages in future disciplinary proceedings. Rather, the settlement agreement simply gave the Board "the right . . . to file an application before a tribunal of competent jurisdiction." That is what happened.

However, a significant part of the judge's opinion explained why maintaining the confidentiality of the text messages was purportedly consistent with the parties' expectations under the terms of the protective order. The judge concluded the settlement agreement did not "supersede or modify" the terms of the protective order upon which defendants had relied, but, as he expressed more clearly in addressing Nathan's motion, the judge thought that arguments

regarding the relevancy of the text messages "skipped a step," i.e., first releasing them from the strictures of the protective order.

However, it is equally clear from both the language of the protective order and the settlement agreement that the judge should not have imbued the protective order with some superior weight based on defendants' alleged reliance on its terms because any purported reliance was misplaced. By its own terms, the protective order permitted the court to override a party's designation of any discovery as confidential. On notice, a party could introduce confidential discovery "during trial or any hearing connected to any motion or proceeding," subject only to the producing party's discretionary ability to "take the steps to preserve the confidentiality." In other words, had the DeFranco litigation gone to trial, we seriously doubt the text messages would not have been disclosed to the public in open court.

Furthermore, the protective order allowed the court to settle disputes over the designation and continued designation of any discovery as confidential. In that regard, it is appropriate to interpret the protective order in context. It was a consent order designed to facilitate discovery and avoid a motion to compel. Contrary to defendants' arguments it did not give them a right to expect that the texts would remain confidential; rather, it deferred any decision on that issue

until a party or someone challenged the confidentiality designation. In short, contrary to defendants' assertions, by its own terms, the protective order was never an invincible shield prohibiting disclosure.

Moreover, we do not understand the judge's conclusion that the text messages would never have been produced in discovery but for entry of the consent protective order. Had the Board or DeFranco attempted to obtain the text messages through the normal course of discovery, the text messages probably would have been found to be relevant and subject to production. Even if defendants had sought a protective order in response to a motion to compel, it is not clear that a protective order would have been entered over another party's objection, and, if it was, the protective order would have been subject to review by the court.

The judge viewed the protective order as requiring the return of the confidential text messages to defendants because, even though the DeFranco litigation had ended, the protective order lived on. This interpretation of the protective order skewed its importance in the judge's ultimate weighing process, because it diverted him from considering anew the competing interests of the parties, including the undeniable public interests served by the Board's ability to use the text messages in any future disciplinary proceedings.

The settlement agreement was entered after the protective order, and by the express terms of this second "contract," the parties bargained for and agreed that the Board could seek to use the text messages. Defendants entered into the settlement agreement expressly "without prejudice to the rights" of the Board to apply to the court "to use the text messages . . . for such disciplinary purposes" as it saw fit. The protective order no longer had continued, independent vitality because the settlement agreement required the court to consider anew whether there was "good cause for the continuation of the [protective] order." R. 4:10-3. Indeed, Rule 4:10-3 specifically permits even a non-party who properly intervenes to challenge the terms of a previously-entered protective order. Here, the challenged vitality of the protective order was not made by intervenors, but rather by parties to the DeFranco litigation and Nathan's OAL proceeding.

Seen in this context and accepting defendants' view of the proper standard of review, we do not hesitate to conclude that the denial of the Board's motion and the grant of Fischetti's and Busichio's cross-motion reflects a mistaken exercise of the court's discretion. An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (emphasis added) (quoting Achacoso-Sanchez v.

Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). We have also described an abuse of discretion as occurring when "the discretionary act 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." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (emphasis added) (citing Flagg, 171 N.J. at 571). Specifically in the context of construing a protective order, we have said, "While ordinarily we give deference to a discretionary decision, we do not do so where the trial judge acted under a misconception of the applicable law." Alk Assocs. v. Multimodal Applied Sys., Inc., 276 N.J. Super. 310, 314 (App. Div. 1994) (citing State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966)).

Ascribing to the protective order only the minimal significance it deserved, we agree that the judge failed to adequately weigh the parties' competing post-settlement interests as he was required to do under the express terms of the settlement agreement. In considering defendants' private interests in maintaining the confidentiality of the text messages, the judge was clearly wrong when he wrote that the "messages had no connection with [defendants'] business activities or school related functions." The Legislature has made clear its intention in enacting legislation to address the bullying and harassment of

students, whether on or off school grounds, and the role of faculty and staff to be role models for appropriate behavior:

> The Legislature finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.
>
> [N.J.S.A. 18A:37-13.]

See also N.J.S.A. 18A:37-13.1(f) ("It is the intent of the Legislature in enacting this legislation to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises."). The public's interest in permitting the Board to utilize these "vulgar, crude, and discriminatory" text messages weighs heavily against defendants' personal privacy interests.

The judge relied upon our decision in Williams to conclude there was no alternative but eventual disclosure of the text messages to the general public if they were introduced at a hearing on tenure charges. In Williams, we held that

"tenure charge documents filed by a school district against a superintendent" were "public records" accessible to the plaintiff-news organization under OPRA's predecessor, the Right-to-Know Law. 329 N.J. Super. at 311. We concluded that because the tenure charges were "public records," they were subject to disclosure. Id. at 318.

The Board asserts that it has no desire to release the text messages to the public at large. However, as defendants note, tenure proceedings require the Board to file "a written statement of evidence . . . to support such charge," and, if it finds cause "to credit the evidence" and votes to dismiss or reduce the salary of the employee, to forward that recommendation to the Commissioner. N.J.S.A. 18A:6-11. These actions, however, "shall not take place at a public meeting." Ibid.

Busichio acknowledges that the judge was empowered to limit the disclosure of the text messages under OPRA, see N.J.S.A. 47:1A-1.1 (exempting from definition of "government record" any "information which is to be kept confidential pursuant to court order"), and the other defendants admit that while the texts themselves might be shielded from public disclosure, a general statement of the evidence supporting the charges would be disclosed.

We need not address what hypothetically could occur if a member of the public sought to access the actual text messages at issue in this appeal, because the Board does not stand on the same footing as a member of the public. The Board is responsible for bringing any tenure charge, evaluating the evidence to determine if probable cause exists and the charge warrants dismissal or reduction in salary, and then forwarding the charge to the Commissioner. N.J.S.A. 18A:6-11. In short, the Board's statutory obligations clearly outweigh any hypothetical public disclosure of the text messages.

The motion judge's decision to order the return of all the text messages produced by defendants during discovery in the DeFranco litigation, and permitting defendants to destroy the messages pursuant to the protective order was a mistaken exercise of his discretion. It gave unjustified weight and significance to the terms of the protective order and thereby inhibited the court's weighing of the public and private interests involved in permitting the text messages to be used in future tenure proceedings the Board may bring against defendants. We therefore reverse the March 16, 2021 order.

B.

Nathan argues that he was not a party in the DeFranco litigation and, therefore, the protective order has no applicability to his proceedings in the

OAL. He cites our rejection of the unsuccessful attempt in the Fischetti litigation to quash Nathan's subpoena of the text messages, notes that he already has them in his possession, and further that a protective order was entered in the administrative proceeding. In short, Nathan contends that although the ALJ required him to move in the Law Division to release the text messages from the strictures of the protective order, the judge mistakenly exercised his discretion by concluding the protective order barred Nathan's use of text messages in the administrative proceedings.

Defendants generally assert that the protective order in the DeFranco litigation was the only reason why the text messages were produced at all, and that Nathan's access to them through the Fischetti litigation was wholly derivative of the DeFranco protective order. According to defendants, the Law Division judge therefore had continued supervisory power over the text messages, regardless of the forum where they might be used. For all the privacy considerations already discussed, defendants contend the text messages cannot be used in the OAL proceedings. We disagree and reverse.

Initially, other than recognizing the privacy interests advanced by defendants and their purported reliance on the protective order, we note the motion judge failed to address with specificity why the DeFranco protective

order prohibited the use of the text messages in Nathan's administrative appeal. We also do not understand, and the record does not make clear, why the ALJ believed the Law Division judge necessarily had to grant Nathan relief from the terms of the protective order to which he never consented, particularly since the ALJ had already entered a consent protective order in the OAL proceedings.

Although we recognize that Nathan's interests may not weigh as heavily in the balance as do the Board's public interests, Nathan nonetheless is asserting HIB claims that implicate the conduct of public school employees; moreover, the Board supports Nathan's ability to use the text messages in the OAL proceedings, even though the Board is effectively a target of Nathan's claims.

We reject defendants' arguments that the protective order governed the use of the text messages in Nathan's OAL proceedings and reverse the Law Division judge's March 16, 2021 order that denied Nathan the ability to do so. Our opinion is not intended to limit the ALJ's discretionary ability to continue enforcement of the existing confidentiality order or to enter additional confidentiality orders.

Reversed. The Law Division's March 16, 2021 order is vacated.