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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-3853-22
A-3854-22

SAMUEL ARNOWITZ, FRANK
CASTRO, ROBERT MARKS,
JOEL MUNIZ, ESLY PANDURO,
DAVID PEREDA, DAVID ROE,
WAYNE STINE, and
ALEXANDER ZAMORA,

Plaintiffs-Appellants,

v.

CITY OF CLIFTON,

Defendant-Respondent,

and

MARK CENTURIONE, individually
and in his capacity as Chief of Police
of the City of Clifton Police
Department (now retired), DOMINICK
VILLANO, individually and in his
capacity as City Manager of City
of Clifton, DOUGLAS JOHNSON,
individually and in his capacity as
Personnel and Equal Employment
Opportunity Officer, THOMAS
RINALDI, individually and in his

capacity as Chief of Police of the City of Clifton Police Department, JAMES ANZALDI, individually and in his official capacities as Mayor and as a member of the City Council, PETER C. EAGLER, WILLIAM GIBSON, RAYMOND GRABOWSKI, LAUREN E. MURPHY, ROSEMARY L. PINO, STEVEN HATALA, JR., JOSEPH KOLODZIEJ, in their individual capacities and official capacities as members of the City Council of the City of Clifton,

Defendants.

SAMUEL ARNOWITZ, FRANK CASTRO, ROBERT MARKS, JOEL MUNIZ, ESLY PANDURO, DAVID PEREDA, DAVID ROE, WAYNE STINE, and ALEXANDER ZAMORA,

Plaintiffs-Respondents,

v.

CITY OF CLIFTON,

Defendant-Appellant,

and

MARK CENTURIONE, individually and in his capacity as Chief of Police of the City of Clifton Police

Department (now retired), DOMINICK VILLANO, individually and in his capacity as City Manager of City of Clifton, DOUGLAS JOHNSON, individually and in his capacity as Personnel and Equal Employment Opportunity Officer, THOMAS RINALDI, individually and in his capacity as Chief of Police of the City of Clifton Police Department, JAMES ANZALDI, individually and in his official capacities as Mayor and as a member of the City Council, PETER C. EAGLER, WILLIAM GIBSON, RAYMOND GRABOWSKI, LAUREN E. MURPHY, ROSEMARY L. PINO, STEVEN HATALA, JR., JOSEPH KOLODZIEJ, in their individual capacities and official capacities as members of the City Council of the City of Clifton,

Defendants.

Submitted March 13, 2024 – Decided June 11, 2024

Before Judges Currier, Firko and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3491-20.

Joseph R. Donahue, LLC, and C. Elston & Associates, LLC, attorneys for appellants in A-3853-22 and respondents in A-3854-22 (Catherine Mary Elston, of

counsel and on the briefs; Cathlene Y. Banker and Joseph R. Donahue, on the briefs).

Carmagnola & Ritardi, LLC, attorneys for respondent in A-3853-22 and appellant in A-3854-22 (Domenick Carmagnola, of counsel and on the briefs; Sean Patrick Joyce and Sarah Elizabeth Westaway, on the briefs).

PER CURIAM

On leave granted in these back-to-back appeals, we consider the July 12, 2023 order that denied appellant-defendant¹ City of Clifton's (defendant or the City) application for a protective order regarding a report it commissioned to investigate allegations of discrimination against active-duty military members employed as police officers with the Clifton Police Department. Plaintiffs appeal from the portion of the order that stayed the dissemination of the report pending appeal. After reviewing the record in light of the contentions advanced on appeal and the applicable principles of law, we affirm the order denying a protective order. As a result, we dismiss plaintiffs' appeal as moot and remand to the trial court to vacate its stay.

Plaintiffs are all City police officers who previously served in the military and remain on reserve duty with their respective branches. In November 2018,

¹ The remaining defendants were either dismissed or did not participate in the appeal.

the City Chief Financial Officer sent notices to police officers that also actively served in the reserves, advising that, pursuant to a settlement agreement between the Policemen's Benevolent Association (PBA) and the City, they were required to submit their pay stubs for the periods of time they were on military leave for active duty or at drills or training. The City would then reduce the officers' pay during the time they received military pay. The City also sought to recoup past paid leave.

In January 2019, plaintiffs' counsel sent a letter to the Mayor and City Council demanding they "cease and desist from any further unlawful discrimination and harassment" and notifying them of potential litigation. The issue was also the subject of a segment on an NBC News broadcast in March 2019. Cops Claim Bullying Over Their Military Service, NBC N.Y. News 4 (Mar. 8, 2019, 8:37 AM), https://www.nbcnewyork.com/on-air/as-seen-on/cops-claim-bullying-over-their-military-service_new-york/68359/.

Thereafter, the City Council advised it would retain an attorney to conduct an independent investigation into plaintiffs' claims. In an April 22, 2019 resolution, the City Council appointed the Law Offices of Nicholas J. Palma, Esq. to lead the investigation.

In March 2020, Palma sent his report to Matthew Priore, the City's municipal attorney and City Manager Dominic Villano. On March 31, 2020, Domenick Carmagnola sent a letter to Palma advising the City had retained his firm to defend it in a federal court lawsuit brought by a retired City police officer and against potential claims by these plaintiffs. Carmagnola stated he had a copy of Palma's report, and he requested the entire file of materials used to prepare the report so the firm could "determine whether [defendant] will rely upon [the] [r]eport in any manner and to prepare for any applications and discovery issues surrounding it." The letter also stated the report did not comply with the terms of Palma's agreement with the City because it did not include the names of the officers he interviewed and the documents he reviewed. Palma did not send Carmagnola the requested information.

After the City refused to pay Palma under its agreement, he filed a complaint for payment for his services for the investigation and report. The complaint stated that "in order to induce the [o]fficers to be candid and forthcoming during their interviews for the completion of a proper and thorough report, the [o]fficers were guaranteed that . . . their individual names would not be linked to specific protagonists or incidents" for "fear of increased harassment

and retaliation by the City" and City Police Department. Therefore, Palma did not send the City the background materials.

Plaintiffs filed their complaint in November 2020, alleging the City and other defendants had violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, in creating a hostile working environment because of plaintiffs' continued military reserve service. Plaintiffs also alleged disparate treatment, retaliation, and aiding and abetting under the LAD.

During discovery, plaintiffs served a subpoena duces tecum on Palma to produce all documents related to his investigation. Defendant moved to quash the subpoena. On April 10, 2023, the court denied defendant's motion.

In a written opinion accompanying the order, the court found there was no attorney-client relationship between Palma and the City, and therefore the attorney-client privilege did not prohibit Palma from complying with the subpoena. In citing to Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-51 (1997), the court found Palma's investigation and report were not prepared for litigation or intended to provide legal advice, but rather to investigate plaintiffs' allegations.

The court also determined the privilege of self-critical analysis did not prohibit Palma from complying with the subpoena. It found defendant's interest

"in keeping personnel records confidential" was outweighed by plaintiffs' interest in the production of the documents. The court reasoned plaintiffs acknowledged they had waived their confidentiality by initiating the lawsuit and that concerns regarding "personal identifiers, work product, and other privileged information may be addressed" through an in camera review and redactions. The court also rejected defendant's argument that the documents were irrelevant because defendant did not intend to rely on them in discovery or to support its affirmative defenses.

The court ordered Palma to submit copies of the report and investigatory file with suggested redactions, which would then be forwarded to the parties under seal to accept or reject the redactions and to suggest further redactions. The court prohibited any dissemination of the materials to third parties until further order.

The court denied defendant's subsequent motion for reconsideration on May 19, 2023. In clarifying its earlier decision, the court ordered Palma to submit unredacted copies of the report and investigatory file to the court with suggested redactions. The court would forward the unredacted report and suggested redactions to the parties for review and suggestion of further redactions or exceptions.

Thereafter, the court provided counsel with a copy of the report including Palma's proposed redactions, with instructions not to share the documents with their clients. We declined defendant's application to file an emergent appeal. However, on July 3, 2023, this court granted defendant's motion for leave to appeal and summarily affirmed the April 10 and May 19 orders.

In a June 23, 2023 email, the court advised counsel it had rejected defendant's requested redactions and stated the report previously sent to counsel would be the final version and could "be freely disseminated." Defendant moved to have the report "maintained under seal and 'attorneys['] eyes only'" pending this court's ruling on a motion for leave to appeal the order. (alteration in original).

On July 12, 2023, the court denied defendant's motion and ordered that the report could "be disseminated to counsel, the parties, witnesses, and third parties." The court stayed its order pending appellate review.

The court considered defendant's motion under Rule 4:10-3, which required defendant to show good cause to prevent discovery of the report. The court noted the City's resolutions "constitute[d] legal authority for preparation of an independent report regarding allegations of discrimination." Therefore, the public had an interest in learning the City had fulfilled its legal obligation to

investigate the allegations. The court also rejected defendant's argument that the report was its own property, reiterating there was no applicable privilege or attorney-client privilege that prohibited its release. To the contrary, the City Council had authorized and commissioned an "independent" investigation and report.

The court further found Rule 1:38-11 did not require sealing of the report because defendant did not have a legitimate privacy interest and plaintiffs waived their privacy interest by initiating the lawsuit and requesting access to the report. In considering defendant's argument that the report should not be disseminated because it did not contain admissible evidence, the court found the contents of the report were "reasonably calculated to lead to relevant evidence" and therefore, disclosure was not prohibited by Rule 4:10-2(a).

After defendant moved for leave to appeal, the court entered a consent protective order allowing plaintiffs' counsel to review an electronic copy of the report and investigatory file. Counsel were prohibited from sharing the report with their clients.

We granted defendant leave to appeal the July 12, 2023 order. We granted plaintiffs leave to appeal the portion of the July 12, 2023 order that stayed the dissemination of the report.

On appeal, defendant contends it demonstrated good cause to prohibit the report from public access because non-party individuals discussed in the report are entitled to their confidentiality and the report is "deliberative in nature . . . [and therefore] entitled to confidentiality."

The issue of whether to seal a record and prevent its disclosure lies within the trial court's discretion. Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 380 (1995). We will only overturn a trial court's ruling if it was an abuse of discretion. Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005). A trial court abuses its discretion when its decision was ""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) (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985)).

For the first time, defendant now asserts a common law right of access argument, stating the court must determine whether "the demand for inspection" is based on a proper public interest as articulated in Loigman v. Kimmelman, 102 N.J. 98 (1986). Defendant contends plaintiffs want to use the report as a "publicized campaign against the City," which is an "illegitimate, private interest."

Defendant's argument is not relevant to the way this matter presented procedurally before the trial court. Plaintiffs served a subpoena duces tecum on Palma for the production of all documents related to his investigation and ensuing report. Defendant moved to quash the subpoena, contending the materials were "protected by law, confidential investigative files, . . . attorney work product," and under the self-critical privilege. However, as noted by the trial court, defendant stated in its reply brief that the court need not undertake a self-critical privilege analysis because the City did not intend to rely on the report for its affirmative defenses and therefore the files were not relevant.

No party sought the report and investigative material under the common law right of access. Plaintiffs attempted to obtain the report through a subpoena to its author during discovery. When defendant moved to quash the subpoena, the court properly analyzed the application under Rule 4:10-3 to determine whether good cause existed to issue a protective order. The court found the work product and attorney client privileges were not applicable and the self-critical privilege analysis did not require the issuance of a protective order. Therefore, the court concluded defendant did not establish good cause to prevent the discovery of the report, as properly redacted for confidentiality concerns. We affirmed that order and the subsequent order denying reconsideration.

This appeal only concerns whether the court abused its discretion allowing the dissemination of the report to third parties. The court again noted the material and report were not privileged. Nor were the files defendant's "property," as it asserted. By resolution, the City requested Palma to undertake an independent investigation of plaintiffs' allegations of discriminatory conduct.

Defendant has not demonstrated a legitimate privacy interest that would preclude dissemination of the report. To the contrary, it is in the public's interest to know the City fulfilled its obligation to investigate its police department's treatment of its officers serving in the military reserves. In addition, the City expended public funds in its retention of Palma to perform the investigation and write the report.²

Like the trial court, we are satisfied the principles underlying Payton are instructive here when considering sealing materials from the general public. As the Payton Court stated, "The privilege of self-critical analysis exempts from disclosure deliberative and evaluative components of an organization's confidential materials." 148 N.J. at 544. The Court directed courts to "balance[] a party's need to know against another party's need for confidentiality." Id. at

² We are unaware of the outcome of Palma's lawsuit to compel payment for the investigation and report.

546. It further explained that when an entity was required by law to "prepare an honest report, replete with self-evaluation," the court would "not assume that [the entity] will shirk its responsibilities in order to hide the truth." Id. at 547. The Court emphasized that when the asserted public interest was the elimination of discrimination, the initial inquiry should be whether "the claim is valid and the material relevant." Id. at 549 (quoting Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432, 455 (1988)). Then the court should weigh that against the interest in nondisclosure. Ibid.

The court found the report was relevant to plaintiffs' LAD claims and would lead to admissible information. In addition, the public is entitled to information regarding the conduct of its police department.

Under Rule 1:38-11(a), a court can seal a document in the record upon a showing of "good cause." Good cause is present "when: (1) [d]isclosure will likely cause a clearly defined and serious injury to any person or entity; and (2) [t]he person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to [the Rule]." R. 1:38-11(b). The good cause must be "substantiated by 'specific examples or articulated reasoning.'" In re Application of T.I.C.-C. to Assume the Name of A.B.C.-C., 470 N.J. Super. 596, 608 (App.

Div. 2022) (quoting Hammock by Hammock, 142 N.J. at 381-82). The court should engage in "[a] flexible balancing process adaptable to different circumstances . . . to determine whether the need for secrecy substantially outweighs the presumption of access." Ibid. (quoting Hammock by Hammock, 142 N.J. at 381).

Other than broadly arguing the report includes information that is unfavorable to the City and its police department, defendant has not provided any specific examples of any injury it will suffer or an interest that outweighs the presumption of accessibility. Moreover, the report was redacted, protecting individuals' privacy.

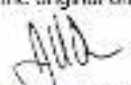
Defendant also asserts the report is a personnel record exempt from disclosure under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. We see no merit to this argument as plaintiffs did not request the report under OPRA. They issued a subpoena to Palma for his entire investigatory file. Moreover, the court redacted the record for confidential identifiers in accordance with Palma's suggestions and after its in camera review. For the above stated reasons, we need not further discuss defendant's contention that the report should be excluded from dissemination under OPRA's deliberative material exemption, N.J.S.A. 47:1A-1.1.

In sum, we are satisfied the trial court properly concluded the public's interest in having access to the report outweighed any injury defendant might sustain by its release. We affirm the portion of the July 12, 2023 order permitting dissemination of the report and attendant materials.

Plaintiffs appealed from the portion of the July 12, 2023 order that stayed the release of the files. In light of our decision, we dismiss plaintiffs' appeal as moot and remand to the trial court to vacate its stay.

Affirmed in part, dismissed in part, and remanded for vacatur of the stay order. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION