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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5085-14T2

MAT STERN,

Plaintiff-Respondent/
Cross-Appellant,

v.

LAKWOOD VOLUNTEER FIRE
DEPARTMENT, INC., a New Jersey
non-profit corporation, LAKEWOOD
FIRE CO. NO. 1, d/b/a ENGINE CO.
NO. 1, a New Jersey non-profit
corporation, JUNIOR HOSE 3, a New
Jersey non-profit corporation, and
RELIANCE HOSE CO. NO. 4 OF LAKEWOOD
INC., a New Jersey non-profit
corporation,

Defendants-Appellants/
Cross-Respondents.

Submitted October 19, 2016 – Decided December 8, 2016

Before Judges Alvarez and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-2160-
14.

Pavliv & Rihacek, LLC, attorneys for
appellants/cross-respondents (Alex Pavliv, of
counsel, John Thaddeus Rihacek, on the brief).

Walter Michael Luers, attorney for
respondent/cross-appellant.

PER CURIAM

In this matter, defendants, four volunteer fire companies in Lakewood Township (collectively, the Fire Companies), appeal the order of the trial court holding that the Fire Companies, as public agencies subject to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, violated OPRA by denying plaintiff access to copies of requested documents. Plaintiff, in turn, cross-appeals his attorney's fee award. Having reviewed the record and applicable law, we affirm.

We discern the following facts from the record. From 1884 to 1888, the Fire Companies were individually founded as community mutual aid societies. The Fire Companies were later incorporated as 501(c)(3) charitable organizations. In 1896, the Lakewood Fire District (the Fire District), in which the Fire Companies are located, was formed. The Fire Companies and the Fire District continue to operate in the capacities for which they were formed and incorporated.

The Fire District utilizes public funds to support the Fire Companies' operation and capital expenditures.¹ This includes \$350

¹ Pursuant to N.J.S.A. 40A:14-79, a fire district tax is assessed (in the same manner as municipal taxes) and collected by the municipality. The tax dollars collected by this assessment are remitted to the Fire District.

per year for uniforms and workers' compensation insurance; pension for members staying in for twenty years; \$200 per month for ten years for members who stay in for twenty years and reach age sixty-five; and the utility, repair, maintenance, and other costs associated with each of the Fire Companies' firehouses and fire trucks. The Fire District is governed by the Board of Fire Commissioners (the Board). The firehouses in Lakewood Township and all of the fire apparatus (fire engines, fire trucks, fire chiefs' cars and similar vehicles) are owned by the Board. The Fire Companies pay for non-public funded expenses through donations and mail solicitations.

The Fire Companies' management and operations are governed by its by-laws. The Board exercises control over the Fire Companies as to membership and policy. In accord with the by-laws, membership "shall be in accordance with the procedures established by the Board of Fire Commissioners" and each new member is provided with the "Commissioner's policies."

On June 9, 2014, the Board unanimously adopted a resolution establishing, as a matter of policy, that all fire companies within the Fire District are required to comply with the provisions of the Open Public Meetings Act (OPMA) and OPRA.

In May 2014, plaintiff sent identical OPRA requests to the Fire Companies, seeking information relating to their

communication, operation, and financial records, including emails, meeting minutes and check registry. The Fire Companies emailed plaintiff in June 2014, indicating they were consulting with legal counsel to determine if they were subject to OPRA. Between July 28 and September 2, 2014, each firehouse comprising the Fire Companies sent a similar letter to plaintiff, stating that after consulting with counsel, the categories of documents requested were either overreaching, improper, invalid and/or exempt.

As a result, plaintiff filed a verified complaint and order to show cause on July 31, 2014, alleging the Fire Companies violated OPRA by denying plaintiff access to copies of the documents requested. On November 5, 2014, after the Fire Companies failed to file a responsive pleading, despite proper service, the court ordered the Fire Companies to comply with the OPRA requests by providing plaintiff with all non-privileged documents. Further, the court held that plaintiff, as the prevailing party, was entitled to an award of attorney's fees and costs.

On November 26, 2014, the Fire Companies filed a motion seeking reconsideration and vacation of the November 5, 2014 order, and to allow them to file an answer. After oral argument, the court vacated the order and reinstated plaintiff's order to show cause. On February 5, 2015, the court heard additional oral argument on the OPRA issues. Thereafter, the court entered an

order, with an accompanying written opinion, directing the Fire Companies to supply all requested documents.

Subsequent to the entry of the order, plaintiff filed a motion seeking attorney's fees pursuant to OPRA, which the Fire Companies opposed. After both parties consented to disposition on the papers, the court entered an order with an accompanying opinion, awarding plaintiff attorney's fees and costs in the amount of \$6300. The parties submitted a consent order staying the matter pending appeal, which the court signed.

The Fire Companies appeal, arguing that the trial court erred when it found that they are instrumentalities within the Fire District and therefore, public agencies subject to OPRA. Further, the Fire Companies argue the court disregarded the "creation and control" test and instead, erroneously applied the government function test. On cross-appeal, plaintiff argues the court abused its discretion when it improperly considered the public service performed by the Fire Companies in determining the fee award.

I.

Our review of a trial court's determination regarding the applicability of OPRA is de novo. Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 175 (App. Div. 2016); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 89 (App. Div.), appeal granted, 223 N.J. 553 (2015); Paff v. N.J. State

Firemen's Ass'n, 431 N.J. Super. 278, 286 (App. Div. 2013); K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011), certif. denied, 210 N.J. 108 (2012). However, "[t]he factual findings of a trial court are reviewed with substantial deference on appeal, and are not overturned if they are supported by 'adequate, substantial and credible evidence.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (citing Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 293 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002)); Paff, supra, 446 N.J. Super. at 175-76.

OPRA "is designed to promote transparency in the operation of the government." Sussex Commons Assoc., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (citation omitted); see Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 501 (2011) (citing N.J.S.A. 47:1A-1 ("[A]ny limitations . . . shall be construed in favor of the public's right of access[.]")).

Under OPRA, a "public agency" is defined as:

[A]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau,

office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1].

The definition of "public agency" is "broadly written so that a wide variety of entities fall within the compass of that term." League of Municipalities, supra, 207 N.J. at 503. Unlike OPMA, however, the plain language of OPRA does not set a governmental-function test. Id. at 504 (explaining that the instrumentality does not need to "perform a traditional government task" in order to be subject to OPRA).

Accordingly, the inquiry as to whether an entity constitutes a public agency under OPRA is a fact sensitive matter that looks beyond mere form. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (holding that a private, nonprofit corporation is nonetheless a public agency for OPRA purposes since the mayor and city council have absolute control over its membership and it could only be created with their approval); League of Municipalities, supra, 207 N.J. at 504 (finding that a nonprofit, unincorporated association, controlled by elected or appointed officials and created through statutory authorization, is a public agency under OPRA); Sussex Commons

Assoc., supra, 210 N.J. at 546-47 (determining that the clinical legal programs do not perform any government function, are not controlled by the University nor any government agency, and that public access would not further OPRA's purpose); Paff, supra, 431 N.J. Super. at 289-90 (concluding that the N.J. State Firemen's Association's "formation, structure and function render it a public agency under OPRA").

Here, we agree with the Fire Companies that the applicable test is whether an entity constitutes a public agency under OPRA is the "creation and control" test. However, we disagree with the Fire Companies that the court failed to apply this test in reaching its determination.

Turning first to "creation," it is indisputable that the Fire Companies' formation in 1888 predates the formation of the Fire District in 1896. This forms the basis for the Fire Companies' argument that the "creation and control" test was not implemented by the trial court. We disagree.

The Fire Companies' formation is subject to and enabled by N.J.S.A. 40A:14-70.1(a) through the express approval of the Board. In pertinent part, under N.J.S.A. 40A:14-70.1(a):

Any persons desiring to form a volunteer fire company to be located within or otherwise servicing the area encompassing a fire district or other type of volunteer organization which has as its objective the prevention of fires or regulation of fire

hazards to life and property therein shall first present to the board of fire commissioners a written application of the organization of such company. . . . The board of fire commissioners, after considering such application and approving the members of the proposed company, may by resolution grant the petition and constitute such applicants a volunteer fire company of the district.

[N.J.S.A. 40A:14-70.1(a).]

Here, to find the Fire Companies were not "created by" the Fire District, predicated upon the earlier incorporation date, without consideration of the enabling legislation, "would be to elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the legislature." Lafayette Yard, supra, 183 N.J. at 535 (acknowledging that although the redevelopment corporation was technically incorporated by private citizens, it was a public agency because it was controlled by the city and created with its essential approval); see Paff, supra, 431 N.J. Super. at 290 ("[T]o say the Association is merely a creature of private non-profit relief is as misleading as characterizing the redevelopment corporation in Lafayette Yard as a creation of local citizens.").

As to the matter of control, it is without dispute that the Board exercises control over the Fire Companies' operations and funds by utilizing tax revenue to pay for uniforms, workers compensation, pension for qualifying members, and other

maintenance costs associated with the fire apparatus, which are owned exclusively by the Board. In accordance with the Fire Companies' by-laws, membership is governed by the procedures established by the Board. Although the Fire Companies argue they are independent and do not take orders from the Fire District, they conceded during oral argument before the trial court that they are under the control of the Board. In light of the above, we conclude that the determination that the "creation and control" test was satisfied was not erroneous.

The Fire Companies' remaining arguments, including their claimed "inadequate resources" to respond to the requests, are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

II.

On cross-appeal, plaintiff argues that the trial court abused its discretion by considering the Fire Companies' public service and fundraising and by not making any determination as to the hours expended by an associate and paralegal. Plaintiff does not appeal the trial court's decision to decline the contingency enhancement.

The trial court is given broad discretion to decide the appropriateness of awarding attorney's fees. Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J.

596, 619 (2011) (citations omitted). Fee determinations by trial courts should be disturbed "only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995); Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). Abuse of discretion may be shown when the trial judge makes a decision without rational explanation, departs from established policies, or relies on an impermissible basis. Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002).

New Jersey generally follows the so-called "American Rule," which requires that each party pay its own legal costs. Rendine, supra, 141 N.J. at 322. Nonetheless, fees may be shifted when permitted by statute, court rule or contract. Packard-Bamberger & Co., supra, 167 N.J. at 440. "The fee-shifting provision within OPRA constitutes such an exception to the American [R]ule." Smith v. Hudson Cty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011) (internal citation omitted).

OPRA dictates that a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Regardless of the source authorizing fee shifting, the same reasonableness test governs. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009). "Without that fee-shifting provision, 'the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible

resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.'" New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't. of Corr., 185 N.J. 137, 153 (2005) (NJDPM) (quoting Courier News v. Hunterdon Cty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

When fee shifting is permissible, a court must ascertain the "lodestar"; that is, the "number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate." Litton Indus., Inc., supra, 200 N.J. at 386 (citation omitted). To compute the lodestar, courts must first determine the reasonableness of the hourly rates charged by the successful party's attorney in comparison to rates "for similar services by lawyers of reasonably comparable skill, experience and reputation" in the community. Rendine, supra, 141 N.J. at 337 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). The court must then determine the reasonableness of the hours expended on the case. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004). "Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances[,]"

and should be informed by the degree of success achieved by the prevailing party. Id. at 22-23.

"[A]buse of discretion is demonstrated if 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). In determining reasonableness, Rules of Professional Conduct 1.5(a) requires the court to consider:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

[RPC 1.5(a).]

In OPRA matters, in addition to the lodestar calculation and the RPC 1.5(a) factors, "[t]he trial court should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of the OPRA was vindicated by the litigation." NJDPM, 185 N.J. at 155. "If, after consideration of all the relevant factors, the court concludes that the requester has obtained a high degree of success, the requester should recover the full lodestar amount." Ibid.

Here, plaintiff sought attorney's fees and costs totaling \$25,002.58; a lodestar award of \$18,064.50, contingency enhancement of \$6025.43 and costs of \$913.05. In application of the lodestar, the trial court agreed that \$315 was a reasonable hourly rate, yet concluded that twenty hours, as opposed to fifty, was reasonably expended under the circumstances, with costs resulting in a fee award totaling \$6300.

In assessing the total amount of time and labor required to litigate this case, the trial court reasoned that:

[T]he legal issue presented does not strike this court as particularly novel or complex. There is adequate case [law] involving volunteer fire companies, which provided guidance to the court, e.g. a recent Appellate Division decision in [Paff, supra, 431 N.J. Super. at 278]. The nature and extent of the operations by these Fire Companies did

not require any significant research by plaintiff's counsel as the certifications submitted in this case clearly outlined the fact necessary for the court to render its opinion. However, the hours expended by plaintiff's counsel initially when no filing response from the Fire Companies was forthcoming warrant reasonable compensation.

"[A] reduction may be appropriate if 'the hours expended, taking into account the damages prospectively recoverable, the interests to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended.'" Walker v. Giuffre, 209 N.J. 124, 132 (2012) (quoting Rendine, supra, 141 N.J. at 336). Additionally, the "trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought." Ibid. In light of these considerations, though the trial court did not explicitly address the hours of an associate and a paralegal when reducing the hours, we do not find this to abuse of discretion. See Hensley v. Eckerhart, 461 U.S. 424, 436-37, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983) ("The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.").

Furthermore, the trial court noted that "[t]he public service and taxpayer savings realized by the service of the Fire Companies

are a factor that the court believes it may properly consider under the circumstances at hand." The Fire Companies have no full-time clerical personnel and their finances are based essentially upon donations and mail solicitations that bring in a net profit of \$18,000 per year.

Plaintiff argues that if every OPRA-defendant is eligible for a reduction in attorney's fees based upon their performance of a public service and interference with their fundraising, the purpose of OPRA's fee-shifting would be undermined. While that argument has its attraction, whether an OPRA-defendant is eligible for those considerations is fact-sensitive.

The Fire Companies are not "a public entity vested with almost inexhaustible resources." NJDPM, supra, 185 N.J. at 153 (citations omitted). While it is true that "financial hardship is not a special circumstance justifying denial of a fee," it may be a relevant consideration in determining the amount of the fee to the extent that if proof of hardship can be adduced. Gregg v. Twp. Comm. of Twp. of Hazlet, 232 N.J. Super. 34, 41 (App. Div. 1989).

In reaching a determination of the fee award, the court made specific findings of fact, justified by the record, rather than "naked conclusions." Further, the court conducted a qualitative analysis related to OPRA matters, and adhered to the RPC 1.5(a) factors. In sum, we are satisfied that after consideration of all

the relevant factors, the trial court "approve[d] a reasonable attorney's fee that is not excessive." Litton, supra, 200 N.J. at 388.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION