SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5422-14T4

SCOTT KENNEDY,

Plaintiff-Appellant/
Cross-Respondent,

v.

MONTCLAIR CENTER CORPORATION
BUSINESS IMPROVEMENT DISTRICT,

Defendant-Respondent/
Cross-Appellant.

Argued February 14, 2017 – Decided November 27, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0924-13.

Richard Gutman argued the cause for appellant/cross-respondent.

Dominic P. DiYanni argued the cause for respondent/cross-appellant (Eric M. Bernstein & Associates, LLC, attorneys; Mr. DiYanni, of counsel and on the briefs).

The opinion of the court was delivered by

OSTRER, J.A.D.

The main issue in this appeal is whether the Open Public Records Act (OPRA) entitles plaintiff to counsel fees he incurred to secure a declaratory judgment that OPRA applies to defendant, after defendant already satisfied his document request. We conclude that OPRA's fee provision does not extend that far. We rely on the statute's plain language, its fundamental purpose to provide access to government records, and supporting caselaw.

As we reviewed the facts in our prior opinion, declaring defendant subject to OPRA, we need not do so here. Kennedy v. Montclair Center Corp. Business Improvement Dist., No. A-4591-12 (App. Div. June 24, 2014), certif. denied, 220 N.J. 269 (2015). Suffice it to say that shortly after plaintiff filed his OPRA complaint, defendant provided plaintiff copies of the documents he requested at the five-cents-a-page charge consistent with N.J.S.A. 47:1A-5(b). Kennedy, supra, slip op. at 3-5. However, defendant continued to deny it was a "public agency," see N.J.S.A. 47:1A-1.1, that was required to promulgate an OPRA form, see N.J.S.A. 47:1A-5(f), and appoint an OPRA custodian, N.J.S.A. 47:1A-1.1. Id., slip op. at 5-6. So, plaintiff persisted in his lawsuit. Ibid. We ultimately reversed the trial court, and declared defendant was a public agency under OPRA. Id., slip op. at 16.

But we did not address plaintiff's right to fees. Id., slip op. at 6 n.3. That issue dominated the proceedings on remand. Plaintiff sought attorney's fees of $156,866.50 and court costs of $2,070.03. He incurred only $8,039.50 of that by the time he received the documents. He contended that even if he were limited to fees through the receipt of the documents, he was entitled to $8,039.50, plus a thirty-five percent contingency enhancement of $2,813.82. The trial court found that plaintiff was not entitled to fees for work after he received the documents. The court then reduced the fee award to $6000 without explanation.

On appeal, plaintiff argues he is entitled to the more than $145,000 in fees he incurred after he obtained the documents. Even if he were not entitled to those fees, he challenges the court's reduction to $6000. Defendant cross-appeals, contending plaintiff was not entitled to any fees at all.

Plaintiff's appeal requires us to construe N.J.S.A. 47:1A-6, which (1) authorizes "[a] person who is denied access to a government record by the custodian of the record" to seek relief in Superior Court or before the Government Records Council (GRC); and (2) mandates the award of "a reasonable attorney's fee" to "a requestor who prevails in any proceeding . . . ." We interpret a statute de novo. State v. Revie, 220 N.J. 126, 132 (2014).

Plaintiff principally contends that "any proceeding" encompasses post-access proceedings such as those here, to obtain a declaration that an entity is a public agency obliged to appoint a custodian and to promulgate a form. We disagree.

The section begins by authorizing a "person who is denied access to a government record" to seek relief from the courts or the GRC. The provision then addresses who may bring such actions; the proceeding's summary nature; who has the burden of proof; the right to an order to compel access; and, finally, the right to fees. N.J.S.A. 47:1A-6 states in full:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:
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> institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or
>
> in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. 2001, c. 404 (C. 47:1A-7).
>
> The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been

> improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
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> [N.J.S.A. 47:1A-6 (emphasis added).][1]

Plaintiff contrasts the reference to "any proceeding" in the section's last sentence, which authorizes fees, with the reference to "any proceeding under this section" and "any such proceeding" in the last paragraph's first two sentences. He argues that those two sentences refer to actions to secure access, based on the section's introductory sentence, which authorizes lawsuits or proceedings "by a person denied access." Since the reference to "any proceeding" in the last sentence is unqualified, he contends the Legislature intended to encompass proceedings designed to achieve relief other than access, such as the declaration of OPRA coverage he secured here. Notably, prior versions of the legislation stated that "[a] requestor who prevails in any proceeding instituted under this section shall be entitled to

[1] Defendant places undue weight on the codified section's title, "Proceeding to challenge denial of access to record." A statute's enacted title may illuminate the Legislature's intended meaning of an ambiguous provision. See Sayreville v. Pennsylvania R. Co., 26 N.J. 197, 206 (1957); Fasching v. Kallinger, 211 N.J. Super. 26, 45 (App. Div. 1986). However, the legislation, as finally passed by the Legislature and reflected in the Advance Law, does not contain the sectional titles. See Advance Law, L. 2001, c. 404, approved January 8, 2002; see also State v. Darby, 246 N.J. Super. 432, 440-41 (App. Div.), certif. denied, 126 N.J. 342 (1991); N.J.S.A. 1:1-6.

taxed costs, and may be awarded a reasonable attorney's fee." Assembly Bill No. 1309 (Second Reprint) § 7, 209th Legislature (March 27, 2000) (emphasis added). However, a later Senate amendment deleted "instituted under this section" and mandated a reasonable fee award. Assembly Bill No. 1309 (Fourth Reprint) § 7, 209th Legislature (May 3, 2001). The enacted bill retained this change. L. 2001, c. 404, § 7.[2]

We reject plaintiff's interpretation. We begin with the section's plain language, because if the language is clear, our task is complete. In re Kollman, 210 N.J. 557, 568 (2012). The right to fees expressly belongs to "a requestor." N.J.S.A. 47:1A-6; see also Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) ("We therefore hold that requestors are entitled to attorney's fees under OPRA . . . ." (emphasis added)). For purposes of securing a fee award, a party plainly ceases being a "requestor" after he or she obtains full access to documents. Thus, "any proceeding" in which a "requestor . . . prevails," is one in which access is achieved.[3] That access can be achieved as a result of, or in

[2] Although embodied in section 7 of the chapter law, the provision is codified at N.J.S.A. 47:1A-6.

[3] Even when obtaining access, a requestor must show a connection between that relief and the lawsuit, to demonstrate that the requestor prevailed and is entitled to fees. The "catalyst theory"

conjunction with, other relief, such as a declaration that an agency is subject to OPRA. See, e.g., Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013) (reversing trial court's determination that association was not a public agency and dismissing complaint for access).[4] But, a party who pursues additional relief after obtaining access does so as someone other than a "requestor."

Certainly, a hypothetical plaintiff who sought only a declaratory judgment that an entity was a public agency, without also requesting documents, would be ineligible for fees according to the section's plain language. Such a plaintiff would not be a "requestor." The result should be no different for plaintiff here, who started out being a requestor, obtained the documents requested at the copying fee he maintained applied, but then persisted in seeking the same declaratory relief as our hypothetical plaintiff.

We shall not divorce the final sentence from the section as a whole. "[I]n fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member

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describes that requisite showing. See Mason, supra, 196 N.J. at 76. We address the theory below.

[4] Notably, in Paff, the defendant both refused to acknowledge OPRA coverage and refused to release certain requested records. 431 N.J. Super. at 285; see also N.J.S.A. 47:1A-10.

of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" Waterfront Comm'n of N.Y. Harbor v. Mercedes-Benz of N. Am., Inc., 99 N.J. 402, 414 (1985) (quoting Richards v. United States, 369 U.S. 1, 11, 82 S. Ct. 585, 591, 7 L. Ed. 2d 492 499 (1962)). N.J.S.A. 47:1A-6 pertains to the right of "[a] person who is denied access" to secure access by bringing "a proceeding" in Superior Court or before the GRC. The section then makes clear that only "the requestor" has the right to institute "any proceeding under this section," using that phrase to encompass both of the just-described proceedings, namely those to gain access in the Superior Court or in the GRC. Ibid. The section then requires expedition of "[a]ny such proceeding," again including both a proceeding to gain access in the Superior Court and in the GRC. Ibid. The section then mandates fees to a requestor who prevails in "any proceeding." Ibid.

There is no reason to read "any proceeding" in that sentence to refer to anything other than what was referenced by "any proceeding under this section" or "any such proceeding," namely a proceeding to gain access in the Superior Court or in the GRC. Ibid. The entire section pertains to the nature of such an access-seeking proceeding, and specifies the relief obtainable - an order compelling access. We are satisfied that "any proceeding," in accord with the rest of the section, consists only of one seeking

access, alone or in conjunction with other relief, before the Superior Court or the GRC, as authorized by N.J.S.A. 47:1A-6.

We must also read N.J.S.A. 47:1A-6 "in context with related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005). A review of OPRA shows that it explicitly provides for no proceeding other than the one for access authorized in N.J.S.A. 47:1A-6. Thus, there is no other proceeding the Legislature would have referenced other than the proceeding for access it authorized in N.J.S.A. 47:1A-6.[5] Defendant concedes that a proceeding to obtain access under N.J.S.A. 47:1A-6 is the only proceeding OPRA authorizes, but he nonetheless contends that the last sentence refers to any action brought by a requestor. Defendant's position reads the last sentence too broadly, and takes it out of context of the section and the act.

[5] We need not address the extent to which a citizen may have an implied right of action to enforce non-access-related aspects of OPRA through a declaratory judgment action. Cf. In re N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under Open Public Records Act, 443 N.J. Super. 238, 252-59 (App. Div. 2015) (holding that custodians do not have an implied private right of action under OPRA to seek declaratory judgment under OPRA), rev'd on other grounds, 230 N.J. 258 (2017). Even if a citizen has a right to bring a proceeding the Legislature did not expressly envision, there is no reason to believe the Legislature envisioned granting fees in such a proceeding.

We do not discern a contrary intent expressed by the legislative amendment of the last sentence. The "under this section" language was unnecessary to limit the fee awards to a denial-of-access proceeding. That is the only type of proceeding in the section and in the act, and only a "requestor" is entitled to fees. Notably, neither the committee reports (nor other legislative materials brought to our attention) express an intention to mandate fees for proceedings in which the initiating party no longer seek access.

We acknowledge the potential salutary effect of securing a declaration that OPRA covers an entity that denied it was covered, even after access is provided. It may assure future compliance with OPRA mandates, as opposed to relying on voluntary accommodations. However, "OPRA's purpose is to maximize public knowledge about public affairs in order 'to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Mason, supra, 196 N.J. at 64-65 (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). That knowledge is secured under OPRA through access to documents. Id. at 78 ("The statute is designed . . . to promote prompt access to government records . . . ."). Furthermore, the fee provision is designed "[t]o ensure that the average citizen is not deterred from challenging an agency's

decision [denying access] due to the financial risk involved . . . ." In re N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under the Open Public Records Act, 230 N.J. 258, 276 (2017).

The fee provision is not designed to incentivize private attorneys general to bring any action to enforce other aspects of OPRA. The Supreme Court has interpreted the fee provision in a way to avoid "more aggressive litigation tactics and fewer efforts at accommodation." Mason, supra, 196 N.J. at 78. As we recently observed in Stop & Shop Supermarket Co. v. Cnty. of Bergen, 450 N.J. Super. 286 (App. Div. 2017), OPRA does not create an entitlement to attorney's fees in all cases:

> Our Supreme Court in Mason . . . emphasized such an entitlement could "upend the cooperative balance OPRA strives to attain," give plaintiffs "an incentive to file suit" to obtain "an award of attorney's fees," and give agencies "reason not to disclose documents voluntarily." "OPRA cases designed to obtain swift access to government records would end up as battles over attorney's fees."
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> [Ibid. (quoting Mason, supra, 196 N.J. at 78-79).]

Although we have not previously addressed the precise issue presented here, our caselaw is consistent with the result we reach. In Stop & Shop, supra, 450 N.J. Super. at 289, the plaintiff sought a declaratory judgment that the county government denied it access

to certain documents, although the plaintiff eventually obtained access in response to a subsequent request. We held the OPRA litigation was moot "because [the plaintiff] already received the documents it sought." Id. at 292. The plaintiff's request for fees did not change that analysis. We reasoned: "To be entitled to such counsel fees under OPRA, a plaintiff must be a prevailing party in a lawsuit . . . that was brought to enforce his or her access rights." Ibid. (quoting Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011)). We noted that the defendants "voluntarily produced the records before" the plaintiff sued; thus the plaintiff was not a prevailing party under section 6. Id. at 293.

Plaintiff here contends that Smith, supra, supports his position that his access to documents did not cut off eligibility for fees. We disagree. After Smith obtained requested documents, he persisted in litigation over the copying fees the defendant charged. He ultimately prevailed in establishing they exceeded the level OPRA allowed. We held he was entitled to fees for that subsequent stage of litigation. We did so because the defendant was still denying access to the documents by charging copying "rates . . . improper under OPRA." 422 N.J. Super. at 392-93. "Excessive copying charges can, in practice thwart a citizen's right to access public records under OPRA." Id. at 397.

Plaintiff had a similar claim but only until defendant provided the documents to plaintiff at five cents a page, as plaintiff demanded. Plaintiff was entitled to a reasonable fee to achieve that access under N.J.S.A. 47:1A-6, but that section did not authorize fees for further litigation after access was given. While plaintiff's continued post-access litigation may indirectly promote future requestors' access rights, plaintiff had already prevailed in vindicating his.

In sum, the trial court correctly denied plaintiff's claim for fees that he incurred after he obtained access to the requested documents, at the per-page copying charge he contended applied.

We turn next to the issue of the fees incurred before plaintiff achieved access. Plaintiff contends the court improperly reduced the amount without justification. Defendant contends on cross-appeal that plaintiff was entitled to nothing, as it did not really deny access to him at all. As to these issues, we agree with plaintiff.

Adopting the "catalyst theory", the Mason Court held:

> [R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate: (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law."

> [Mason v. City of Hoboken, 196 N.J. 51, 76 (2008) (quoting Singer v. State, 95 N.J. 476, 494 (1984)).]

The trial court here noted that defendant insisted upon providing access to the requested documents at a twenty-cents-a-page copying charge, until plaintiff filed suit. Then, defendant relented and provided the copies at the generally applicable five-cents-a-page rate. See N.J.S.A. 47:1A-5(b). The court recognized it had not resolved whether defendant was entitled to charge twenty cents a page. See N.J.S.A. 47:1A-5(c). Still, the court found that "plaintiff has established a causal nexus" between its lawsuit and the five-cents-a-page copying charge.

On appeal, defendant renews its argument that plaintiff was obliged to demonstrate that it effectively denied access by charging an unlawful copying rate. We disagree. Defendant's argument would essentially require a decision on the merits of the issue that the settlement or voluntary disclosure was intended to avoid. Mason rejects that view by requiring the two-part showing described above.

We defer to the trial court's finding of a causal nexus, which was well-supported in the record. See Rendine v. Pantzer, 141 N.J. 292, 317 (1995) (stating that appellate courts will disturb a trial court's fee determinations "in the rarest occasions, and then only because of a clear abuse of discretion").

Defendant did not coincidentally lower its copying rate after the suit was filed. It lowered its rate because the suit was filed, even if its asserted motivation was to reduce litigation costs. See Smith, supra, 422 N.J. Super. at 394 (stating that a party must demonstrate that the lawsuit was a "necessary and important" factor in obtaining relief) (quoting Teeters v. Div. of Youth & Family Servs., 387 N.J. Super. 423, 432 (App. Div. 2006)).

As for the second prong, although the trial court did not expressly address it, we are satisfied that the relief "had some basis in law." The five-cents-a-page copying rate is the general standard. N.J.S.A. 47:1A-5(b).[6] Defendant would have borne the burden to demonstrate grounds for deviating from that. See Smith v. Hudson Cnty. Register, 411 N.J. Super. 538, 572 (App. Div. 2010), superseded on other grounds by statute, L. 2010, c. 75, § 5. In sum, we shall not disturb the trial court's determination

[6] Public agencies are required to charge five cents a page, or their actual costs, if higher. N.J.S.A. 47:1A-5(b). Defendant admitted that its costs of materials and supplies were less than five cents a page. Adding its labor costs allegedly increased its costs over that amount. But, labor costs are not a permissible consideration in calculating actual costs under N.J.S.A. 47:1A-5(b), except as provided by N.J.S.A. 47:1A-5(c). That subsection allows an agency to exceed the five-cents-a-page rate if it can show that as a result of "the nature, format, manner of collation or volume of a government record," the document "cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort . . . ." Ibid.

that plaintiff prevailed in securing access to the requested documents by obtaining defendant's reduction of the copying costs to five cents a page, and was entitled to a reasonable fee incurred to achieve that result.

However, we cannot affirm the court's reduction of the requested fee to $6000 without explanation. The court was obliged to determine the lodestar fee, and then determine whether that amount should be adjusted. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005); Rendine, supra, 141 N.J. at 337. The court was also required to set forth its findings with sufficient detail to enable appellate review. See Curtis v. Finneran, 83 N.J. 563, 569-70 (1980); R. 1:7-4. We are constrained to remand for those purposes, and to vacate the $6000 award.

Affirmed in part; vacated and remanded in part. We do not retain jurisdiction.