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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0219-22**

JUSTIN P. FLOOD,

Plaintiff-Appellant,

v.

**CITY OF OCEAN CITY, NEW
JERSEY, and MELISSA G.
RASNER, as Custodian of Records
for the City of Ocean City,**

Defendants-Respondents.

Submitted September 26, 2023 – Decided November 9, 2023

Before Judges Gilson and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Cape May County, Docket No. L-0112-22.

Justin P. Flood, appellant pro se.

Carlin, Ward, Ash & Heiart, LLC, attorneys for
respondents (Michael J. Ash, of counsel and on the
brief; Arthur Usvyat, on the brief).

PER CURIAM

Plaintiff Justin Flood requested documents from the City of Ocean City and its custodian of records (collectively, the City) under the common law right of access to government records (CL Right). The City produced certain documents but withheld others, asserting that they were protected by the attorney-client privilege and the work-product doctrine.

Plaintiff filed a complaint in the Law Division seeking to compel the City to turn over the privileged documents under the CL Right. He appeals from an order dismissing his complaint with prejudice and denying his request to amend his complaint to assert a claim under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. He also appeals from an order that denied his request to proceed summarily under N.J.S.A. 47:1A-6, a provision of OPRA.

Because plaintiff did not establish a particularized need for the privileged documents, we affirm the order dismissing his complaint with prejudice. We also affirm the portion of the order denying his motion to amend his complaint because the proposed claim under OPRA was futile. Finally, we affirm the order denying plaintiff's request to proceed summarily.

I.

To place plaintiff's CL Right request in context, it is helpful to discuss a condemnation action the City brought to acquire title to property belonging to

the Palmer Center, LLC (Palmer Center). In June 2020, the City initiated eminent domain proceedings to take certain property belonging to Palmer Center (the Palmer Condemnation Action). In the Palmer Condemnation Action, Palmer Center has filed multiple motions contending that the City failed to comply with its obligation to allow Palmer Center to audit and monitor the City to ensure that the City was dealing with the matter fairly. In support of that contention, Palmer Center cited to F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) (holding that the government must "deal forthrightly and fairly with property owners" and must not act to gain a "bargaining or litigational advantage" in condemnation cases). The court overseeing the Palmer Condemnation Action has denied most of the relief sought by Palmer Center.

On January 10, 2022, plaintiff submitted a CL Right request to the City. Plaintiff is the chief operating officer of Palmer Center, and his father is the managing member. In his CL Right request, plaintiff identified himself as a "member of [Palmer Center]." He requested "all emails to and/or from the City Solicitor, Ms. Dorothy McCrossen, Esq. regarding Palmer Center and/or the Palmer Center property between May 1, 2020 until present." In his letter, plaintiff asserted his particularized need for the documents by applying the test

established by the New Jersey Supreme Court in O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). Specifically, he claimed that (1) the government emails were not available from other sources; (2) the degree of harm Palmer Center would suffer from the documents' unavailability could be great because non-disclosure "greatly impairs or eliminates [Palmer Center's] ability to ensure that the City is fulfilling its 'overriding obligation'"; and (3) disclosure would not prejudice the City.

The City requested additional time to respond, and plaintiff consented to that extension and clarified that he was seeking the documents under the CL Right and not OPRA. At the same time, plaintiff expanded his request to include:

- a. All memos, emails, reports, appraisals, estimates and/or other documents produced or received by Michael Ash, Esq., as outside counsel for the City, associated with his representation of the City in the [Palmer Condemnation Action][.]
- b. All memos, emails, reports, appraisals, estimates and/or other documents produced or received by Michael Stingone, Esq., as outside counsel for the City, associated with his representation of the City in the [Palmer Condemnation Action][.]
- c. All memos, emails, reports, test results, estimates and/or other documents produced or received by GEI Consultants, as a contractor for the City, associated with their representation & work for the City with

regards to the [Palmer Center] properties (Block 1606 Lot 3 & Block 1506 Lot 1).

d. All memos, emails, reports, and/or other documents produced or received by J.P. Bainbridge & Associates, as a contractor for the City, associated with their representation & work for the City with regards to the [Palmer Center] properties (Block 1606 Lot 3 & Block 1506 Lot 1).

In February 2022, the City provided plaintiff with two CDs and one flash drive containing all responsive non-privileged documents. The City also provided plaintiff with a ten-page log identifying 170 documents that were being withheld on the grounds that they were protected by the attorney-client privilege or the work-product doctrine. Following an exchange of letters, the City denied plaintiff's CL Right request for the withheld privileged documents on the grounds that the request did not satisfy the O'Boyle test.

On March 18, 2022, plaintiff filed a verified complaint and order to show cause against the City. Plaintiff contended that the City had violated the CL Right and he requested to proceed in a summary fashion under N.J.S.A. 47:1A-6. On April 8, 2022, the trial court entered an order denying plaintiff's order to show cause, finding that he failed to satisfy the requirements of Rule 4:67-1. Accordingly, the trial court ordered the matter to proceed in the ordinary course as an action in lieu of prerogative writs under Rule 4:69.

Shortly thereafter, the City filed a motion to dismiss plaintiff's complaint for failure to state a claim. The City argued that (1) plaintiff lacked standing to bring the action in his individual capacity; (2) the City complied with its obligations under the CL Right; and (3) plaintiff failed to establish a particularized need for the privileged documents. Plaintiff opposed the City's motion and cross-moved for leave to file an amended complaint seeking to add an OPRA claim.

After hearing argument, on August 3, 2022, the trial court entered an order and issued a written opinion granting the City's motion, dismissing plaintiff's complaint with prejudice, and denying plaintiff's motion for leave to file an amended complaint. The court held that plaintiff lacked standing to bring the action as a member of Palmer Center. Alternatively, the court held that plaintiff failed to demonstrate a particularized need for access to the privileged documents. The court also found that plaintiff would not be entitled to the documents under OPRA and, therefore, his proposed amended complaint was futile.

Plaintiff now appeals from the August 3, 2022 order dismissing his complaint with prejudice and denying his motion to amend his complaint.

Plaintiff also appeals from the April 8, 2022 order denying his request for an order to show cause to proceed summarily.

II.

On appeal, plaintiff, who is representing himself, presents three primary arguments for our consideration. He contends that the trial court erred in granting the City's motion to dismiss because the court (1) lost sight of the purpose of public record disclosure and (2) failed to follow the standard for accessing public records under the CL Right. Plaintiff also argues that (3) the trial court erred in denying his order to show cause and not allowing him to proceed in a summary fashion under N.J.S.A. 47:1A-6.

Having conducted a de novo review of the record and law, we affirm both orders challenged by plaintiff. Plaintiff did not establish a particularized need justifying the disclosure of privileged documents. Because OPRA also excludes documents protected by the attorney-client privilege and the work-product doctrine, the trial court correctly denied the motion to amend as adding an OPRA claim would have been futile. Finally, when plaintiff sought to proceed summarily under N.J.S.A. 47:1A-6, he was only proceeding under the CL Right and, therefore, he had no right to proceed under N.J.S.A. 47:1A-6, which is a provision of OPRA.

"Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). In considering a Rule 4:6-2(e) motion, "[a] reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)). Courts should search the complaint thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). But "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107).

A. Plaintiff's Request Under the CL Right.

New Jersey provides access to public records in three ways: "(1) through the citizen's common law right of access; (2) OPRA; and (3) through the discovery procedures applicable to civil disputes." Constantine v. Township of Bass River, 406 N.J. Super. 305, 322 (App. Div. 2009). Access to public

documents under the CL Right is broader than under OPRA because the CL Right encompasses a more expansive class of documents. In determining whether a person has a right of access under the CL Right, the request "must be balanced against the State's interest in preventing disclosure." O'Boyle, 218 N.J. at 196 (quoting Educ. L. Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302 (2009) (quoting Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995))). "In other words, [parties] requesting documents must explain why [they] seek[] access to the requested documents." Ibid. "To gain access to this broader class of materials, the requestor must make a greater showing than OPRA requires,' namely, '(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen's right to access must be balanced against the State's interest in preventing disclosure.'" Gannett Satellite Info. Network, LLC v. Township of Newton, 254 N.J. 242, 257 (2003) (quoting N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017), (quoting Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2008))).

To determine whether the CL Right applies, a court must follow a three-step test. Ibid. "First, it must determine whether the documents in question are 'public records.'" Ibid. (quoting Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 59 (1994)). "[T]o constitute a public record subject to

disclosure under the common law 'the item must be "a written memorial[] . . . made by a public officer, and . . . the officer [must] be authorized by law to make it.'" Gannett, 254 N.J. at 256-57 (2023) (quoting Lyndhurst, 229 N.J. at 578 (2017) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978))).

"Second, [parties] seeking disclosure must show that [they have] an interest in the public record." O'Boyle, 218 N.J. at 196 (citing Educ. L. Ctr., 198 N.J. at 302). "The requisite interest necessary to accord a plaintiff standing to obtain copies of public records may be either a wholesome public interest or a legitimate private interest." Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, Div. of L., 421 N.J. Super. 489, 499 (App. Div. 2011) (quoting Educ. L. Ctr., 198 N.J. at 302 (quoting Higg-A-Rella, 141 N.J. at 47)).

Third, "once the plaintiff's interest in the public record has been established, the burden shifts to the public entity to establish that its need for non-disclosure outweighs the plaintiff's need for disclosure." O'Boyle, 218 N.J. at 197. It is only at that point of the analysis that courts will balance six factors in analyzing the parties' respective interests in disclosure and non-disclosure:

- (1) [T]he extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to

which agency self-evaluation, program improvement, or other decision[-]making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Educ. L. Ctr., 198 N.J. at 303 (citing Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).]

The analysis under the second part of the O'Boyle test becomes more specific when the requestor is seeking disclosure of privileged records. O'Boyle, 218 N.J. at 196, 200. "[I]f the plaintiff is seeking 'disclosure of privileged records,' such as those protected by the work-product doctrine, he [or she] must show 'particularized need.'" Id. at 196 (quoting Wilson v. Brown, 404 N.J. Super. 557, 583 (App. Div. 2009)). A court determines whether a requestor has articulated a particularized need by analyzing: (1) "the extent to which the information may be available from other sources," (2) "the degree of harm the litigant will suffer from its unavailability," and (3) "the possible prejudice to the agency's investigation." Id. at 196-97 (quoting McClain v. Coll. Hosp. & N.J. Coll. of Med. & Dentistry, 99 N.J. 346, 351 (1985)).

For purposes of its motion to dismiss, the City conceded that the requested documents constituted "public records." Consequently, the first part of the three-part test of O'Boyle is satisfied.

The key dispute is whether plaintiff has an interest in the public records he seeks. The trial court found that plaintiff was acting on behalf of Palmer Center and was seeking to obtain documents related to the Palmer Condemnation Action. Accordingly, the trial court found that plaintiff lacked standing to seek the requested documents under the CL Right.

We need not determine whether plaintiff had standing. Instead, we are convinced that plaintiff lacked the particularized need necessary for compelling the production of privileged documents. There is no dispute that the documents the City withheld were protected either by the attorney-client privilege or the work-product doctrine. Indeed, plaintiff has presented no arguments, and certainly no proof, to dispute the privileged nature of the withheld documents.

The attorney-client privilege protects confidential communications between a client and his attorney during a professional relationship. Id. at 185 (citing N.J.S.A. 2A:84A-20; N.J.R.E. 504). "The privilege also extends to consultations with third parties whose presence and advice are necessary to the legal representation." Ibid. (citing State v. Davis, 116 N.J. 341, 361 (1989)).

New Jersey also recognizes the work-product doctrine, which is codified in Rule 4:10-2. The doctrine protects documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial. R. 4:10-2(c).

Persons seeking access to work-product can only prevail if they show:

[S]ubstantial need of the material in the preparation of the case and [are] unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[Ibid.]

The record amply establishes that plaintiff failed to set forth any harm he, Palmer Center, or the public would suffer from the denial of access to the privileged documents. Just as importantly, the record establishes that the City would be substantially prejudiced by the disclosure of its privileged documents.

We reject plaintiff's contention that the trial court lost sight of the purpose of public record disclosure. As we have analyzed, the records plaintiff seeks are privileged documents and he failed to establish the particularized need required to access such documents.

We also reject plaintiff's argument that the trial court failed to follow the proper procedures and analysis. Specifically, plaintiff contends that the trial court never engaged in the third step of the O'Boyle test and never balanced plaintiff's asserted interest against the City's need for confidentiality. Because plaintiff failed to establish a particularized need, there was no need to proceed to the third step of the O'Boyle test. Moreover, even if the factors were balanced, plaintiff has not shown an interest that would overcome the City's need to protect its attorney-client-privileged and work-product materials.

B. The Denial of Plaintiff's Request to Proceed Summarily.

Plaintiff filed an order to show cause and sought to proceed summarily under N.J.S.A. 47:1A-6. That statute is part of OPRA, and the Supreme Court has clarified that "[t]he sentences that immediately precede N.J.S.A. 47:1A-6's final sentence make clear that 'any proceeding' is not an amorphous reference to legal proceedings in general, or to all proceedings to obtain public records; instead, that language clearly denotes only OPRA proceedings instituted in court or the Government Records Council." Gannett, 254 N.J. at 262. In short, the Supreme Court has clarified that N.J.S.A. 47:1A-6 does not apply to requests under the CL Right.

In addition, we also note that this argument is now effectively moot. Plaintiff was accorded the proceedings he was entitled to, and he has made no showing that proceeding summarily would have produced a different result.

C. The Request to Amend the Complaint.

Plaintiff has failed to present any arguments concerning the denial of his request to amend the complaint. Accordingly, we deem that argument waived and abandoned. See Green Knight Cap., LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (citing Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017)); N.J. Dep't of Env't Prot. v. Alloway Township, 438 N.J. Super. 501, 505 n.2 (App. Div. 2015).

Moreover, even if we were to consider this issue, it lacks merit. Plaintiff sought to amend his complaint to add an OPRA claim. Such a claim would have been futile. OPRA exempts from disclosure government records protected by privilege. N.J.S.A. 47:1A-9(b). "The attorney-client privilege is a recognized privilege that may shield documents that otherwise meet the OPRA definition of government record from inspection or production." O'Boyle, 218 N.J. at 185. "Documents that fall within the scope of the work-product doctrine are also shielded from OPRA." Ibid. Accordingly, plaintiff would not have a right of access to the privileged documents under OPRA and, therefore, his proposed

amended complaint was futile. See C.V. ex rel. C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306 (2023); Grillo v. State, 469 N.J. Super. 267, 275-76 (App. Div. 2021); Rosario v. Marco Constr. & Mgmt. Inc., 443 N.J. Super. 345, 352 (App. Div. 2016).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION