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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0563-21**

ULTIMATE FORCE, LLC,

Plaintiff-Respondent,

v.

ZONING BOARD OF
ADJUSTMENT OF THE
TOWNSHIP OF ROCHELLE
PARK,

Defendant-Appellant,

and

200 ROUTE 17, LLC,

Defendant-Respondent.

Submitted December 19, 2022 – Decided May 12, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-1515-20.

Alfred V. Acquaviva, attorney for appellant.

Price, Meese, Shulman & D'Arminio, PC, attorneys for respondent Ultimate Force, LLC (John L. Molinelli and Jacqueline E. Esposito, on the brief).

PER CURIAM

Defendant Rochelle Township Zoning Board (Board) appeals the denial of its motion for reconsideration of an order awarding counsel fees against the Board. For the reasons set forth below, we affirm in part and remand in part. In March 2020, plaintiff Ultimate Force LLC (Ultimate) filed a verified complaint and order to show cause seeking enforcement of N.J.S.A. 40:55D-10(g)(2), compelling the Board to prepare a written resolution memorializing certain actions it took on November 7, 2019.

Prior to the trial court conducting a hearing on the merits, the Board issued the sought-after memorializing resolution. Because the Board did so before the hearing, the trial court found Ultimate's complaint moot. Nonetheless, the court awarded attorney's fees against the Board pursuant to the statute.¹

¹ The statute reads in pertinent part:

If the municipal agency fails to adopt a resolution or memorializing resolution . . . any interested party may apply to the Superior Court in . . . summary manner for an order compelling the municipal agency to reduce its findings and conclusions to writing within a stated time, and the cost of the application, including

The trial court issued an order on May 8, 2020, stating:

[It is further ordered] that [Ultimate] be and hereby is awarded costs of suit and attorney's fees against [the Board], pursuant to N.J.S.A. 40:55D-10(g)(2). [Ultimate] and [the] Board shall confer and attempt to agree on the quantum of fees. Failing agreement[,] [Ultimate] shall submit to the [c]ourt a certification as to costs of suit and attorney's fees incurred within [twenty] days

Between May and October 2020, the parties attempted to negotiate attorneys' fees to be paid by the Board, however the negotiations failed. Ultimate submitted its application for attorneys' fees to the trial court on October 27, 2020, over five months after the deadline set in the trial court's order. The Board filed its opposition the next day. On October 30, 2020, the trial court ordered the submission of a certification of costs in accordance with R.P.C. 1.5. Ultimate submitted its certification on December 8, 2020. The Board submitted nothing further. On August 9, 2021, the court awarded attorney's fees against the Board in the amount of \$34,836.10. No accompanying statement of reasons containing the court's findings of fact and conclusions of law in support of its order appears in the record. The Board filed a motion for reconsideration, which

attorney's fees, shall be assessed against the municipality.

[N.J.S.A. 40:55D-10(g)(2).]

was denied by the trial court after a hearing on September 10, 2021. This appeal followed.

We review a trial judge's decision on whether to grant or deny a motion for reconsideration under Rule 4:49-2 (motion to alter or amend a judgment order) for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Kornbleuth v. Westover, 241 N.J. 289, 301 (2020); Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022); Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). "The rule applies when the court's decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022).

The Board contends the court erred by ignoring the twenty-day time limit embedded in its May order. Next, the Board argues we should reverse the order denying the Board's motion for reconsideration because the trial court did not adequately consider its arguments and the court instead utilized the reconsideration hearing to place its statement of reasons on the record. Finally, the Board argues that attorney's fees are not appropriate because Ultimate was not a prevailing party. We are not persuaded.

The Board's contention that the trial court exceeded its authority in extending the twenty-day deadline on the motion is unsupported by the record. The trial court's May order anticipated prompt and successful negotiations. However, in the event such negotiations were unsuccessful, the order imposed a twenty-day deadline on Ultimate to submit its certification of costs and fees. The record shows there was email correspondence between the parties from May 2020 to October 2020. The record further shows the Board met at least four times during this period without communicating to its counsel their negotiating position on fees. Finally, at its October 2020 meeting, the Board directed its counsel to inform Ultimate that they would not pay the statutory counsel fees. This refusal by the Board precipitated Ultimate's October 27, 2020 fee application to the court. Given that the negotiation delays were caused by the Board, we reject the notion that the trial court abused its discretion by relaxing the twenty-day time limit for Ultimate to apply for fees.

The Board next argues it was deprived of its chance to be heard during the motion for reconsideration because the trial court used the hearing as an opportunity to place its reasons on the record. We find this argument to be without merit. R. 2:11-3(e)(1)(E). The record shows the Board had a full and

fair opportunity to present its arguments before the court at the reconsideration hearing.

The Board also argues that fees should be only awarded to a party which prevailed in the underlying action, and Ultimate did not prevail because the underlying action was moot. Therefore, the Board contends, respondent is not entitled to attorneys' fees.

Rule 4:42-8(a) states in pertinent part that, "[u]nless otherwise provided by law . . . costs shall be allowed as of course to the prevailing party." R. 4:42-8(a) (emphasis added). The "otherwise provided by law" exception applies here, and the concept of a "prevailing party" under Rule. 4:42-8(a) does not.

The language of N.J.S.A. 40:55D-10(g)(2) is mandatory as to attorneys' fees. The statute requires the Board to provide a memorializing resolution "not later than [forty-five] days after the date of the meeting at which the [Board] voted to grant or deny approval." N.J.S.A. 40:55D-10(g)(2). It authorizes "any interested party" to file a summary action against the responsible municipal entity to compel issuance of the resolution, and states: "[T]he cost of the application, including attorney's fees, shall be assessed against the municipality." N.J.S.A. 40:55D-10(g)(2) (emphasis added).

It is undisputed that the Board failed to memorialize its resolution within forty-five days. Because it missed the forty-five-day deadline, the Board is statutorily obligated to pay costs, including attorneys' fees.

In setting an award for attorneys' fees, a court must ensure, above all, that the award is reasonable. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004). To facilitate that review, Rule 4:42-9(b) requires counsel for the prevailing party to submit a certification of services sufficiently detailed to permit accurate calculation—that is, with "fairly definite information as to the hours devoted to various general activities . . . and the hours spent by various classes of attorneys." Walker v. Giuffre, 209 N.J. 124, 131 (2012) (quoting Rendine v. Pantzer, 141 N.J. 292, 337 (1995)). The considerations set forth in R.P.C. 1.5(a) must also be addressed.

The court must not accept such a submission at face value and must instead "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel." Rendine, 141 N.J. at 335. In particular, it must ensure the award reflects only the time counsel reasonably expended, rather than actually expended, on the case. Id. at 336.

With regard to the hourly rate awarded, the court must ensure that rate is "fair, realistic, and accurate" and should calculate it "according to the prevailing

market rates in the relevant community" for "similar services" offered by attorneys of comparable experience and skill to the prevailing party's counsel. Id. at 337.

The trial court properly dismissed the motion for reconsideration and awarded attorneys' fees pursuant to N.J.S.A. 40:55D-10(g)(2). While we agree with the trial court that attorneys' fees are mandated by statute, we find the court mistakenly exercised its discretion to award the fees without making corresponding findings on the record. See R. 1:7-4(a). Hence, we reverse the order of September 10, 2021, denying reconsideration, as well as vacate the order of August 9, 2021, granting attorneys' fees in the amount of \$34,836.10.

We remand to the trial court so that it may hear argument, within sixty days of the date of this opinion, as to the attorneys' fees the Board will pay Ultimate, consistent with the principles outlined herein. The court may, in its sound discretion, issue a case management order establishing deadlines for additional submissions from the parties in support of their respective positions.

Any of the Board's arguments not addressed here lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, remanded in part.

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



CLERK OF THE APPELLATE DIVISION