

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3727-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.H.,

Defendant-Appellant.

Argued October 3, 2023 – Decided October 13, 2023

Before Judges Haas and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, MX-130-20.

Allan Marain argued the cause for appellant.

Thomas M. Bachman, Assistant County Counsel,
argued the cause for respondent (Jerome M. St. John,
Essex County Counsel, attorney; Thomas M. Bachman,
on the brief).

PER CURIAM

Defendant T.H. appeals from a June 23, 2022 Law Division order denying her application for the attorney's fees she incurred to enforce an expungement order. After a thorough review of the record, we discern no abuse of the court's discretion and affirm.

I.

On April 16, 2021, the court entered an order expunging T.H.'s criminal record. Defendant's counsel served a copy of that order upon the Essex County Correctional Facility (ECC) on April 22, 2021, and requested ECC remove all information regarding T.H.'s criminal history from its website. ECC confirmed receipt of counsel's request the following day. Despite the order and T.H.'s request, T.H.'s criminal history remained on ECC's website for seven months.

Beginning July 23, 2021, after defendant's counsel discovered T.H.'s expunged information remained on ECC's website, counsel and his staff made numerous unsuccessful attempts requesting ECC personnel remove the information. Those efforts included calling ECC representatives, leaving voicemails with ECC's Records and Social Services Departments, emailing various ECC staff, and directly contacting Warden Guy Cirillo.

On August 12, 2021, Warden Cirillo responded to defendant's counsel by email, stating he was in receipt of the expungement order and would address it

immediately. One week later, defendant's counsel's staff followed up with Warden Cirillo, who indicated he "c[ould] not give . . . a definitive date but they are actively working on expungements as we speak." On August 23, 2021, defendant's counsel's staff sent another email to Warden Cirillo requesting an update, but he did not respond.

T.H. next moved to enforce the expungement order under Rule 1:10-3 on November 12, 2021, and requested \$5,000 in attorney's fees. Defendant's counsel's affidavit explained those fees related to his, and his staff's, time spent investigating, conducting legal research, preparing and arguing the motion, and "ministerial hoops through which [he was forced to] jump." In further support of her application, T.H. also submitted an affidavit of her counsel's legal assistant, as well as copies of emails with ECC staff and certified mail return receipts. On November 30, 2021, prior to the court addressing the motion, ECC complied with the expungement order and removed T.H.'s information from its website.

ECC filed a response to defendant's application on January 19, 2022 and explained its delay in removing T.H.'s information was due to circumstances caused by the COVID-19 pandemic. After the court adjourned a previously scheduled December 16, 2021 hearing, it heard oral argument on January 27,

2022. Because ECC had already removed T.H.'s information, T.H.'s request for attorney's fees was the sole issue remaining.

Defendant's counsel argued the expungement order assumed ECC would comply within a reasonable time, the COVID-19 pandemic did not provide a reasonable excuse for its failure to do so, and Rule 1:10-3 authorized the court to award fees in such circumstances. In opposing the application, ECC maintained the expungement order did not include a specific deadline and the difficulties visited upon ECC personnel by the COVID-19 pandemic justified its belated compliance because the pandemic caused it to modify or suspend its prior practices and procedures. Additionally, ECC contended the court should reduce any amount awarded by \$1,885, which represented the fees T.H. already paid to counsel to seek enforcement of the expungement order, and requiring Essex County taxpayers to reimburse T.H. "would be contrary to public policy."

As noted, the court issued an order denying T.H.'s application and explained its reasons for doing so in an oral decision. The court initially acknowledged that Rules 1:10-3 and 4:42-9(a)(7) "permit the court in its discretion to make allowance for counsel's fees to . . . a party accorded relief" but found nothing in the record supporting T.H.'s claim ECC refused or was unwilling to comply with the expungement order. Rather, the court determined

the delay was reasonably caused by the COVID-19 pandemic which required ECC to reallocate resources and staff "from their usual expungement responsibilities to assist with more immediate needs of the operation of the facility." In making this finding, the court expressly relied upon the certification of Warden Cirillo in which he explained that personnel who typically handled expungements were reassigned to other duties. Further, the court took judicial notice of ECC's new COVID-19-related responsibilities, which included the need to accommodate virtual court appearances and COVID-19 testing, as well as the increased population at ECC due to the suspension of jury trials.

The court also noted the expungement order did not explicitly establish a deadline for ECC's compliance and found the seven-month delay in removing T.H.'s information not unreasonable "in light of the COVID-19 pandemic [and] the pressures that came with it for the [ECC]." In support, the court relied on State v. Smith, 465 N.J. Super. 515 (App. Div. 2020). In that case, defendant's jury trial was ongoing on March 15, 2020, when the Supreme Court suspended all jury trials because of the COVID-19 pandemic. Id. at 524. After the trial had not resumed for seven months, the court sua sponte declared a mistrial based on the extraordinary, unique circumstances of the COVID-19 pandemic and ordered a second trial "at a date to be determined." Id. at 527-30. We affirmed,

finding "double jeopardy would not be violated by a retrial because . . . the termination [of the first trial] was 'required by a sufficient legal reason and a manifest or absolute overriding necessity.'" Id. at 547 (quoting N.J.S.A. 2C:1-9(d)(3)). The court concluded "if a seven-month delay [due to COVID-19] was reasonable in [Smith] where [a] defendant's constitutional rights are involved, a seven-month delay is certainly reasonable in this case." This appeal followed.

II.

Before us, T.H. argues the court erred in refusing to award her attorney's fees. In support, she contends the trial court abused its discretion when it found the ECC complied with the expungement order. T.H. argues ECC's complete disregard of her counsel's communications to remove her criminal history from its website demonstrated its failure to comply with the order within a reasonable time. Further, T.H. notes Warden Cirillo's August 2021 emails never mentioned the COVID-19 pandemic as a contributing factor to the delay, or that ECC was unable to comply with the expungement order promptly.

T.H. also characterizes Warden Cirillo's certification as "self-serving" as it lacked details and corroboration sufficient to meaningfully explain ECC's delay in compliance. Finally, T.H. argues the court improperly took judicial notice, contrary to N.J.R.E. 201(b)(1), to explain why ECC's information

technology "personnel could not find one minute to expunge [T.H.]'s record." Because the specific reason for the delay was never explained, in Warden Cirillo's certification or elsewhere, T.H. claims it was improper for the court to determine that ECC did not refuse to comply with the expungement order and she was therefore entitled to attorney's fees under Rule 1:10-3. We disagree.

"[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). A trial court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). We decline to disturb "'factual findings and legal conclusions of the trial judge' unless convinced that [they] were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

Rule 1:10-3 provides a means for a litigant "to obtain enforcement of a court order." Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 463 (App. Div. 2023). "Once the court determines the non-compliant party was able to comply with the order and unable to show the failure was excusable, it may impose appropriate sanctions." Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012). While "the court has discretion and flexibility in fashioning an appropriate remedy to compel compliance," it is "limited to remediation of the violation of a court order." Lipsky, 474 N.J. Super. at 463 (quoting Abbott v. Burke, 206 N.J. 332, 371 (2011)). The relief ordered is not "punishment, but . . . a coercive measure to facilitate the enforcement of the court order." A.J. v. R.J., 461 N.J. Super. 173, 181 (App. Div. 2019) (quoting Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997)).

Rule 1:10-3 further permits an award of attorney's fees to "a party accorded relief under th[e] rule," at the court's discretion. The court has "considerable latitude" in that determination. Wear v. Selective Ins. Co., 455 N.J. Super. 440, 459 (App. Div. 2018). Any award of fees under Rule 1:10-3 is subject to the provisions of Rule 4:42-9. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011).

In reviewing the trial court's decision, it is not our role to second-guess its factual findings. Rather, we are bound by those findings so long as they are adequately supported by sufficient credible evidence. Rova Farms Resort, 65 N.J. at 484. Indeed, "[a]n appellate court should not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal.'" State v. Nelson, 237 N.J. 540, 551 (2019) (quoting State v. Elders, 192 N.J. 224, 244 (2007)).


We are satisfied the court did not abuse its discretion in denying T.H.'s application for attorney's fees as that decision was supported by credible evidence in the record. As noted, the court relied upon Warden Cirillo's certification, in which he attributed ECC's delayed response to the COVID-19 pandemic and the attendant reallocation of ECC resources and staff. The court also took judicial notice of additional COVID-19-related duties for which ECC staff were responsible.

Finally, it is clear from the court's comments it considered the entire motion record, including the emails from Warden Cirillo, which T.H. highlights. Against that evidence, the court determined it was reasonable to infer ECC's delayed compliance resulted not from an intentional refusal, but from "the reality of the circumstances resulting from the COVID-19 pandemic that we

have all had to endure." Again, we find this determination adequately supported by Warden Cirillo's certification. In finding the delay reasonable, the court implicitly found ECC's initial failure to comply with the expungement order was excusable. See Milne, 428 N.J. Super. at 198. Although we are cognizant and appreciate T.H.'s understandable frustration with the delay she experienced, we are unable to conclude the court abused its discretion in denying T.H.'s request for attorney's fees as the court's decision did not lack "a rational explanation, inexplicably depart[] from established policies, or rest[] on an impermissible basis." R.Y., 242 N.J. at 65 (quoting Flagg, 171 N.J. at 571). Therefore, we discern no abuse of discretion in the record before us.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION