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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4550-10T3

MARK'S ADVANCED TOWING, INC.,

Plaintiff-Appellant,

v.

CITY OF BAYONNE and
ROBERT SLOAN,

Defendants-Respondents,

and

LOGAN'S TOWING and TUMINO'S
TOWING, INC.,

Defendants.

Argued February 27, 2012 - Decided March 22, 2012

Before Judges Parrillo, Skillman and
Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Docket
No. L-864-10.

Anthony J. Bianciella argued the cause for
appellant.

Anthony V. D'Elia argued the cause for
respondents (Chasan Leyner & Lamparello,
attorneys; Mr. D'Elia, of counsel; Robert E.
Finn, on the brief).

PER CURIAM

Plaintiff Mark's Advanced Towing was licensed by the defendant City of Bayonne to tow motor vehicles under a municipal ordinance that requires any company seeking to tow at the direction of the Bayonne Police Department to obtain a license to engage in this activity. An application for such a license is reviewed by the Chief of Police. If the Chief denies an application, this denial may be appealed to the City Council.

The rates that a licensed towing company may charge for police-directed towing are governed by the ordinance. In August 2008, the Chief of Police suspended Mark's towing license for two weeks because it had been overcharging Bayonne for towing municipal vehicles. Mark's reimbursed Bayonne for the overcharges and did not appeal the suspension to the City Council.

In August 2009, the Police Chief advised Mark's that he had again received complaints that it was overcharging for towing vehicles and that a hearing would be held regarding those alleged ordinance violations, which could result in a suspension or revocation of its license. The original date for the hearing was adjourned, and before the hearing was rescheduled, Mark's 2009 towing license expired.

In December 2009, Mark's applied to the Police Chief for a renewal of its license for the 2010 calendar year. However, because of the pending complaints for overcharging, the Police Chief did not act upon this renewal application. Despite the fact that Mark's license had not been renewed, the Police Department continued to allow Mark's to conduct police-directed tows.

Although the Police Chief withheld action on Mark's application for a renewal of its license, he granted towing licenses for the 2010 calendar year to two of Mark's competitors, Logan's Towing and Tumino's Towing. Thereafter, these towers and Mark's were called by the Police Department for police-directed tows on a rotating basis.

On January 6, 2010, Mark's filed a request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, asking for "any and all applications for towing license for the City of Bayonne including renewals, for license year 2010." The Law Department responded that the request was "unduly burdensome, vague and onerous. . . . A request this vague cannot be complied with." Mark's faxed a document clarifying his OPRA request on January 12, 2010, stating that its request was limited to "any application, whether it is a new application or renewal application, submitted to the City of Bayonne for a towing

license which would be effective for the license year 2010." The City did not respond, and later claimed that it had never received the clarifying fax.

Mark's then filed this action in lieu of prerogative writs against the City, its clerk, Robert Sloan, and Logan's and Tumino's. The complaint sought three forms of relief: (1) an order directing the City to turn over the requested OPRA documents and award attorney's fees; (2) an order directing the City to issue Mark's a 2010 towing license; and (3) revocation of Logan's and Tumino's 2010 towing licenses.

Pursuant to the trial court's direction at a case management conference held shortly after the filing of Mark's complaint, the City provided Mark's with the Logan's and Tumino's license renewal applications that had been the subject of its OPRA request. This directive was memorialized by an order entered on April 1, 2010.

In September 2010, the City and Sloan moved for summary judgment with respect to Mark's other claims. After hearing oral argument, the trial court ordered the Police Chief to conduct a hearing within ten days regarding the proposed suspension of Mark's towing license and, if the Police Chief's decision resulted in a suspension, ordered the City Council to conduct a hearing within 20 days of the Police Chief's decision.

The court also determined in a written opinion issued on October 22, 2010 that the City had failed to produce the documents that were the subject of Mark's OPRA request until "compelled to do so" by the court's April 1, 2010 order. The court further determined that "the City intentionally violated OPRA," and that "the present litigation was a catalyst" for the City's compliance with Mark's OPRA request. Accordingly, the court determined that Mark's was entitled to an award for the attorney's fees it reasonably incurred in pursuing its OPRA claim. However, the court determined that Mark's submission in support of its request for attorney's fees was insufficient to determine a reasonable award. Therefore, it denied the request for attorney's fees without prejudice.

In addition, the trial court determined in the same October 22, 2010 opinion that Mark's lacked standing to challenge the issuance of towing licenses to Logan's and Tumino's and that in any event the Police Chief's decision to issue licenses to these two companies had not been arbitrary and capricious.

Mark's filed a motion for reconsideration of the rulings reflected in the court's October 22, 2010 opinion, which the court denied on January 21, 2011. In the order memorializing this denial, the court stated that "[p]laintiff has not provided sufficient proof required by RPC 1.5(a) as to appropriate and

reasonable attorney fees." However, the court also indicated in colloquy with Mark's counsel that he could further supplement his submission with respect to the application for attorney's fees.

On November 4, 2010, the Police Chief recommended that Mark's towing license application be denied and that it be suspended from police-directed towing activities for a period of two years. In his recommended decision, the Police Chief stated:

> Many of the invoices I reviewed listed administrative charges and had itemized towing charges in excess of the $70.00 fee stipulated in Ordinance 4-29. Some of these invoices also contained storage charges in excess of the approved $25.00 per day. Many of these excess charges appeared on invoices where the police department requested the tows and the vehicles were either towed to Advanced Towing's storage facility or the police department's vehicle impound storage facility; thus regulated by the City's Towing Ordinance.

Mark's appealed this decision to the City Council, which upheld the Chief's finding that Mark's had charged fees for police-directed tows that exceeded what was allowed under the governing municipal ordinance, but reduced the length of the license suspension to one year.

The matter then returned to the trial court to review the City Council's suspension of plaintiff's license. On April 7,

2011, the court issued a written opinion affirming that denial. The court made the following findings of fact and conclusions of law:

> Each invoice presented to the Chief at the hearing before the Council indicated that the tow was requested by the Bayonne Police Department and that the vehicle was towed to the [p]laintiff's towing yard. These invoices listed charges which were inconsistent with the acceptable charges under the Ordinance. [Plaintiff's principal] Mr. Borkowski tried to explain that these tows were in fact customer requested rather than police requested and that the drivers did not properly fill out the forms. However, it was within the discretion of the Chief and the Council to disregard such an explanation upon examination of the record. Moreover, upon examination of the record it is clear that the Chief's determination that the Plaintiff violated the Ordinance and the Council's affirmation of that determination were both supported by the evidence.
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> . . . .
>
> The Council's reliance on Chief Kubert's testimony regarding what constituted a "police directed" tow, was not arbitrary, capricious or unreasonable. Chief Kubert initially testified that the ordinance does not apply when the owner is present and directs the tow. The Chief subsequently testified that simply because an owner authorizes the police officer to call for a tow at the scene of an accident, it does not mean that the owner is directing the tow or that the tow is not "police directed" for purposes of the ordinance. Although Mark Borkowski testified that many of the invoices relied upon by the city were actually customer requested and he had

> separate private agreements relating to the tow, the Council was free to determine that this testimony lacked credibility since the forms stated that the tow was requested by the Bayonne Police Department. Additionally, notwithstanding any subsequent private agreements to tow a vehicle from the [p]laintiff's lot to a third location the [p]laintiff was obligated to comply with the Ordinance with respect to the initial tow and it was not unreasonable for the Council to determine based on the record that the [p]laintiff did not do this.

On appeal, plaintiff challenges (1) the trial court's dismissal of its challenge to the City's issuance of towing licenses for 2010 to Logan's and Tumino's; (2) the court's affirmance of the City's one-year suspension of its towing license; and (3) the court's denial of its request for an award of counsel fees based on the City's failure to comply with its OPRA request.

I.

We affirm the dismissal of plaintiff's challenge to the issuance of licenses to Logan's and Tumino's substantially for the reasons set forth in the trial court's October 22, 2010 written opinion. We also note that this challenge related solely to the licenses issued to those two competitors for 2010. The record does not indicate whether the City renewed Logan's and Tumino's licenses in 2011 and 2012, and if it did, whether

plaintiff challenged those renewals. Therefore, this part of the appeal appears moot.

II.

Plaintiff presents the following arguments regarding the trial court's affirmance of the City Council's one-year suspension of its towing license:[1]

> POINT IV:
>
> THE RESOLUTION OF THE BAYONNE MUNICIPAL COUNCIL TO SUSPEND PLAINTIFF'S TOWING PRIVILEGES FOR ONE YEAR WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE.
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> POINT IV(A):
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> THE BAYONNE TOWING ORDINANCE DID NOT APPLY TO PLAINTIFF IN 2009 SINCE THE TOWING ORDINANCE ONLY APPLIES TO LICENSED TOWERS AND PLAINTIFF WAS NOT LICENSED IN 2009.
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> POINT IV(B):
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> PLAINTIFF COMPLIED WITH THE TOWING RATES SET FORTH IN THE ORDINANCE.
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> POINT IV(C):
>
> CHIEF KUBERT'S 14 MONTH INVESTIGATION INTO UNAUTHORIZED LABOR CHARGES WAS UNREASONABLE SINCE LABOR CHARGES ARE PERMITTED UNDER BAYONNE'S ORDINANCE.

[1] We note that this suspension, which was stayed pending the trial court's review, is scheduled to expire on April 14, 2012.

POINT IV(D):

THE MUNICIPAL COUNCIL'S RELIANCE UPON CHIEF KUBERT'S NOVEMBER 4, 2010 RECOMMENDATION WAS UNREASONABLE CONSIDERING THAT THE RECOMMENDATION WAS COMPLETELY RIDDLED WITH ERRORS.

POINT IV(E):

THE MUNICIPAL COUNCIL'S RELIANCE ON CHIEF KUBERT'S INCONSISTENT TESTIMONY WAS UNREASONABLE.

POINT IV(F):

THE OUTRAGEOUS AND PREJUDICIAL CONDUCT OF THE LAW DIRECTOR AND CITY'S LEGAL COUNSEL AT THE MUNICIPAL COUNCIL HEARING IN PROVIDING FALSE STATEMENTS TO THE MUNICIPAL COUNCIL AND PREVENTING PLAINTIFF'S COUNSEL TO PROVIDE RELEVANT EVIDENCE TO THE MUNICIPAL COUNCIL WARRANTED A DE NOVO REVIEW BEFORE THE COURT.

We reject these arguments substantially for the reasons set forth in the trial court's April 7, 2011 written opinion. "The challenger of municipal action bears the 'heavy burden' of overcoming this presumption of validity by showing that it is arbitrary, capricious or unreasonable." Vineland Constr. Co., Inc. v. Twp. of Pennsauken, 395 N.J. Super. 230, 256 (App. Div. 2007), appeal dismissed, 195 N.J. 513 (2008).

There was nothing arbitrary or capricious in the City Council's decision to suspend plaintiff's towing license for one year. This decision is sufficiently supported not only by the Police Chief's testimony, but most significantly, by the

invoices filled out and signed by plaintiff's own employees, which reflect charges in excess of what was allowed under the Bayonne ordinance for tows to plaintiff's storage facility at the request of the Bayonne Police Department.

III.

The trial court determined that the City had "wilfully" and "intentionally" denied plaintiff's request for production of applications for towing licenses and therefore plaintiff was entitled to an award of counsel fees under OPRA. However, the court declined to award plaintiff any counsel fees on the ground that its submissions in support of the fee request were inadequate.

The trial court made the following findings of fact regarding plaintiff's request for the production of documents under OPRA:

> Plaintiff has presented sufficient evidence to show that the defendants were aware of plaintiff's narrowed OPRA request. Plaintiff's January 12, 2010 letter clarifying his request and Ms. Russo's conversations with plaintiff's attorney, regarding the requests [led] the court to believe that the City was aware of what documents that plaintiff had requested. Since the City did not produce the OPRA documents until March 23, 2010 when it was compelled to do so by this court, it is reasonabl[e] to infer that the City intentionally violated OPRA, and that the

> present litigation was a catalyst for compliance by the defendant, and that the OPRA documents were wilfully withheld.

These findings are adequately supported by the record. Moreover, the City's argument that plaintiff was not entitled to counsel fees under OPRA because the request for documents was made by its principal, Mark Borkowski, is clearly without merit. R. 2:11-3(e)(1)(E). Therefore, as the trial court correctly ruled, plaintiff was "entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6; see Mason v. City of Hoboken, 196 N.J. 51, 76 (2008).

Following this ruling, plaintiff submitted a certification of services by plaintiff's counsel which stated that he had spent 22.70 hours performing legal work relating to plaintiff's OPRA request, for which he sought compensation at his current rate of $300 per hour, for a total of $6,810.

The trial court concluded in its October 22, 2010 opinion that this certification was inadequate to support the requested fee award because it did not address the factors set forth in RPC 1.5(a) for determining whether the fee of plaintiff's counsel was "reasonable and customary." In addition, this certification appeared to include time plaintiff's counsel had spent on the parts of plaintiff's complaint relating to the suspension of its license and its challenge to the licenses

issued to Logan's and Tumino's. This denial of plaintiff's request for attorney's fees was without prejudice to its renewal based on an adequate certification of services.

Plaintiff filed a motion for reconsideration of, among other things, the denial of its application for counsel fees. Although this motion was supported by a brief that contained additional discussion of plaintiff's request for counsel fees, it was not supported by a supplemental certification of services that addressed the deficiencies identified by the trial court in the original certification. Consequently, the court declined to reconsider its prior denial of counsel fees. However, the court indicated that it would still entertain an application for counsel fees if plaintiff's counsel cured those deficiencies identified in his initial certification of services.

At the argument regarding plaintiff's challenge to the City Council's one-year suspension of its license held on March 30, 2007, plaintiff's counsel indicated that he would be submitting a further affidavit of services relating to the request for attorney's fees, and the court seemed to indicate that it would consider that affidavit. However, on April 7, 2011, the trial court filed a written opinion upholding the suspension of plaintiff's license and a final judgment dismissing plaintiff's

complaint, without addressing plaintiff's outstanding request for counsel fees under OPRA.

On April 12, 2011, plaintiff's counsel submitted a supplemental certification of services, which indicated that he had spent 19.70 hours on "the OPRA component of this lawsuit," for which he sought compensation at the rate of $300 per hour, for a total of $5910. This certification was not accompanied by a motion, and the trial court did not enter any further order based on that certification.

We conclude that the trial court abused its discretion in denying any counsel fee award for the legal services performed on plaintiff's behalf in obtaining the documents sought by its OPRA request. Although plaintiff's initial certification of services was deficient, it clearly identified certain legal services that related solely to the part of plaintiff's complaint challenging the denial of its OPRA request. Therefore, even that certification of services could have supported some award of counsel fees. See Elizabeth Bd. of Educ. v. New Jersey Transit Corp., 342 N.J. Super. 262, 272-73 (App. Div. 2001) (noting that "an award of counsel fees may be affirmed even if the affidavit of services is deficient."); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 367-68 (1995). Moreover, in view of the fact that the trial court had

indicated at the March 30, 2011 argument that it would still entertain a supplemental submission in support of plaintiff's request for counsel fees, the court should have considered the April 12, 2011 certification of plaintiff's counsel even though it was not accompanied by a motion.

Accordingly, we reverse the parts of the October 19, 2010, January 21, 2011 and April 7, 2011 orders that denied plaintiff's request for an award of counsel fees under OPRA and remand that part of the case to the trial court for reconsideration in conformity with this opinion. We affirm those orders in all other respects.