

Not Reported in A.2d, 2008 WL 2964875 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Helen **HIRSCH**, Plaintiff-Appellant,
v.
CITY OF HOBOKEN, City Clerk of the **City of Hoboken** and John Cassesa, Fire Chief of the **City of Hoboken**, Defendants-Respondents.
Argued April 22, 2008.
Decided Aug. 5, 2008.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4375-06. Richard Gutman argued the cause for appellant.

Christopher K. Harriott argued the cause for respondents (Florio & Kenny, attorneys; Mr. Harriott, of counsel and on the brief).

Before Judges **COBURN**, **GRALL** and **CHAMBERS**.

PER CURIAM.

*1 Plaintiff Helen Hirsch filed an action in the Law Division to obtain financial disclosure statements filed by defendant John Cassesa, Fire Chief of the City of Hoboken, and maintained by defendants the City of Hoboken and the City Clerk. Hirsch asserted rights of access under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1* to -13, and the common law. She alleged that the City redacted the statements without providing a reason, thereby violating *N.J.S.A. 47:1A-5(g)* and the common law. She sought attorney fees, pursuant to *N.J.S.A. 47:1A-6*, an order “enjoining” redaction of the forms and a civil penalty of \$1,000. Her request for injunctive relief was withdrawn on January 30, 2007. The trial

court dismissed the complaint as untimely and denied all relief. The Supreme Court's decision of July 22, 2008, in *Mason v. City of Hoboken*, --- *N.J.* ---- compels affirmance of the order of dismissal.

The pertinent facts are not in dispute. The financial disclosure statements at issue here are documents that the “Local Government Ethics Law,” *N.J.S.A. 40A:9-22.1* to -22.25, requires all “local government officers” to file. *N.J.S.A. 40A:9-22.6a*.^{FN1} The Law expressly provides that the financial disclosure statements are “public records,” and it requires the local government entity to maintain each annual disclosure statement filed for a period of five years. *N.J.S.A. 40A:9-22.6c*; *N.J.S.A. 40A:9-22.25*.

FN1. As defined in *N.J.S.A. 40A:9-22.3*

“Local government officer” means any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the “New Jersey Employer-Employee Relations Act,” [*N.J.S.A. 34:13A-1* to -39], but shall not mean any employee of a school district or member of a school board[.]

On June 12, 2006, Hirsch filed a request for financial disclosure statements filed by the City elected officials, department heads and attorneys. On June 19, 2006, the City Clerk, Michael Mastropasqua, provided copies of the statements that were heavily

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redacted. Eighty days later on September 7, 2006, Hirsch filed her complaint in the Law Division. Before Hirsch's complaint was served on any defendant, the City Clerk gave Hirsch a second set of financial disclosure statements from which he had redacted nothing other than home telephone numbers. Hirsch does not dispute that the City provided the second set of statements on October 12, 2006.

Hirsch did not withdraw her complaint after receipt of the documents. On November 15, 2006, she filed an order to show cause. On December 1, 2006, the City filed an answer, asserting that Hirsch's complaint was not filed within forty-five days of the accrual of Hirsch's right to review as required by *Rule* 4:69-6(a).

On May 4, 2007, Judge O'Shaughnessy dismissed plaintiff's complaint on the ground that it was not filed within the forty-five-day period for an action challenging local government action or inaction. Hirsch did not ask the trial court to enlarge the period on the ground that it was "manifest that the interest of justice so require[d]." *R.* 4:69-6(c).^{FN2}

FN2. Although Hirsch asks this court to consider an extension of the time for filing in the first instance on appeal, it is not "manifest that the interests of justice" warranted an extension in this case and there is no reason for this court to deviate from its ordinary practice and consider this issue that was not raised below. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973).

As noted above, the Supreme Court has held that actions asserting a right of access to public records under OPRA and the common law must be commenced within forty-five days of a denial of access. *Mason, supra*, --- N.J. at ---- (slip op. at 19, 22). Because the complaint was properly dismissed, Hirsch's claim for attorney's fees is moot. *Cf. id.* at ---- (slip op. at 22-38) (discussing a claim for fees in a case in which only some of the plaintiff's claims were dismissed as untimely).

*2 We add only that there is an additional basis for affirming the dismissal of Hirsch's claim for imposition of a civil penalty. The civil penalty at issue applies when "[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], ... is found to have unreasonably denied access under the totality of the circumstances...." *N.J.S.A.* 47:1A-11.

OPRA gives authority to impose penalties for such violations to the Government Records Council. "If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [*N.J.S.A.* 47:1A-11]." *N .J.S.A.* 47:1A-7e.

The Superior Court's role under OPRA is not as broad as the role of the Government Records Council. The Superior Court has jurisdiction over "proceeding[s] to challenge the custodian's decision" to deny access to a record and may grant relief limited to an "order that access be allowed" and an award of "a reasonable attorney's fee" to a requestor who prevails. *N.J.S.A.* 47:1A-6. Pursuant to *N.J.S.A.* 47:1A-11, the Superior Court's jurisdiction with respect to penalties is over "proceedings for the *collection and enforcement* of the penalty" (emphasis added). The court is required to collect and enforce the penalty in "proceedings in accordance with the 'Penalty Enforcement Law of 1999,' [*N.J.S.A.* 2A:58-10 to -12]." *Ibid.* Under the Penalty Enforcement Law, the penalties imposed for knowing and willful violations of OPRA are not payable to the person who has been denied access to the records. The penalties collected are "remitted to the State Treasurer of New Jersey, unless other disposition is provided for in the statute imposing the penalty," *N.J.S.A.* 2A:58-11(f), and OPRA does not provide for "other disposition." Thus, Hirsch did not have a claim to recover for a civil penalty.

Even assuming that Hirsch sought to recover the civil penalty on behalf of the State Treasurer, the

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Penalty Enforcement Law does not provide an independent basis for the Superior Court to adjudicate OPRA civil penalties. That Law allows the Superior Court to “impose a civil penalty” when “a statute or ordinance allows a court action to impose a civil penalty.” *N.J.S.A. 2A:58-11(a)*; see *State, Dept. of Cmty. Affairs v. Wertheimer*, 177 *N.J.Super.* 595, 600 (App.Div.1980). As noted above, OPRA does not so provide.

For the foregoing reasons, we conclude that the trial court's dismissal of the complaint was proper in all respects.

Affirmed.

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