

Court Prepared

JOHN PAFF,
Plaintiff,
v.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAPE MAY COUNTY
DOCKET NO. CPM-L-265-14

FILED

NOV 18 2014

SON C. JOHNSON, J.S.C.

CAPE MAY COUNTY PROSECUTOR'S
OFFICE,
Defendant

ORDER

THIS MATTER having been brought before the Court upon Motion by James B. Arsenault, Esquire, Attorney for Defendant, Cape May County Prosecutor's Office, and Cross-Motion by Richard Gutman, Esquire, Attorney for Plaintiff, John Paff, and the Court having reviewed and considered the pleadings, briefings and submissions of the parties, both in support of and in opposition to the Motion, and having heard the arguments of counsel, if any, and for good cause shown,

IT IS ON THIS 18th day of November, 2014, hereby

ORDERED that Defendant's Motion for Reconsideration of this Court's August 21, 2014 Order is GRANTED;

ORDERED that Plaintiff's Cross-Motion to Strike the Certification of Prosecutor Robert J. Taylor is DENIED;

ORDERED that any pleadings to be filed by Joseph Rodgers, Esq. and David Meyer, Esq. on behalf of their respective clients [and the pleadings, if any of the Borough of Wildwood Crest] must be filed and served with the Court and all counsel on or before November 17, 2014;

ORDERED that Mr. Gutman shall file his response to the same on behalf of the Plaintiff on or before December 3, 2014;

ORDERED that in the event counsel feels compelled to submit additional pleadings, the same must be filed on or before December 3, 2014.

ORDERED that there shall be no surrebuttal replies by anyone; If the Court wishes supplemental pleadings following the Plenary Hearing, counsel will be so advised.

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.

A handwritten signature in cursive script, appearing to read "Nelson C. Johnson", is written above a horizontal line.

HON. NELSON C. JOHNSON, J.S.C.

FILED

NOV 18 2014

NELSON C. JOHNSON, J.S.C.



SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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Atlantic City, NJ 08401-4527
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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Richard Gutman, Esq.
9 Prescott Avenue
Montclair, New Jersey 07042
Attorney for Plaintiff, John Paff

James B. Arsenault, Jr., Esq.
Cape May County Counsel
4 Moore Road, DN-104
Cape May Court House, New Jersey 08210
*Attorney for Defendant, Cape May County
Prosecutor's Office*

Joseph J. Rodgers, Esquire
J. Rodgers Chartered
5901 New Jersey Avenue
Wildwood Crest, New Jersey 08260
Attorney for Capt. David J. Mayer, Ret'd.
(via telephone appearance)

J. David Meyer, Esquire
Smith & Meyer
160 S. Pitney Road, Suite 2A
Galloway, New Jersey 08205
Attorney for Lt. Michael Hawthorne

RE: Paff vs. Cape May County Prosecutor's
Office

DOCKET NO. CPM-L-265-14

NATURE OF MOTION(S): Defendant's Motion for Reconsideration or Stay Pending
Appeal; Plaintiff's Cross Motion to Strike Certification

**HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE
RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:**

Nature of Motion and Procedural History

Defendant, Cape May County Prosecutor's Office ("CMCPO"), brings this motion for reconsideration of the Court's August 21, 2014 Order entitling Plaintiff to access the four letters listed in Defendant's Vaughn index under the Common Law Right of Access

("CLRA"). Alternatively, Defendant moves for a stay pending appeal. Plaintiff, John Paff, opposes this motion and also brings a cross-motion to strike the certification of Prosecutor Robert J. Taylor. In lieu of a detailed recitation of the facts and procedure preceding this petition, the Court's Memorandum of Decision of August 21, 2014 is incorporated by reference herein.

Preliminarily, the Court notes that Defendant did not oppose Count II of Plaintiff's Complaint, which sought access to the aforementioned documents under the CLRA, and the CMCPD did not assert the need for confidentiality as to the two police officers. Additionally, there is little to nothing contained in the certification of Prosecutor Taylor which could not have been presented in response to the original Order to Show Cause.

The Court's understanding of the parties' positions is as follows.

Parties' Contentions

Defendant: In support of its motion, the Defendant emphasizes that releasing the documents to the Plaintiffs would chill the Prosecutor's ability to provide candid consultation and guidance to civilian overseers of local law enforcement and hamper the Prosecutor's overall supervisory role over same. Likewise, the governmental interest in allowing the Prosecutor to engage in candid communications with law enforcement managers is compelling and overshadows any public interest in the contents of the letters.

Defendant states that in attempting to balance the competing interests in disclosure, the Court did not consider the interests of the Borough of Wildwood Crest or the individual officers named in the subject letters. Citing New Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 2013 N.J. Super. Unpub. LEXIS 2766 (Law Div. Nov. 15, 2013), Defendant argues that the officers have an interest in the status of the letters, as well as a reasonable expectation of individual privacy. Likewise, the municipal governing body, as the recipient of the Prosecutor's guidance, has a perspective that is yet before the Court. Defendant asserts that in balancing interests and equities, these parties should be entitled to a notice and an opportunity to be heard.

The certification of Prosecutor Robert J. Taylor echoes the arguments of defense counsel. Furthermore, Mr. Taylor states that it was his understanding that the four documents in the

Vaughn Index clearly refer, at least partially, to criminal investigatory records and ongoing internal affairs or administrative investigations in Wildwood Crest. Mr. Taylor asserts that, as part of an internal affairs or administrative investigation, his two letters to the Mayor should remain confidential at least initially under Guidelines adopted by the New Jersey Attorney General. These records can be released upon a court order, but generally a court order for release comes during a plaintiff's suit for damages and violations of civil rights. Likewise, Wildwood Crest investigatory and/or disciplinary proceedings were ongoing at the time of the letters in the Vaughn index as the language of the letters indicate. Mr. Taylor asserts that, contrary to the Court's finding, there was clearly on ongoing investigation mentioned in his letters to the Mayor as well as those of the First Assistant Prosecutor. Furthermore, Mr. Taylor asserts that the rights of the municipality and officers must be considered and they may be indispensable parties in this matter.

Plaintiff: In opposition to Defendant's motion, Plaintiff first asserts that the request for stay is untimely. The Court's August 21, 2014 Order and Memorandum of Decision granted Defendant twenty one (21) days from the date of that Order to decide whether or not it wished to appeal the decision and submit a proposed form of Order staying the release of these letters to the Plaintiff. Twenty one days from August 21st was September 11th, and Defendant's proof of service states that it did not mail the Court its motion for a stay until September 15th.

Plaintiff also argues that the request for notice to the letter's subjects and to the municipal governing body is untimely. This is because the necessity for notice became apparent when the Defendant received Plaintiff's Complaint, which was long before the Order to Show Cause hearing. However, the parties agree, through letters to the Court, that the Court should consider the interests of Captain David J. Meyer in adjudicating this dispute.

Furthermore, Plaintiff argues that reconsideration should be denied because the Court's decision was not based upon a palpably incorrect or irrational basis. It is the Prosecutor's job to inform mayors about official misconduct by police officials. Therefore, Plaintiff asserts that it is unrealistic to expect a prosecutor to decline to inform mayors about official misconduct because the facts will become public through OPRA.

Plaintiff also seeks to strike the certification of Mr. Taylor because it could have been submitted prior to this Court's decision. A motion for reconsideration is limited to instances in which the court committed an error of law or it is obvious that the Court either did not consider, or failed to appreciate the significance of, probative and competent evidence. That significant evidence must be either evidence already in the record or evidence that was not available prior to the Court's judgment. Likewise, a motion for reconsideration is not an opportunity to submit evidence that could have been presented prior to the Court's judgment. Here, all of the factual assertions within Mr. Taylor's certification could have been made when the Defendant filed its July 14, 2014 brief. Thus, Plaintiff asserts that Mr. Taylor's certification should be stricken.

The Court is also in receipt of counsels' replies to one another and the same were discussed at the time of oral argument on October 24, 2014. At that time of oral argument, the Court also heard from Joseph Rodgers, Esquire, via telephone appearance, who is counsel for retired Captain David J. Mayer. Finally, Lieutenant Michael Hawthorne appeared in Court, advising that he will be represented by David Meyer, Esq. on any future proceedings in this matter

Discussion

R. 4:49-2 provides:

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Motions for reconsideration are granted only under very narrow circumstances. Reconsideration should be used only for those cases which fall into that narrow corridor in which either: (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Board of Educ. of City of Newark, 349 N.J. Super.

455, 462 (App. Div. 2002). Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice, and the movant must demonstrate that the court's prior ruling was arbitrary, capricious or unreasonable. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Notwithstanding the above statement of law, and for the reasons stated on the record at the time of oral argument, the Court is inclined to Grant the Prosecutor's petition and to Deny the Plaintiff's Cross-Motion. Such relief is granted in the interest of granting everyone affected the opportunity to be heard on a ruling that may impact upon personal privacy and matters which people genuinely believe must remain confidential. Thus, the Defendant's Motion is GRANTED and the Plaintiff's Cross-Motion is DENIED.

While the Court is disappointed by the Prosecutor's "timing" in raising various issues set forth in the certification of Prosecutor Taylor, the positions of both Messrs. Mayer and Hawthorne must be heard. Additionally, if the Prosecutor is concerned about the Borough of Wildwood Crest, he should inform them that this matter is proceeding and if the Borough wishes to be heard, now is the time for them to intervene. [Counsel for the Borough may submit a form of Order to Intervene.] Furthermore, the Court reminds counsel that the Memorandum of Decision of August 21, 2014 is incorporated by reference herein. That is the point of departure from which these matters will proceed and the pertinent issues discussed.

As was made clear to all counsel at oral argument of October 24, 2014, the Court is not only sensitive to the rights of Messrs. Mayer and Hawthorne but also the public, particularly the residents of the Borough of Wildwood Crest. Given the seriousness of the public records which are the subject of Mr. Paff's petition, viz., namely, discussion of "*serious deceitful and/or untruthful*" conduct by people sworn to uphold the law, both gentlemen are obligated to appear before the Court. They must be prepared to testify under oath and explain why their purported rights of confidentiality should weigh heavier than the rights of the Borough residents to know how and why they have lost the services of two police officers.

Accordingly, as counsel were informed at oral argument, the Court will conduct a Plenary Hearing on Friday, December 12, 2014, 10:30 AM. Any pleadings to be filed by Joseph Rodgers, Esq. and David Meyer, Esq. on behalf of their respective clients [and the pleadings, if any of the Borough of Wildwood Crest] must be filed and served with the Court and all counsel

on or before November 17, 2014. Mr. Gutman shall file his response to the same on behalf of the Plaintiff on or before December 3, 2014. The Court understands the Prosecutor's position, but in the event counsel feels compelled to submit additional pleadings, the same must be filed on or before December 3, 2014. There shall be no surrebuttal replies by anyone. If the Court wishes supplemental pleadings following the Plenary Hearing, counsel will be so advised.

An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: 11-18-14