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JOHN PAFF, *Plaintiff,* v. BERGEN COUNTY and CAPTAIN WILLIAM EDGAR, *Defendants.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-7739-14 CIVIL ACTION OPINION

Decided: February 26, 2015

Honorable Peter E. Doyne, A.J.S.C.

Donald M. Doherty, Jr., Esq. appearing on behalf of the plaintiff, John Paff (The Law Office of Donald M. Doherty, Jr.).

Christopher E. Martin, Esq. appearing on behalf of the defendants, Bergen County and Captain William Edgar (Morrison Mahoney LLP).[1]

Introduction

Presented is an application filed by counsel for defendants, Bergen County and Captain William Edgar (the "County" or "Captain Edgar" when referenced individually, "defendants" when referenced collectively), seeking a stay pursuant to R. 2:9-5 of the court's order dated November 6, 2014 pending an appeal of that order to the appellate division. Counsel for plaintiff, John Paff ("plaintiff" or "Paff"), submitted a certification in partial opposition to the motion. For

[1] Initially, defendants were represented by John McCann, Esq. ("McCann"), General Counsel to the Office of the Bergen County Sheriff. Later, however, McCann yielded to Christopher E. Martin, Esq. ("Martin") of Morrison Mahoney, LLP. Although a substitution of attorney has, apparently, not been filed, in the interest of justice, the court will address the merits of the application.

the reasons set forth herein, defendants' motion is granted while acknowledging the court cannot find a reasonable probability of success.

Facts/ Procedural History

On October 16, 2014, the court authored an opinion outlining the history of this litigation. That prior decision is hereby incorporated as if set forth at length. A brief summary of the relevant facts, however, is provided.

The underlying action arose from the partial denial of a records request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA" or the "Act"). On June 19, 2014, plaintiff, a self-proclaimed "open government activist" who investigates purportedly wasteful taxpayer spending, submitted the following request to the Custodian of Records at the Bergen County Sheriff's Office:

> Background:
>
> > I am interested in researching the frequency and nature of complaints brought, either internally or by an inmate or member of the public, against corrections officers who work at the Bergen County Jail. I believe that the type of complaint I am interested in might be referred to as "Internal Affairs" matters.
>
> Records Requested:
>
> 1. If the Jail maintains a log of such complaints (I would imagine the log, if it exists, would contain fields such as "complainant name" "officer name" "date of complaint" etc.), I would like a copy of such log showing all such complaints filed between January 1, 2012 and present date. If you consider denying access to this record, please first a) confirm to me in writing whether or not a responsive record exists and b) consider providing it [to] me in redacted form rather than suppressing it in its entirety.
>
> 2. Only if no document exists in response to #1 above, please provide me with the initial writing upon which each "Internal Affairs" complaint filed between January 1, 2012 and current date is based. I am referring to records such as a letter from an inmate or citizen complaining about a correctional officer's conduct or an initial

> charge levied internally against a corrections officer for violating a rule or policy. If you consider denying access to this category of records, please first a) confirm to me in writing of whether or not a responsive records [sic] within this category exist and b) consider providing it me [sic] records in redacted form rather than suppressing them in their entirety.

On June 25, 2014, Captain Edgar, in his capacity as the official Custodian of Records for the Office of the Bergen County Sheriff, responded on behalf of the County to plaintiff's OPRA request stating in relevant part:

> The following records are being provided in their entirety and are responsive to your request.
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> 1. Bergen County Sheriff's Office 2012 Internal Affairs Summary Report. 2 pages.
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> 2. Bergen County Sheriff's Office 2013 Internal Affairs Summary Report. 2 pages.
>
> 3. Bergen County Sheriff's Office Internal Affairs Requirement 10 Summary, 2012-2014. 5 pages.
>
> These records are being transmitted to you via email, as per your request. Pursuant to N.J.S.A. 47:1A-5.b., the cost associated with this request is, no fee.
>
> If your request for access to a government record has been denied or unfilled within the seven (7) business days required by law, you have a right to challenge the decision by the Bergen County Sheriff's Office to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint with the Government Records Council (GRC) by completing the Denial of Access Complaint Form.

Plaintiff asserts while he received the above-referenced documents, they were improperly redacted. Specifically, he contends defendants withheld the name of every employee and complainant for each complaint without providing an explanation for the redactions.

Subsequently, on August 8, 2014, plaintiff had filed a verified complaint with an order to show cause and a letter brief in support of the relief requested. The complaint alleged violations

of OPRA and the common law right of access to government records. Plaintiff sought a judgment directing defendants to release the requested documents, awarding attorney's fees and costs, and granting any other relief the court may deem just and equitable.

On August 29, 2014, defendants' initial counsel, McCann, submitted a letter brief in opposition to the order to show cause. Thereafter, on September 30, 2014, plaintiff had filed a reply. Oral argument was entertained on October 10, 2014, followed by the court's written decision on October 16, 2014. On November 6, 2014, an order (the "order") was entered directing defendants to provide plaintiff with unredacted copies of the requested documents within five business days.

On January 21, 2015, defendants' new counsel, Martin, submitted a motion for a stay pursuant to R. 2:9-5 pending an appeal of the order to the appellate division.[2] In support of the motion, counsel submitted a brief, a certification and the affidavits of Detective Lieutenant Carmelo Giustra ("Detective Giustra") and John McCann, Esq. ("McCann").

On January 28, 2015, counsel for plaintiff, Donald M. Doherty, Jr., Esq. ("Doherty"), filed a certification in partial opposition to defendants' application. Doherty certifies that he consents to a stay of the court's order, but he objects to the extent there is any representation, to wit, in McCann's affidavit, that Doherty sanctioned providing redacted documents, which, assertedly, he did not. Subsequently, on January 30, 2015, defendants had filed a reply in further support of the motion.

On February 24, 2015, three days before scheduled oral argument, counsel submitted a consent order (the "consent order") providing a stay of the order. In light of the reasons set forth

[2] Due to a ministerial error, however, the motion was not actually filed with the Deputy Clerk of the Superior Court, Bergen County until February 3, 2015. See R. 1:5-6(b)(1). As, though, the motion was retransmitted with the appropriate filing fee within ten days after the clerk notified defendants' counsel of the deficiency, it shall be treated as having been filed on January 21, 2015. R. 1:5-6(c)(1).

in this decision, though, the court has decided to grant the relief requested by way of this written decision. Neither counsel objected to this procedure, thereby obviating the need for a hearing.

The decision was sent to counsel on February 26, 2015.

Legal Standards

A motion for a stay pending appeal is governed by the standards set forth in Crowe v. DeGoia, 90 N.J. 126 (1982). See, e.g., Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citing In re Comm'r of Ins. Deferring Certain Claim Payments by NJIUA, 256 N.J. Super. 553, 560 (App. Div. 1992)). Specifically, the court must determine whether: (1) such relief is needed to prevent irreparable harm; (2) the applicant's claim is based on settled law and has a reasonable probability of success on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." McNeil v. Legis. Appor. Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting) (citing Crowe, supra, 90 N.J. at 132–34). The burden is on the moving party to prove each of the Crowe factors by clear and convincing evidence. Garden State, supra, 216 N.J. at 320 (citing Brown v. City of Patterson, 424 N.J. Super. 176, 183 (App. Div. 2012)). The court, however, may place less emphasis on a particular factor if another greatly requires issuance of the remedy. Ibid. (quoting Brown, supra, 424 N.J. Super. 176 at 183). When a case presents an issue of "significant public importance," the court must consider the public interest together with the Crowe factors. Ibid. (citing McNeil, supra, 176 N.J. at 484). In addition, the court is to exercise its discretion in each case based on its own merits. Pressler, Current N.J. Court Rules, comment 1 on R. 2:9-5 (2014).

Analysis

As indicated previously, the court is presented with defendants' motion for a stay of the order pursuant to R. 2:9-5. The court is guided in this inquiry by the application of the Crowe

factors, which will be examined hereinafter. Before that, though, the court must address several preliminary matters.

Initially, it is noted the court is presented with several new arguments that were not raised, as they must have been, in the underlying action. The instant application, though capably done, was filed as a motion for a stay of the proceedings, not one for reconsideration. Even if that were the case, the court could not hear it, as defendants had filed a notice of appeal on December 17, 2014, which deprived this court of the jurisdiction to hear such a motion.[3] See Manalapan Realty v. Twp. Comm., 140 N.J. 366, 376 (1995) ("The ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule."); In re Plainfield-Union Water Co., 14 N.J. 296, 302 (1954) ("The filing of the notice of appeal invokes the jurisdiction of the appellate tribunal . . . . And, by the same token, the appeal divests the lower court of jurisdiction save as reserved by statute or rule."); Kiernan v. Kiernan, 355 N.J. Super. 89, 94 (App. Div. 2002) (citations omitted) (same); see also Pressler, Current N.J. Court Rules, comment 1 on R. 2:9-1 (2014).

It is also noted that defendants' submission is, suffice it to say, untimely. The court rendered its decision on October 16, 2014 and the appropriate order was executed on November 6, 2014. The order expressly provided that "[t]he Defendants shall provide plaintiff un-redacted copies of the requested documents sought within 5 business days of this order." Therefore, any motion should have been filed no later than November 12, 2014. In this case, however, defendants' motion was filed on January 21, 2015, more than two months after the documents were ordered to be disclosed, which is in flagrant disregard of the order, and without recognition of the same.

[3] The appellate division case is captioned John Paff v. Bergen County and Captain William Edgar, bearing docket number A-1839-14.

Accordingly, this matter is improperly before the court, and the equitable doctrine of unclean hands might even suggest the motion not be entertained favorably. In the interest of justice, though, the court will consider defendants' application as it was timely submitted. See Hageman v. 28 Glen Park Assoc., 402 N.J. Super. 43, 48 (Ch. Div. 2008) (quoting Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 13 (App. Div. 1981)) ("The clean hands doctrine is 'an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy.'").

Moreover, the court is not compelled, nor is it permitted, to articulate how it would have ruled if the record was then as it is said to be now. Simply put, the present application appears to be nothing more than an opportunity to improperly augment the record for purposes of appeal. Parenthetically, it is noted the following new arguments were raised in connection with defendants' motion: (1) internal affairs matters constitute inter-agency or intra-agency advisory, consultative or deliberate material which is exempt from disclosure under N.J.S.A. 47:1A-1.1; (2) internal affairs matters are "records relating to any grievance filed by or against an individual" which are exempt from disclosure under N.J.S.A. 47:1A-10; (3) complainants and officers have a reasonable expectation of privacy in internal affairs matters under Doe v. Poritz, 142 N.J. 1 (1995); (4) internal affairs matters are exempt from disclosure pursuant to the IAPP; (5) Executive Order No. 26 provides the Attorney General's Guidelines have the force of law; (6) O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009) provides the Attorney General's Guidelines have the force of law; and (7) the proper construction of N.J.A.C. 10A:34-1.6(a)(2) is that internal affairs records shall not be subject to public access unless redaction of information would sufficiently protect the safety of any person or the secure operation of a detention facility.

The court considered and rejected the first, second, fourth and seventh arguments in its October 16, 2014 decision. These areas were at best tangentially referenced in defendants' opposition brief – i.e., for example, a statutory citation may have been set forth, but without any exploration, analysis and/or suggestion as to how it must be applied. Such a fleeting reference, however, is inconsistent with the burden imposed on public agencies under OPRA. N.J.S.A. 47:1A-6. Specifically, the court was not presented with any competent evidence that the Sheriff's Office had adopted the IAPP, or that the guidelines were binding on that office absent their express adoption. In addition, the court was not presented with any competent evidence to suggest the redactions were insufficient to protect the safety of any person or the safe and secure operation of the Sheriff's Office. N.J.A.C. 10A:34-1.6(a)(2). The fact that defendants are now attempting to supplement the record with additional support for these arguments is wholly inappropriate in the context of the present application and the same shall not be considered. Whether the appellate court allows such an improper expansion is, of course, left to that court's best discretion.

The third, fifth and sixth arguments are completely novel and were not raised previously in defendants' opposition brief, certification or affidavit, or at oral argument. Unlike motions to reconsider, a motion for a stay in a civil proceeding is an application to postpone a judgment or order entered by the trial court. See R. 2:9-5(a)-(b); Black's Law Dictionary 1548 (9th ed. 2009). Such an application is not an occasion for the court to reconsider the basis of its decision or the significance of competent evidence upon which it rests, or even whether the trial court record should be expanded. Cf. Capital Fin. Co. of Del. Valley v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.), certif. denied, 195 N.J. 521 (2008) (citation omitted) (holding reconsideration should be granted only where the court's decision (1) was premised "upon a palpably incorrect or irrational basis" or (2) failed to consider or appreciate the significance of competent evidence).

Therefore, given the present application was filed as a motion for a stay and not one for reconsideration, and in light of the appeal filed with the appellate division, the court shall not evaluate the substantive merits of these three entirely new arguments.

Finally, the court proceeds to its consideration of the Crowe requirements. As heretofore established, the burden is on the moving party to show, by clear and convincing evidence, the following: (1) irreparable harm; (2) reasonable probability of success; and (3) the balance of hardship favors relief. Further, in cases of "significant public importance," the court must consider whether the public interest will be harmed by granting the stay. For the reasons set forth herein, the court is satisfied defendants have not met their burden, and it shall review, as it must, each of the Crowe factors seriatim.

First, the court must determine whether a stay is required to prevent irreparable harm to the moving party. Defendants assert that they will suffer irreparable harm in a number of ways if the court's order is not stayed. First, they claim "[t]he overwhelming need to keep the identity of complainants and employees involved in Internal Affairs matters confidential goes to the heart of the internal affairs investigation process." That is to say, internal affairs matters are meant to be internal; they are not intended to be public records. Defendants further urge such matters should be deemed confidential as the Bergen County Sheriff's Office has adopted and strictly adheres to the Attorney General's Internal Affairs Policy and Procedures ("IAPP").[4] Second, defendants claim that exposure of the identity of complainants might inhibit the filing of future complaints. Third, they also claim that exposure of the identity of employees has the potential to threaten the security of the individuals involved, especially those who may be part of ongoing investigations.

[4] Parenthetically, the court notes it was not presented with any competent evidence, whether by certification, brief or otherwise, save for McCann's remarks at oral argument, the Sheriff's Office had in fact adopted the IAPP. That defendants have since made this information available is irrelevant for the purposes of this application.

The court finds defendants have made a strong showing of irreparable harm, if only upon improperly presented evidence. If defendants are forced to comply with the order pending an appeal, any harm resulting therefrom, regardless of the disposition, cannot be undone. Put another way, once the names are disclosed, they are subject to public consumption. Therefore, the court finds defendants may well have carried their burden with respect to the first Crowe factor.

Second, the court must determine whether the applicant's claim is based on settled law and has a reasonable probability of success on the merits. Defendants argue the motion should be granted as, among other things, (1) internal affairs matters are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10 and (2) the names of complainants and employees are confidential pursuant to the IAPP. As indicated previously, however, the court considered and rejected both of these arguments in its October 16, 2014 decision.

It remains defendants provided no explanation for the redactions, as they must, at the time of production. See N.J.S.A. 47:1A-5(i) ("A custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request."); see also N.J.S.A. 47:1A-5(g) ("If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor."). Defendants also failed to provide any competent support for their arguments in favor of nondisclosure. In its decision, the court noted, "it is simply unacceptable for a public agency to merely list the purported statutory exemptions in support of its argument for nondisclosure without the necessary proofs." The burden is on the public agency to demonstrate that the denial of access is authorized by law. N.J.S.A. 47:1A-6. Similarly, defendants failed to provide the court with any competent evidence that the Sheriff's Office had in fact adopted the IAPP. See n.4 supra. As the present application is not one

for reconsideration, that defendants have since attempted to provide support for these arguments is unavailing. Therefore, the court finds defendants have not shown a reasonable probability or likelihood of success on the merits.

Third, the court must consider whether the balance of hardship favors granting the relief requested. It must also consider the public interest when, in matters such as this, an issue of "significant public importance" is involved. As these factors both involve a balancing of interests, they shall be considered together. Defendants assert that they would suffer "immediate, significant and irreparable" harm if the stay is not granted. See p. 9 supra. By comparison, defendants argue plaintiff would not be prejudiced by the issuance of a stay as he is already in possession of the relevant information, albeit in redacted form.

The court finds the balance of hardship weighs in defendants' favor. In this case, the risk of harm is greater if the stay is not granted than if it were. As defendants correctly noted, plaintiff already has the internal affairs materials that he requested. Thus, the issue is not the failure to produce the documents, but rather the failure to produce them in unredacted form. If, however, the stay is not granted, defendants will be compelled to disclose sensitive information while an appeal of this court's order is pending. Once the information is disclosed, whether or not the court's decision is upheld, the "damage" is done. Although the court is mindful that the fundamental purpose of OPRA is to provide the public with unfettered access to government records, it must balance the public interest and the hardship to plaintiff against the harm created by compliance with the court's order. For these reasons, and for the limited purpose of appeal, the court believes the public's interest in gaining access to the unredacted information should yield to defendants' interest in preserving the integrity and security of the Sheriff's Office. This is particularly so as plaintiff is not objecting to the requested stay.

Conclusion

For the foregoing reasons, defendants' application for a stay of the order is granted. The court makes this determination without finding that defendants have shown a reasonable probability or likelihood of success on the merits. See Waste Mgmt. of N.J. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 534–36 (App. Div. 2008). Rather, it finds the issuance of a stay is warranted in light of the irreparable harm and relative hardship to defendants that would issue if the court's order were now enforced. This result hopefully comports with the application of the Crowe factors, and in light of the appeal that has been filed with the appellate division.