

FILED

JUL 10 2015

WILLIAM G. JOHNSON, J.S.C.

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Attorney for Plaintiff John Paff

JOHN PAFF,
Plaintiff,

v.

CAPE MAY COUNTY PROSECUTOR'S
OFFICE,
Defendant.

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

Civil Action

ORDER

This matter being opened to the Court by Richard Gutman, P.C., attorney for Plaintiff John Paff, by way of motion, proof of costs, certification and brief, on notice to James B. Arsenault, Jr., attorney for Defendant Cape May County Prosecutor's Office, Doreen Y. Corino and William G. Blaney, attorneys for Borough of Wildwood Crest, Joseph J. Rodgers, attorney for David J. Meyer and Michelle J. Douglass, attorney for Michael Hawthorne, and the Court having considered the papers submitted by the parties, and for good cause appearing,

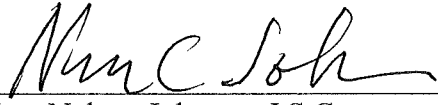
IT IS on July 10, _____, 2015 ORDERED as follows:

1. Cape May County Prosecutor's Office shall pay Richard Gutman, P.C. \$514.76
in court costs and \$45,176.00 in attorney's fees.

2. Payment shall include R. 4:42-11(a) interest.

3. Payment shall be made within 120 days of the termination of all appeals and appeal periods in this lawsuit.

4. Plaintiff Paff shall serve a copy of this order upon CMCPD within 5 days of receipt.



Hon. Nelson Johnson, J.S.C.

Opposed _____
Unopposed _____



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SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
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MEMORANDUM OF DECISION

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.

Michelle J. Douglass, Esquire
The Douglass Employment Law Group
424 Bethel Road
Somers Point, New Jersey 08244
Attorney for Lt. Michael Hawthorne

William G. Blaney, Esquire
Blaney Donohue
2123 Dune Drive, Suite 11
Avalon, New Jersey 08202
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*Attorney for the Borough of Wildwood
Crest*

Doreen Y. Corino, Esq.
Corino Law Office, P.A.
9700 Pacific Ave, P.O. Box 849
Wildwood Crest, NJ 08260
*Solicitor for the Borough of Wildwood
Crest*

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

DOCKET NO. CPM-L-265-14

NATURE OF MOTION: Plaintiff's Request for Reasonable Attorneys' Fees

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

BACKGROUND

THIS MATTER was commenced via the filing of a Verified Complaint and Petition of the Plaintiff, John Paff, represented by Richard Gutman, Esquire. Said Complaint was filed on June 11, 2014, and an Order to Show Cause was entered on June 23, 2014. The Defendant, Cape May County Prosecutor's Office ("CMCPO"), is represented by Assistant Cape May County Counsel, James B. Arsenault, Jr., Esquire. Capt. David J. Meyer (Ret'd.), an interested party, is represented by Joseph D. Rodgers, Esquire. Lt. Michael Hawthorne, an interested party, is now represented by Michelle J. Douglass, Esquire. The Borough of Wildwood Crest, an interested party, is represented by Solicitor Doreen Y. Corino, Esquire.

Plaintiff's Petition sought access to certain public records in the possession of the CMCPO regarding the performance of three police officers.

Plaintiff's original request was as follows:

Records Requested:

I would like all letters (or other forms of notification) made by the Cape May County Prosecutor's Office of such exculpatory or favorable information to defendants concerning the following Wildwood Crest Officers:

1. Chief DePaul
2. Captain Mayer
3. Lt. Hawthorne

Subsequent to the court's November 18, 2014 Order, Wildwood Crest Solicitor Doreen Y. Corino, Esquire advised the court that three separate but related OPRA requests were received by the Borough. Two requests were from John Paff regarding: (1) all reports by James Fallon or his company; and (2) the Separation Agreement between Captain David Mayer and the Borough of Wildwood Crest; Citizen Barbara Hunt requested (3) all correspondence pertaining to Lt. Hawthorne's termination, including his Separation Agreement. The Borough denied these requests based on exemptions to OPRA, the Attorney General guidelines pertaining to internal affairs investigations, and personnel and employee confidentiality provisions. [NOTE: there are no "letters" pertaining to Chief DePaul.]

At the return date of the original Order to Show Cause, the court conducted oral argument on July 22, 2014 regarding the Plaintiff's demand for release of these records under the Open Public Records Act ("OPRA"). The court found the reply pleadings of the Defendant to be

wanting and made little effort to describe the information in the possession of the CMCPD. Defense counsel asserted that the records sought were “Inter-agency or intra-agent advisory, consultative or deliberative material ... exempt from the definition of government record provided by OPRA.”

As counsel proceeded through his reply for the Defendant, each of these exemptions were discussed, without regard to the substance of the records, nor was there any effort to characterize which type of exempt record they might be. It was not until the day of the Show Cause hearing, that defense counsel tendered a “Vaughn Index” to his adversary and the court. Defense counsel also provided the court with copies of the correspondence referenced in the Vaughn Index; the same tendered under seal, for the court’s review.

Based upon the submissions made and the arguments of counsel, the court deemed it necessary to conduct an *in camera* review of the disputed documents received under seal. The court found that Plaintiff was not entitled to the four letters under OPRA, because Prosecutor Taylor was writing to inform the Mayor – as Director of Public Safety – that there were significant problems with the two mentioned officers ever testifying in a criminal proceeding. The court found that such communications were “inter-agency advisory materials,” to wit, advising the Mayor that should either gentleman be named as a witness in a future criminal proceeding, then the Prosecutor would issue a “Brady Letter” as to whomever was to testify, such letters required by the U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

Nonetheless, after conducting a careful *in camera* inspection and applying the tests set forth in *Loigman v. Kimmelman*, 102 N.J. 98 (1986) and *Keddie v. Rutgers*, 148 N.J. 36 (1997), the court found that Plaintiff was entitled to the four letters listed in Defendant’s Vaughn Index under the Common Law Right to Access (“CLRA”). The court noted that Defendant did not comment on access to the aforementioned documents under the CLRA, nor did CMCPD assert the need for confidentiality as to the two police officers. The court was satisfied that: (a) the public’s interest in said letters outweighed any government interest in confidentiality; (b) disclosure of the letters in question would not impede CMCPD functions; and (c) disclosure would not have a chilling effect on citizens who wish to provide information to the government anonymously.

Further, the court found that disclosure of the letters would have a minimal impact, if any, on the decision-making of CMCPO. The letters contained findings of fact, as opposed to an in depth evaluation or analysis. Furthermore, the letters contained no formal findings of public official misconduct, but rather are harbingers of “Brady Letters” which would be written by the Prosecutor in the future should either Captain Mayer or Lieutenant Hawthorne be called to testify as witnesses in a criminal case wherein the CMCPO is involved. [The court’s August 21, 2014 Memorandum of Decision is incorporated by reference herein.]

The CMCPO subsequently filed a Motion for Reconsideration of the court’s August 21, 2014 decision and included a supporting Certification from Prosecutor Robert J. Taylor. This was the first occasion in which the court was advised of the Prosecutor’s concerns and prior to the petition for reconsideration, the court was essentially uninformed as to the Prosecutor’s position on this matter, other than the blanket opposition presented by Mr. Arsenault. Plaintiff also filed a cross-motion to strike the Certification of Prosecutor Taylor as untimely. Following oral argument on October 24, 2014, the court granted the Prosecutor’s Motion for Reconsideration and Denied the Plaintiff’s Cross-Motion to strike Prosecutor Taylor’s Certification.

The court found that such relief was appropriate 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. Because neither the Plaintiff nor the CMCPO had moved to join three interested parties whose interests could be impacted by any ruling in this matter, the court on its own motion, elected to permit the interests of Messrs. Mayer and Hawthorne, and the Borough of Wildwood Crest, to be heard at a Plenary Hearing scheduled for December 12, 2014. At that hearing, Hawthorne was represented by J. David Meyer Esquire, (now, Ms. Douglass), and Mayer was represented by Joseph J. Rodgers, Esquire. The Borough was represented by Doreen Y. Corino, Esquire. [The court’s November 18, 2014 Memorandum of Decision is incorporated by reference herein.]

Thereafter, as a consequence of delays experienced by the court, this matter was not rescheduled for hearing until May 6, 2015, at which time the court received the benefit of the arguments of counsel. The court held as follows: (1) the records of the internal affairs investigation, to wit, the “Fallon Report” of March 21, 2014, shall remain confidential; (2) the

Separation and Release Agreements executed by Messrs. Mayer and Hawthorne at the time of leaving their employment with the Borough of Wildwood, shall remain confidential; and (3) the 4 letters listed in the original Vaughn Index shall be provided by Defendant, CMCPD to Plaintiff's counsel, Richard Gutman, Esquire. [The court's May 8, 2015 Order and Memorandum of Decision is incorporated by reference herein.]

ARGUMENTS OF COUNSEL

Mr. Gutman filed this motion for attorney's fees and costs on May 21, 2015. Mr. Arsenault filed an opposition on behalf of the CMCPD on July 2, 2015. The CMCPD emphasizes that the OPRA did not control the court's disposition of this matter. Since Plaintiff obtained relief under the CLRA, the CMCPD argues that there is no statutory authority or controlling decision that entitles Plaintiff to attorney's fees or costs. Accordingly, the CMCPD argues that the following language from *Mason v. City of Hoboken*, 196 N.J. 51, 79 (2008) is not controlling:

The parties have not addressed at length whether the question of attorney's fees merits different treatment in an action brought under the common law. Absent an apparent, theoretical basis for such a distinction, we conclude that the catalyst theory applies to common law suits as well.

The CMCPD asserts that, since the Prosecutor acted in good faith to protect materials that he believes to be exempt from disclosure under both OPRA and the CLRA, there is no basis under *Mason* to award fees or costs to Plaintiff.

Citing *State v. Rose*, 206 N.J. 141, 183 (2011), Mr. Gutman responds by arguing that this court is bound by Supreme Court dicta. Further, Mr. Gutman emphasizes that the CMCPD has failed to demonstrate an "apparent, theoretical basis" for distinguishing between OPRA and CLRA lawsuits. For Mr. Gutman, the fact that the CMCPD may have acted in good faith and for rational reasons does not establish a distinction between OPRA and CLRA cases generally. This is because the CMCPD does not and cannot assert that there is a fundamental difference between the degree of good faith exercised by public agencies in OPRA and CLRA lawsuits. Further, Mr. Gutman asserts that a public agency's degree of good faith or reasonableness is not a basis for denying or granting attorney's fees or costs as the purpose of the award is not to punish unreasonable or bad faith conduct.

DISCUSSION

N.J.S.A. 47:1A-6 provides, in relevant part, that a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. A plaintiff is considered a prevailing party when actual relief on the merits of the claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Mason, supra*, 196 *N.J.* at 73. However, the form of the judgment is not entitled to conclusive weight; courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. *Id.* at 74. Under the catalyst theory, requestors are entitled to attorney's fees under *N.J.S.A.* 47:1A-6, absent a judgment or an enforceable consent decree, when they can demonstrate: (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law. Litigants seeking fees are required to make that showing. *Id.* at 76. Further, "[a]bsent an apparent, theoretical basis for such a distinction...the catalyst theory applies to common law suits as well." *Id.* at 79. This court agrees with the Supremes' court's dicta in *Mason*, that in this instance, on these facts, the catalyst theory should apply.

From the early steps in this proceeding the Defendant failed to treat this claim with urgency or respect. The Vaughn Index should have been part of the Defendant's reply pleadings, not delivered at the time of the initial oral argument. The same is true of the Prosecutor's Certification; instead, it was furnished as part of a Motion for reconsideration, which was granted. Had the Certification been tendered at the outset, valuable time would not have been expended. Finally, the court is satisfied that *but for* Mr. Paff's inquiry, these letters would never see the light of day. The catalyst theory does apply here and counsel fees are warranted.

"The starting point in awarding attorneys' fees is the determination of the 'lodestar,' which equals the 'number of hours reasonably expended multiplied by a reasonable hourly rate.'" *Furst v. Einstein Moomjy, Inc.*, 182 *N.J.* 1, 21 (2004) (citation omitted). Accordingly, *R.* 4:42-9(b) provides, "all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a)." In addition, "[t]he affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought." *R.* 4:42-9(b). "No portion of any fee allowance claimed for attorneys'

services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client.” *Ibid.* Furthermore, “[a]ll applications for the allowance of fees shall state how much had been paid to the attorney...and what provision, if any, has been made for the payment of fees to the attorney in the future.” R. 4:42-9(c).

R.P.C. 1.5(a) requires that all attorney’s fees be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

After setting the lodestar, “a trial court should decrease the lodestar if the prevailing party achieved limited success in relation to the relief he had sought.” *Furst, supra*, 182 *N.J.* at 23. However, “if a plaintiff achieves excellent results in a lawsuit, counsel fees should not be reduced on the ground that the plaintiff did not prevail on each claim advanced.” *Silva v. Autos of Amboy, Inc.*, 267 *N.J. Super.* 546, 556 (App. Div. 1993). Finally, “when the prevailing attorney has entered into a contingent-fee arrangement, a trial court should decide whether that attorney is entitled to a fee enhancement.

In determining and calculating a fee enhancement, the court should consider the result achieved, the risks involved, and the relative likelihood of success in the undertaking.” *Furst, supra*, 182 *N.J.* at 23. “[I]n evaluating a contingency enhancement, ‘a court’s job simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment.’” *Walker v. Giuffre*, 209 *N.J.* 124, 139 (2012).

First, this court is bound by the conclusions of the Supreme Court of New Jersey. “[M]atters in the opinion of a higher court which are not decisive of the primary issue presented

but which are germane to that issue . . . are not dicta, but binding decisions of the court.” *Rose, supra*, 206 *N.J.* at 183. In *Mason, supra*, 196 *N.J.* at 79, our Supreme Court expressly stated that “[a]bsent an apparent, theoretical basis for such a distinction...the catalyst theory applies to common law suits as well.”

Nevertheless, the CMCPO cannot establish an apparent theoretical distinction. The fact that the CMCPO may have acted in good faith, and for rational reasons, does not establish an apparent theoretical distinction between OPRA and CLRA cases. The CMCPO does not and cannot assert that there is a fundamental difference between the degree of good faith or reasonableness exercised by public agencies in OPRA versus CLRA lawsuits. Nor is the degree of good faith or reasonableness a basis for denying or granting attorney’s fees or costs. The court acknowledges that “the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to ‘even the fight’ when citizens challenge a public entity.” *Id.* at 74.

Here, John Paff is the prevailing party as his lawsuit acted as a catalyst that prompted the CMCPO to provide the four letters listed in the original Vaughn Index and, therefore, there is a factual causal nexus between Plaintiff’s litigation and the relief ultimately achieved. The court also found that Plaintiff was entitled to the four letters listed in Defendant’s Vaughn Index under the CLRA. Thus, the relief ultimately secured by plaintiffs had a basis in law.

Furthermore, Plaintiff’s counsel Mr. Gutman has provided the court with an affidavit addressing the factors enumerated by *R. 4:42-9* and *R.P.C. 1.5(a)*. The affidavit recites a total of 112.94 hours which the court finds credible under the circumstances. The time expended is reasonable related to the efforts of counsel as directed by the court throughout this OPRA matter, including the number of pleadings and court appearances that were required. This matter involved novel issues, such as the applicability of OPRA and the CLRA to the CMCPO’s Vaughn Index. Further, the issue was made more difficult by the CMCPO’s failure disclose the letter’s authors, recipients or subject matter, or a Vaughn Index prior to oral argument; plus, the issues evolved as other interested parties were brought to the court’s attention. The efforts of counsel in litigating this OPRA matter spanned over a year. Further, multiple parties had an interest in the records that made this litigation far more complex than originally anticipated by the court or legal counsel.

Mr. Gutman has appeared before this court on multiple occasions. His academic credentials are impressive, as is his career as an attorney. The court will enhance Mr. Gutman's fees to his normal billing rate of \$400.00 per hour, in lieu of \$350.00 per hour previously awarded by the undersigned in another OPRA matter.

Accordingly, Plaintiff's request for attorney's fees and costs is GRANTED. Mr. Gutman is entitled to \$45,176.00 in attorney's fees, together with litigation expenses incurred, totaling \$514.76 for an aggregate of \$45,690.76. However, the entry of this award is stayed pending the outcome of Mr. Arsenault's appeal. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: July 10, 2015