

L.R. ON BEHALF OF J.R., Plaintiff-Appellant,
v.
CHERRY HILL BOARD OF EDUCATION CUSTODIAN, Defendant-Respondent.

No. A-4891-12T3.

Superior Court of New Jersey, Appellate Division.

Submitted September 24, 2014.

Decided October 6, 2014.

Jamie Epstein, attorney for appellant.

Methfessel & Werbel, attorneys for respondent (Eric L. Harrison, of counsel and on the brief; Boris Shapiro, on the brief).

Before Judges Alvarez and Waugh.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff L.R. appeals the Law Division's orders denying her motion to proceed as an indigent and subsequently denying her motion to reinstate her complaint. We reverse and remand to the Law Division.

We discern the following facts and procedural history from the record on appeal. L.R. is the mother of three children, one of whom is classified as severely disabled. She resides in subsidized housing and receives food stamps.

In 2011, she submitted OPRA^[1] document requests to defendant Cherry Hill Board of Education's (Board) custodian of records. For reasons not relevant to this appeal, she was dissatisfied with the Board's responses.

On November 9, 2011, L.R. filed a complaint against the Board, seeking relief under OPRA. At the same time, she filed a motion to leave to file as an indigent, which would result in a waiver of the filing fee. In support of the motion, L.R. submitted a certification and a copy of the June 21, 2011 order from this court granting her leave to proceed as an indigent in another case. The certification reflected that she was unemployed and that her only sources of income were child support and SSI benefits for her son. L.R. listed a monthly rental obligation of \$300, as well as medical and other debts totaling \$23,000.

The motion judge denied the motion to proceed as an indigent on December 5, 2011. He stated his reasons as follows:

Applications. . . to proceed as an indigent are governed by Rule 1:13-2, which indicates that a waiver of fees when it's sought by reason of poverty may be provided. . . at the Court's discretion.

There are no guidelines other than the Court's own discretion. The Court notes that the only guideline that can be found that deals with the Federal Guidelines for Indigent Defense Services where life and liberty are at stake and the [weekly] gross income in those is \$261.78. That hasn't been provided in this case.

This is an OPRA case seeking documents from Cherry Hill Board of Education regarding allegations of improprieties. The Court will not go into detail into the complaint. However, the Court does note that Section (b) of 1:13-2 prohibits attorneys from accepting fees when they're assigned to represent indigents. There's been no assignment in this case.

However, OPRA cases include fee shifting. So, if . . . the claimant would be successful, attorneys[] fees and costs would be allowed under the shifting. For that reason, the motion to proceed as an indigent is denied.

The judge subsequently denied a motion for reconsideration.

L.R. then filed a notice of appeal and also moved for leave to appeal. We dismissed the appeal as interlocutory and denied leave to appeal. The case was subsequently dismissed in the Law Division for failure to prosecute, based on L.R.'s failure to pay the filing fee. L.R.'s motion to reinstate the complaint was denied as untimely in May 2013. This appeal followed.

On appeal, L.R. contends that the motion judge erred in denying her application to proceed as an indigent. She also argues that her motion to reinstate the complaint should have been granted.

Rule 1:13-2(a) provides, in relevant part, that

whenever any person by reason of poverty seeks relief from the payment of any fees provided for by law which are payable to any court or clerk of court. . . , any court upon the verified application of such person, which application may be filed without fee, may in its discretion order the payment of such fees waived.

In Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (citations and internal quotation marks omitted), the Supreme Court observed that,

[a]lthough the ordinary abuse of discretion standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. It may be an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.

"[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

The judge did not find that L.R. was not indigent, a finding that would not have been supported by the papers before him. Instead, in denying the motion, the judge referred to the fact that OPRA is a fee-shifting statute and that a successful litigant can be awarded counsel fees and costs. "For that reason," the judge denied the motion.

If an indigent person cannot pay the filing fee to start a fee-shifting action, the prospect of having the fee reimbursed in the future is of no value. See Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 1:13-2(a) (2015) (citing Edmond v. Waters, 149 N.J. Super. 579 (App. Div. 1977)). Given the proofs submitted

by L.R., including our order granting her identical relief a few months earlier, and the judge's reliance on the fee-shifting nature of OPRA, we conclude that he erred in denying her motion to proceed as an indigent.

Consequently, we vacate the order dismissing the complaint and remand to the Law Division. Because we reverse on the basis of the denial of indigent status, we need not reach the other issues raised by L.R.

Reversed and remanded.

[1] Open Public Records Act, N.J.S.A. 47:1A-1 to-13.

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