FOCUS - 6 of 6 DOCUMENTS

MARIA CRESPO, Plaintiff-Appellant, v. CITY OF NEWARK, Defendant, and COUNTY OF ESSEX, Defendant-Respondent.

DOCKET NO. A-5526-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 968

April 12, 2010, Argued
May 4, 2010, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Related proceeding at *Crespo v. City of Newark, 2012 N.J. Super. Unpub. LEXIS 2289 (App.Div., Oct. 11, 2012)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-737-08.

COUNSEL: Dennis G. Polizzi argued the cause for appellant (Weiner, Ryan & Mazzei, attorneys; Mr. Polizzi, of counsel and on the brief).

Ferdinando M. Pugliese, Assistant County Counsel, argued the cause for respondent (James R. Paganelli, Essex County Counsel, attorney; Mr. Pugliese, on the brief).

JUDGES: Before Judges Rodriguez and Yannotti.

OPINION

PER CURIAM

Plaintiff Maria Crespo appeals from an order entered by the Law Division on June 19, 2009, which awarded defendant County of Essex (County) attorney's fees and costs pursuant to the frivolous litigation rule, *R. 1:4-8*. We affirm.

I.

We begin our consideration of this appeal with a statement of the relevant facts and procedural history. On April 30, 2007, plaintiff allegedly tripped and fell on the pavement while she was crossing Elwood Avenue, at the intersection of Mt. Prospect Avenue, in the City of Newark. On May 22, 2007, plaintiff's attorney served upon the City, the County and the City's Water Department, a notice of claim pursuant to the Tort Claims Act, *N.J.S.A. 59:1-1 to 12-3*.

The notice of claims stated that plaintiff had sustained personal injuries "due [*2] to a negligently, and carelessly constructed, erected, and or palpably unreasonably maintained roadways, and/or cross walks at the intersection of" Elwood and Mt. Prospect Avenues in Newark. The County referred the notice to Inservco Insurance Services, Inc. (Inservco), the claims administrator for its self-insurance program.

On January 22, 2008, plaintiff filed a complaint in the Law Division, in which named the City, County and certain fictitious parties as defendants. Plaintiff alleged that on April 30, 2007, she was a lawful pedestrian "upon the premises owned by the defendants located at Elmwood [sic] Avenue [at]/or near the intersection of Mount Prospect Avenue." Plaintiff further alleged that defendants were "either the owner of the street, responsible for maintenance and repair of the street, and/or created the dangerous and hazardous condition in the street." Plaintiff claimed that she was injured when she fell, as a "direct and proximate result of the negligence and carelessness" of defendants.

By letter dated January 30, 2008, Ron Huntley (Huntley), a senior claim representative for Inservco, informed plaintiff's attorney that the County "does not

own, maintain [or] control [*3] Elwood Avenue or Mt. Prospect Avenue" in Newark and, therefore, the County was "not involved in this claim." In the letter, Huntley also stated that"

> the County of Essex takes an aggressive approach in responding to claims that are not properly directed to it. We must advise you that under the New Jersey Frivolous Lawsuit Act, the County's policy is to seek reimbursement of all legal fees and expenses for any suit filed against it without merit.

On February 27, 2008, the County filed an answer in which it denied the allegations in plaintiff's complaint. Plaintiff also asserted twenty-six separate defenses, and made a cross-claim for contribution and indemnification from the other defendants.

In her answers to the Form A Interrogatories, plaintiff asserted that she tripped and fell "on an uneven repatched/re-paved portion of the crosswalk" at the intersection of Elwood Avenue and Mt. Prospect Avenue. She stated, among other things, that her claim arose from a "[f]ailure to properly maintain, supervise and make repairs to the intersection crosswalk used by pedestrians."

On April 2, 2008, an assistant county counsel wrote a letter to plaintiff's attorney, and stated that the County had previously [*4] advised that the intersection in question was not owned, maintained or controlled by the County. The assistant county counsel said that he had also contacted plaintiff's attorney by phone and left a message again advising that the County did not own, maintain or control the intersection and inquiring whether plaintiff would be willing to execute a stipulation of dismissal without prejudice. According to the assistant county counsel, plaintiff's attorney had not replied to the message.

In his letter of April 2, 2008, the Assistant County Counsel also stated the following:

> The purpose of this letter is to advise that pursuant to [*Rule] 1:4-8* . . . continued prosecution of this matter by your client is frivolous. The purpose of this letter is to further advise that I am in the process of drafting discovery responses as well as a Motion for Summary Judgment seeking dismissal of the action. Please note that should you fail to withdraw the complaint against the County of Essex within [twenty-eight] days of the date hereof, that a request for attorney's fees will be made alongside the Motion for Summary Judgment requesting sanctions pursuant to [*Rule] 1:4-8(b)*. . .

The County thereafter provided [*5] answers to the Form C(2) Interrogatories, in which is stated, among other things, that on information and belief the intersection where plaintiff allegedly fell "is owned, controlled and maintained by the City of Newark."

On July 9, 2008, the County filed a motion for summary judgment and for the imposition of sanctions pursuant to *Rule 1:4-8*. In support of its motion, the County submitted a certification dated April 4, 2008, from Salvatore R. Macaluso (Macaluso), the Assistant County Supervisor of Roads in the County's Department of Public Works, Division of Roads and Transportation. In his certification, Macaluso stated that "neither Mt. Prospect Avenue nor Elmwood [sic] Avenue, nor their intersection is owned, controlled or maintained by the County of Essex."

Plaintiff opposed the motion and argued that Macaluso had not specifically stated that the County did not open the roadway or do any digging in the area. The County thereupon filed a supplemental certification by Macaluso in which he stated that the County "did not do any digging at the subject intersection and crosswalk."

The court entered an order on August 20, 2008, granting the County's motion for summary judgment and awarding [*6] the County attorney's fees and costs pursuant to *Rule 1:4-8*. On the order, the court wrote that plaintiff failed to present any evidence that the County controlled, operated or maintained the property where the accident allegedly occurred and had not provided any basis to impose liability upon the County. The court also wrote on the order that the County was entitled to an award of attorney's fees and costs pursuant to *Rule 1:4-8* because the claims against it were frivolous and the County had complied with the procedural requirements of the rule by demanding the withdrawal of the complaint.

The court ordered the County to submit a certification supporting its claim for attorney's fees and costs. Thereafter, an Assistant County Counsel submitted a certification dated September 4, 2008, in which he stated that he had devoted twelve hours, forty-three minutes to this case. The County sought an award of attorney's fees, at a rate of $ 275 per hour. It appears, however, that the County failed to serve a copy of the certification upon plaintiff's attorney.

The court considered the matter on September 26, 2008. Plaintiff argued that the hourly rate sought by the County was excessive and it [*7] was more than the actual amount that the County paid its attorney. The court directed the assistant county counsel to provide further information about his salary and the costs that the County incurred in this litigation. Thereafter, the County provided the court with a certification from William J. Friel, the County's Payroll Manager, who set forth the Assistant County Counsel's annual base salary and his hourly rate of pay.

It appears that responsibility for this case was then transferred to another judge, who entered an order dated February 6, 2009, awarding the County attorney's fees in the amount of $ 3,492.54, plus costs in the amount of $ 165. Plaintiff filed a motion for reconsideration of the award of counsel fees and costs, and the County filed a cross-motion for reconsideration seeking an increase in the amount of counsel fees awarded by the court.

The court considered the motions on March 20, 2009. The court refused to reconsider the earlier order finding that the County was entitled to an award of attorney's fees and costs pursuant to *Rule 1:4-8*. The court agreed to reconsider the amount of counsel fees awarded. The court vacated the February 6, 2009 order. The court permitted [*8] the parties to submit additional information on the amount of the fees. On June 19, 2009, the court entered an order awarding the County attorney's fees in the amount of $ 4,750.04 and costs of $ 165. This appeal followed.

II.

Plaintiff first argues that the court erred by finding that the claim against the County was frivolous. We disagree.

Rule 1:4-8(a) provides that:

> [t]he signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically [*9] identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and
>
> (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.

Rule 1:4-8(b)(1) permits the court to impose sanctions upon an attorney if counsel files a paper that does not conform to the requirements of *Rule 1:4-8(a)*, and fails to withdraw the paper within twenty-eight days of service of a demand for its withdrawal.

We are convinced that the court correctly found that plaintiff's claim against the County was "frivolous" within the meaning of *Rule 1:4-8(a)*. Here, the record established that, after plaintiff filed her complaint, the County's claim administrator advised plaintiff's attorney that the County did not own, control or maintain the intersection where plaintiff was allegedly injured. The letter indicated [*10] that the County might seek sanctions if plaintiff pursued a frivolous action. Furthermore, as noted in his letter of April 2, 2008, the assistant county counsel demanded that plaintiff's attorney withdraw the claim against the County and offered to consent to a dismissal of the claim without prejudice. Plaintiff's attorney refused to do so, apparently because he was not satisfied that the County did not have a role in the creation of the alleged dangerous condition at the intersection of Elwood and Mt. Prospect Avenues in Newark.

Plaintiff insists that it was not clear that the County had no potential liability in the matter until Macaluso provided his supplemental certification, in which he stated that the County had not engaged in any excavation at the site. We are convinced, however, that the County's repeated assertions that it did not own, control or maintain the intersection were sufficient to place plaintiff's

attorney on notice that the County had no role in the creation of the alleged dangerous condition at that site. Plaintiff's attorney never established a factual basis for the claim that the County created a dangerous condition on property it did not own, control or maintain. [*11] In our view, the complaint was without factual support and its continued maintenance was in contravention of the standards in *Rule 1:4-8(a)(3)*. We therefore conclude that the court correctly found that the County was entitled to attorney's fees and costs pursuant *Rule 1:4-8(b)(1)*.

Plaintiff additionally argues that the County's motion for sanctions should have been denied because it violated the requirement that an application for sanctions pursuant to *Rule 1:4-8* "shall be by motion made separately from other applications[.]" However, the rule requires the court to consider whether "it is practicable under all the circumstances to require strict adherence to" its requirements. *Toll Bros., Inc. v. Twp. of West Windsor, 190 N.J. 61, 72, 918 A.2d 595 (2007)*. We are satisfied that the County's submission of one motion for summary judgment and sanctions under *Rule 1:4-8* was practicable and reasonable under the circumstances.

In addition, plaintiff argues that the County did not comply with the "safe harbor" provisions of the rule. Plaintiff contends that she was entitled to twenty-eight days to withdraw her complaint after the County provided Macaluso's supplemental certification. However, because the [*12] complaint had no factual basis when it was filed and plaintiff did not thereafter establish a factual basis for the County's liability, plaintiff should have withdrawn the complaint no later than twenty-eight days after receiving the April 2, 2008, letter from the Assistant County Counsel demanding its withdrawal, not within twenty-eight days after receipt of Macaluso's supplemental certification.

III.

Plaintiff also challenges the amount of attorney's fees awarded by the court. Plaintiff contends that the court erred by awarding the County attorney's fees at an hourly rate of $ 275. Plaintiff asserts that the record shows the County only pays the Assistant County Counsel who handled this case a base salary of $ 30 per hour.

Rule 1:4-8(d) allows the court to impose "reasonable" attorney's fees upon an attorney who files and refuses to withdraw a pleading that does not conform to the standards of *Rule 1:4-8(a)*. In our view, the award of fees at a rate of $ 275 per hour was reasonable.

As the court noted on the record when it ruled on the motions for reconsideration, an award to the County at a rate of $ 30 an hour was unreasonable because that rate was based on the base salary of the attorney [*13] and did not include any benefits or overhead. The court also aptly noted that such a low rate would not deter the assertion of frivolous lawsuits against public entities such as the County.

We are therefore satisfied that the award of counsel fees at a rate of $ 275 per hour was reasonable under the circumstances. The certification of the Assistant County Counsel established that the hourly rate charged generally by attorneys in the northeastern counties of the state varies from $ 250 to $ 400 per hour. Plaintiff presented no evidence showing that an hourly rate of $ 275 was unreasonable.

We have considered plaintiff's other contentions and find them to be without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.