

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1415-20

CHRISTINE SAVAGE,

Plaintiff-Appellant,

v.

TOWNSHIP OF NEPTUNE,
NEPTUNE TOWNSHIP POLICE
DEPARTMENT, MICHAEL J.
BASCOM, in an individual and
official capacity, and JAMES M.
HUNT, in an individual and
official capacity,

Defendants-Respondents,
and

ROBERT MANGOLD, in an
individual and official capacity,
MICHAEL MCGHEE, in an
individual and official capacity,
ANTHONY GUALARIO, in an
individual and official capacity,
KEVIN O'DONNELL, in an
individual and official capacity,
VITO GADALETA, in an
individual and official capacity,
SCOTT COX, in an individual
and official capacity, LEWIS
SCHLOSSER, and THE INSTITUTE
FOR FORENSIC PSYCHOLOGY,

Defendants.

APPROVED FOR PUBLICATION

May 31, 2022

APPELLATE DIVISION

Argued May 19, 2022 – Decided May 31, 2022

Before Judges Haas, Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1528-16.

Donald F. Burke, Jr. argued the cause for appellant (Law Office of Donald F. Burke, attorney; Donald F. Burke and Donald F. Burke, Jr., on the briefs).

John D. McCarthy argued the cause for respondents Michael J. Bascom and James M. Hunt (Schenck, Price, Smith & King, LLP, attorneys; Joseph Maddaloni, Jr. and John D. McCarthy, of counsel and on the brief).

The Dwyer Law Firm, LLC and Bennet D. Zurofsky, attorneys for amicus curiae National Employment Lawyers Association of New Jersey (Andrew W. Dwyer and Bennet D. Zurofsky, of counsel and on the brief).

The opinion of the court was delivered by

HAAS, P.J.A.D.

Plaintiff Christine Savage, a former sergeant with defendant Township of Neptune Police Department, appeals from an order enforcing a "non-disparagement provision" in a settlement agreement. In the underlying employment discrimination case, plaintiff alleged defendants engaged in continuing sexual discrimination, harassment, and unlawful retaliation, in violation of New Jersey's Law Against Discrimination (LAD) N.J.S.A. 10:5-1

to -50, the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, and Article I, Paragraph 6 of the New Jersey Constitution. On July 23, 2020, the parties settled the employment discrimination action and entered into an agreement, which included a non-disparagement provision, but not a non-disclosure provision.

Defendants Michael J. Bascom, the former Police Director for Neptune Township, and James M. Hunt, the Chief of the Neptune Police Department, filed a motion in September 2020, to enforce the settlement, arguing that plaintiff violated the non-disparagement provision during an interview with a television news reporter that aired on Channel 4, NBC news on August 11, 2020. The trial judge granted defendants' motion, finding that N.J.S.A. 10:5-12.8(a) only barred confidentiality or non-disclosure agreements (also referred to as NDAs), and that plaintiff violated the non-disparagement provision in the agreement when she commented during the televised interview that the Neptune Police Department had not changed, and it was still a "good old boys club." The judge subsequently awarded defendants \$4,917.50 in counsel fees and costs for breach of the non-disparagement clause.

Plaintiff appeals from the order enforcing the non-disparagement provision of the settlement agreement. On appeal, plaintiff argues that the judge erred in granting the motion because the non-disparagement provision

was against public policy and unenforceable under N.J.S.A. 10:5-12.8(a), and thus the judge also erred in denying her cross-motion for counsel fees under N.J.S.A. 10:5-12.9. In the alternative, plaintiff argues that even if the non-disparagement provision were enforceable, by adjudicating this dispute as a motion to enforce, rather than as a separate breach of contract action, the judge deprived her of her right to have a jury decide the disputed facts.

For the reasons that follow, we reverse the order granting defendants' motion to enforce the settlement agreement and find that although the terms of the non-disparagement provision are enforceable and the judge properly adjudicated this matter by motion, the judge nonetheless erred in finding that plaintiff violated the terms of the non-disparagement provision during the televised interview. Because defendants' enforcement motion was not successful, we vacate the judge's award of \$4,917.50 in counsel fees to defendants. However, we affirm the judge's order denying plaintiff's cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9.

I.

In December 2013, plaintiff, who had been employed as a police officer by the Neptune Police Department since January 5, 1998, brought an action against defendants under the LAD for sexual harassment, sexual discrimination in the form of a hostile work environment, and retaliation for filing a charge of

sex discrimination with the Equal Employment Opportunity Commission (EEOC) (the first action). The parties entered into a settlement agreement in that case in May 2014, under which defendants agreed to promote plaintiff to sergeant and to provide her with access to training.¹

In a second action, plaintiff filed a complaint in April 2016 and an amended complaint in September 2018, against, among others, defendants Township of Neptune, Neptune Township Police Department, Bascom, and Hunt. Plaintiff alleged continuing sex discrimination and harassment, retaliation, and aiding and abetting discrimination in violation of the LAD, and violations of the New Jersey Civil Rights Act and State Constitution.

In her amended complaint, plaintiff asserted defendants violated "the letter and spirit of the Settlement Agreement" entered in the first action because even though she was promoted to sergeant on May 1, 2014, three male police officers were promoted at the same time thereby sending "a message to the rank and file that male dominance" of the police department "would remain the status quo." She alleged defendants failed to provide her with the agreed upon training, and promoted men ahead of women in violation of their standard operating procedures. She also claimed that after the settlement in

¹ That agreement, like the agreement at issue here, included a non-disparagement provision.

the first action, the sexual discrimination, harassment, and retaliation against her "intensified," and she was subjected to unfair assessments, arbitrary internal affairs investigations, discriminatory work assignments, discriminatory performance standards and evaluations, and more stringent scrutiny, monitoring and oversight. She was ultimately placed "on no-pay status" based on the result of an undisclosed "Fitness for Duty evaluation."

On July 23, 2020, after engaging in three months of extensive negotiation and mediation before a retired Superior Court Judge, the parties executed the comprehensive "Settlement Agreement and General Release." The "lynchpin" of the agreement was to allow plaintiff to remain employed by the Township so she could reach her twenty-five years of pensionable/creditable service by her predicted retirement date of June 1, 2021. Defendants agreed that plaintiff, who was then on paid administrative/medical leave, would be permitted, once medically cleared, to return to work until she reached her retirement date, and they also agreed to pay her \$175,000 (pain and suffering), \$50,354.32 (reimbursement for purchase of pension credits), and \$23,206.38 (retroactive pay).

At issue here, the settlement agreement included the following mutual "non-disparagement provision":

10. The parties agree not to make any statements written or verbal, or cause or encourage others to

make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party. The parties agree that this non[-]disparagement provision extends to statements, written or verbal, including but not limited to, the news media, radio, television, internet postings of any kind, blogs, social media, (e.g., Facebook, Instagram, Twitter, or the like), consumer or trade bureaus, other state, county or local government offices or police departments or members of the public. Neptune Township will respond to inquiries from prospective employers with dates of employment and positions held. The parties agree that non-disparagement is a material term of this Agreement and that in the event of a breach, the non-breaching party may seek enforcement of the non-disparagement provision and damages for its breach, and that the filing of any such action would not be deemed a breach of this Agreement. Nothing herein shall be construed as prohibiting or precluding in any way testimony or statements of [p]laintiff related to other proceedings including lawsuits.

[(emphasis added).]

During oral argument on the motion to enforce the settlement, defendants' counsel represented that earlier versions of the agreement contained a very broad-based provision that included both a confidentiality or non-disclosure provision and a non-disparagement provision. Defense counsel said they agreed to remove the confidentiality provision based on "extensive discussions" about its unenforceability under N.J.S.A. 10:5-12.8(a), but did not remove the non-disparagement provision because the parties agreed that it was material to the agreement that neither party would disparage the other.

Defense counsel claimed "there was never any discussion about [the] non-disparagement provisions being unenforceable." However, plaintiff's counsel maintained he had expressed the view that the non-disparagement provision was unenforceable, but ultimately agreed to include the provision because under the severance clause of the agreement, the remainder of the agreement would remain enforceable even if that provision was stricken.

In any event, the settlement was placed on the record on July 24, 2020. On that same date, the trial judge issued an order dismissing the case setting forth that it was "Settled by Conference by Judge."² On August 1, 2020, the parties filed a stipulation of dismissal without prejudice as to plaintiff's application for attorney's fees and costs as a prevailing party. However, it is not clear from this record whether she pursued that application.

Approximately one month later, in early September 2020, defendants Bascom and Hunt filed a motion to enforce the settlement, seeking \$23,206.38

² Under the terms of the settlement agreement, all pending matters between the parties were also dismissed with prejudice including, among others, a separate declaratory judgment action, Savage v. Neptune Township, A-1713-19, filed by plaintiff and another Neptune police officer against defendants. In that action, plaintiffs challenged the constitutionality of the Neptune Police Department's policy that no employee could communicate with a reporter about the operations of the department without authorization from the Chief of Police. Plaintiffs appealed from an order granting defendants' motion for summary judgment in that case and that appeal was dismissed pursuant to the settlement agreement in this case.

in damages (the amount of plaintiff's retroactive pay) and legal fees, and to compel plaintiff to refrain from making any further disparaging comments. Defendants Neptune Township and Neptune Township Police Department joined in the motion to enforce the settlement. Plaintiff filed a cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9.

In a certification in support of the motion, Bascom's and Hunt's counsel set forth that on August 11, 2020, just days after plaintiff received her settlement payment, she was interviewed by Sarah Wallace, a news reporter, on Channel 4, NBC news. Defendants claimed plaintiff violated the non-disparagement provision during the televised interview when she commented and caused the reporter to comment, as follows (in bold):³

Reporter (introducing segment): We have an I Team exclusive update tonight. A major win for a former police sergeant who sued Neptune Township in central New Jersey for sex discrimination. Now a settlement. Investigative reporter Sarah Wallace who has covered the legal battle for years and joins us for details in the closing chapter.

[Plaintiff:] I feel vindicated.

Sarah Wallace: Neptune Township's only female police sergeant Christine Savage, claiming a legal victory. The 46-year-old agreeing to settle a

³ We cite to the transcript as corrected by our review of the actual video of the interview.

contentious sexual discrimination lawsuit which she first filed against her superiors in 2013.

[Plaintiff:] My integrity's intact and I get to keep my rank, you couldn't fire me, you couldn't demote me, **you abused me, you abused me for about 8 years.**

Sarah Wallace: **Savage says the harassment and retaliation intensified with bogus disciplinary charges.**

[Plaintiff:] I never asked for special treatment, I just asked for the same treatment.

Sarah Wallace: **In 2018, she was put on unpaid leave after being found unfit for duty during a psych exam the sergeant says was a set up.**

[Plaintiff:] They wouldn't tell me what it was that determined me unfit.

Sarah Wallace: She [plaintiff] spoke out for the first time to the I Team.

[Plaintiff:] I'm being financially choked out.

Sarah Wallace: Savage fought back in Court the result, one hearing after another, and a back and forth series of other psych exams.

[Plaintiff:] But I passed 5 fitness for duties, 5, and at no point in time was I put back to work.

Sarah Wallace: She never got back in uniform, but the Township finally agreed to put her back on the payroll and then a settlement offer for this veteran who will retire with 25 years on the job, with full benefits, back pay and all disciplinary charges dismissed. The Township denies any improper conduct.

Sarah Wallace: What do you say to other whistle blowers?

[Plaintiff:] Stand your ground, don't submit.

Sarah Wallace: I've seen the toll that it has taken on you over the years. Was it worth it?

[Plaintiff:] It is worth it. If you have the integrity, and the strength to stand your ground and stand up for what's right then that's worth its weight in gold.

Sarah Wallace: But Savage also believes women will continue to face an uphill battle for equal promotions within her department.

[Plaintiff:] I really don't think you're ever going to see another female sergeant, lieutenant, captain or above.

Sarah Wallace: Because?

[Plaintiff:] Because we're oppressed. They don't want women there.

Sarah Wallace: Has it not changed?

[Plaintiff:] It has not changed, not for a minute. It's not gonna change, it's the good ol' boy system.

The trial judge conducted oral argument on September 25, 2020. The judge, who reviewed the transcript of the television news interview and watched the video, found that plaintiff was "certainly taking shots at the Neptune Police Department, as well as the senior leadership for the Police Department" near the end of the interview, but that the comments were not related to the details of her claim. In response to plaintiff's counsel's argument

that the non-disparagement provision was against public policy because it "gagged" plaintiff from talking about discrimination, the judge, who had also listened to the recording of the settlement, found that:

No one is trying to gag your client. She is allowed to talk about, and that's what this statute [N.J.S.A. 10:5-12.8] addresses, that if she wants to talk about whatever occurred in the past to her . . . , if she felt that she was the subject of any type of harassment, intimidation, retaliation, she's free to speak about that.

There's nothing either in the statute or in this settlement agreement that you negotiated that was placed on the record in front of me, none of these objections were noted on July 24th or concerns when we put this on the record.

. . . .

The problem occurs, though, with those comments at the end of the interview. Nothing is going to change. They're still the good old boys club. That doesn't deal with her harassment in the past. She also just settled her claim. . . . And if there was concern, I think the appropriate time to address the non-disparage[ment] was during the settlement negotiations, particularly when it says . . . it's a material term.

The judge reasoned that there was a difference between a non-disparagement provision, which was enforceable, and a non-disclosure or confidentiality provision, which was against public policy and unenforceable under N.J.S.A. 10:5-12.8, and concluded that if the Legislature had intended to

include non-disparagement provisions in the statute it would have done so.

The judge found that:

Our Legislature prohibited . . . settlement agreement[s] that . . . include[d] [a] non-disclosure or confidentiality agreement. As this [c]ourt reads the settlement agreement here, there is absolutely no confidentiality and/or non-disclosure.

As I mention on multiple occasions, over three months the parties went through this agreement with [the retired judge] at length. I was reminded consistently of the efforts, the yeoman efforts taken by all sides on this, as well as [the retired judge] to get the parties to a meeting of the minds. It's clear, when you read the settlement agreement, that the parties, and that's both sides, agree that the non-disparage[ment] is a material term of this settlement. And in the event of a breach, the non-breaching party may seek enforcement of the non-disparagement agreement provision, and . . . damages for its breach.

That's a mutual and reciprocal obligation, as the [c]ourt noted. That obligation protected both the plaintiff, as well as the defendant in this matter. So, the [c]ourt finds that to be an acceptable agreement.

At the conclusion of oral argument, the judge issued an oral decision and a written order granting defendants' motion to enforce the settlement, ordering plaintiff to refrain from making any further statements or conducting any further interviews disparaging defendants, denying defendants' application for \$23,206.38 in damages, granting defendants' application for counsel fees, and denying plaintiff's cross-motion for counsel fees. Bascom's and Hunt's counsel

thereafter submitted a certification in support of their request for \$6,612.50 in counsel fees. After reviewing the certification of services, the judge reduced the total amount of time, found the hourly rate was reasonable, and awarded defendants \$4,917.50 in counsel fees and costs. The judge entered a conforming order on December 22, 2020.

II.

Plaintiff first argues that the non-disparagement provision in the settlement agreement is against public policy and unenforceable under N.J.S.A. 10:5-12.8(a), because it prohibits her from making any statements about defendants' past behavior and thus has the purpose or effect of concealing the details relating to her claims of employment discrimination, retaliation, and harassment. Amicus curiae, the National Employment Lawyers Association of New Jersey (NELA-NJ), joins in that argument and contends that the trial judge's interpretation of N.J.S.A. 10:5-12.8(a), as applying only to provisions framed as "non-disclosure" or "confidentiality" clauses, "elevate[d] form over substance," and gave "a crabbed reading to what was intended by the Legislature to be a remedial provision." Amicus contends that the plain language of the statute prohibits any provision which "has the purpose or effect of concealing the details relating to a claim of discrimination,

retaliation, or harassment," and thus the non-disparagement "label" assigned to the clause at issue here was irrelevant.⁴

Resolution of these contentions involves an interpretation of both the settlement agreement and the statute, N.J.S.A. 10:5-12.8(a). "Settlement of litigation ranks high in our public policy." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961)). "[O]ur courts have refused to vacate final settlements absent compelling circumstances." Ibid. "A settlement agreement between parties to a lawsuit is a contract[.]" ibid., "governed by [the general] principles of contract law." Globe Motor Co. v. Igdaley, 225 N.J. 469, 482 (2016) (alteration in original) (quoting Brundage v. Est. of Carambio, 195 N.J. 575, 600-01 (2008)). "A court's objective in construing a contract is to determine

⁴ Amicus also separately argues that penalizing plaintiff as a "former government employee" for speaking to a television reporter about a matter of public concern violated Article I, Paragraph 6 of the New Jersey Constitution and the First Amendment of the United States Constitution. However, the parties did not raise this issue before the trial judge, nor was it raised by plaintiff on appeal. "[A]s a general rule, [an appellate court] 'does not consider arguments that have not been asserted by a party, and are raised for the first time by an amicus curiae.'" In re Request to Modify Prison Sentences, 242 N.J. 357, 396 (2020) (first alteration in original) (quoting In re A.A., 240 N.J. 341, 359 n.1 (2020) (quoting State v. J.R., 227 N.J. 393, 421 (2017))). Moreover, "courts should not reach constitutional questions unless necessary to the disposition of the litigation." O'Keefe v. Passaic Valley Water Comm'n, 132 N.J. 234, 240 (1993). Therefore, we will not consider this contention here.

the intent of the parties." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 320 (2019). "A basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Id. at 321.

Similarly, "the goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335 (2015). The "'best indicator' of that intent, [is the] statute's plain language." Finkelman v. Nat'l Football League, 236 N.J. 280, 289 (2019) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). Further, special rules of interpretation apply because this case involves the LAD. Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016) (citing Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 108 (2010)). "[T]he LAD is given liberal construction, for the 'more broadly [the LAD] is applied, the greater its antidiscriminatory impact.'" Richter v. Oakland Bd. of Educ., 246 N.J. 507, 537 (2021) (second alteration in original) (quoting Smith, 225 N.J. at 390).

Courts "construe the words of a statute 'in context with related provisions so as to give sense to the legislation as a whole.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (quoting N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 570 (2017)). If the plain language leads to a clear and unambiguous result, the court's job is complete, Matter of Commitment of W.W., 245 N.J. 438, 449 (2021), and the court applies "the

law as written." Kaminskas v. Off. of the Attorney Gen., 236 N.J. 415, 422 (2019). Courts "turn to extrinsic tools to discern legislative intent . . . only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429 (2013).

In the absence of a factual dispute, the interpretation and enforcement of a contract, including a settlement agreement, is subject to de novo review by the appellate court. Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 612 (2020); Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009) (interpretation and construction of a settlement agreement). Interpretation of a statute is also subject to de novo review. State v. Fuqua, 234 N.J. 583, 591 (2018). Under that standard of review, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

At issue here, effective March 18, 2019, the Legislature passed a law, L. 2019, c. 39, § 2, supplementing the LAD and preventing enforcement of non-disclosure agreements in employment contracts or settlement agreements, as follows:

A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee . . . who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer.
[N.J.S.A. 10:5-12.8(a).]

The plain language of the statute provides that it applies to a "non-disclosure provision." Ibid. The statute does not include or exempt "non-disparagement provisions," although it specifically exempts non-competition and proprietary information provisions. N.J.S.A. 10:5-12.8(c)(1)-(2).

Notably, as the trial judge found, there is a difference between a non-disclosure or confidentiality clause and a non-disparagement clause. A non-disclosure or confidentiality clause is a "clause prohibiting the parties to an agreement from disclosing to nonparties the terms of the agreement and, often, anything related to the formation of the agreement." Black's Law Dictionary 315 (11th ed. 2019). See N.J.S.A. 10:5-12.8(a) (also defining a non-disclosure provision as "[a] provision . . . which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment"). See also Jamillah Bowman Williams, Maximizing # Metoo: Intersectionality &

The Movement, 62 B.C. L. Rev. 1797, 1857 (2021) ("Settlement agreements generally include nondisclosure clauses, and the clauses often prohibit the employee from discussing any discrimination or harassment issues that were the subject of the settlement"); Rachel S. Spooner, The Goldilocks Approach: Finding The "Just Right" Legal Limit On Nondisclosure Agreements In Sexual Harassment Cases, 37 Hofstra Lab. & Emp. L.J. 331, 333-334 (2020) ("NDAs have morphed into a powerful tool for silencing sexual harassment accusers"). In contrast, a non-disparagement clause is a "contractual provision prohibiting the parties from publicly communicating anything negative about each other." Black's Law Dictionary 315 (11th ed. 2019).

The Legislature could have, but did not, prohibit the enforcement of non-disparagement provisions. See, e.g., Domestic Workers Bill of Rights Act, S. 2569, 117th Cong. (2021-2022) (proposed federal bill creating rights and employment protections for domestic workers that would bar non-disclosure and non-disparagement agreements). That omission is noteworthy given that both non-disclosure and non-disparagement provisions are often included in employment agreements. Denson v. Donald J. Trump for President, Inc., 116 N.Y.S.3d 267, 270 (App. Div. 2020) (noting that the plaintiff was required to sign a non-disclosure and non-disparagement agreement); Elizabeth C. Tippet, The Legal Implications of the MeToo

Movement, 103 Minn. L. Rev. 229, 234 (2018) (noting that Harvey Weinstein entered into multiple settlement agreements containing non-disclosure and non-disparagement provisions).

Instead, the plain language of the law indicates that it was only intended to prevent employers from compelling employees to enter into agreements to conceal the details of their LAD claims. And the extrinsic evidence supports this interpretation. See A. Appropriations Comm. Statement to S. 121 (Jan. 28, 2019) ("The bill applies to non-disclosure agreements"); Sponsor's Statement to S. 121 (the law bars "agreements that conceal details relating to discrimination claims"); Suzette Parmley, Murphy Signs Bill Curtailing Workplace Nondisclosure Agreements, 225 N.J.L.J. 12 (2019).

As amicus points out, as a prelude to S. 121, the chief sponsor of the law co-chaired hearings regarding challenges facing survivors of sexual assault and the policies and procedures for hiring a candidate for state employment who had been accused of sexually assaulting an Executive Branch staff volunteer. Pub. Hearing Before N.J. Legis. Select Oversight Comm. (Feb. 26, 2019). While much of the Final Committee Report focused on the specific allegations of sexual assault, the Committee found that non-disclosure agreements "have a chilling effect on individuals who have experienced discrimination or harassment and would have reported violations but for the non-disclosure

agreements." Report of the N.J. Legis. Select Oversight Comm. Concerning the Hiring of Albert J. Alvarez as Chief of Staff at the N.J. Schs. Dev. Auth.

100-01 (June 5, 2019).

<https://www.njleg.state.nj.us/publications/reports/LSOC%20Report.pdf>

The Committee did not address non-disparagement provisions. Further, the chief sponsor cited to the discussion of non-disclosure provisions during the hearings in support of S. 121, stating that:

An important step in delivering meaningful reform is the legislation that would make non-disclosure agreements in cases of sexual assault and sexual harassment unenforceable against employees who are survivors. These non-disclosure agreements have been used to silence and intimidate survivors of sexual assault and harassment as well as victims of discrimination and retaliation. Limiting these so-called confidentiality agreements will help eliminate the secrecy that too often allows abuses to continue. It should no longer be appropriate to buy forced silence that further victimizes assault survivors.

[Letter from Sen. Loretta Weinberg to the 67 Women Who Spoke Out in Support of Legislative Hearings that Support Sexual Assault Victims and Lead to Meaning Reforms, at 1 (Feb. 20, 2019).]

Thus, neither the language of N.J.S.A. 10:5-12.8(a), nor the legislative history, indicate an intent by the Legislature to prohibit the enforcement of non-disparagement provisions.

Turning to the settlement agreement, the plain language of the carefully negotiated agreement indicates that the "purpose" of the non-disparagement provision was to mutually prohibit the parties from making disparaging statements about each other, and not to "conceal" the details relating to plaintiff's LAD claims, in violation of N.J.S.A. 10:5-12.8(a). During their lengthy negotiations, the parties removed the proposed non-disclosure provision, and intentionally left in the non-disparagement provision, which they agreed was "a material term" of the agreement, presumably in response to the long history of litigation between the parties. That mutual prohibition provided that the parties agreed "not to make any statements written or verbal . . . regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party." (emphasis added). The provision benefitted both parties, in that Neptune Township not only agreed not to disparage plaintiff, but also to respond to inquiries from prospective employers with only the dates of plaintiff's employment and the positions she held. Plaintiff was also not prohibited from testifying or submitting a statement disparaging defendants in any other legal proceedings brought by herself or by others, including other employment discrimination cases.

Further, the "effect" of the non-disparagement provision was also not to silence plaintiff from speaking out about the details of her claims. N.J.S.A.

10:5-12.8(a). Although there can be some overlap, in that describing the details of a LAD claim could be disparaging, that was not what happened here. Defendants agreed that plaintiff could discuss with the news reporter the terms and details of the sexual discrimination giving rise to the settlement disclosure that N.J.S.A. 10:5-12.8(a) was designed to protect. Defendants also do not claim that plaintiff violated the non-disparagement provision by discussing such details. Defendants only objected to plaintiff's more general disparaging language, including that the department had not changed and that it was still a "good ol' boys system"—comments that were not directly related to the details of her claim but rather related to her impression of defendants' present and future behavior.

Under these circumstances, we conclude that the non-disparagement provision, which differs from a non-disclosure provision, was enforceable. The Legislature did not specifically declare such a provision to be against public policy under N.J.S.A. 10:5-12.8(a). In addition, the provision did not have the purpose or effect of barring plaintiff from discussing the details of the settlement agreement or her underlying LAD claims as prohibited under N.J.S.A. 10:5-12.8(a).

Because the non-disparagement provision was enforceable, plaintiff was not entitled to counsel fees under N.J.S.A. 10:5-12.9. This statute provides

that "[a] person who enforces or attempts to enforce a provision deemed against public policy and unenforceable pursuant to P.L.2019, c.39 (C.10:5-12.7 et seq.) shall be liable for the employee's reasonable attorney fees and costs." In other words, an employer who enforces or attempts to enforce a non-disclosure agreement will be liable for the employee's counsel fees and costs. N.J.S.A. 10:5-12.9. Because defendants did not attempt to enforce a prohibited non-disclosure provision in this case, the trial judge correctly denied plaintiff's counsel fee application under N.J.S.A. 10:5-12.9.

III.

Plaintiff next argues that even if the non-disparagement provision was enforceable, the trial judge deprived her of her right to have a jury decide the disputed facts. Plaintiff asserts defendant should have filed a separate breach of contract action rather than a motion to enforce the settlement. This contention lacks merit.

Plaintiff objected to defendants' motion by arguing that she had a constitutional right to a trial by jury on the factual issue of whether she had violated the non-disparagement provision. The judge rejected this argument, determining that any factual issues would be decided under the standards applicable to motions for summary judgment as set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Here, the lengthy signed and valid settlement agreement was placed on the record before the trial court and incorporated into the July 24, 2020 order dismissing the action. Thus, the judge had the authority to enforce the terms of the settlement agreement under Rule 1:10-3, which provides in part that "[n]otwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action." "[A] proceeding to enforce litigants' rights under Rule 1:10-3 'is essentially a civil proceeding to coerce [a party] into compliance with the court's order for the benefit of the private litigant[,]'" Pasqua v. Council, 186 N.J. 127, 140 (2006) (quoting Essex Cnty. Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195 (App. Div. 1975)), and "a device to enable a litigant to enforce his or her rights." In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015). "The scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011).

To that end, plaintiff's reliance upon Globe Motor Co., 225 N.J. at 469, is not persuasive. In Globe, the parties executed a settlement agreement and a stipulation of dismissal dismissing the action with prejudice. Id. at 473-74. Shortly thereafter, the bankruptcy trustee demanded that the plaintiff disgorge the settlement funds because the funds belonged to the bankrupt entity, not the defendants. Id. at 473. The plaintiff paid to resolve the trustee's claim and

then filed a separate declaratory judgment action against the defendants for breach of the settlement agreement, seeking to recover the money they had paid to settle the bankruptcy claim. Ibid. The trial judge granted the plaintiff's motion for summary judgment and the Court reversed, finding that the record viewed in accordance with Rule 4:46-2(c) did not establish the plaintiff's right to judgment as a matter of law. Ibid.

This case is plainly distinguishable. First, unlike in Globe, here the settlement agreement was incorporated into a court order and is thus enforceable under Rule 1:10-3. Second, a court is not required to hold an evidentiary hearing on a Rule 1:10-3 motion unless there are material factual disputes concerning the parties' "compliance with the order or ability to comply[.]" State Dep't of Env't Prot. v. Mazza & Sons, Inc., 406 N.J. Super. 13, 29 (App. Div. 2009).

Here, all of plaintiff's comments were made during the televised interview, which the court viewed. There was no dispute as to what plaintiff said, or when she said it, and thus there was no need for a hearing or trial to determine whether those comments violated the terms of the settlement agreement. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-75 (App. Div. 1997).

IV.

To summarize, the non-disparagement provision in the parties' settlement agreement was valid and defendants were permitted to seek its enforcement. The remaining question is whether the trial judge erred in finding that plaintiff violated the agreement.

We review a court's order enforcing litigant's rights under Rule 1:10-3 for an abuse of discretion. Wear v. Selective Ins. Co., 455 N.J. Super. 440, 458 (App. Div. 2018). "An abuse of discretion occurs when a decision was 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Id. at 459 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). An appellate court should defer to the trial court's findings of fact where those findings are supported by sufficient credible evidence. N. Jersey Media Grp., Inc. v. State, Off. of Governor, 451 N.J. Super. 282, 295-96 (App. Div. 2017). "The particular manner in which compliance may be sought is left to the court's sound discretion." Id. at 296 (quoting Bd. of Educ. of Middletown v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501, 509 (Ch. Div. 2001)).

Here, the judge's findings that plaintiff's statements toward the end of the interview were disparaging or impugned defendants' reputation are subject to deference. However, the question of whether those statements violated the

terms of the agreement, that is, the interpretation of the settlement agreement, is a matter of law subject to our de novo review. In re Est. of Balk, 445 N.J. Super. 395, 400 (App. Div. 2016).

The settlement agreement provided that the parties agreed "not to make any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party." (emphasis added). Plaintiff's comment that women were "oppressed," that the department did not "want women there," and that the department had "not changed," would not change, and was "the good ol' boy system," are statements about present or future behavior, not comments about past behavior prohibited under the plain language of the agreement.

Moreover, although the judge did not find that any other statements were disparaging, it is clear that some of the statements, including the first two statements by Wallace, that plaintiff said the "harassment and retaliation intensified with bogus disciplinary charges," and that plaintiff "was put on unpaid leave after being found unfit for duty," repeat statements plaintiff made during an earlier interview. Because that interview occurred before the parties entered into the settlement agreement, it could not be considered disparaging under the agreement. In fact, a large part of the NBC broadcast consisted of

portions of previous interviews with plaintiff, video clips of the courtroom, and photographs of plaintiff in uniform and of the complaint she had filed against defendants, none of which were prohibited under the non-disparagement provision of the settlement agreement. Further, the settlement agreement was not binding on Wallace, nor did it prevent her from interpreting or misinterpreting plaintiff's statements.

Therefore, we reverse the trial court's order granting defendant's motion to enforce the settlement. Although the terms of the non-disparagement provision were enforceable, and the trial judge properly adjudicated this matter by motion, the judge nonetheless erred in finding that plaintiff violated the terms of the non-disparagement provision during her televised interview. Because defendants' enforcement application was not successful, we also vacate the judge's award of \$4,917.50 in counsel fees and costs to defendants. Finally, we affirm the judge's order denying plaintiff's cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9.

Affirmed in part and reversed in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION