ORDER ON EMERGENT MOTION

NEW JERSEY DIVISION OF CHILD PROTECTION & PERMANENCY
v.
T.F., M.L. & E.W.
v.
THE TRENTONIAN & ISAAC AVILUCEA

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3199-16
MOTION NO. M-
BEFORE PART: F
JUDGE(S): MITCHEL E. OSTRER
GEORGE S. LEONE

EMERGENT MOTION FILED: 4/4/2017 BY: DCPP

ANSWER(S) FILED: 4/7/2017 BY: THE TRENTONIAN
4/7/2017 ISAAC AVILUCEA
4/7/2017 LAW GUARDIAN

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 24th DAY OF APRIL, 2017, HEREBY ORDERED AS FOLLOWS:

EMERGENT MOTION FOR A STAY

GRANTED	DENIED	OTHER
(☐)	(☒)	(☐)

SUPPLEMENTAL:

This emergent motion relates to an abuse or neglect action filed on October 26, 2016, by the Division of Child Protection and Permanency (the Division) against the parents and grandparent of N.L., a boy then five years old, who twice was found to have brought controlled dangerous substances to school.

On the same day, a Trentonian reporter, Isaac Avilucea, received a copy of the verified complaint and exhibits from N.L.'s mother, T.F. The Division immediately obtained from the

Family Part, upon an oral ex parte application, an order temporarily restraining the Trentonian newspaper from publishing the contents of those documents. The restraints were to expire in two days unless extended.

The restraints were extended on October 28, 2016, the same day the Division filed an amended verified complaint, adding the Trentonian and its reporter, Isaac Avilucea (collectively, hereafter, the Newspaper), as defendants in the abuse or neglect case. The amended complaint requested an order (1) prohibiting all defendants, including the Newspaper, from "possess[ing], disclos[ing], disseminat[ing], copying, or us[ing] any Division records without court order"; (2) compelling the Newspaper to return documents it already possessed; (3) compelling Avilucea to disclose the names of anyone he may have provided such documents and "prohibiting those persons from further disclosure."

The restraints were extended again, but narrowed, on January 27, 2017. After a plenary hearing in February and post-hearing submissions, the court denied the State's application and vacated the restraints in an oral decision on the record on March 27, 2017.[1] The court found that Avilucea did not encourage

[1] There is no indication in the court's oral opinion that advance notice was given to counsel. See R. 1:6-2(f) ("[I]f [a] motion was argued and the court intends to place its findings on the record at a later date, it shall give the parties one day's notice . . . of the time and place it shall do so.").

T.F. to give him the pleadings. Instead, the court found that T.F. turned them over voluntarily. Deeming this fact to be dispositive, the court entered an order the same day dissolving the restraints against the Newspaper and dismissing "the Amended Complaint as to all defendants." The abuse or neglect case involving the child's parents and grandparent remained pending.

On March 30, 2017, the Trentonian published an online article about the complaint, which included a copy of the initial verified complaint with N.L.'s name redacted, but T.F.'s and M.L.'s name disclosed.[2] Sulaiman Abdur-Rahman, Mercer County judge finds in favor of The Trentonian and freedom of the press, The Trentonian, March 30, 2017, http://www.trentonian.com/general-news/20170330/mercer-county-judge-finds-in-favor-of-the-trentonian-and-freedom-of-the-press.

The following day, the Division sought permission to file its application for emergent relief consisting of a stay of the trial court's March 27, 2017 order.[3] The court permitted the

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[2] Notably, T.F.'s and M.L.'s identity was already a matter of public disclosure as a result of earlier news reports, which also reported that M.L. was criminally charged. See Anna Merriman, Bail reduced for father of 5-year-old who brought heroin to school, NJ.com, Sept. 27, 2016, http://www.nj.com/mercer/index.ssf/2016/09/dad_of_5-year-old_who_brought_heroin_to_school_app.html; Isaac Avilucea, Kid, 5, who brought heroin to school, now caught with crack, The Trentonian, Oct. 27, 2016, at 2-3.

[3] The Division's counsel stated that she had learned of the court's order on March 30, 2017. She later stated she was unaware that publication had already occurred when she initially filed the application for permission to file an emergent motion;

Division to file an emergent motion, but did not enter interim relief to stay the trial court's March 27, 2017 order. The Division thereafter unsuccessfully sought emergent relief from the Supreme Court.

Although publication had occurred, the State asserted there remained an issue as the attachments to the complaint had not been released. However, pending briefing on the Division's emergent motion, the Trentonian posted the attachments to the March 30, 2017 article — redacting N.L.'s name and certain details about his personal health.[4]

Consequently, the Trentonian has released into the public domain the identified materials that the Division seeks to suppress except the child's name and aspects of his personal health. Moreover, the Newspaper has represented to the court that it does not intend to release the child's name or details of his health. Indeed, the Newspaper exercised that self-restraint in its coverage of the case before it came into possession of the pleadings.

In light of the document's publication, we deem the Division's request to stay the trial court's order dissolving the prior restraint against the Newspaper to be moot. "An issue

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consequently, she did not disclose the fact of publication to the court, which also was unaware.

[4] It is difficult to ascertain precisely when the attachments were posted. The website indicates that the March 30, 2017 article was updated on April 1, 2017. See Abdur-Rahman, supra, The Trentonian, March 30, 2017.

is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrs., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (internal quotation marks and citation omitted).

Even if it were not moot, the Division has not satisfied the prerequisites for a stay.

> A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding 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.
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> [Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (internal quotation marks and citation omitted).]

Considering the first prong, the relief is not needed to prevent irreparable harm. The publication of the child's name is not imminent, and all other details that the Division seeks to suppress have already been released and cannot be recaptured.

As for the second and third prongs, we note that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." State v. Neulander, 173 N.J. 193, 204 (2002) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803, 49 L. Ed. 2d 683, 697 (1976)). "The damage can be particularly great when the prior restraint falls upon the communication of news

and commentary on current events." Ibid. (quoting Neb. Press, supra, 427 U.S. at 559, 96 S. Ct. at 2803, 49 L. Ed. 2d at 698).

Thus, the Division faces a high hurdle to demonstrate a probability of succeeding on the merits of its request to restrain the Newspaper's exercise of its First Amendment rights. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." N.Y. Times Co. v. United States, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141, 29 L. Ed. 2d 822, 824-25 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584, 593 (1963)). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" Id. at 714, 91 S. Ct. at 2141, 29 L. Ed. 2d at 825 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1, 6 (1971)).[5]

However, given the Division's failure to satisfy prong one, we need not address further the weighty constitutional implications of the relief the Division seeks from this court — that is, to reinstate a prior restraint of the press that was in

[5] Even after publication, the State's remedies are circumscribed. See Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103, 99 S. Ct. 2667, 2671, 61 L. Ed. 2d 399, 405 (1979) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

place for five months. See In re Civil Commitment of D.Y., 218 N.J. 359, 379 (2014) ("As a general principle, we strive to avoid reaching constitutional questions unless required to do so." (internal quotation marks and citation omitted)).

The application for emergent relief is denied.

FOR THE COURT:

MITCHEL E. OSTRER, J.A.D.