STATE OF MICHIGAN

COURT OF APPEALS

KAREN WHEATLEY, Plaintiff-Appellant,	UNPUBLISHED December 19, 2017
v	No. 338197 Court of Claims
DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	LC No. 17-000049-MZ

Before: MURPHY, P.J., and KELLY and SWARTZLE, JJ.

PER CURIAM.

In this action involving records requested under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(I)(2) (opposing party entitled to judgment), and denying plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

On September 27, 2016, plaintiff sent a FOIA request to defendant, "requesting an opportunity to inspect or obtain copies of public records (emails)" that included her name in specified variations. On October 5, 2016, defendant responded, indicating that the request was granted in part and denied in part, that an estimated 1,700 pages of content had been identified pursuant to the request, and that a 50% deposit ($207.54) for processing the request was required. The response additionally stated, "[o]nce a deposit is received, the Department will issue a written notice within approximately 60 days concerning the balance due, exemptions from disclosure if any, and your remedial rights if applicable."

On October 10, 2016, defendant received a money order from plaintiff for the full amount, $415.09. From December 2016 through February 2017, plaintiff and defendant's employee conversed via email regarding when plaintiff would receive the records requested. Defendant's employee repeatedly informed plaintiff that he was working diligently on her request but that he was unable to provide an estimate for when her FOIA request would be complete.

Plaintiff sued defendant on March 2, 2017, alleging that defendant failed to produce requested documents under the FOIA. Defendant's answer raised MCL 15.243(1)(v) (exemption

for records "relating to civil action in which the requesting party and public body are parties") as an affirmative defense. According to defendant, the entirety of the information plaintiff sought related to the federal civil action *Wheatley v Michigan Dep't of Corrections, et al*, Case No. 1:16-cv-01154, filed on October 21, 2016,[1] and was therefore categorically exempt from disclosure under MCL 15.243(1)(v).

On April 3, 2017, plaintiff filed a motion for partial summary disposition under MCR 2.116(C)(10) and sought to compel production of all records requested under MCL 15.240(4). On April 5, 2017, the trial court issued an order setting a deadline for defendant's response and prohibiting the additional filing of briefs absent leave of the court. Defendant filed a response on April 19, 2017 and requested summary disposition under MCR 2.116(I)(2). The trial court granted defendant's motion on April 26, 2017, finding that each of the requested records was exempt from disclosure because it related to the federal civil action. Also on April 26, 2017, plaintiff filed a motion for entry of an order under *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983), and an application for leave to file a reply/response. Both motions were denied as moot in light of the trial court's grant of summary disposition to defendant.

II. ANALYSIS

A. Plaintiff's Due Process Claim

Plaintiff first argues that she was denied due process of law by the trial court's order prohibiting her response to defendant's motion for summary disposition. "[W]hether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). "The fundamental requisite of due process is the opportunity to be heard." *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011) (internal citation and quotation notation omitted).

Plaintiff argues that defendant's response to her summary disposition motion should have been limited to demonstrating a genuine factual issue for trial, and that defendant's motion under MCR 2.116(I)(2) necessitated a response from plaintiff because defendant's motion added "new evidence and arguments not raised in the original motion." Plaintiff further argues that if the opposing party wishes to move for summary disposition, the court rules require a written motion and brief in support.

Plaintiff's position ignores the independent force of MCR 2.116(I)(2), which allows the court to grant judgment in favor of the opposing party, rather than the movant. Plaintiff moved for summary disposition under MCR 2.116(C)(10). Under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court

[1] It appears that this action actually commenced on September 21, 2016 in the United States District Court for the Western District of Michigan and that plaintiff filed an amended complaint on October 21, 2016, adding defendants.

may render judgment in favor of the opposing party." The rule gives a trial court "authority to grant summary disposition sua sponte." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). Summary disposition under MCR 2.116(I)(2) is available "at any time," even absent the motion of a party. *Boulton v Fenton Twp*, 272 Mich App 456, 462; 726 NW2d 733 (2006). Accordingly, the trial court retained the authority to grant defendant summary disposition under MCR 2.116(I)(2) regardless of whether defendant moved the trial court to do so.

Moreover, contrary to plaintiff's argument, defendant's response did not raise new legal issues to which the court's sua sponte order deprived plaintiff of a meaningful opportunity to be heard on. Defendant's response set forth counter-arguments to plaintiff's grounds for summary disposition, and the court found that defendant was entitled to summary disposition under MCR 2.116(I)(2). Plaintiff was given a meaningful opportunity to be heard on these issues in her own motion for summary disposition and earlier filings with the trial court. That the trial court disagreed with plaintiff's position and granted summary disposition to defendant is within its independent authority under MCR 2.116(I)(2) and does not deprive plaintiff of her constitutional right to due process.

B. Plaintiff's FOIA Claims

Plaintiff raises three issues regarding the FOIA. First, plaintiff contends that defendant is required to produce the documents it "granted" in its October 5, 2016 response. Next, plaintiff claims that defendant waived the MCL 15.243(1)(v) exemption by failing to assert it prior to raising it as an affirmative defense during litigation. Finally, plaintiff argues that the court erred by failing to follow the instructions set forth in *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983). Plaintiff's arguments are without merit.

This Court reviews determinations of law de novo, including a trial court's decision on a motion for summary disposition. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006); *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). Accordingly, this Court must review the record in the same manner as the trial court to determine whether a party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence presented to the lower court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

"Whether requested information fits within an exemption from disclosure is a mixed question of fact and law, and, on appeal, the trial court's factual determinations are reviewed for clear error but its legal conclusions are reviewed de novo." *Taylor v Bd of Water and Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). Although the FOIA contains several exceptions to disclosure, MCL 15.243, the "exemptions must be construed narrowly, and the burden of proof rests with the party asserting an exemption." *Rataj v City of Romulus*, 306 Mich App 735, 748-749; 858 NW2d 116 (2014) (internal citation and quotation marks omitted). The "public body must disclose all public records that are not specifically exempt under the act." *Id*. at 749 (internal citation and quotation marks omitted).

Defendant Did Not "Grant" the FOIA Request. Plaintiff argues that she is entitled to the requested records by way of defendant's initial "grant" of her FOIA request. We disagree. Preliminarily, we note that plaintiff mischaracterizes defendant's initial response to her FOIA request. While defendant did state that the request was "granted in part," defendant's response makes clear that the records requested would only be released to plaintiff to the extent that the records were not exempt from disclosure, as determined by defendant's review of the records requested. Accordingly, if all the records requested were determined to be exempt, it is clear that defendant would release none of the records to plaintiff.

Moreover, "[a] party's choice of labels is not binding on this Court." *King v Michigan State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013). This Court will look past a public body's characterization of whether it granted or denied a request to ascertain whether it, in fact, granted or denied the request. See *id*. at 189-190.

Plaintiff submitted her request to defendant in October 2016. Defendant then "granted" the request in part pending its review of the documents to determine whether any of the records were exempt from disclosure. Several months later, plaintiff still had not received any of the requested records and defendant could not provide plaintiff with any estimate as to when its review would be complete. Therefore, we agree with plaintiff that defendant failed to respond timely to her request. See *id.* at 190.

Plaintiff argues that, by failing to respond timely, defendant effectively granted her request. We disagree. That same argument has already been raised before this Court. See *id*. at 189-190. This Court rejected the argument and concluded that a defendant's failure to respond timely to a FOIA request "constitutes a final determination to deny the request." *Id*. at 190; MCL 15.235(3). Thus, by failing to respond timely to plaintiff's request, defendant did not grant, but actually denied the request. That denial does not automatically entitle plaintiff to the requested requests. Rather, that denial affords plaintiff the opportunity to seek review of the denial in the Court of Claims, just as plaintiff has done. MCL 15.240(1)(b).

Defendant Did Not Waive the Affirmative Defense Provided by MCL 15.243(1)(v). Next, plaintiff argues that defendant waived its right to assert MCL 15.243(1)(v) as an affirmative defense by not raising that defense in its administrative response to plaintiff's request.

In *Residential Ratepayer Consortium v Pub Serv Comm # 2*, 168 Mich App 476, 480-481, 425 NW2d 98 (1987), this Court concluded that there is no waiver of a FOIA exemption where the public body fails to raise the exemption in response to a record request, but subsequently asserts the exemption as a defense during litigation. This conclusion was affirmed in *Stone St Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 n 2; 689 NW2d 541 (2004) where this Court held that "a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level." Citing *Residential Ratepayer*, 168 Mich at 480-481. Accordingly, contrary to plaintiff's assertion, defendant did not waive its right to assert MCL 15.243(1)(v) as an affirmative defense by not raising the exemption in its administrative response. Moreover, we decline plaintiff's invitation to declare a conflict with *Residential Ratepayer* and *Stone St Capital, Inc* and note that those cases are consistent with the general concept that FOIA exemptions are affirmative defenses to document requests, *Messenger*

v Consumer & Indus Servs, 238 Mich App 524, 536; 606 NW2d 38 (1999), and that affirmative defenses are not waived if asserted in a party's first responsive pleading, MCR 2.111(F)(2).

MCL 15.243(1)(v) Exempts the Requested Records From Disclosure. Finally, we address plaintiff's argument that the trial court erred in concluding that the records were exempt from disclosure and granting summary disposition to defendant.

Under MCL 15.243(1)(v), a public body is permitted to exempt from disclosure "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties." Because there is no dispute that plaintiff and defendant are parties in a civil action, the trial court had to determine whether the requested records were "relating to" plaintiff's federal lawsuit. The phrase "relating to" is not defined in the FOIA; therefore, a dictionary is instructive in ascertaining the plain meaning of the phrase. *Messenger*, 238 Mich App at 534. Narrowly construed, "relate" means "to show or establish logical or causal connection between" or "to have relationship or connection." *Merriam-Webster's Collegiate Dictionary* (2014).

Plaintiff's federal lawsuit alleges that plaintiff was sexually harassed by one of defendant's employees and that several other unnamed individuals failed to address that harassment despite having knowledge of its occurrence. Plaintiff requested from defendant emails mentioning her name that were exchanged by the alleged harasser and 10 named individuals. We agree with the trial court's reasoning and conclusion that these emails all relate to defendant's claims of alleged sexual harassment and defendant's failure to prevent it. Accordingly, we agree with the trial court that defendant could exempt the records from disclosure under MCL 15.243(1)(v).

Finally, regarding plaintiff's claim that the trial court did not strictly follow the guidelines set forth in *Evening News*, 417 Mich at 502-503, for analyzing whether a request is exempt under the FOIA, the trial court explained its basis for determining that MCL 15.243(1)(v) is applicable to all documents and records in plaintiff's FOIA request. The trial court did not generically determine the applicability of the exemption. Rather, the trial court's analysis of MCL l5.243(1)(v) set forth a detailed and particularized basis for its applicability, properly placing the burden on defendant as the moving party, and narrowly construing the claimed exemption. While we note that the trial court did not strictly follow the procedures outlined in *Evening News*, the nature of this exemption and the facts of this case indicate that the additional procedures outlined in *Evening News* were not necessary to the resolution of the matter. Because we find that the exemption applies, any remand regarding *Evening News* would be futile.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Brock A. Swartzle