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Bar Still High For Injunctive Relief In NJ Public Bidding Cases

Some observers believed the test for interlocutory injunctive relief was relaxed by the holding in Waste Management of New Jersey Inc. v. Morris County Municipal Utilities Authority.[1] Was it?

In Waste Management of New Jersey v. Morris County Municipal Utilities Authority, the New Jersey Superior Court, Appellate Division granted leave to appeal from, and reversed, a trial court's refusal to enjoin the award of a solid waste disposal contract pending resolution of the litigation. The trial court had denied the injunction solely on the ground that plaintiffs — in the trial court's view — had a losing case on the merits.

The Appellate Division faulted the trial court for failing to address the other Crowe v. DiGioia[2] factors, such as the public interest and irreparable harm, and it remanded the case to the trial court, maintaining the preliminary restraints the appellate court had imposed when granting leave to appeal.[3]

Because the Appellate Division was emphatic about the need to protect the status quo, stating that "justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit,"[4]some observers believed the traditional injunctive test, which requires a showing of likelihood of success on the merits, had been weakened, at least in public bidding cases.[5]

Long before Waste Management, New Jersey courts had relaxed the test for preliminary injunctive relief for purposes of maintaining the status quo.[6] Consequently, Waste Management and the case on which it heavily relied, Waste Management of New Jersey Inc. v. Union County Utilities Authority,[7] did not create a new general principle. At least one trial court judge views Waste Management as merely a restatement of well-established general principles.[8]

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Waste Management is a forceful defense of using a preliminary injunction to preserve the status quo in a public bidding matter. The statement that justice is not served if the subject-matter of the litigation is destroyed suggests, though it does not say, that the merits may be close to immaterial in a bidding dispute if the contract work would be completed before the issue could be resolved, leaving the challenger with no remedy. Damages cannot be recovered against a public entity for loss of a publicly bid contract.[9]

Establishing a hard-and-fast rule for preserving the status quo in public bidding cases — or more — was not likely the Appellate Division's intent in Waste Management because such a ruling would have turned the law of preliminary injunctions "on its head."

More likely, the appellate court was unhappy that the trial court had ignored the rest of the Crowe factors — which can lead to no good in the long run — and the appellate court wasn't in a position to affirm the trial court's view of the merits and say "no harm, no foul" because the record below was incomplete, with more evidence yet to be adduced on the merits. Consequently, the court remanded and kept an injunction in place.[10]

The Waste Management ruling does not seem to have had a transformative effect on injunctive practice in public bidding cases, as some thought it might. As of the publication of this article, it has not been cited in a reported public bidding case. It is cited principally in unreported Appellate Division cases.[11]

Courts continue to find ways to dismiss public bidding actions they deem baseless without having to issue an injunction. Consider, for example, the recently decided, unreported Appellate Division case of Fitzgibbon v. Stafford Township Board of Education,[12] where the trial court, the Appellate Division, and the NJ Supreme Court all denied injunctive relief because the plaintiff's case was perceived to be weak on the merits.

The case was finally mooted because, in the absence of an injunction, the work was performed.

In Fitzgibbon, the Stafford Township Board of Education received two bids for mechanical/plumbing work on school facilities. The board rejected the low bid — because the bidder failed to identify subcontractors — and awarded the $3.79 million contract to the high bidder.

A resident — not the low bidder — challenged the award, arguing that the higher and winning bid was materially defective because the certifications from the bidder's two subcontractors setting forth their total amount of uncompleted contracts — to show they had the capacity to complete the contract being bid — predated the receipt of bids by several weeks and actually predated the board's advertisement for bids. In other words, they contained old and possibly outdated information regarding the subcontractors' capacity to handle the work.

Pursuant to New Jersey Treasury regulations, bidders are required to establish that the amount of the project will not exceed their aggregate rating by submitting documentation establishing the existence of such fact "before or on the date of the bid."[13] This regulation has been held to apply to subcontractors as well as general contractors.[14] The watershed term "before" is not defined.

The trial court in Fitzgibbon denied the plaintiff's request for temporary restraints and, on the return date of the order to show cause, denied preliminary injunctive relief, concluding that the plaintiff could not show a reasonable likelihood of success on the merits.

The court seems to have determined that subcontractor certifications dated before the advertisement for bids are not materially defective because "ultimately the risk of the project falls to the successful bidder," not the board.[15]

The Appellate Division and the Supreme Court both denied emergent applications for stays pending appeal.

After the appeal was briefed and argued, the Appellate Division dismissed it as moot because the work had been performed — exactly the result that preservation of the status quo is intended to prevent. Notably, the Appellate Division expressed reluctance in disposing of the case, and it did not necessarily agree with the trial court's assessment of the possible materiality of the defect.

The court went out of its way to acknowledge the plaintiff's position — "We do not minimize the bona fides of plaintiff's claim" — and the court credited him for diligently pursuing judicial relief.[16] But the court found no way to decide the merits of the moot case, reasoning that the record failed to reveal that the alleged defect was prevalent (an exception to mootness).[17]

Of course, the case became moot not because of anything the plaintiff did but because the courts declined to grant injunctive relief.

The lesson in Fitzgibbon would seem to be that trial and appellate courts will continue to deny preliminary injunctive relief if they think a plaintiff's case is weak on the merits, even if denial of an injunction means the plaintiff will be mooted out of relief.

That result is hard to reconcile with the goal of Waste Management — to serve justice by preserving the status quo. Nevertheless, a showing of likelihood of success on the merits still seems to be a requirement, at least in some courts and under some circumstances, for obtaining preliminary injunctive relief in public bidding cases.[18]

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[1] Waste Management of New Jersey Inc. v. Morris County Mun. Utilities Auth., 433 N.J. Super. 445 (App. Div. 2013).

[2] Crowe v. De Gioia, 90 N.J. 126 (1982).

[3] We prefer the term "preliminary" to "interlocutory" even though Rule 4:52 of New Jersey's court rules uses the latter term. Preliminary (interlocutory) injunctions are typically sought at the outset of cases by way of order to show cause. Thus, they tend to be more "preliminary" (coming before) than "interlocutory" (made during the progress of a legal action). We realize that "interlocutory" also carries the denotation of "not final," but

in balance, we prefer the word that more precisely describes the circumstances under which the remedy is typically sought. The Federal Rules of Civil Procedure use the term "preliminary." See F.R.C.P. 65.

[4] 433 N.J. Super. at 453.

[5] See, e.g., Alworth, Liss and Lamparello, Injunction Practice in New Jersey State and Federal Courts, New Jersey Lawyer, April 2014, at 11, in which the authors thought Waste Management "might be the most significant decision on injunction standards since Crowe."

[6] See, e.g., General Elec. Co. v. Gem Vacuum Stores Inc., 36 N.J. Super. 234, 236-37 (App. Div. 1955) ("The rule is that an interlocutory injunction should not issue if plaintiff's asserted rights are not clear as a matter of law . . . To this rule there are exceptions, as where the subject matter of the litigation would be destroyed or substantially impaired if a preliminary injunction did not issue.").

[7] New Jersey Inc. v. Union County Utilities Authority, 399 N.J. Super. 508 (App. Div. 2008).

[8] See Confident Care Corp. v. Amerigroup New Jersey Inc., 2015 N.J. Super. Unpub. LEXIS 1166 (Ch. Div., May 18, 2015) ("Waste Management, in my view, simply restated what has long been the standard to be applied in TRO and preliminary injunctive jurisprudence."), citing Christiansen v. Local 680 of Milk Drivers, 127 N.J. Eq. 215, 219-220 (E. & A. 1940) ("And it goes without saying that justice is not served if the subject matter of the litigation is destroyed or substantially impaired during the pendency of the suit.").

[9] M. A. Stephen Constr. Co. v. Rumson, 125 N.J. Super. 67, 75-76 (App. Div. 1973).

[10] We are confident the Appellate Division did not intend a hard-and-fast rule because the appellate judge who wrote the opinion in Waste Management also wrote the opinion in Waste Management of New Jersey Inc. v. Union County Utilities Authority, supra, n.7, where the court stated that the relaxed rule for preserving the status quo "does not permit the issuance of an injunction . . . in all cases. An application for such an injunction still must be considered in light of the Crowe factors." 399 N.J. Super. at 534.

[11] Ironically, on remand in Waste Management, the trial court reversed itself on the merits, finding a defect in the challenged bid — yet another string to the bow of those who support preliminary injunctive relief to preserve the status quo.

[12] Fitzgibbon v. Stafford Township Board of Education, 2019 N.J. Super. Unpub. LEXIS 1083 (App. Div. May 13, 2019).

[13] N.J.A.C. 17:19-2.13(c).

[14] Brockwell & Carrington Contrs. Inc. v. Kearny Bd. of Educ., 420 N.J. Super. 273 (App. Div. 2011).

[15] Fitzgibbon at 4.

[16] Id. at 7-8.

[17] A moot case may be heard if it presents an issue of substantial importance capable of repetition while evading review. See Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002). In applying that standard, the Appellate Division in Fitzgibbon looked for actual evidence in the record that stale certifications are frequently supplied and found none.

[18] One reason we don't see a plethora of injunctive rulings in procurement cases in online sources may be that trial courts can convert motions for preliminary injunctive relief into summary judgment motions and issue a

final judgment on the return date of the order to show cause, given that the material facts in public bidding cases are frequently not in dispute. If the government has agreed not to award the contract until the return date of the order to show cause, temporary restraints are not necessary. See, e.g., J. Smentkowski Inc. v. Lacey Twp., 2014 N.J. Super. Unpub. LEXIS 1689 (Law Div. July 11, 2014) (in the absence of any factual dispute, court disposes of parties' arguments summarily, obviating the need to decide whether to impose restraints).