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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4520-07T2

206-36TH STREET, LLC,

Plaintiff-Respondent,

v.

OTTO WICK,

Defendant-Appellant.

Argued March 18, 2009 - Decided July 30, 2009

Before Judges Stern, Rodríguez and Ashrafi.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1789-06.

Christine Gillen argued the cause for appellant (Diktas Schandler Gillen, attorneys; Ms. Gillen, on the brief).

Robyne D. LaGrotta argued the cause for respondent.

PER CURIAM

Defendant Otto Wick (Seller) appeals from the May 8, 2008 judgment of $79,342.50 in favor of 206-36th Street, LLC (Buyer). We affirm.

It is undisputed that Buyer agreed to purchase real estate, located at 206-208 36th Street in Union City. The property,

which was used as an embroidery factory for several years, needed environmental renovations due to lead contamination. Thus, the property is subject to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 to -35, which is implemented by the New Jersey Department of Environmental Protection (NJDEP). The factory building had wooden floors in some areas. In addition, part of the property consisted of open grassy areas.

Buyer purchased the property with the intention of demolishing the existing structure and erecting a multi-unit residential dwelling. Seller agreed to tender a No Further Action (NFA) letter from the NJDEP "on or before closing." An NFA letter is a "written determination by [NJDEP] that, based upon an evaluation of the historical use of the industrial establishment and the property . . . there are no discharged hazardous substances or hazardous wastes present at the site of the industrial establishment . . . ." N.J.S.A. 13:1K-8. The NFA letter also provides that "any discharged hazardous substances or hazardous wastes present at the industrial establishment . . . have been remediated in accordance with applicable remediation regulations." Ibid.

On the day before closing, Seller's attorney sent a letter stating that all environmental work had been completed, although the NFA letter had not been received. The letter referenced a report received from Seller's engineer, H2M Associates, Inc.

(H2M). In its "Site Investigation, Remedial Investigation, Remedial Action Report," H2M found that:

> [T]he remedial activities conducted onsite have addressed operational environmental impacts on the subject property identified . . . and additional intrusive remedial activities (e.g. soil removal) are not likely to be required by the NJDEP. Implementation of a deed notice recognizing existing engineering controls (e.g. the building) should be adequate to address the historic fill onsite, contingent upon NJDEP's review and approval of the attached document.

The closing occurred on February 27, 2004. However, the NFA letter was not provided by Seller. According to Paul Hanak, a shareholder of the Buyer corporation, Seller's counsel represented at closing that an NFA letter would be available "in about a week or two." According to Richard Molinari, another shareholder of the Buyer corporation, the NJDEP later imposed a $10,000 fine on the Seller for transferring the property without either an approved remediation action report or an NFA letter. N.J.S.A. 13:1K-13b. After numerous futile attempts were made to get the Seller to pay the fine, Buyer, with approval from the NJDEP, paid the fine in order to move the process forward.

About six weeks after the closing, the NJDEP completed its review of H2M's report. Pei C. Huang, a case manager for NJDEP's Bureau of Risk Management, noted that "[a]n institutional control via a deed restriction along with the identification of the appropriate engineering control for the subject site shall be

submitted for NJDEP's review." In response, H2M prepared a document to address additional site investigation activities performed on the property. H2M acknowledged that, "due to the presence of historic fill . . . an application for a deed of environmental restriction on the subject property will be submitted to the NJDEP under separate cover. The [deed restriction] application will include a proposed engineering control consisting of a cap over the subject property." Subsequently, Huang informed the project engineer from H2M that she was satisfied with the results noted in the response letter and that the NFA letter would be issued upon receipt of the deed notice.

More than a year after the closing, Buyer prepared the deed notice, which was forwarded to the NJDEP. In response to the receipt of the draft deed, the NJDEP advised Seller's counsel that Seller had violated ISRA by failing to either obtain an NFA letter prior to closing, receive an NJDEP approved remedial action workplan, or execute a remediation agreement pursuant to N.J.A.C. 7:26B-1.10(c).

Buyer hired PetroScience, Inc. (PetroScience) to develop the remedial action workplan. PetroScience completed the workplan in July 2005. Thus, it was not until sixteen months after the closing that Buyer was able to begin construction on the property.

Buyer sued Seller to recover damages resulting from Seller's transfer of the property in violation of ISRA and the delay of the project. Seller filed an answer. After a period of discovery, both parties moved for summary judgment. Judge Hector R. Velazquez denied the motions for summary judgment and ordered an extension of discovery.

Buyer again moved for summary judgment. Seller cross-moved for summary judgment. Judge Velazquez granted summary judgment to Buyer as to liability and denied Seller's cross-motion for summary judgment. The judge found:

> [U]nder the circumstances I think the statute is clear. If the - it is the responsibility of the seller to comply with the ISRA requirements. It is clear from the statutory language that if the seller fails to cleanup the industrial property or to - or fails to shift the burden of such to seller via written contract, the owner of the industrial establishment shall be strictly liable without regard to fault for all remediation costs and for all direct and indirect damages resulting from a failure to implement the remedial action work plan.
>
> In the present case I don't believe that there is any competent evidence that the parties agreed either orally or in writing that the seller - I mean the purchaser or the plaintiff in this case would assume the responsibility for the cleanup, would resume [sic] the responsibility for the issuance of the - of the no further action letter.

Seller moved for reconsideration. The judge denied the motion for reconsideration, finding that "all of the issues

raised in this motion were previously raised on the motion for summary judgment" at which time these issues were handled "adequately and completely."

The matter proceeded to a bench trial on damages only before Judge Mark A. Baber. Edward William Redfield, the General Manager for PetroScience, and Richard Molinari testified for Buyer. Redfield, through PetroScience, was retained by Buyer in early summer 2005 to prepare the remedial action workplan and to oversee all of the work performed in furtherance of said plan. Redfield testified regarding the amounts paid out in furtherance of receiving NJDEP approval based on his experience with NJDEP related matters and his knowledge of this particular project. Contrary to Seller's contentions, Redfield also specifically testified that the $10,000 fine assessed by NJDEP was against Seller, and not Buyer, for the ISRA violation.

Richard Molinari testified to the $10,000 fine and oversight costs that Buyer was forced to pay in order to proceed with the project. Molinari further testified to the signatures on all relevant checks submitted into evidence in support of its case for damages. Christos J. Diktas, Huang, Seller, Charles Martello, Paul Hanak and Stephen Spector testified for the Seller.

Seller argued that the evidence with regard to the relationship between the expenses testified to and the failure of

Seller to provide an NFA letter was not causally linked by the testimony. The judge denied the motion, finding sufficient the testimony of Molinar and Redfield that the costs would not have incurred but for the fact that an NFA letter was not provided at closing. After the close of Buyer's case, Seller moved to dismiss Buyer's case and requested entry of judgment in favor of Seller. Again, at the end of all evidence, Seller moved for judgment on behalf of Seller based on a lack of causation in the evidence presented by Buyer. The judge denied for the same reasons the motion was denied at the close of Buyer's case.

In a written opinion, Judge Baber found as a fact that Buyer did incur the expenses set forth and that those expenses were in fact incurred in satisfying NJDEP's concerns so that development of the property could proceed. The judge noted that he found Molinari and Redfield credible. Furthermore, the judge found that Seller did not succeed in creating doubt that certain expenses claimed by Buyer were not in fact incurred. The judge awarded $79,342.50 in damages to Buyer, based on the following:

> $23,107.81 paid to PetroScience, Inc.;
>
> $715.50 for Public Service Sewer fee;
>
> $5,800.00 to Environmental Technologies Group, required by Buyer's financing bank to oversee the remediation work;
>
> $25,000.00 to Union City Builders for work at the site;

> $160.00 to Federal Rent-a-Fence to satisfy a NJDEP requirement that access to the site be restricted until the remediation was completed;
>
> $10,267.56 for real estate taxes and $1,645.00 for insurance costs from the date of the closing to June 30, 2005, the period of time during which Buyer was unable to proceed with its development of the property due to the need to satisfy DEP's requirements;
>
> $12,646.63 to DEP, of which $10,000 was a fine imposed on Seller and not paid by him.

Buyer moved for counsel fees, relying on Dorofee v. Pennsauken Twp. Planning Bd., 187 N.J. Super. 141, 144-45 (App. Div. 1982). Judge Baber denied the motion.

On appeal, Seller contends that Judge Velazquez erred by: (1) denying summary judgment to Seller; (2) and premising strict liability upon failure to deliver an NFA letter at closing. We disagree.

Judge Velazquez correctly analyzed the issue before him. "ISRA requires owners and operators of industrial establishments to demonstrate that the property is environmentally sound as a precondition to sale or transfer of the property or the closure of a business." In re R.R. Realty Assocs., 313 N.J. Super. 225, 228 (App. Div. 1998). See N.J.S.A. 13:1K-7. A transferor's failure to perform a remediation and obtain department approval as required pursuant to the provisions of ISRA "entitles the transferee to recover damages from the transferor, and renders

the owner or operator of the industrial establishment strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages resulting from the failure to implement the remediation workplan." N.J.S.A. 13:1K-13a.

In Dixon Venture v. Joseph Dixon Crucible Co., 122 N.J. 228, 232 (1991), the Supreme Court confirmed that a private right of action exists under the act. See N.J.S.A. 13:1K-13a. In Dixon the court held, pursuant to the requirements of the Environmental Cleanup Responsibility Act (ECRA),[1] ISRA's predecessor, that the seller will be subject to absolute liability without regard to fault, unless the parties contractually agreed to shift the costs and obligations arising under the act. Dixon, supra, 122 N.J. at 232, 234.

Here, Seller transferred the property to Buyer without NJDEP approval or a remedial action workplan as required by ISRA. See N.J.S.A. 13:1K-9c. There was no remediation agreement allowing for transfer pursuant to an authorization letter. See Ibid. Therefore, strict liability attached to Seller "for all remediation costs and for all direct and indirect damages resulting from the failure to implement the remedial action workplan." N.J.S.A. 13:1K-13a. There was no proof that, pursuant to ISRA, Buyer contractually assumed this

[1] N.J.S.A. 13:1K-6 to -13 (now repealed).

responsibility. It is clear that Seller did not follow any of the above procedures provided for pursuant to ISRA and thus the motion judge did not err in finding Seller "strictly liable, without regard to fault." Ibid.

Seller also argues that the motion record established that Seller had procured informal approval of his remedial actions after closing. However, this alleged "informal" approval was obtained after the closing date. ISRA requires the approval of either the negative declaration or remedial action workplan prior to transferring ownership. N.J.S.A. 13:1K-9c. Thus, Seller admits that at the time of closing, ISRA requirements were not satisfied.

Furthermore, nothing in the statute allows for informal approval as a substitution for formal approval by the NJDEP. Again, the statute requires NJDEP approval of the negative declaration in the form of an NFA letter or the approval of a remedial action workplan at the time of closing. N.J.S.A. 13:1K-9c.

Seller next argues that he performed the requisite remediation for a commercial building and that Buyer precluded final NJDEP approval in eliminating the structure. However, this argument fails because there is no evidence that NJDEP approved of the remediation at the time of closing. Again, Huang's communication regarding the issuance of the NFA letter occurred

five months after the closing and was not an actual approval of remediation but rather a statement of the potential future issuance of an NFA letter.

Seller also contends that the trial judge erred in denying his motions for judgment at the close of Buyer's case and at the close of all evidence because Buyer failed to carry its burden to prove that the alleged damages were proximately caused by Seller's violation of ISRA. We disagree.

We have held that it is clear "the only remedy available to a present owner of a contaminated site who has conducted a 'swift and thorough cleanup through [the] regulatory process' is damages." Dixon Venture v. Joseph Dixon Crucible Co., 235 N.J. Super. 105, 111 (App. Div. 1989), aff'd as modified, 122 N.J. 228 (1991). Accordingly, ISRA authorizes the buyer of property transferred in violation of the act to maintain an action for money damages against the seller. N.J.S.A. 13:1K-13a. The remedial section of ISRA relevant to this case provides:

> Failure of the transferor to perform a remediation and obtain department approval thereof as required pursuant to the provisions of this act . . . entitles the transferee to recover damages from the transferor, and renders the owner or operator of the industrial establishment strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages resulting from the failure to implement the remedial action workplan.
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> [N.J.S.A. 13:1K-13a (emphasis added).]

In construing ISRA's plain language, we held that a seller is strictly liable to remedy any environmental contamination found on the site. In re R.R. Realty Assocs., supra, 313 N.J. Super. at 235-36. There is no limitation on a buyer's right to seek redress from the prior owners of the property. Id. at 236. See Dixon, supra, 235 N.J. Super. at 110.

Seller relies on Bahrle v. Exxon Corp., 279 N.J. Super. 5, 36-37 (App. Div. 1995), aff'd, 145 N.J. 144 (1996) to support the argument that Buyer's damages were not of the nature contemplated by ISRA. However, Bahrle is distinguishable on its facts because it involved the Spill Act,[2] which precludes damages based on emotional distress, enhanced risk of disease, and loss of enjoyment of their properties. Ibid.

This case does not involve the Spill Act and does not involve the damages precluded from coverage in Bahrle. Rather, Buyer sought and Judge Baber awarded damages resulting directly from the Seller's failure to implement the remedial action workplan or to adhere to ISRA.

Seller also contends that the Buyer failed to carry its burden to prove that its damages were proximately caused by the tort alleged, relying on the proposition that expert testimony is

[2] Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -50.

required as to any issue that is beyond the "common knowledge of lay persons." Froom v. Perel, 377 N.J. Super. 298, 318 (App. Div.), certif. denied, 185 N.J. 267 (2005) (quoting Kelly v. Berlin, 300 N.J. Super. 256, 265-66 (App. Div. 1997)). However, Redfield, the general manager for PetroScience, testified as an expert in environmental consulting remedial management and submitted an expert report. The judge qualified him as an expert witness by telling counsel to "go ahead" with the questioning following Redfield's testimony regarding his credentials and expertise.

Seller further argues that ISRA does not confer a private cause of action for the recovery of costs incurred to accomplish redevelopment of industrial property for residential use. This is not what the statute requires. The statute allows damages to accrue from Seller's failure to implement an approved remedial action workplan. As discussed, Seller failed to obtain an approved workplan. The damages Buyer is claiming stem directly from Seller's failure to perform pursuant to ISRA by obtaining such an approved workplan. If Seller had remedied the property by providing a cap over the entire surface as was required by the NJDEP, Buyer would not have incurred some of the claimed damages. Moreover, the lead level in the property exceeded both industrial and non-residential levels. Because of the grassy areas and

partial wooded floor, remediation requires placement of an engineering cap consisting of concrete.

As previously discussed, strict liability remained with Seller here because liability was not contractually shifted to Buyer. Accordingly, Seller is liable "for all remediation costs and for all direct and indirect damages resulting from the failure to implement the remedial action workplan." N.J.S.A. 13:1K-13a. Therefore, the only issue for trial was as to what costs and expenses resulted from Seller's failure to implement the remedial action workplan.

Appellate review of the trial court's denial of a motion for judgment made at the close of plaintiff's case and the close of all evidence is evaluated under the same standard applied by the trial court. The standard is "whether 'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor' of the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969) (quoting R. 4:37-2(b)). If it can then the motion should be denied. Ibid. Here, from our review of the record, we conclude that the motions at the end of plaintiff's case and at the close of all evidence, were properly denied. In short, the proofs presented could sustain a judgment in Buyer's favor.

Our scope of review of a trial court's fact-finding is a limited one. Trial court findings are ordinarily not disturbed

unless "they are so wholly insupportable as to result in a denial of justice," and are upheld wherever they are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997).

Judged by that standard, we conclude that the proofs presented by Buyer and the facts undisputed by Seller, amply support the damage award.

Seller finally contends that the judge made erroneous evidentiary rulings clearly capable of producing an unjust result. Specifically, Seller argues that the judge erred in precluding Seller from introducing documentary or testimonial evidence of the parties agreement regarding continuation of the tenancy in the existing building post-closing and any other evidence relative to pre-closing events on the ground that such evidence was irrelevant to damages. We reject this argument by Seller.

A judge is to focus on "the logical connection between the proffered evidence and a fact in issue." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). Because Judge Velazquez granted partial summary judgment on liability, Seller

was held to be strictly liable pursuant to ISRA and the only issue before Judge Baber related to damages. Therefore, Judge Baber did not err in finding Seller's evidence irrelevant as evidence that the continued use was to be an embroidery factory had no logical connection to the damages incurred.

Affirmed.