NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4652-08T1

NORTHERN INTERNATIONAL REMAIL
AND EXPRESS CO.,

Plaintiff-Appellant/Cross-Respondent,

and

SATEC, INC.,

Plaintiff,

v.

LESTER ROBBINS, Trustee Under Trust
Indenture Dated June 28, 1976,[1]

Defendant-Respondent/Cross-Appellant,

and

MILLTOWN COURT ASSOCIATES, PUREX
INDUSTRIES, INC., and HONEYWELL
INTERNATIONAL,

Defendants.

Argued May 11, 2010 - Decided August 18, 2010

Before Judges Grall, Messano and LeWinn.

On appeal from Superior Court of New

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[1] Improperly pleaded as Lester Robbins, Trustee d/b/a Milltown Court Associates.

Jersey, Law Division, Union County, Docket No. L-1372-05.

Richard J. Dewland argued the cause for appellant/cross-respondent (Coffey & Associates, attorneys; Gregory J. Coffey, of counsel and on the brief; Mr. Dewland, on the brief).

Daniel L. Schmutter argued the cause for respondent/cross-appellant (Farer Fersko, P.A., attorneys; Mr. Schmutter, on the brief).

PER CURIAM

The litigation that gives rise to this appeal involves environmental contamination of commercial real estate in Union (the Union property). This is an appeal and cross-appeal from an order of April 13, 2009 that resolves all claims that were not settled by plaintiffs and defendant Honeywell Industries, Inc. The order was entered on cross-motions for summary judgment and a motion by plaintiffs to add additional counts to their complaint. We affirm, substantially for the reasons stated by Judge Anzaldi in his oral decisions of March 6 and 13, 2009, as supplemented herein.

Only two of the parties are participating in this appeal. They are plaintiff-appellant Northern International Remail and Express Co. (Northern) and defendant-cross-appellant Lester Robbins, Trustee Under Trust Indenture dated June 28, 1976 (Robbins). Northern purchased the Union property from Robbins in 1991.

In a complaint filed on April 15, 2008, Northern sought declaratory relief and damages from Robbins and the other defendants, including Honeywell International, Inc. Northern's claims were based on contamination of the Union property and asserted under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58-10:23.11 to -23.24 (the Spill Act) and the common law governing strict liability, nuisance, negligence, indemnification and restitution. Northern subsequently moved to add counts alleging misrepresentations by Robbins. Honeywell filed a counterclaim against Northern, and Honeywell and Robbins filed cross-claims for indemnification.

Judge Anzaldi dismissed Northern's common law claims and denied its motion to add a new common law claim on the ground that the six-year limitation period, which commenced in 1998 when Northern knew it had a basis for asserting claims based on contamination of the Union property, had expired when the complaint was filed. He entered judgment in favor of Robbins under the Spill Act on the ground that the evidence did not permit a finding that there had been a "discharge" during the period of Robbins's ownership. Northern appeals from those determinations.

The judge also dismissed Robbins's cross-claim for indemnification by Honeywell because he found that the legal relationship essential for common law indemnification was

lacking. Robbins cross-appeals from that determination. Northern opposes that cross-appeal, but Honeywell does not.

The evidential materials submitted on the motions, viewed in the light most favorable to the non-prevailing party, support Judge Anzaldi's factual findings on the rulings challenged by Northern and Robbins. We agree with his determination that the prevailing parties were entitled to judgment as a matter of law.

Robbins took title to the Union property on June 30, 1976, and Robbins transferred title to Northern on December 31, 1991. In 2003, Northern sold the property to plaintiff Satec, Inc.

Honeywell is the successor-in-interest to Baron-Blakeslee, Inc., (Baron), which was a division of defendant Purex Industries, Inc., during a portion of the term of the lease.[2] Baron was a tenant of the Union property under a lease between the owner from whom Robbins took title. Baron's ten-year lease was signed on November 10, 1967.

Between November 10, 1967 and August 1970, Baron used the property to store and distribute solvents. The solvents were distributed in drums to customers who purchased degreasing machines from Baron. At this site, Baron received the solvent in drums and also had a minimum of two 1000-gallon outdoor tanks

[2] Although Purex was named as a defendant, Purex did not participate in this litigation at any point, presumably because Honeywell was acting as Baron's successor-in-interest.

in which it stored solvents. The solvents contained trichloroethylene (TCE); perchloroethylene; methylene chloride; Freon; and 1,1,1-trichloroethylene (TCA). The tanks were mounted on a concrete storage pad outside the building.

In August 1970, Baron moved the work done on the Union property to another location. Northern does not assert that Baron discharged any solvent at the Union property after Robbins took title in June 1976. After moving its operation in August 1970, Baron sub-leased the property to J&J Construction Co. (J&J), for a term beginning on September 16, 1970 and ending on December 14, 1977.

There is additional evidence that Baron was not operating on the Union property. A June 1981 Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) report lists the Union property and refers to "Purex Corporation/Baron-Blakeslee." The CERCLIS listing indicates that no hazardous substances were being handled on site at that time and that there were no underground or above-ground storage tanks.

J&J is in the business of installing car radios. In October 1977, Robbins leased the property to J&J for a term ending on September 30, 1982. That lease was either renewed or extended. Records of the United States Environmental Protection Agency (EPA) show that in 1985 J&J was registered as a "large

quantity generator" of hazardous waste at the Union property. Moreover, in 1987, J&J sub-leased a portion of the Union property to Northern. There is no evidence demonstrating what waste J&J generated and no evidence of any investigation of or governmental action taken against J&J.

A second entity, T&T Corporation, was registered with the EPA as a "small quantity generator" of hazardous waste. The parties, however, were never able to identify T&T. There is no evidence that T&T was a tenant of Robbins or a sub-lessee under an agreement with a tenant of Robbins.

As noted above, Northern purchased the property from Robbins in 1991. Northern took title on December 31, 1991 at a purchase price of about $575,000. Paragraph five of that contract of sale provides:

> ECRA Obligations. Buyer and Seller acknowledge that sale of the premises may be subject to compliance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6, et seq. and the regulations promulgated thereunder ("ECRA").
>
> As a condition precedent to Seller's obligation to sell the premises pursuant to this Contract, Seller shall have received from the Industrial Site Evaluation [E]lement, or its successor either (a) a nonapplicability letter; (b) a deminimus [sic] quantity exemption; or (c) approval of Seller's negative declaration.

Further, paragraph nine provides:

> Physical Condition of Property. This property is being sold "as is." The Seller makes no claim or representation about the condition or value of any of the property included in this sale. The Buyer has satisfied itself prior to entering into this agreement as to the condition of the premises and the building thereon.

Pursuant to paragraph twenty-four of the contract, Northern was authorized to conduct tests on the property.

A letter of nonapplicability issued by the New Jersey Department of Environmental Protection (DEP) on November 22, 1991, states:

> On the basis of the sworn statements set forth in the affidavit signed by Lester Robbins, the Department finds that this transaction is not subject to the provisions of [the Environmental Cleanup Responsibility Act] ECRA.
>
> This decision is made in light of the absence of an industrial establishment as defined within the Standard Industrial Classification numbers covered by the Act. Any inaccuracies in the affidavit or subsequent changes in the facts as stated therein could alter the Department's determination.

According to Stefan Puzyk, owner of Northern, neither Northern nor Robbins secured an environmental study. In Puzyk's view, he "was set up," and Robbins took advantage of him by not disclosing that there were environmental issues.

Robbins issued an Affidavit of Title dated December 30, 1991. In paragraph seven of the affidavit, Robbins certified

that "the Subordination and Non-Disturbance Agreement dated March 19, 1968 with American Savings Bank referring to the Baron-Blakeslee, Inc., lease is no longer effective since Baron-Blakeslee, Inc.[,] vacated the premises more than ten (10) years ago." There is no evidence that this information about Baron's departure was incorrect.

After taking ownership, Northern leased some portions of the property to Design Furniture, an office furniture distributor, and to Mattiola Construction Company, an office and warehouse for a concrete cutting firm.

In July 1998, Northern sought to refinance. In connection with that refinancing, Roux Associates, Inc., conducted an environmental investigation. Puzyk completed a questionnaire in which he stated that testing wells had been installed on Northern's property in connection with an investigation of a leaking storage tank on an adjacent property. Puzyk gave the adjacent property owner permission to install the test wells on Northern's property in 1994, and he admitted that he knew that benzene, a harmful and hazardous chemical, had been detected.

Roux's preliminary report was completed on July 28, 1998. It referenced the storage tank investigation of Northern's neighbor mentioned by Puzyk. According to Roux, that investigation was done in 1994, and it had disclosed chlorinated solvents in the groundwater on Northern's premises in excess of

the New Jersey Ground Water Quality Criteria. Roux stated that the presence of chlorinated solvents might be attributable to an incident that occurred while Purex, meaning Baron as a division of Purex, occupied the premises.

Roux concluded:

> [T]he historical use of the property and chlorinated solvents detected in the on-site ground water is a concern. The environmental database identified historical generation of hazardous wastes by previous occupants and an USEPA CERCLA [Comprehensive Environmental Response, Compensation and Liability Act] investigation of the site. The chlorinated solvents were detected in higher concentrations in the on-site wells than in the upgradient monitoring wells indicating that the site may have been the site of a release of chlorinated solvents.

The bank denied the loan Northern sought.

By letter dated October 16, 1998, Northern's counsel asked Robbins to contribute to the cost of cleanup of the property, and in a letter dated January 13, 1999, Northern's attorney notified the DEP of Roux's findings and asked the agency to issue a Full Compliance Determination and a covenant not to sue Northern with respect to the presence of chlorinated solvents. In that letter, which Puzyk reviewed, there was a summary of the findings of the Roux report and references to Purex/Baron and an off-site source of contamination, Carpenter Technology.

In August 1999, Northern sought approval from the DEP to conduct a cleanup under the DEP's oversight pursuant to a

Memorandum of Agreement (MOA) with the agency and thereby obtain a Full Compliance Letter. On August 31, 1999, the DEP executed the MOA. Northern requested a "no further action" determination from the DEP, but the DEP directed Northern to do more testing.

In 2003 Northern and Satec negotiated a contract of sale and purchase. Satec had Code Enviro-Sciences, LLC (CODE) test the soil and groundwater. CODE found vinyl chloride in the soil at the property "at the []DEP Residential Direct Contact Soil Cleanup Criteria"; dichloroethene in the soil in excess of the permitted level; and "extremely elevated concentrations of vinyl chloride" and other compounds in the ground water. CODE could not determine whether the contamination was attributable to prior operations on the Union property or an off-site source, or both.

Satec obtained additional studies after closing. In June 2004, Hillman Environmental Group, LLC, was retained to assess the impact of "former business operations" on the site. Hillman confirmed the presence of chlorinated solvents – cis-1, 2-dichloroethene, tetrachloroethene, 1,1,1-trichloroethane, and trichloroethane – in the soil and groundwater at unacceptable concentrations. They were near the concrete pad used by Baron for its storage tanks until August 1970. Hillman concluded that "the site may have been impacted by a release from an off-site source[, Carpenter Technology,] as well as previous on-site

operations." Hillman noted on-site migration of chlorinated solvents from an up-gradient source and deemed that migration to be "not indicative of the source of contamination on the subject property." Hillman noted that its search of records revealed a regional groundwater chlorinated solvent impact.

On April 14, 2005, the DEP concluded that Hillman had attributed the chlorinated solvent contamination to a former occupant's handling, storage and usage of chlorinated solvents.

Northern argues that Robbins was not entitled to summary judgment under the Spill Act because the judge overlooked evidence indicating that there were potential dischargers of hazardous waste, other than Baron, on the Union property while Robbins owned it. Northern's claim is based on the evidence showing that T&T and J&J were registered generators of hazardous waste at the Union property during the period that Robbins was the owner.

We reject Northern's claim that the EPA registrations were adequate to raise a genuine dispute of fact as to Robbins's liability under the Spill Act. At best, the registrations raised a question as to whether T&T and J&J generated hazardous waste.

Generation of hazardous waste, without more, does not give rise to liability. The Spill Act was enacted to "prohibit[] the discharge of petroleum and other hazardous substances into New

Jersey waters and provide[] for the cleanup of any such discharge . . . ." Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 8 (1991) (internal quotations omitted). To that end, "[t]he Spill Act imposes strict liability, 'jointly and severally, without regard to fault,' on 'any person who has discharged, . . . or is in any way responsible' for the discharge of any hazardous substance." Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. 2, 18 (2003) (quoting N.J.S.A. 58:10-23.11g(c)(1)).

The Spill Act defines "discharge" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State . . . ." N.J.S.A. 58:10-23.11b. Although the phrase "in any way responsible" is not defined in the statute, it has been interpreted to include "[o]wnership or control over the property at the time of the discharge." State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983); see Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 145-46 (1997).

Thus, while there is no question that an owner is responsible for a discharge on its property, that responsibility does not attach unless there is evidence of a discharge during ownership. In the absence of evidence that the waste generated

by these companies included the contaminants detected, there was no basis for an inference permitting a finding that either T&T or J&J discharged the hazardous waste generated. We stress that Northern acknowledges that Robbins did not own the property while Baron was operating on the Union property.

Northern also maintains that the court misinterpreted the Spill Act's "broad liability scheme." They posit that under the Spill Act, Robbins is liable for a "continuing discharge[] [from Baron's activity that ended prior to Robbins's ownership that] took place during the entire time that this property was owned."

That question has been resolved against Northern's position. Liability under the Spill Act is not imposed if a party's only link to the discharge is through the passive migration of pre-existing contamination. White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294, 300 (App. Div.), certif. denied, 170 N.J. 209 (2001).

The arguments presented on appeal disclose no basis for us to disturb Judge Anzaldi's award of summary judgment in favor of Robbins on the Spill Act claim.

Northern also argues that the trial judge erred by dismissing its common law claims against Robbins on the basis of the statute of limitations. Northern asserts that there were disputed facts relevant to the date upon which Northern acquired

information about the contamination that is sufficient to trigger the running of the limitations period.

We have reviewed the record in light of the arguments presented and conclude, as did Judge Anzaldi, that the information in the 1998 Roux report and the letter of October 1998, in which Northern requested contribution from Robbins, was more than sufficient to resolve the factual question against Northern as a matter of law.

"Statutes of limitation begin to run upon the 'accrual' of a cause of action"; that is, "upon the occurrence of a wrongful act resulting in injury for which the law provides a remedy." Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 327 (App. Div.), certif. denied, 188 N.J. 577 (2006). Pursuant to the "discovery rule," however, "'a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.'" Nester v. O'Donnell, 301 N.J. Super. 198, 204 (App. Div. 1997) (quoting Lopez v. Swyer, 62 N.J. 267, 272 (1973)). When the discovery rule applies, the limitations period commences on the date the "plaintiff 'learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action.'" Vispisiano v. Ashland

Chem. Co., 107 N.J. 416, 426 (1987) (quoting Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978)).

The 1998 Roux report states facts that may equate in law with a cause of action. Moreover, Northern's 1998 letter demonstrates its understanding of those facts.

The arguments to the contrary lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

We affirm Judge Anzaldi's decision to deny Northern leave to amend the complaint to state claims of misrepresentation for the reasons he stated. "'[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998)). There is no abuse of discretion here.

We turn to consider Robbins's cross-appeal. It is important to note that Honeywell, as Baron's successor-in-interest, stands in the position of Baron on Robbins's claim for indemnification based on common law principles. Thus, we consider the relationship between Baron and Robbins.[3]

[3] As Robbins escaped all liability, we presume that Robbins pursues the issue on appeal to recover the cost of its defense. Central Motor Parts Corp. v. E.I. duPont deNemours & Co., 251 N.J. Super. 5, 9 (App. Div. 1991).

In this case, there is no contract, agreement or statute to which Robbins can point as requiring indemnification. Thus, Robbins's claim depends on the existence of a special legal relationship between it and Baron that implies a right to indemnification. Port Authority of New York & New Jersey v. Honeywell Protective Servs., Honeywell, Inc., 222 N.J. Super. 11, 20 (App. Div. 1987); Ruvolo v. U.S. Steel Corp., 133 N.J. Super. 362, 367 (Law Div. 1975). A lessor-lessee relationship has been recognized as one implying that right. Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 189 (1986); Ruvolo v. U.S. Steel Corp., 139 N.J. Super. 578, 584 (Law Div. 1976). But, we agree with Judge Anzaldi's conclusion that this lessor-lessee relationship is too tenuous a link in this case, which involves claims based on Robbins's conduct on the property years before Robbins took title and under a lease issued to Baron by the prior owner. In short, the relationship did not exist until after the discharge that gave rise to this litigation.

Thus, we reject Northern's argument and affirm the dismissal of Robbins's cross-claim.

Affirmed.