NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0842-13T4

ALL SEASONS PROPERTY MANAGEMENT,
LLC,

Plaintiff-Appellant,

v.

HACKETTSTOWN MUNICIPAL UTILITIES
AUTHORITY, ROBERT H. BURD, and
H. BURD AND SON,

Defendants-Respondents,

and

JOSEPHINE C. PALMER,

Defendant.

Argued March 16, 2015 – Decided September 16, 2015

Before Judges Sabatino and Simonelli.

On appeal from the Superior Court of New Jersey, Chancery Division, Warren County, Docket No. C-16014-08.

Jason A. Meisner argued the cause for appellant (Coughlin Duffy LLP, attorneys; David N. Heleniak, on the briefs).

David T. Shivas argued the cause for respondent Hackettstown Municipal Utilities Authority (Bell, Shivas & Fasolo, P.C., attorneys; Mr. Shivas, of counsel and on the brief).

Joseph E. Kelley argued the cause for respondents Robert H. Burd and H. Burd and Son (Zirulnik Sherlock & DeMille, attorneys; Mr. Kelley, on the brief).

PER CURIAM

This matter involves a water leak that defendant Hackettstown Municipal Utilities Authority (HMUA) claimed came from a water service line for which plaintiff All Seasons Property Management, LLC (All Seasons) was responsible. All Seasons asserted that the leak did not come from the water service line located on its property and filed a complaint in lieu of prerogative writs after HMUA terminated water service. All Seasons subsequently joined defendant Josephine C. Palmer (Palmer), the prior property owner, and defendants Robert H. Burd and H. Burd and Son (collectively, Burd), who Palmer's husband, Raymond Palmer,[1] hired in the 1980s to install a service line pipe.

All Seasons appeals from the March 16, 2012 Law Division order, which granted summary judgment to Burd based on the Statute of Repose, N.J.S.A. 2A:14-1.1, and from the June 18, 2013 final judgment dismissing the complaint with prejudice as

[1] Raymond Palmer was deceased at the time this action commenced.

to HMUA.[2] We affirm the grant of summary judgment to Burd, but for reasons other than those expressed by the motion judge. Aquilio v. Cont'l Ins. Co. of N.J., 310 N.J. Super. 558, 561 (App. Div. 1998). We also affirm the final judgment.

I.

We derive the following facts from the record. In 1956, Raymond Palmer acquired property located on Roosevelt Street in Independence Township.[3] The property had a steel water service line that was connected to a valve located at the curb of the property. In 1964, the property began receiving public water from HMUA's predecessor.

HMUA was created in 1965 and began providing water service in Independence Township. HMUA supplied water to its customers through an approximately three-inch cast or ductile iron water main line that ran from the pumping station, underground through public roadways and right-of-ways, then to a valve located at or near the customer's property line (the curb valve). The water

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[2] All Seasons' amended notice of appeal states that it also appeals from an August 28, 2013 order denying its motion for reconsideration of the grant of summary judgment to Burd and entry of final judgment as to HMUA. All Seasons did not address the motion for reconsideration in its merits brief. The issue, therefore, is deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2015).

[3] In 1967, defendant Josephine Palmer was placed on the deed to the property. We shall hereafter collectively refer to Raymond and Josephine Palmer as Palmer.

then flowed from the curb valve through an approximately two-inch copper, galvanized or plastic water service line located on the property and into a home or business. The curb valve shut the flow of water at the curb, preventing it from flowing into the water service line. There were also water main line valves throughout the water main line that HMUA could open or close to isolate and control water flow in specific areas of the water main line.

Section 201 of HMUA's water regulations provides that "[t]he water service line from the curb line, property line or easement line to the building shall be furnished and maintained by the [o]wner of the property and shall be installed by a licensed plumber." Section 204 provides that" [t]he [c]ustomer shall maintain all [c]onnections, [water] service lines and fixtures from the curb [valve] to the structure [on the property] in good order[]" and that the HMUA "shall be responsible for the maintenance of the water line from the [water main line] to the curb [valve]." Section 205 provides that the HMUA "shall in no event be responsible for maintaining any portion of the [water] service line owned by the [c]ustomer." Section 116.B. of HMUA's water and sewer regulations permits HMUA to terminate water service, upon notice, for the customer's "[w]illful or continued waste of

water through improper or defective pipes, fixtures, or otherwise."

Sometime between 1980 and 1982, Palmer hired Burd to install a new water service line. Burd installed an approximately two-inch plastic water service line and laid it next to the original steel water service line. Burd then continued installing the line in an unorthodox way: he bypassed the curb valve and ran the water service line five hundred feet from the property under Roosevelt Avenue and the Morris Canal, and through a heavily wooded area to an adjacent private property. He then connected the water service line to a curb valve near the adjacent property. The newly-installed water service line serviced only All Seasons' property.

On June 8, 2006, All Seasons purchased the property from Palmer as an investment and rented it to college students. In January 2007, HMUA became aware of a water leak somewhere between the water main line and the water service line when the water meter at the property showed that water flowing through the meter substantially exceeded the historic flow. HMUA notified All Seasons of the leak and requested for permission to turn off the water in order to locate it. HMUA turned off the curb valve to which Burd had attached the water service line and found that the water flow continued through the line.

Consequently, HMUA determined that the leak was in the water service line, for which All Seasons was responsible.

Efforts to resolve the matter were unsuccessful. Meanwhile, the leak increased to 6000 gallons per day. HMUA terminated water service and sent All Seasons a water bill for $1,985.96, which All Seasons did not pay. The property became vacant and uninhabitable because it lacked water service.

On June 13, 2008, All Seasons filed a verified complaint in lieu of prerogative writs, seeking, in part, to compel HMUA to locate and repair the leak and resume water service. All Seasons alleged that the leak was somewhere in that portion of the water service line that ran beneath municipal, county and/or private property, over which All Seasons had no control and could not enter to repair the leak.

On December 3, 2010, All Seasons filed an amended complaint, adding Palmer and Burd as defendants.[4] All Seasons alleged that Burd "negligently, carelessly and/or recklessly installed, serviced, designed and/or repaired a water pipe at the [p]roperty, proximately causing [All Seasons] to sustain severe economic injuries." (Emphasis added.)

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[4] All Seasons alleged that Palmer misrepresented that the property had public water service. The claim against Palmer was bifurcated for trial. Following a one-day bench trial, the court entered a final judgment dismissing the complaint with prejudice as to Palmer. All Seasons does not appeal from that final judgment.

Burd filed a motion for summary judgment based on the ten-year limitation period in the Statute of Repose, N.J.S.A. 2A:14-1.1. All Seasons countered that the Statute of Repose did not apply because this action did not concern the defective and unsafe condition of an improvement to real property; rather, it concerned a negligently-installed water service line in an area off the property over which All Seasons had no control, thus precluding All Seasons from making any repair.

In a March 16, 2012 written opinion, the motion judge granted summary judgment to Burd. The judge found it was undisputed that Burd installed the water service line over twenty years before All Seasons filed its complaint. Relying on Ebert v. S. Jersey Gas Co., 307 N.J. Super. 127 (App. Div. 1998), aff'd, 157 N.J. 135 (1999) and Sahl v. West Deptford, 32 N.J. Super. 546 (App. Div. 1954), the judge determined that the Statute of Repose applied because the water service line was an improvement to the property.

The matter proceeded to a four-day bench trial before a different judge on All Seasons' claims against HMUA. All Seasons asserted, without documentary support, that the water service line located within its property boundaries was not leaking, and that the main water line incorporated that portion of the water service line located beyond the property. All

Seasons argued it had no responsibility for the water service line beyond its property.

There was no permit[5] or other evidence showing that HMUA knew about or approved Burd's work. In addition, the exact location of the water service line was unknown, as it was not documented on any map maintained by the municipality or HMUA and Burd could not recall how or where he installed it; however, he admitted that: he installed a plastic water service line through a wooded area; the line he installed was a water service line, not a water main line; and he connected the line he installed to "the main source of the water that hooked to the main source of the line."

In a November 28, 2012 written opinion, the trial judge found that the original steel and the plastic water service were not installed by or on behalf of HMUA, and Palmer was aware that he, not HMUA, was responsible for the repair or maintenance of the water service line. The judge also found that HMUA did not install or own the water service line Burd had installed.

Pointing to HMUA's water regulations, the judge noted that although Section 204 provides that the property owner must maintain the water service line from the curb valve to the structure on the property, this regulation assumed a traditional

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[5] Section 102 of HMUA's water and sewer regulations required a permit to install the water service line.

water service installation where the water service line was connected to the water main line at the curb valve, which was not the case here. The judge found as follows:

> Section 201, clearly provides that the [water] service line is the owner's responsibility whether it connects to the building [on the property] from the curb [valve] or the property line or the easement line. The scheme is clear: the [water] service line is the owner's responsibility, while the water main [line] is [HMUA's] responsibility.
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> The court finds that the [water service line] is the service line installed by a previous owner, that [the installation] was an informal, non-traditional installation, that [the water service line] cannot be readily found and that it is located primarily on the private lands of others including the Morris Canal.

The judge concluded that HMUA had no duty to find and repair the water service line.

The judge also determined that HMUA was not required to resume water service. The judge distinguished Reid Dev. Corp. v. Twp. of Parsippany-Troy Hills, 10 N.J. 229 (1952), where, unlike here, a municipal water utility attempted to withhold water service to a development to coerce the developer to increase lot sizes. The judge entered final judgment in favor of HMUA.

II.

On appeal, All Seasons contends that the motion judge erred in granting summary judgment to Burd. All Seasons does not dispute that the water service line was an improvement to the property and that more than ten years had elapsed since Burd installed it. Rather, All Seasons argues that the Statute of Repose does not apply because a "construction deficiency is at issue -- the running of a [water service line] through an area that could not be accessed by [All Seasons], render[ing] the repair of any leaks in the line in that area impossible, or at the very least prohibitively expensive." All Seasons concludes that this construction deficiency caused the termination of water service to the property.

We review a ruling on judgment de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (citations and internal quotation marks omitted). Thus, we consider, as the motion judge did, "'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 406. If there is no genuine issue of material fact, we must then "'decide whether the trial court correctly interpreted the law.'" DepoLink Court Reporting & Litigation Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013)

(quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008), overruled in part on other grounds, Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 563, (2012)). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

The Statute of Repose provides, in pertinent part, that:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than [ten] years after the performance or furnishing of such services and construction.
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> [N.J.S.A. 2A:14-1.1(a).]

"Unlike a statute of limitations, the Statute of Repose 'does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action[] from ever arising.'" Daidone v. Buterick Bulkheading, 191 N.J. 557, 564-65 (2007) (quoting Rosenberg v. Town of N. Bergen, 61 N.J. 190, 199 (1972). The Statute of Repose commands that "injury occurring

more than ten years after the negligent act allegedly responsible for the harm[] forms no basis for recovery." Id. at 565 (internal quotation marks omitted). The statute "reflects the legislative preference, from a public policy standpoint, for finality in construction-related claims[.]" Id. at 567. Consequently, our courts "have read the statute broadly to accomplish this purpose[.]" Ibid. (citations and internal quotation marks omitted). The Court has held that the statute should be construed to apply "to all who can, by a sensible reading of the words of the act, be brought within its ambit." Rosenberg, supra, 61 N.J. at 198.

To receive the protection of the Statute of Repose, a defendant must show that:

> (1) the injury sustained by plaintiff resulted from a defective and unsafe condition of an improvement to real property;
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> (2) [defendants were] responsible for performing or furnishing the design, planning, surveying, supervision of construction, or construction of the improvement; and
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> (3) the injury occurred more than ten years after the performance or furnishing of the services.
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> [Dziewiecki v. Bakula, 180 N.J. 528, 531-31 (2004).]

The Statute of Repose is triggered without the need to show an unsafe condition "[i]f improvements to property made in

accordance with a defective design would render that property unable to be used for the purpose for which it was designed[.]" Newark Beth Israel Med. Ctr. v. Gruzen & Partners, 124 N.J. 357, 365 (1991). The statute is also triggered where the construction of the improvement created "'a situation hazardous to the well-being and safety of persons or property coming into contact with the improvement or structure' in the course of using or preparing to use the structure for its intended purpose[.]" Id. at 366 (quoting E.A. Williams v. Russo Dev. Corp., 82 N.J. 160, 171 (1980)); see also Port Imperial Condo Ass'n, Inc. v. K. Hovanian Port Imperial Urban Renewal, Inc., 419 N.J. Super. 459, 466, 474 (App. Div. 2011) (applying the Statute of Repose to construction that caused property damage).

All Seasons' claim against Burd is based on the defective design and/or construction of the water service line, which ultimately rendered the property uninhabitable and unusable for any purpose. Thus, it was not necessary for Burd to show that the water service line was dangerous or unsafe. The Statute of Repose was triggered because the defective design and/or construction rendered the property unusable.

Nevertheless, the defective design and/or construction created a situation hazardous to the well-being and safety of persons coming into contact with the property. Water service is essential to the habitability of a property, and the lack of

water service raises safety concerns, such as the inability to extinguish a fire. "Liability for such a hazard is precisely what the legislature sought to foreclose after ten years." Newark Beth Israel Med. Ctr., supra, 124 N.J. at 367. For these reasons, Burd was entitled to summary judgment.

III.

All Seasons contends, without supporting proof, that the water service line was part of the water main line, and thus, the judge erred in finding it responsible for the leak.[6] All Seasons also contends that the interests of justice and fairness require HMUA to restore water service to the property. We have considered these contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons the trial judge expressed in his November 28, 2012 written opinion, which the record amply supports. See Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (holding that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence). However, we make the following brief comments.

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[6] All Seasons relies on an unpublished opinion from this court to support this contention. Unpublished opinions do not constitute precedent or bind us. Trinity Cemetery Ass'n v. Twp. of Wall Twp., 170 N.J. 39, 48 (2001); R. 1:36-3.

Burd's testimony confirmed that the line he installed was a service line pipe, not a water main line. The record confirms that the leak was in the water service line and that All Seasons owned the entire line, not just that portion located on its property. All Seasons is responsible for its own water service line and has no basis whatsoever to shift the costs of locating and repairing the line to HMUA.

HMUA had no a duty to restore water service. Although utility authorities have a duty to provide water service, that duty only extends to "all within the area who comply with fair and just rules and regulations applicable to all alike." *Reid*, *supra*, 10 *N.J.* at 234. HMUA's regulations require property owners to maintain their water service lines and permits HMUA to terminate water service for a willful or continued waste of water. All Seasons did not maintain and repair its water service line and it permitted the leak to continue. Accordingly, HMUA properly terminated water service to the property and has no duty to restore service.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION