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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0884-13T2

PRINCETON AMOCO, INC.,
AND WILLIAM ROSSO,

Plaintiffs-Appellants,

v.

PRINCETON SHOPPING CENTER COMPANY,
A NEW JERSEY LIMITED PARTNERSHIP,

Defendant-Respondent,

and

QUICK ENVIRONMENTAL, INC.,

Defendant.

Argued February 10, 2015 – Decided August 26, 2015

Before Judges Ostrer, Hayden and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2207-10.

Bruce I. Afran argued the cause for appellant.

Kit Applegate argued the cause for respondent.

PER CURIAM

Plaintiffs Princeton Amoco, Inc. (Amoco) and its owner, William Rosso, appeal from a Law Division order granting summary judgment to defendant Princeton Shopping Center (the Center),

finding that Rosso and Amoco breached their lease with the Center, allowing the Center to retain the remaining security deposit, and awarding the Center attorney's fees. After reviewing the record in light of the applicable law, we affirm in part and reverse in part.

We discern the following facts from the record. Amoco, as the tenant, and Rosso, individually as the guarantor, entered into a ten year lease agreement with the Center that ran from November 1, 1998 until October 31, 2008. The parties agreed that Amoco would "comply with . . . the requirements of any federal, state, county or local law or ordinance applicable to Tenant's use and including without limitation all Environmental Laws . . . ." In Section 32.1 of the lease, the parties stipulated:

> Within thirty (30) days following the earlier to occur of the termination of the Lease (whether at the expiration of the term or by the occurrence of any other event) . . . Tenant, at its sole cost and expense, shall remove all underground tanks, pumps and other underground equipment related to the use of the Premises as a gas station and shall commence the cleanup of any water or soil contamination as set forth in the Lease.

The parties further agreed that Amoco would sign a "Letter of Credit" in the amount of $150,000[1] as security for the covenants

[1] In the "First Amendment of the Lease," which is otherwise not relevant to the current dispute, the parties modified this amount to $100,000.

in the lease. That clause provided that in the event of a default, the

> Landlord may draw upon the Letter of Credit and use, apply, or retain proceeds of the Letter of Credit and/or the proceeds of the Security Deposit, if any, in whole or in part for the payment of any such rents or charges not paid by Tenant in default of the provision of this Lease or for any other sum which Landlord may expend or be required to expend by reason of Tenant's default, including without limitation any damages or deficiency in the reletting of the Premises, ...

However, if the tenant fully complied with the lease, the security deposit was to be returned "no later than sixty (60) days after the expiration or termination of this Lease and after delivery of possession of the entire Premises to Landlord." In the case of a breach of the lease by Amoco, the agreement permitted the Center to recover attorney's fees for enforcing the lease.

When the lease terminated on October 31, 2008, Amoco did not vacate the premises. In July 2009, the Center drew against Amoco's letter of credit, which caused a dispute between the parties. Nonetheless, they agreed to extend the lease on August 31, 2009, entering into the "Second Amendment of Lease" (Second Lease). The Second Lease extended the lease term until November 30, 2009 and further clarified some of the obligations of the parties. As to tank removal, Section 4 provided in pertinent part:

> Tenant agrees that on or prior to November 30, 2009, all petroleum product storage tank systems (tanks and associated lines/pumps)

> located at the Premises shall be decommissioned and closed by removal by Tenant in accordance with all local, state and federal governing laws and regulations including, without limitation, securing the appropriate permits from the Township of Princeton.
>
> . . . .
>
> In addition, Tenant shall:
>
> . . . .
>
> (g) Pay to the Landlord, if Tenant fails to remove the storage tanks and accompanying remediation on or prior to November 30, 2009 pursuant to the terms of this Section 4, within three (3) days of demand, a fee of $500 for each calendar day following November 30, 2009 that such storage tanks and accompanying remediation have not been fully and completely removed and remediated in express accordance with the terms of this Section.
>
> (h) Following the completion of the work required to remove the storage tank and any accompanying remediation and natural resources restoration and the approval by the Department or the Licensed Site Remediation Professional, as the case may then be under applicable laws, Landlord shall return to Tenant any unused security currently being held by Landlord pursuant to the Lease.

On January 12, 2010, the parties agreed to extend the lease again and entered into the "Third Amendment of Lease" (Third Lease). The Third Lease extended the lease term until February 28, 2010, explicitly postponing the removal of underground storage tanks until that date. It also changed the Second Lease language concerning the security deposit, stating in Section 6:

> Tenant agrees that Landlord shall be entitled to retain such $100,000 deposit if Tenant fails to comply with all of the terms and provisions of the Existing Lease as amended hereby. Landlord agrees that following Tenant's successful completion of the removal of the tanks and any accompanying work and remediation associated therewith Landlord shall return to Tenant the remaining balance, if any, of such deposit within thirty (30) days of Landlord's confirmation thereof.

In Section 7, the agreement also added a clause waiving all claims against the Landlord, including:

> Tenant and Guarantor hereby waive, release and forever discharge Landlord and its officers, directors, attorneys, agents and employees from any liability, damage, claim, loss or expense of any kind that Tenant and/or Guarantor may have previously had or may now have against Landlord through the date hereof and arising out of or relating to the Existing Lease and/or Guaranty.

In addition, the Center agreed in a separate section to forgive a holdover rent arrearage of approximately $17,000.

In furtherance of this agreement, in February 2010, Amoco entered into a contract with Quick Environmental (Quick) for removal of the storage tanks and other services to appropriately restore the site. Quick removed the tanks, but observed a small amount of gasoline contamination in the area of the pump dispensers. Quick and Amoco entered into a second contract for approximately $6000 to provide necessary services to remediate the contamination. After initially signing the second contract for the recently discovered spill, Amoco refused to pay. Amoco claimed

it was not liable for the cost of the cleanup because Quick admitted the spill was a "historic spill" caused by a third party.

There is no dispute that the remediation was appropriately completed according to the applicable laws. The environmental cleanup was overseen by James Skelcy, a licensed site remediation professional (LSRP), tasked with approving remediation and filing response action outcomes[2] (RAO) with the DEP. Skelcy approved the remediation done by Quick and prepared a RAO but unfortunately died before filing the RAO with DEP. Due to the fee dispute between Quick and Amoco, Quick refused to file the report with DEP or provide a copy to Amoco.

On August 26, 2010, Rosso filed suit against the Center[3] alleging that the Center improperly drew down Amoco's letter of credit in July 2009. In response, the Center asserted that Rosso's

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[2] Under the Site Remediation Reform Act, N.J.S.A. 58:10-1 to -29, the primary supervision for industrial site cleanup of contaminants shifted from the New Jersey Department of Environmental Protection (DEP) to certified specialists known as LSRPs. Des Champs Laboratories, Inc. v. Martin, 427 N.J. Super. 84, 99 (App. Div. 2012). When a LSRP is satisfied that the site has been fully "remediated in accordance with all applicable statutes and regulations," the LSRP issues a RAO certifying the compliance with law. N.J.S.A. 58:10C-2, -14. A RAO has the same legal effect as a "covenant not to sue" had under the former Industrial Site Recovery Act, N.J.S.A. 13:1K-6 to -18. N.J.S.A. 58:10B-13.2.

[3] Initially, Rosso filed suit against both Quick and the Center. After Quick was ordered to file the RAO, Rosso and Quick settled their claims. The only claim remaining in Rosso's complaint was for the Center's 2009 draw against the letter of credit.

claim was barred by the release of all claims contained in the Third Lease, and also filed a counterclaim, which alleged breach of the lease for failure to completely remediate the property as well as a separate breach for filing the lawsuit, and demanded damages and attorney's fees.

On October 6, 2011, the Center moved for partial summary judgment on the issue of whether Amoco was in breach of the lease, and requested retention of the entire remaining security deposit as damages. In defense, Rosso argued that the Third Lease was not valid because his signature was forged onto the document. He also claimed that he had completed the required remediation. The Center deposed Amoco's former attorney, who disclosed that Rosso did sign the lease. The attorney also explained that while he had sent one version of the Third Lease to the Center's attorney with a letter stating the release did not include the claim Rosso believed he had for the 2009 drawing down the line of credit, the Center refused to accept that reservation. Ultimately, Rosso agreed to withdraw his reservation and accept the release as that was the only way the Center would accept the Third Lease. Rosso did not submit further certification disputing this testimony.

Having heard oral argument, the trial court granted in part and denied in part the Center's partial summary judgment motion on

February 27, 2012,[4] finding Amoco in "noncompliance" with the lease. However, the court denied without prejudice the Center's application to retain the entire security deposit and for the Court to assess against Amoco a $500 per day penalty since February 28, 2010 for being in breach of the lease. The court ordered the Center to pay Quick its outstanding bill out of the security deposit, and ordered Quick to file the RAO with DEP. Quick filed the RAO on March 1, 2012.

Shortly after the court decided the partial summary judgment motion, the Center filed a motion for summary judgment seeking dismissal of Amoco's complaint, and requesting the entire remaining security deposit, as well as attorney's fees and costs for enforcement of the lease. The Center maintained that there were no material facts in dispute. The Center argued that plaintiffs breached the lease twice, once by failing to complete the remediation and once by filing this lawsuit. On June 15, 2012, the court granted the Center's summary judgment motion and dismissed Amoco's complaint.

Concerning the claim for the 2009 draw down of the line of credit, the judge found that Amoco waived this claim when it signed

[4] Although both counsel signed the order, it is not listed as a consent order and nothing in the text of the order states that the parties consented to the judge's order. Thus, we reject the Center's argument that Amoco consented to the finding that it was in "noncompliance" with the lease.

the Third Lease because the Section 7 release language was comprehensive, covering all claims arising under the lease, and did not permit any exception. The judge observed that plaintiffs had originally denied the validity of the release provision because Rosso did not sign the Third Lease, but after plaintiffs' former attorney explained the circumstances of the signing, Rosso did not assert any facts denying the truth of his former counsel's statements. Further, the judge reasoned, in response to the motion for summary judgment, Amoco no longer argued that the Third Lease was invalid but argued that no breach of the lease occurred as it had completely remediated the property within the agreed-upon time.

As to the Center's application to retain the security deposit, the court reiterated that Amoco was in non-compliance with the lease, because although the remediation was timely completed, the required documentation was not filed with DEP. The judge further found that due to the breach, the Center was compelled to initiate its counter-claim to enforce the lease, thus triggering the provision that entitled the Center to collect attorney's fees from Amoco. The judge also found a second breach of the lease in Amoco's filing suit against the Center, stating "this Court accepts defendant's argument that the very bringing of this lawsuit is a default of the release provision in Section 7 . . . ." Finally, the judge found that the parties agreed to the sum of $100,000

dollars as the measure of damages for breach of the lease under the security deposit agreement.

Further, the judge awarded reasonable counsel fees to the Center but reserved decision on the amount pending a formal fee application. After receiving the application, the court ordered that Amoco pay $29,796.25 in attorney's fees. Amoco filed a motion for reconsideration, which was denied. This appeal followed.

On appeal, plaintiffs argue that the court erred in dismissing its complaint, because it did not waive the claim over improper drawing of the letter of credit. Further, plaintiffs contend that the court erred in finding a breach of the Third Lease as Amoco had completed the necessary remediation, and bringing the law suit did not violate Section 7. In addition, plaintiffs allege the court erred in holding that the Center was entitled to retain the entire security deposit as liquidated damages and objects to the award of counsel fees as there was no breach.[5]

We begin with a review of the well-established legal principles that guide our analysis. Rule 4:46-2(c) directs that summary judgment be granted "if the pleadings, depositions,

[5] The Center claims that the appeal should be dismissed because plaintiffs did not supply the transcript of the December 2, 2011 hearing on the motion for partial summary judgment. During the pendency of this appeal, plaintiffs supplied the transcript at the request of the court. We note that the transcript does not show that plaintiffs consented to the judge's decision to find Amoco in non-compliance with the Third Lease. Thus, we reject this argument.

answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." "While 'genuine' issues of material fact preclude the granting of summary judgment, those that are 'of an insubstantial nature' do not." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995) (internal citations omitted). Essentially, the court must determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536).

In reviewing a trial court's summary judgment decision, we review it "de novo, employing the same standard used by the trial court." Tarabokia v. Structure Tone, 429 N.J. Super. 103, 106 (App. Div. 2012) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)), certif. denied, 213 N.J. 534 (2013). We give "no deference to the trial judge's conclusions on issues of law." Depolink Court Reporting & Litig. Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013). Also, "[w]e must view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a

matter of law." Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012) (citing Brill, supra, 142 N.J. at 523).

"When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). In that case, "[a]ppellate courts give 'no special deference to the trial court's interpretation and look at the contract with fresh eyes.'" Ibid. (quoting Kieffer v. Best Buy, 205 N.J. 213, 223 (2011)).

Contracts are to be read "'as a whole in a fair and common sense manner.'" Id. at 118 (quoting Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009)). We enforce contracts "'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Ibid. (quoting Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)). If a contract can be construed according to its plain language, then that language governs. Twp. of White v. Castle Ridge Development Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011). When dealing with ambiguous provisions, they are to be construed against the drafter. Kotkin v. Aronson, 175 N.J. 453, 455 (2003) (citing In re Estate of Miller, 90 N.J. 210, 221 (1982)).

With these principles in mind, we turn first to plaintiffs' contention that the court erred in granting summary judgment

dismissing the complaint because the release did not cover plaintiffs' claim against the Center for the 2009 draw down. The plain language of Section 7 is broad and inclusive. Plaintiffs "waived, released, and forever discharged" the Center for "any liability, damage, claim, loss or expense of any kind" that plaintiffs "may have previously had or may now have in the future." In the face of this all-encompassing wording, we reject plaintiffs' argument that the release only covered future claims.

Plaintiffs' claim that a material fact was in dispute that prevented the entry of summary judgment is equally unpersuasive. Plaintiffs argue that the Third Lease was transmitted by plaintiffs' attorney with a letter that stated that the release did not include plaintiffs' claim against the Center concerning the draw down. However, plaintiffs' former counsel was deposed about the release. He testified that the Center immediately rejected plaintiffs' attempted qualification and ultimately, plaintiffs agreed to the release. Counsel's statements are unrefuted as in opposing the second summary judgment motion plaintiffs did not submit certifications disputing their former counsel's explanation about the negotiations about the desired qualification to the release. Accordingly, there is no dispute of material facts and plaintiffs' withdrawn attempt to qualify the release cannot bar its enforcement. See R. 4:46-5(a) (in opposing summary judgment an adverse party must set "forth specific facts

showing that there is a genuine issue for trial") see also G.D. v. Kenny, 205 N.J. 275, 304 (2011).

Next, plaintiffs contend that they did not breach the plain language of the Third Lease. We agree. We initially reject the finding that Amoco breached Section 7 of the Third Lease, by filing this lawsuit against the Center when Section 7 stated Amoco had no claims against the Center. We perceive no language in Section 7 that can be construed as creating a covenant not to sue. "A clause depriving a citizen of access to the courts should clearly state its purpose." Marchak v. Claridge Commons, 134 N.J. 275, 282 (1993); see also Atalese v. U.S. Legal Servs. Group, L.P., 219 N.J. 430, 444 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, ___ L. Ed. 2d ___ (2015). The release certainly functions as an affirmative defense to any suit brought by a party who released its claims, but it is not the same as a covenant not to sue, which is breached when a suit is brought. Given New Jersey's strong public policy against ambiguous clauses depriving a citizen of access to the courts, we reverse the trial court's holding. Marchak, supra, 134 N.J. at 282.

As to the issue of the remediation requirement, we must first examine the terms of the lease to see if the lease is clear on what remediation Amoco was required to complete by the termination of the lease. The Second Lease required Amoco to remove the storage tank systems on the premises and "conduct all onsite and

offsite remediation" required by law "as a result of any releases of petroleum product on or from the premises." If Amoco failed "to remove the storage tanks and accompanying remediation on or prior to November 30, 2009 pursuant to the terms of the Section[,]" Amoco was required to pay a $500 per day fee for each day the storage tanks and "accompanying remediation" were not "fully and completely removed." So far, the lease did not mention any need for approval by DEP.

The next subsection concerned the timing of the release of the security deposit.

> Following the completion of the work required to remove the storage tank and any accompanying remediation and natural resources restoration and the approval by the Department or the [LSRP], as the case may be under the applicable laws, Landlord shall return to Tenant any unused security currently being held by Landlord pursuant to the Lease. (emphasis added).

Thus, under the Second Lease, Amoco was required to fully remediate by the termination date, but before obtaining the remaining security deposit, Amoco was required to both remediate and obtain the approval of the DEP or LSRP.

The Third Lease changed the end of the term of the lease to February 28, 2009 and provided that all references in the prior lease to November 30, 2009 should be to February 28, 2010. It required Amoco to comply with certain "terms and specifications" of Exhibit A "regarding the removal of the tanks and the subsequent

restoration and remediation." Exhibit A detailed several very specific requirements for the remediation but did not mention or refer to approval by the DEP or LSRP.

As to the security deposit, Section 6 acknowledged that the Center was entitled to retain the amount remaining "if Tenant fails to comply with all of the terms and provisions of the Existing Lease as amended hereby." However, the parties agreed following Amoco's "successful completion of the removal of the tanks and any accompanying work and remediation associated therewith Landlord shall return to Tenant the remaining balance, if any, of such deposit within thirty (30) days of Landlord's confirmation thereof." Noticeably absent in Section 6 is the condition in the Second Lease requiring DEP or the LSRP approval of the remediation before the security deposit is released.

Our reading of the plain language of the Second Lease shows that the remediation to be done by Amoco was separate from the approval by the DEP or the LSRP. Under the terms of the Second Lease, both were to occur before the release of the security deposit. In contrast, under the Third Lease, remediation by Amoco was required but approval by the DEP or the LPRP was not mandated before the security deposit was to be returned. There is no dispute that plaintiffs completed the physical remediation in accordance with the lease. We are convinced that under the plain language of the Third Lease, the completion of remediation complied

with the terms of the lease. Twp. Of White, supra, 419 N.J. Super. 74.

We are in accord with the Center that plaintiffs' argument that the regulations allow the LSRP to file the RAO within three years, N.J.A.C. 7.26E-5.8(b)(1), is unavailing because that regulation was not in effect at the time of the signing of the Third Lease. Even so, the interim regulation, N.J.R. 4467(a), contained no time requirement for the filing of the RAO, which supports plaintiffs' argument that the filing of the RAO was not late when it finally occurred in 2012.

While the parties did not define the term remediation,[6] the intent of the parties is clear from the express language. We do not view the term remediation to be ambiguous here. Nevertheless, to the extent it is ambiguous, the record shows the lease was prepared by the Center, so any ambiguity must be interpreted

[6] We note that the applicable statute defines remediation as "all necessary actions to investigate and clean up or respond to any known, suspected or threatened discharge of contaminants, including . . . the preliminary assessment, site investigation, remedial investigation, and remedial action . . . ." N.J.S.A. 58:10C-2. Remedial action includes "those actions taken at a site or offsite if a contaminant has migrated . . . as may be required by the department, including the removal, treatment, containment, transportation, securing or other engineering or treatment measures, . . . to ensure that any discharged contaminant . . . is remediated . . . ." Ibid. These definitions support plaintiffs' contention that remediation refers to the conduct of physically remediating a contaminated site.

against the drafter of the agreement. Kotkin, supra, 175 N.J. at 455.

There is no dispute that the property was physically cleaned up at the time of the expiration of the lease on February 28, 2010, the relevant timeline after the Second Lease. Based upon the plain language of the Second Lease and the Third Lease, we cannot agree that the remediation Amoco was required to perform included the filing of the RAO with the DEP. As there was no breach of the lease, plaintiffs were entitled to a return of the security deposit when the remediation was completed.

In sum, we affirm the dismissal of plaintiffs' complaint and reverse the order granting summary judgment in favor of the Center's counterclaim and counsel fees. As the parties agreed that no material facts were in dispute and the question was limited to the interpretation of the lease, we remand the case to the trial court for entry of summary judgment in favor of plaintiffs, dismissing the Center's cross-claim against them. Brill, supra, 142 N.J. at 537 ("If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party . . . .").

Reversed and remanded for proceedings in accordance with this opinion.