NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4066-13T3

CD&L REALTY, LLC,

Plaintiff-Appellant,

v.

THE STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Defendant-Respondent.

Argued March 24, 2015 – Decided July 30, 2015

Before Judges Messano, Ostrer and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-820-13.

Louis Giansante argued the cause for appellant (Giansante & Assoc., LLC, attorneys; Mr. Giansante, of counsel and on the briefs).

Mark S. Heinzelmann, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Heinzelmann, on the brief).

PER CURIAM

Plaintiff CD&L Realty, LLC (CD&L) appeals from a March 28, 2014, order of the Law Division dismissing with prejudice CD&L's

October 2013 amended complaint in lieu of prerogative writ. CD&L sought relief in the nature of mandamus, compelling defendant New Jersey Department of Environmental Protection (DEP) to take enforcement action against non-party Owens-Illinois, Inc. (Owens).

Having reviewed CD&L's arguments in light of the record and applicable principles of law, we affirm, but modify the dismissal as one without prejudice.

As this is an appeal from a motion to dismiss for failure to state a claim, Rule 4:6-2(e), we "assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences." NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 365 (2006). With that in mind, we assume the following facts.[1]

In 2000, CD&L purchased an industrial property in Bridgeton from Owens-Brockway Glass Container Inc. (Owens-Brockway). We presume Owens-Brockway was related to Owens, although the precise corporate relationship is not disclosed in the record.

[1] We recognize that CD&L has also included in its appendix on appeal various documents, which generally relate to efforts or the lack of effort to remediate the site previously owned by Owens. These were not included as exhibits to the complaint, nor were they apparently presented to the trial court in any other manner. Indeed, many post-date the trial court's order. None are properly authenticated. As these documents are not properly before us, we shall not consider them, except as noted below. See R. 2:5-4(a).

From the late 1800s until the 1980s, the site was used for glass manufacturing. The property is contaminated with various hazardous chemicals that were used or produced in glass manufacturing and disposed of there. Hazardous waste has been leaching into the groundwater. Contaminants have also apparently been discharged into the Cohansey River.

Owens was the owner of the site in 1987, when it entered into a stock transaction with another related entity. As a result, the site became subject to the Environmental Clean Up Responsibility Act (ECRA), L. 1983, c. 330. The statute was later revised and renamed the Industrial Site Recovery Act (ISRA). See L. 1993, c. 139, codified at N.J.S.A. 13:1K-6 to -18. In March 1987, Owens entered into an administrative consent order (ACO) with DEP, undertaking various commitments to remediate contamination at the site.

In Owens' purchase and sale agreement with CD&L, Owens acknowledged that the transaction was subject to ISRA. According to CD&L, Owens misrepresented that it was in compliance with state and federal environmental laws to induce CD&L to purchase the property. Owens also promised CD&L that it would resolve all outstanding issues at the site before the closing in August 2000 or shortly thereafter. However, Owens had allegedly failed to do so as of the filing of the complaint.

Owens also failed to comply with the requirement of N.J.S.A. 13:1K-9(a) (requiring an owner or operator of an industrial establishment to notify DEP of a closing of operations or a transfer of ownership).

CD&L did not discover the extent of Owens' non-compliance until 2010, after which it sought to enforce its rights under the purchase and sale agreement. Pursuant to a mandatory arbitration clause, the matter was referred to arbitration. However, the arbitrator dismissed all claims, holding that compliance with ISRA was not mandatory.

The United States District Court confirmed the arbitrator's decision, which was affirmed on appeal. CD&L Realty LLC v. Owens-Illinois, Inc., Civil No. 11-CV-7248 (D.N.J. Sept. 25, 2012), aff'd, 535 Fed. Appx. 201 (3d Cir. 2013). CD&L argued that the sale agreement was void because Owens-Brockway did not obtain DEP's approval to sell the property under N.J.S.A. 13:1K-13. The Court of Appeals rejected the argument, holding that the failure to obtain departmental approval renders the agreement voidable, not void. CD&L, supra, 535 Fed. Appx. at 203-04.

CD&L filed its initial complaint in September 2013, and its amended complaint the following month. CD&L acknowledged in its pleading that in its purchase and sale agreement with Owens-

Brockway, it ceded to Owens the sole authority to select and propose remedial actions necessary to comply with ISRA; and to utilize the least stringent remedial standards applicable to non-residential properties. CD&L also granted Owens the sole authority to negotiate with DEP regarding remedial actions, and agreed not to interfere with a remedial action that Owens selected.

However, CD&L alleged that DEP failed to vigorously enforce environmental laws to assure a timely and appropriate remediation by Owens. We need not detail CD&L's numerous allegations of non-compliance by Owens. We note, however, that CD&L alleged that Owens has misrepresented the nature and scope of the contamination. In particular, Owens has misrepresented the characteristics of a waste landfill on the property and in other respects has withheld key information from DEP. CD&L alleged Owens has illegally discharged hazardous substances from its landfill into the groundwater, and ignored technical regulations for site remediation. Its demolition of old factory buildings also violated regulatory requirements.

CD&L alleged that Owens has drastically underfunded its remediation activities and has moved slowly. CD&L provided a detailed chronology of DEP actions, and Owens' actions and inactions that have delayed remediation of the site. In its

prayer for relief, CD&L asked the court to "direct[] the NJDEP to take appropriate action in the face of the clear violations of the law by Owens, which the NJDEP is charged . . . with the public duty of executing in the public interest and for the public's protection."

The trial court granted DEP's motion to dismiss. Relying on Equitable Life Mortgage & Realty Investors v. New Jersey Division of Taxation, 151 N.J. Super. 232, 238 (App. Div.), certif. denied, 75 N.J. 535 (1977); and Cohen v. Board of Trustees of the University of Medicine & Dentistry of New Jersey, 240 N.J. Super. 188, 199 (Ch. Div. 1989), the court held that notwithstanding Rule 2:2-3(a)(2), a challenge to agency inaction may be heard in the trial court, but only when the inaction pertains to a ministerial obligation. The court held that DEP's enforcement authority, the exercise of which CD&L sought to compel, was discretionary.

CD&L appeals and argues that DEP has failed to exercise ministerial duties in three respects. First, CD&L contends that the agency has failed to exercise non-discretionary authority to assume oversight of the remediation, pursuant to N.J.S.A. 58:10C-27. Second, DEP failed to engage in a non-discretionary review of the purchase and sale agreement, pursuant to N.J.S.A.

13:1K-9. Third, DEP has failed to execute ministerial duties under the federal Clean Water Act, 33 U.S.C.A. §§ 1251 to 1387.

We are unpersuaded. However, we begin by addressing the threshold question whether this action was properly brought in the Law Division. Rule 2:2-3(a)(2) states that appeals may be taken to the Appellate Division "[a]s of right . . . to review final decisions or actions of any state administrative agency . . . ." That right of review also extends to agency inaction. The longstanding rule is that "every proceeding to review the action or inaction of a local administrative action [is] by complaint in the Law Division and that every proceeding to review the action or inaction of a state administrative agency [is] by appeal to the Appellate Division." Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 223 (2006) (internal quotation marks and citation omitted); see also Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 329 (App. Div. 2000) ("Rules 2:2-3(a)(2) and 2:2-4 contemplate[] that every proceeding to review the action or inaction of a state administrative agency [shall] be by appeal to the Appellate Division.") (internal quotation marks and citation omitted); Vas v. Roberts, 418 N.J. Super. 509, 516 (App. Div. 2011) ("Our 'jurisdiction extends not only to State agency action but also

agency inaction.'") (quoting Pressler & Verneiro, Current N.J. Court Rules, comment 3.1 on R. 2:2-3(a)(2) (2011)).

The Court in Pascucci v. Vagott, 71 N.J. 40, 52 n.2 (1976), noted that two exceptions had been judicially recognized, comparing Pfleger v. State Highway Department, 104 N.J. Super. 289, 291-93 (App. Div. 1968), with Baldwin Construction Co. v. Essex County Board of Taxation, 27 N.J. Super. 240, 242 (App. Div.), supplemented after reargument, 28 N.J. Super. 110 (App. Div. 1953), aff'd, 16 N.J. 329 (1954). See also Infinity Broad., supra, 187 N.J. at 223. Pfleger involved an action to compel a condemnation, which the appellate court held was properly brought in the Law Division because of the inherent difficulty of the appellate court conducting the necessary fact-finding hearings. Pfleger, supra. Baldwin Construction involved a state agency whose jurisdiction was limited to a single locality. Baldwin Constr., supra, 27 N.J. Super. at 242.

The panel in Township of Montclair v. Hughey, 222 N.J. Super. 441 (App. Div. 1987), broadly interpreted Pfleger to stand for the general principle that a trial court may exercise review of an agency action "where the proposed administrative action has not been preceded by the creation in the agency of a record which is amenable to appellate review." Id. at 446. In Hughey, municipalities sought to enjoin a DEP administrative

order regarding disposal of contaminated soil. Id. at 444; see also Equitable Life Mortg., supra, 151 N.J. Super. at 238.

The Court in Infinity Broadcasting clarified the scope of appellate jurisdiction. The Court expressly rejected the so-called "single locality" exception:

> [W]e see no basis to differentiate between those matters as to which Appellate Division jurisdiction clearly lies, from those matters remitted to the Law Division under the "single locality" exception. On the contrary, that inconsistency underscores our concern that the "single locality" exception generates unnecessary confusion when a straightforward rule of appellate review would suffice. Therefore, we jettison the "single locality" exception to the broad rule that lodges appellate jurisdiction from the actions of state agencies in the Appellate Division.
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> [Infinity Broad., supra, 187 N.J. at 225.]

The Court also analyzed Pfleger and read it narrowly, to authorize Law Division review of condemnation and inverse condemnation actions:

> We next address those specific instances where a record must be developed as a prerequisite to meaningful appellate review of state agency action. It has long been recognized that condemnation actions and, by extension, inverse condemnation actions resulting from state administrative action are properly cognizable in the Law Division. Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258, 486 A.2d 330 (1985) (remanding to the Law Division a takings claim arising from administrative action); Orleans Builders &

> Developers v. Byrne, 186 N.J. Super. 432, 446, 453 A.2d 200 (App. Div. 1982) (stating that jurisdiction for developer's takings claim against Pinelands Commission "should be in the Law Division of this court where a factual record can be developed"); Pfleger v. State Highway Dep't, 104 N.J. Super. 289, 291-93, 250 A.2d 16 (App. Div. 1968). This is so because condemnation and inverse condemnation actions, by their very nature, require particularized fact finding and determinations that are best resolved in the Law Division. By definition, then, condemnation and inverse condemnation actions, even when precipitated by state agency action, are cognizable in the first instance in the Law Division, and not in the Appellate Division.
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> [Id. at 225-26.]

The Court summed up: "We reaffirm our prior holdings that appeals from state agencies must lie in the Appellate Division unless the matter is a condemnation or inverse condemnation appeal arising from state agency action and, therefore, are cognizable in the Law Division in the first instance." Id. at 227; see also Rinaldo v. RLR Investment, LLC, 387 N.J. Super. 387, 399 (App. Div. 2006) (stating "the Appellate Division has exclusive jurisdiction to review any decision of a state agency except one involving condemnation or inverse condemnation").

The Court also recognized our power to refer matters for additional fact-finding. "[T]he Appellate Division retains the discretion, in an appropriate case, to retain jurisdiction in an appeal from the action of a state agency, but to refer the

matter to the Law Division or to the agency for such additional fact-finding as it deems necessary to a just outcome." Infinity Broadcasting, supra, 187 N.J. at 227; see also Hosp. Ctr. at Orange, supra, 331 N.J. Super. at 329-330 (noting that if resolution of an appeal from agency action or inaction "requires development of a factual record, we can remand to the agency for a statement of reasons, for further action by the agency, or can permit the Law Division to create a record and make fact-finding") (internal quotation marks and citation omitted).

Although we are persuaded that CD&L's action should have originated in this court, we choose to address the merits of its complaint, as did the trial court. Cf. Vas, supra, 418 N.J. Super. at 523-30 (addressing the merits of strictly legal issue although it should have been brought initially in the trial court). CD&L mischaracterizes the trial judge's decision, and contends that she dismissed its complaint because jurisdiction lies with this court. Rather, the trial court held it had jurisdiction to hear a mandamus action, but that CD&L failed to allege an entitlement to relief. We agree.

"[O]ur authority to compel agency action is exercised sparingly, as courts are ill-equipped to micromanage an agency's activities." Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 101 (App. Div. 2014). "Rather, we accord

wide discretion to administrative agencies which are to decide 'how best to approach legislatively assigned administrative tasks.'" Ibid. (quoting In re Failure by the Dep't of Banking & Ins., 336 N.J. Super. 253, 262 (App. Div.), certif. denied, 168 N.J. 292 (2001)).

Specifically, relief in the nature of mandamus "is only appropriate where the party seeks to compel a governmental agency to perform a duty [that] is ministerial and wholly free from doubt or to compel the exercise of discretion, but not in a specific manner." Twp. of Neptune v. N.J. Dep't of Envtl. Prot., 425 N.J. Super. 422, 434 (App. Div. 2012) (internal quotation marks and citation omitted). "Mandamus issues to compel the performance, in a specific manner, of ministerial duties so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of their performance. . . ." Id. at 435 (internal quotation marks and citation omitted). Thus, mandamus-like relief is available "to compel only clearly mandated ministerial obligations, which do not require an evaluative judgment in the exercise of discretion." Caporusso, supra, 434 N.J. Super. at 101 (internal quotation marks and citation omitted).

Applying these principles, CD&L has failed to plead the non-exercise of a non-discretionary, ministerial duty

susceptible to mandamus-type relief. We consider first CD&L's claim that DEP is compelled to assume oversight of the remediation. With the adoption of the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 to -29, principal oversight of remediation was shifted from DEP to private licensed professionals.

> SRRA "creates a new site remediation paradigm pursuant to which sites would be remediated without prior Department[al] approval, but while still requiring the Department to maintain a certain level of oversight." [43 N.J.R. 1077(a), 1078 (May 2, 2011)]; see also Governor's Message on Signing (May 7, 2009) (stating that the law "will cut through the bureaucracy to streamline the clean[]up process and allow more than 19,000 contaminated sites to be evaluated more quickly. To be clear, we are cutting the red tape"). SRRA seeks to accomplish this goal through the licensing of private remediation professionals to oversee environmental remediation. See 43 N.J.R. 1077(a), 1078 (May 2, 2011).
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> [Des Champs Labs, Inc. v. Martin, 427 N.J. Super. 84, 99 (App. Div. 2012).]

See also N.J.S.A. 58:10C-5.

The statute provides that DEP "shall" reassert oversight if certain conditions are met:

> Except as provided in section 1 of []L. 2013, c. 283 ([N.J.S.A.] 58:10C-27.1), the department shall undertake direct oversight of a remediation of a contaminated site under the following conditions:

> (1) the person responsible for conducting the remediation has a history of noncompliance with the laws concerning remediation, or any rule or regulation adopted pursuant thereto, that includes the issuance of at least two enforcement actions after the date of enactment of []L. 2009, c. 60 ([N.J.S.A.] 58:10C-1 et al.) during any five-year period concerning a remediation;
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> (2) the person responsible for conducting the remediation at a contaminated site has failed to meet a mandatory remediation timeframe or an expedited site specific timeframe adopted by the department pursuant to section 28 of []L. 2009, c. 60 ([N.J.S.A.] 58:10C-28), including any extension thereof granted by the department, or a schedule established pursuant to an administrative order or court order; or
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> (3) unless a longer period has been ordered by a court, the person responsible for conducting the remediation has, prior to the date of enactment of []L. 2009, c. 60 ([N.J.S.A.] 58:10C-1 et al.), failed to complete the remedial investigation of the entire contaminated site 10 years after the discovery of a discharge at the site and has failed to complete the remedial investigation of the entire contaminated site within five years after the date of enactment of []L. 2009, c. 60 ([N.J.S.A.] 58:10C-1 et al.).
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> [N.J.S.A. 58:10C-27(a).]

Simply put, the CD&L's complaint fails to allege the prerequisites for DEP oversight. CD&L invokes paragraphs (1) and (3) in its brief before us. However, with respect to paragraph (1), CD&L has not alleged the issuance of two enforcement actions since enactment of SRRA. With respect to

paragraph (3), CD&L's complaint is obviously premature. DEP must assume oversight if remediation remains unfinished ten years after discovery of the contamination and five years after the date of enactment of SRRA, which is May 7, 2014. Although CD&L has met the ten-year time frame, according to its complaint, the five-year post-enactment period ended May 7, 2014. However, plaintiff's complaint was filed in October 2013. Furthermore, as noted in the first paragraph of section 27, the five-year period may be extended by two years. N.J.S.A. 58:10C-27.1. Without stating whether Owens has received such an extension, CD&L asserts that Owens is not entitled to one. However, review of an extension, if any, is not subject to mandamus-type relief.

CD&L also contends that review and approval of the 2000 agreement was a ministerial duty ignored by DEP, citing N.J.S.A. 13:1K-9(a) and N.J.A.C. 7:26B-1.7(b). However, N.J.A.C. 7:26B-1.7 was repealed May 7, 2012. 43 N.J.R. 1935(a) (Aug. 15, 2011); 44 N.J.R. 1339(b) (May 7, 2012). We recognize that N.J.S.A. 13:1K-9(a) requires owners and operators of an industrial establishment who transfer ownership or close operations to notify DEP in writing. However, the statute imposes no non-discretionary duty upon DEP to respond if an owner or operator fails to comply. Under N.J.S.A. 13:1K-13(b),

repealed by L. 1993, c. 139, § 12, "[f]ailure to submit a negative declaration, or cleanup plan pursuant to the provisions of section 4 of this act is grounds for voiding the sale by the department." However, under current law, non-compliance makes the sale voidable, at the discretion of the transferee. N.J.S.A. 13:1K-13 ("Failure of the transferor to perform a remediation and obtain department approval thereof as required pursuant to the provisions of this act is grounds for voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith by the transferee . . . ."). CD&L also complains that Owens is barred from conducting remediation without DEP's approval. However, it has failed to identify a non-discretionary action that DEP has declined to take with respect to Owens' alleged failure to obtain necessary approvals.

Finally, we are unpersuaded that DEP has a non-discretionary duty to take enforcement action against Owens for violations of the federal Clean Water Act. The State administers the aspects of the Clean Water Act through its Water Pollution Control Act. N.J.S.A. 58:10A-2. CD&L has not cited to any specific provision of law that mandates ministerial action on its part. We recognize that N.J.S.A. 58:10A-10

provides that the DEP commissioner "shall" take one of several actions if it finds there to be a violation of the WPCA:

> Whenever the commissioner finds that any person is in violation of any provision of this act, he shall:
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> (1) Issue an order requiring any such person to comply in accordance with subsection b. of this section; or
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> (2) Bring a civil action in accordance with subsection c. of this section; or
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> (3) Levy a civil administrative penalty in accordance with subsection d. of this section; or
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> (4) Bring an action for a civil penalty in accordance with subsection e. of this section; or
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> (5) Petition the Attorney General to bring a criminal action in accordance with subsection f. of this section.
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> Use of any of the remedies specified under this section shall not preclude use of any other remedy specified.

However, we are not prepared to find that taking one of the five specified actions is subject to an order in the nature of mandamus. First, the enforcement actions are predicated on the DEP's finding, as opposed to an allegation as presented by CD&L that the basis for such a finding exists. Second, the provision expressly authorizes resort to "any other remedy specified."

We note that if a state fails to take appropriate enforcement action, the United States Environmental Protection

Agency (EPA) may be required to act, by taking enforcement action against the violator. 33 U.S.C.A. § 1319(a)(1). If the EPA Administrator finds "widespread" violations resulting from a State failure "to enforce such permit conditions or limitations effectively," he or she shall notify the state and, under specified circumstances, directly assume enforcement responsibility. 33 U.S.C.A. § 1319(a)(2).

In sum, plaintiff has failed to allege a basis for relief in the nature of mandamus. Consequently, dismissal was appropriate. However, dismissal pursuant to Rule 4:6-2(e) should ordinarily be without prejudice, permitting a plaintiff to file an amended complaint to cure pleading defects. Printing Mart-Morristown v. Sharp. Elecs. Corp., 116 N.J. 739, 771-72 (1989). Particularly given the complex, and ongoing activities at the site, we are not prepared to foreclose the filing of a subsequent appeal from the agency's action or inaction.

Affirmed as modified.